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this distinction, but it is in my humble opinion one of detail only, and not of juridical principle as representing a fundamental doctrine.

For these reasons I hold that our answer to the question referred must be that a second appeal lies, under s. 584 of the Code, from a decree of the lower appellate Court passed in the absence of the respondent, whether the respondent were plaintiff or defendant in the suit.

STRAIGHT, Offg. C. J., and TYRRELL, J.—Upon consideration of the question referred to the Full Bench, we are of opinion that, as an amendment of the law on this subject is in contemplation by the Legislature, and will in all probability be shortly carried into effect, any remarks by us on the present occasion would, under the circumstances, be undesirable.

APPELLATE CIVIL.

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May 12.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

SANT KUMAR, MINOR, BY HIS GUARDIAN, SUKH NIDHAN (PLAINTIFF) *v.* DEO SARAN AND OTHERS (DEFENDANTS).*

Hindu Law—Daughter's son—Hindu widow—Decree against widow—Reversioner—Res judicata—Declaratory decree—Act I of 1877 *(Specific Relief Act), s.* 42—*Civil Procedure Code, s.* 578.

A suit brought against *K*, the widow of *R*, a Hindu, by the representatives of *R*'s brothers *H* and *P*, for possession of his estate, ended in a compromise by which the defendant recognized the plaintiffs' rights, and conceded that the family was joint. After *K*'s death, *M*, a daughter of *R*, brought a suit on her own behalf against the above-mentioned plaintiffs for possession of her father's estate, but afterwards withdrew her claim. Subsequently, *S*, *M*'s son, who had been born after *K*'s compromise, brought a suit against *M* and the representatives of *H* and *P* to recover possession of the estate, on the allegation that, the family being a divided one, he was entitled, under the Hindu Law, to succeed to such estate, and that both the compromise entered into by *K* and the withdrawal of the former suit by *M* were in fraud of his succession, and did not affect his rights. The Court of first instance found that the plaintiff was entitled to succeed to the estate, but that, his mother being still alive, he was entitled to possession after her death only, and, upon these findings, gave him a decree declaring his right to

* Second Appeal No. 1279 of 1885, from a decree of Maulvi Muhammad Ahmad-ul lah Khan, Subordinate Judge of Gorakhpur, dated the 18th May, 1885, reversing a decree of Maulvi Aziz-ul Rahman, Munsif of Bansgaon, dated the 5th January, 1885.

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possession on *M's* death. The lower appellate Court reversed the decree, holding that the compromise entered into by *K* was conclusive against the plaintiff's claim, and also that, during his mother's lifetime, he had no *locus standi* to maintain the suit.

Per MAHMOOD, J., that the plaintiff's rights as a daughter's son (which were not affected by his birth having taken place after his maternal grandfather's death) did not entitle him, under ordinary circumstances, to succeed to his maternal grandfather's estate in a divided Hindu family, during the existence of a daughter, whether she were his own mother or his maternal aunt; and that the claim for possession was therefore rightly dismissed. *Aumirtolal Bose* v. *Rajoneckant Mitter* (1), *Sibta* v. *Badri Prasad* (2), and *Baijnath* v. *Mahabir* (3) referred to.

Also that the prayer in the plaint was wide enough to include a prayer for declaratory relief such as the first Court had given.

Also that the rule whereby decrees obtained against a Hindu widow succeeding to her husband's estate as heir are binding by way of *res-judicata* against all who in the order of succession come after her, and in that sense may be dealt with as her representatives, was limited to decrees fairly obtained against the widow in a contested and *bonâ fide* litigation, and would not apply to the compromise effected by *K*, which could scarcely be regarded as on a higher footing than an alienation which the widow in possession of her husband's divided estate might have made, and which the plaintiff distinctly alleged had not been fairly obtained. *Rani Anund Koer* v. *The Court of Wards* (4), *Nand Kumar* v. *Radha Kuari* (5), and *Katama Natchiar's case* (6) referred to

Also that *M's* withdrawal of her suit was not a bar to the suit of the plaintiff.

