

It is clear that in the present case the enjoyment of the land by the first defendant's father at a certain rent for as long as he retained possession of it was ample consideration and motive for his agreement to pay that rent, and that it is not necessary, in order to prevent the consideration and motive for his agreement from being wholly defeated, to imply on the part of the Collector an agreement that he should hold the land for ever at that rent and no more.

1866.  
May 26.  
S. A. No. 70  
of 1866.

Our view of the nature of the agreement contained in Exhibit I, renders it unnecessary for us to consider the other question, whether the Collector had authority to enter into any such agreement at a permanent rent as it is sought to imply on his part.

We reverse the decrees of the Courts below, and there must be a decree for the plaintiff as prayed for, and the first defendant must pay the costs of the plaintiff here and in the Courts below.

*Appeal allowed.*

APPELLATE JURISDICTION (a)

*Special Appeal No. 115 of 1866.*

DEVAPPA SETTI.....*Appellant.*

RAMANÁDHA BHATT.....*Respondent.*

A party to a suit against whom a judgment *ex parte* has been passed in regular appeal, cannot prefer a special appeal from that judgment. He must first proceed under Section 119 of the Civil Procedure Code to get rid of the *ex parte* judgment against him.

THIS was a special appeal from the decision of Srinivása Row, the Principal Sadr Amin of Mangalore, in Regular Appeal No. 389 of 1864, reversing the decree of the District Munsif of Mulki in Original Suit No. 274 of 1862.

1866.  
June 21.  
S. A. No. 115  
of 1866.

The father of the appellant was the plaintiff in the original suit, which was decided in his (plaintiff's) favor. The 21st defendant (the present respondent) appealed and

(a) Present Innes and Collett, J. J.

1865.  
 June 21.  
 S. A. No. 115  
 of 1865.

the plaintiff's heir (plaintiff having died) not appearing a judgment *ex-parte* was passed against him. He then preferred the present special appeal.

*Srinivasa Chariyar*, for the appellant, the plaintiff's heir.

*Ranga Chariyar*, for the respondent, the 21st defendant,  
 The Court delivered the following

JUDGMENT :—The plaintiff is now special appellant, and was the respondent in the Court below. He was then duly served with notice of the appeal, but did not appear. The appeal was consequently under Section 346, heard *ex parte* in his absence. Under Section 25 of Act XXIII of 1861, amending Section 375 of the Code, a special appeal “shall proceed in all other respects as a regular appeal and shall be subject to all the rules herein before provided for such appeals, so far as the same may be applicable.” One of the rules provided for regular appeals is that where the case against the party had been heard *ex parte* in his absence in the Court below, he cannot appeal at once, but must first proceed under Section 119 to get rid of the *ex parte* judgment against him. There appears to be no reason for saying that this rule, which is not expressly confined to original proceedings, was not intended to be applicable also to the appeal and special appeal stages of a suit. Under Section 37 of Act XXIII of 1861, an Appellate Court has in regular appeals all the powers which a Court of First Instance has in respect to original suits, and among them the powers under Section 119 of setting aside an *ex parte* judgment. The special appellant having allowed judgment to go against him *ex parte* in the Court below, cannot now appeal here. The special appeal is therefore rejected with costs.

*Appeal dismissed.*