suggested by Mr. Seshagiri Aiyar who appeared for the respondent that in case we should hold that the suit is maintainable we should give him an opportunity of meeting the appellant's case on the other pleas on which the lower Appellate Court has come to no finding. But the findings on these points of the Original Court were not challenged, and the defendant chose to rest his case in appeal on the question of law which was argued before us. We do not think we ought to accede to the respondent's prayer.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

PALANI CHETTY (PLAINTIFF), APPELLANT,

v.

RANGIADOSS NAIDU (DEFENDANT), RESPONDENT.*

1908. September 8, 9, 29.

Civil Procedure Code—Act XIV of 1882, ss. 562, 578—Remand contrary to the provision of s. 562 illegal and not merely irregular—Failure to appeal against an illegal order of remand not a waiver of the illegality.

The Court of First Instance passed a decree in favour of plaintiff on the strength of a plan which was not disputed by the defendant. On appeal, the Appellate Court held that the plan was unsatisfactory and that a proper plan was necessary for a right decision of the suit and remanded the suit for re-trial under section 562 of the Code of Civil Procedure. No appeal was preferred by plaintiff under section 588, Civil Procedure Code, against the order of remand and the lower Court again passed a decree in favour of the plaintiff which was reversed on appeal. Plaintiff preferred a second appeal to the High Court:

Held: (1) That the original order of remand was contrary to the provisions of section 562 of the Code of Civil Procedure, as the Court of First Instance had not decided the suit on a preliminary point within the meaning of the section.

(2) That such order was not merely irregular but illegal, and could not be validated by section 578 of the Code of Civil Procedure.

(3) That even if such illegal order might be validated by consent or waiver, neither the omission of the plaintiff to appeal under section 588 nor his acquiescing in the trial on remand amounted to such consent or waiver.

Subramania Ayyar v. *King-Emperor*, [(1902) I.L.R., 25 Mad., 61] referred to.

Manager of the Court of Wards, Kalahasti Estate v. *Ramasawmi Reddi*, [(1905) I.L.R., 28 Mad., 437], referred to.

* Second Appeal No. 971 of 1905.

MUNRO AND ABDUR RAHIM, JJ.

PALANI CHETTY v. RANGIADOSS NAIDU.

SECOND APPEAL against the decree of J. Hewetson, District Judge of Trichinopoly, in Appeal Suit No. 175 of 1904, presented against the decree of S. Doraiswami Aiyar, District Munsif of Trichinopoly, in Original Suit No. 336 of 1905.

The facts are sufficiently set out in judgment.

K. Jagannatha Ayyar for *K. Balamukunda Ayyar* for appellant.

V. Purushotha Ayyar for The Hon. The Advocate-General for respondent.

JUDGMENT.—One of the grounds taken in this appeal is that the order of remand by the District Judge, dated the 23rd February 1903, passed in Appeal No. 48 of 1902, was illegal. The suit was for a declaration of title to three plots of land and for an injunction. The plaintiff filed a plan (exhibit A). No exception to this plan seems to have been taken by the defendant before the District Munsif. The plaintiff got a decree. On appeal the District Judge held that the plan (exhibit A) was most unsatisfactory, and that, for the decision of the suit, it was necessary to have a proper plan prepared. He therefore remanded to the suit for re-trial under section 562 of the Civil Procedure Code. The District Munsif again gave a decree for the plaintiff. The District Judge reversed that decree and hence this second appeal.

The order of remand was clearly illegal, for the District Munsif had disposed of the suit not on a preliminary point but on the merits. If the District Judge required a better plan he could have called for it himself, and then dealt with the evidence with reference to the new plan.

It is clear however that the appellant was in no way prejudiced by the order of remand, and it is therefore argued that, with reference to the provisions of section 578, Civil Procedure Code, we should not interfere. In *Subba Sastri* v. *Balachandra Sastri*(1), where it was held in second appeal that the order of remand was illegal, all the proceedings subsequent to the order of remand were set aside, Section 578, Civil Procedure Code, was not referred to. In *Mallikarjuna* v. *Pathaneni*(2), it was held that the order of remand was *ultra vires* and illegal. There are however observations to the effect that if the merits of the case

(1) (1895) I.L.R., 18 Mad., 421. (2) (1896) I.L.R., 19 Mad., 479.

where not affected by the remand, section 578, Civil Procedure Code, might apply. In *The Manager of the Court of Wards, Kalahasti Estate* v. *Ramasawmi Reddi*(1), it was held that a remand, contrary to the provisions of section 564, Civil Procedure Code, was not merely irregular but illegal. For this the ruling of the Judicial Committee in *Subramania Ayyar* v. *King-Emperor*(2), was relied upon. That was a case under the Criminal Procedure Code, but there are observations at page 98 of the report which show that the same view would have been taken of disobedience to an express provision of the Civil Procedure Code as to a mode of trial. The illegal remand in the present case cannot therefore be treated as a mere irregularity and section 578, Civil Procedure Code, has no application. It was held however by Subramania Ayyar, J., in *The Manager of the Court of Wards, Kalahasti Estate* v. *Ramasawmi Reddi*(1). MOORE, J., dissenting, that an illegal order of remand might be validated by consent or waiver, and it is therefore argued that we should not interfere because the plaintiff did not appeal against the order of remand or object to the District Munsif going on with the suit. As to the first of these reasons, the plaintiff had the right either to appeal under section 588 (28), Civil Procedure Code, against the order of remand, or to take the objectoin in second appeal. This is not disputed, and there is authority for it in *Subba Sastri* v. *Balachandra Sastri*(3). Failure to appeal under section 588 (28) cannot therefore be treated as consent or waiver. As to the second reason the plaintiff could not prevent the trial from going on. Thus, even if the view taken by Subramania Ayyar, J., be followed, the argument fails. We therefore have no alternative but to set aside the decree of the District Judge, the second decree of the District Munsif and the remand order of the District Judge and to remand the Original Appeal No. 48 of 1902 for disposal according to law. Costs will abide the event.

(1) (1905) I.L.R., 28 Mad., 437. (2) (1902) I.L.R., 25 Mad., 61.
(3) (1895) I.L.R., 18 Mad., 421.