Also that it could not be said that a daughter's son was not, under any condition, competent to maintain a declaratory suit of this nature during the lifetime of his mother or maternal aunt, in respect of his maternal grandfather's property, to the full ownership of which he had a reversionary right.

Also that the awarding of declaratory relief, as regulated by s. 42 of the Specific Relief Act, is a discretionary power which Courts of equity are empowered to exercise with reference to the circumstances of each case and the nature of the facts stated in the plaint, and the prayer of the plaintiff; that so long as a Court of first instance possesses jurisdiction to entertain a declaratory suit, and entering into the merits of the case arrives at right conclusions and awards a declaratory decree, such a decree cannot be reversed in appeal simply because the discretion has been improperly exercised; and that such improper exercise of discretion under s. 42 of the Specific Relief Act has no higher footing than that of an error, defect or irregularity, not affecting the merits of the case or the jurisdiction of the Court, within the meaning of s. 578 of the Civil Procedure Code.

This does not imply that, even in cases where the discretionary power to award declaratory relief has been exercised wholly arbitrarily, and in a manner

(1) 15 B. L. R., 10; L. R., 2 Ind. Ap. 113.
(2) I. L. R., 3 All. 134.
(3) I. L. R., 1 All. 608.
(4) I. L. R., 6 Calc. 764; L. R., 8 Ind. Ap. 14.
(5) I. L. R., 1 All. 282.
(6) 9 Moo. I. A. 543.

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grossly inconsistent with judicial principles, the Court of appeal would have no power to interfere.

Ram Kanaye Chuckerbutty v. *Prosunno Coomar Sein* (1), *Sadut Ali Khan* v. *Khajeh Abdool Gunnee* (2), *Sheo Singh Rai* v. *Dakho* (3) and *Damoodur Surmah* v. *Mohee Kant Surmah* (4), referred to

THE facts of this case were as follows:—One Ram Fakir had two brothers, Hanuman and Sheo Parshan, represented in this case by their sons. The plaintiff was the son of Mohra, daughter of Ram Fakir, who died many years ago, leaving also a widow, Kadma. Upon the death of Ram Fakir, Kadma, his widow, obtained possession of his zamindari property, a 1 anna and 4 pies share in each of three villages, on the allegation that her deceased husband, having been separated from his brothers, and having died without leaving a son, she was entitled to succeed to his estate according to the Hindu law. After this, about the year 1865, probably soon after Ram Fakir's death, the sons of Hanuman and Sheo Parshan instituted a suit against Kadmo for possession of the estate of Ram Fakir, and that litigation ended in a compromise, which the widow entered into with them on the 8th November, 1865. Under the terms of this compromise the widow recognized their rights, and conceded that, the family of Ram Fakir being joint, her right in his estate was limited to receiving maintenance for life only. At that time Sant Kumar, the plaintiff in the present case, had not been born. Kadma having died, Mohra, the mother of the plaintiff, instituted a suit on her own behalf for her father's estate, against the sons of Hanuman and Sheo Parshan, about the year 1880, but subsequently withdrew her claim on the 5th November, 1880, apparently without reserving any right to sue again.

The present suit was instituted by the plaintiff Sant Kumar as a minor, through his guardian, on the 1st December, 1884, against Mohra and the sons of Hanuman and Sheo Parshan, and its object was to recover possession of the estate of Ram Fakir, which was in the possession of the sons of Hanuman and Sheo Parshan, who were the principal defendants, on the allegation that, the family being divided, he was entitled, under the Hindu law, to succeed to such estate, and that the compromise of the 8th Nov-

(1) 13 W. R. 175.
(2) 11 B. L. R. 203; L. R., Ind. Ap., Sup. Vol., 165.
(3) I. L. R., 1 All. 688; L. R., 6 Ind. Ap. 87.
(4) 21 W. R. 54.

