

MILLER
AND
MUNRO, J.J.
—
KUNHAMINA
v.
KUNHAMBI.

Items 5 to 7, which were the acquisitions of Kunhi Pathumma, descended at her death, if the decisions are right, to her tarwad. The karnavan has not claimed them and they have been held by Biyyathumma. But the District Munsif finds, and the District Judge does not differ, that she held them for the thavazi. There is nothing to suggest, he says, that she held them adversely to the plaintiffs, and there is evidence that she maintained the plaintiffs. If then the karnavan has lost his rights, it is the thavazi not Biyyathumma alone that has acquired them.

In our opinion the decision of the Courts below is right and we dismiss the appeal with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

1908.
November
18.

JAMMALAMADAKA SUBBA LAKSHMAMMA (PLAINTIFF),
APPELLANT,

v.

JAMMALA VENKATARAYADU AND OTHERS (DEFENDANTS,
Nos. 2 to 8, 10 to 25, 27, 31, 28 to 30), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, ss 562, 591—An order of remand on appeal cannot be reviewed by same Court subsequently—An order of remand not appealed against cannot be objected to in second appeal from the final appellate decree.

A decree was reversed on appeal and the case was remanded for retrial. Against the decree passed at the remanded trial, an appeal was preferred and the Judge of the Appellate Court, who was the successor of the Judge who originally remanded the case, held that the previous order of remand was wrong, and allowed the appeal :

Held, on Second Appeal, that the original order of remand could not be reviewed by the lower Appellate Court, and could not be questioned on the second appeal under section 591 of the Code of Civil Procedure as such order was not appealed against.

SECOND APPEAL presented against the decree of S. P. Rice, District Judge of Guntur, in Appeal Suit No. 15 of 1906, presented against the decree of M. Viswanatha Ayyar, District Munsif of Guntur, in Original Suit No. 289 of 1901.

* Second Appeal No. 669 of 1906.

The facts for the purpose of this report are sufficiently stated WHITE, C.J.,
AND
ABDUR
RAHIM, J.
in the judgment.

The Hon. the Advocate-General for appellants.

The Hon. Mr. *V. Krishnaswami Ayyar* and *K. Subrahmanis
Sastri* for first to twenty-third respondents.

SUBBA
LAKSHMA-
MMA
v.
VENKATA-
RAYADU.

P. Narayanamurthi for twenty-fourth respondent.

JUDGMENT.—The facts which give rise to this appeal are these. The plaintiff brought a suit for specific performance of a contract of sale of land and for possession of the land. The District Munsif gave him a decree for specific performance, but dismissed his claim for possession. This decree was affirmed on appeal by the Subordinate Judge. The plaintiff then brought a fresh suit for possession. The Munsif held his claim was *res judicata*. The District Judge (Mr. Venugopaul Chetty) held it was not and remanded the case for disposal on the merits. The defendant did not appeal against this order. The Munsif then gave the plaintiff a decree for possession. The defendant appealed against this decree. Mr. Venugopaul Chetty had been succeeded as District Judge by Mr. Rice. Mr. Rice took the view that the plaintiff's claim for possession was *res judicata*. He held that the order of remand was wrong, allowed the appeal and dismissed the suit. We are unable to agree with the District Judge that it was open to him to review the order of remand which had been made by Mr. Venugopaul Chetty. The question of law is not affected by the fact that Mr. Venugopaul Chetty had been succeeded by Mr. Rice. If the defendant is right, it would have been open to Mr. Venugopaul Chetty, on the appeal against the decree for possession given by the Munsif to the plaintiff, to review his own order.

The question as it seems to us turns on the meaning of the word "decree" in section 591 of the Code of Civil Procedure. We think it should be construed as meaning a decree passed by the Court which made the order which is alleged to be erroneous, defective or irregular. If the word decree is to be construed quite generally as the defendant has contended it should be, the effect would be to give a right of review which is not conferred in express terms and to cause great inconvenience in practice. The construction which we adopt is supported by authority (see *Suroj Din v. Chattar*(1), *Luleet Pandey v. Byjnath Singh*(2)).

(1) (1880-81) I.L.R., 3 All., 765.

(2) (1870) 14 W.R., 285.

WHITE, C.J., *Kharag Prasad Bhagat v. Durdhari Rai*(1), *Brojo Soondur Gossamee v. Juggut Chunder Day*(2), and *Balvant Ramachandra RAHM, J. Natu v. The Secretary of State*(3).

SUBBA
LAKSHMA-
MMA
v.
VENKATA-
RAYADU.

It was contended that it was open to us in second appeal to go into the question as to whether the remand order made by Mr. Venugopaul Chetty was right. In our opinion section 591 of the Code of Civil Procedure does not empower us to do this.

We must set aside the decree of the lower Appellate Court and remand the case for disposal on the merits. Costs will abide the event.

APPELLATE CIVIL.

Before Mr. Justice Sankaran-Nair and Mr. Justice Pinhey.

SRINIVASA REDDI (FIRST DEFENDANT), APPELLANT,

v.

SIVARAMA REDDI (PLAINTIFF), RESPONDENT.*

1908.
November
30.
December 1.

Specific Relief Act I of 1877, ss. 15, 17—Sec. 15 does not apply where undivided father, without concurrence of his sons, agrees to sell—Decree in such cases in suit for specific performance against the father and son.

An undivided father has an interest in, and under certain circumstances a power of disposal over, every portion of the undivided property. Section 15 of the Specific Relief Act will not apply where an undivided father contracts to sell undivided property without the concurrence of his undivided son.

Where such an agreement is sought to be enforced in a suit in which the father and son are joined as defendants, the proper decree to be passed is one directing the sale by the father of the entire property on payment of the whole consideration, without determining whether the sale will be binding on the son, and not one directing the father to sell his one half share on payment of one half of the purchase money.

Kosuri Ramaraju v. Ivalury Ramalingam [(1903) I.L.R., 36 Mad., 74], followed.

SECOND APPEAL presented against the decree of F. H. Hamnett, District Judge of South Arcot, in Appeal Suit No. 79 of 1905, presented against the decree of V. S. Narayana Aiyar, District Munsif of Villupuram, in Original Suit No. 22 of 1904.

Suit to compel the defendants to execute in favour of plaintiff a registered deed of sale conveying the plaint properties for Rs. 135.

(1) (1892) I.L.R., 14 All., 348.

(2) (1874) 21 W.R., 199.

(3) (1908) I.L.R., 32 Bom., 432.

* Second Appeal No. 249 of 1906.