

(1869) 01 CAL CK 0002

Calcutta High Court

Case No: Special Appeal No. 2466 of 1868

Jakriram Bhakat

APPELLANT

Vs

Shahzada Pakaktar Alias Kahnu
Sahib

RESPONDENT

Date of Decision: Jan. 4, 1869

Judgement

Loch, J.

The lower Courts have held that the defendant, when duly summoned to appear, failed to attend without lawful excuse. We think that this Court cannot interfere with this finding. But it is urged, in the second place, that the procedure followed by the Subordinate Court is not in accordance with the provisions of section 170 of Act VIII of 1859.* The Subordinate Judge did not pass judgment against the party who failed to appear, as he might have done, under the provisions of the law quoted above, but he ordered that the case should be heard ex parte, and he refused to allow the vakeel of the defendant to cross-examine the witnesses of the plaintiff. The Judge, in appeal, held that the order of the lower Court was right. We think that on the defendant failing to appear without lawful excuse, the Judge might at once have passed judgment against him. But if he proceeded to take the evidence of the plaintiff's witnesses, the defendant who had entered appearance was entitled to cross-examine them by his vakeel, and the Subordinate Judge was wrong in treating the case as an ex parte one; for, as the defendant had appeared and filed a written statement, it could not be called an ex parte case. If not an ex parte case, the defendant was entitled to cross-examine the plaintiffs witnesses.

2. We think that the case must go back to the first Court to allow the defendant's vakeel an opportunity to cross-examine the plaintiff's witnesses.

3. With regard to the third objection taken in special appeal, we find that it was not urged in the lower Appellate Court, and is of no real weight. The case is, accordingly, remanded to the first Court to allow the defendant's vakeel to cross-examine the plaintiff's witnesses, and to re-try the case.

* Section 170, Act VIII of 1859.--"If any person, being a party to the suit, who shall be ordered to attend to give evidence or produce a document, shall, without lawful excuse, fail to comply with such order, or attending, or being present in Court, shall without lawful excuse refuse to give evidence, or to produce any document in his custody or possession named in such summons as aforesaid, upon being required by the Court so to do, the Court may either pass judgment against the party so failing or refusing, or make any such order in relation to the suit as the Court may deem proper in the circumstances of the case."