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ember, 1865, entered into by Kadma, and the withdrawal of the former suit by Mohra, were both in fraud of the plaintiff's succession, and were not binding upon him.

The suit was resisted by the principal defendants mainly upon the ground that Ram Fakir was a member of a joint Hindu family; that his widow, Kadma, was therefore entitled only to maintenance; that the compromise entered into by her before the plaintiff's birth was *bonâ fide*, as also the withdrawal of her claim by the plaintiff's mother, Mohra; that plaintiff was neither entitled to set aside those proceedings, nor had he any right to sue for possession in the lifetime of his mother Mohra; and that the suit was barred by the rule of *res-judicata*, the plaintiff's *status* being that of a legal representative of Kadma through Mohra. All these pleas were disallowed by the Court of first instance which found, *inter alia*, that Ram Fakir was separate in estate from his brothers; that the plaintiff was, therefore, entitled to succeed to the share of his maternal grandfather; that the proceedings taken by Kadma and Mohra could not prejudice his rights; but that the mother of the plaintiff being still alive, he was entitled to possession only upon her death. Upon these findings the Court of first instance gave a decree to the plaintiff declaring his right to obtain possession of the property upon the death of his mother Musammat Mohra.

Upon appeal the lower appellate Court, having regard to the case of *Nand Kumar* v. *Radha Kuari* (1), reversed the decree of the first Court on the ground that, Kadma's compromise of the 8th November, 1865, was conclusive and binding upon the plaintiff, and also on the ground that, the plaintiff's mother being still alive, the plaintiff had no *locus standi* to maintain the suit. For this latter proposition the lower appellate Court relied upon *Baijnath* v. *Mahabir* (2).

The plaintiff appealed to the High Court.

Babu *Sital Prasad Chattarji*, for the appellant.

Pandit *Ajudhia Nath* and Shah *Asad Ali*, for the respondents.

MAHMOOD, J.—In my opinion the first question to be considered in this case is, whether, upon the facts as stated by plaintiff

(1) I. L. R., 1 All. 282. (2) I. L. R., 1 All. 608.

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himself, he has any *locus standi* to maintain the suit. The general rule of Hindu law is, that a daughter's son can never succeed to the estate of his grandfather so long as there is in existence any daughter who is entitled to take, either as heir or by survivorship to her other sisters. This is the effect of the ruling of the Lords of the Privy Council in *Aumirtolal Bose* v. *Rajoneekant Mitter* (1) and also of the other cases cited by Mr. Mayne in his excellent work on Hindu Law and Usage, s. 478. In s. 479 of the same work the learned author, upon the authority of the ruling of this Court in *Sibta* v. *Badri Prasad* (2), goes on to say that, according to the Mitakshara law, a daughter's son takes his maternal grandfather's estate as full proprietor; on his death such estate devolves on his heirs and not on the heirs of his maternal grandfather, but that until the death of the last daughter capable of being an heiress, he takes no interest whatever, and can transmit none, and therefore if he should die before the last of such daughters leaving a son, that son would not succeed because he belongs to a completely different family, and he would offer no oblation to the maternal grandfather of his own father. These I take to be the undoubted propositions of the Mitakshara school of Hindu law, and fully consistent with the rule laid down by this Court in *Baijnath* v. *Mahabir* (3) so far as that case follows the ruling of the Privy Council above referred to. In short, a daughter's son—to use the words of Mr. Mayne—"takes not as heir to any daughter who may have died, but as heir to his own grandfather, and, of course, cannot take at all so long as there is a nearer heir in existence." I do not understand any of the rulings to which I have referred to lay down any rule which goes beyond saying that, during the existence of any daughters, the daughter's son cannot succeed to—that is to say, obtain proprietary possession of—his maternal grandfather's estate in a divided Hindu family; and it seems to me equally clear that, whenever, according to the rule of succession, the daughter's son does succeed to his maternal grandfather's estate, he succeeds as "full owner" in the sense in which that expression is understood in Hindu law. Now, this being so, I hold that during the lifetime of a daughter, the position of the daughter's son, with reference to his maternal grandfather's divided estate, is, at least by a close analogy, similar

(1) 15 B. L. R. 10; L. R., 2 Ind. Ap. 113.
(2) I. L. R., 3 All. 134.
(3) I. L. R., 1 All. 603

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to the *status* of such reversioners as trace their descent through the main line to the full owner. This is a conclusion which I think is borne out by the learned summary of the historical aspect of the rights of a daughter's son given by Mr. Mayne in s. 477 of his work: and I may add that the circumstance of the daughter's son being born *after* the death of his maternal grandfather, would have no effect upon his rights in a case such as the present. But it is of course clear that those rights do not entitle him under ordinary circumstances to succeed to the maternal grandfather's estate during the existence of a daughter, whether she be his own mother or maternal aunt. The claim for possession in this case was, therefore, rightly dismissed by the Munsif, but the question remains whether the declaratory decree, which he awarded to the plaintiff, was rightly interfered with by the lower appellate Court.

Upon this last question the nature of the plaint has to be considered, and after having read the pleadings in the case, I am of opinion that the prayer in the plaint is expressly and clearly wide enough to include a prayer for declaratory relief. This being so, the next point is, whether the plaint discloses any such circumstances as would entitle the plaintiff to ask for a decree such as the Munsif has given him. Questions of this kind formerly arose under the somewhat indefinite provisions of s. 15 of the old Civil Procedure Code (Act VIII of 1859), and numerous rulings are to be found in the reports as to the exact scope of declaratory relief. The matter is now governed by the provisions of s. 42 of the Specific Relief Act (I of 1877), and I have before now, in the case of *Balgobind* v. *Ram Kumar* (1), had occasion to express the manner in which I interpret that section in its application to declaratory suits by Hindu reversioners. According to those views, and with reference to the ruling of their Lordships of the Privy Council in *Rani Anund Koer* v. *The Court of Wards* (2), it seems to me that the present is a case in which, if the facts alleged by the plaintiff are true, he can maintain the suit. It is perfectly true, as was held by this Court in *Nand Kumar* v. *Radha Kuari* (3), that where, on her husband's death, a Hindu widow obtains possession of his estate as his heir, in a suit against her for possession thereof

(1) I. L. R., 6 All. 431. (2) I. L. R., 6 Calc. 764; L. R., 8 Ind. Ap. 14.
(3) I. L. R., 1 All. 282.

by certain persons claiming to succeed to the estate as rightful heirs, a decree obtained by them would be a bar to a new suit against those persons by the daughter claiming the estate in succession to the widow; in other words, such a decree would operate as *res-judicata* against all who, in the order of succession, came after the widow, and in that sense may be dealt with as her representatives. But the peculiar nature of the "widow's estate" under the Hindu law is such that her position in litigation must necessarily be subjected to the qualification which the ruling which I have just cited imposes upon the operation of such a plea in bar of the action, namely, that the decree should have been fairly obtained against the widow in a *bonâ fide* litigation. This seems to me to be perfectly clear from the ruling of the Privy Council in the case of *Katama Natchiar* (1) where their Lordships made the following observations at p. 608 of the report:—

"It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in *Anga Mootoo Natchiar's* lifetime, would have bound those claiming the zemindari in succession to her. And their Lordships are of opinion that unless it could be shown that there had not been a fair trial of the right in that suit—or in other words, unless that decree could have been successfully impeached on some special ground—it would have been an effectual bar to any new suit in the zila Court by any person claiming in succession to *Anga Mootoo Natchiar*. For, assuming her to be entitled to the zemindari at all, the whole estate would for the time be vested in her absolutely for some purposes, though, in some respects for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

(1) 9 Moo. I. A. 543.

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Now, in the present case, the compromise which the principal defendants obtained from Musammat Kadma on the 8th November, 1865, was an arrangement which can scarcely be regarded as having any footing higher than that of an alienation which the widow in possession of her husband's divided estate could have made. At any rate, the compromise, whether it was made by a rule of Court or not, cannot, in my opinion, be dealt with as having the full force of a decree which would be the result of adjudication in a contested suit. Moreover, the plaintiff distinctly alleges in the plaint that the transaction of the compromise was not *bonâ fide*, and that it had not been fairly obtained. The question was therefore clearly in issue, and whilst the Court of first instance took a view favourable to the plaintiff's case, the lower appellate Court has failed to enter into the merits of it, apparently under the view that the *bonâ fides* of the compromise was a matter of no significance at all.

Almost the same remarks, *mutatis mutandis*, are applicable to the manner in which the lower appellate Court has dealt with the position of Musammat Mohra and her action in withdrawing the suit which she had instituted against the principal defendants. It is admitted that the object of that suit was to recover possession of the property now in suit, on the ground that it formed the separate property of Ram Fakir, and devolved upon her upon the death of her mother Musammat Kadma, which is said to have taken place in Asarh 1286 fasli (1879). The suit was not adjudicated upon but ended in being withdrawn on the 5th November, 1880, under circumstances which the plaintiff distinctly alleges were tainted with fraud and collusion. Upon this point also the Munsif took a view favourable to the plaintiff, but the lower Court has failed to go into the merits of the question because it held that the very existence of Musammat Mohra constituted a full answer to the present suit, as it deprived the plaintiff of *locus standi*. For this view the learned Subordinate Judge has relied upon the ruling of this Court in *Baijnath* v. *Mahabir* (1). Having carefully considered the report of that case, I am of opinion that it is not on all fours with the present case. The main proposition of law there laid down is undoubted; but there is nothing in the judgment deliver-

(1) I. L. R., 1 All. 608.

ed by the learned Judges in that case to show that a daughter's son is not under any condition competent to maintain a declaratory suit of this nature during the lifetime of the mother or maternal aunt in respect of his maternal grandfather's property, to the full ownership of which he has a reversionary right. The awarding of declaratory relief is a discretionary power which Courts of equity are empowered to exercise with reference to the circumstances of each case and the nature of the facts stated in the plaint, and the prayer of the plaintiff. The discretion is now regulated by s. 42 of the Specific Relief Act, and I have already said enough to indicate that, if the allegations of the plaintiff are true, a suit of this nature, so far as it prays for declaratory relief, would be maintainable : and I wish to take this opportunity of expressing a view which I have long entertained in connection with the power of interference which the appellate Court should exercise in cases where it is doubtful whether the circumstances fully justified a declaratory decree. The awarding of specific relief belongs to one of those branches of law, regarding which even the great jurists are not unanimous as to whether it falls within the province of procedure, *ad litis ordinationem*, or appertains to the region of substantive law, *ad litis decisionem*. Perhaps the simplest and safest view is to regard the subject as occupying a middle place between these two great divisions of law. But whether the awarding of declaratory decrees is a rule of procedure or a rule of substantive law, it seems to me that it does not occupy such a position in the juristic arrangement of legal rules as would vitiate decrees awarded in cases where its application may be doubtful. I may here observe that the Legislature, in framing the rule in s. 42 of the Specific Relief Act, has dealt with the matter as purely discretionary with the Court, and it is noticeable that the only restriction to which the discretionary power is made subject by the express letter of the statute, is contained in the proviso to that section, which lays down "that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so." Beyond this restriction, no other limitation is imposed by the Legislature, though it may well be taken for granted, and it goes without saying, that the Legislature did not intend the discretionary power

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to be exercised in an unsound manner. The absence of any other restriction in s. 42 is all the more significant when we find that the same enactment, in laying down the rule as to a cognate branch of specific relief, and in leaving it to the discretion of the Court to decree specific performance of contracts, has framed s. 22 in language which expressly provides restrictions upon the power. For the latter section, after giving the power, goes on to say that "the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles, and capable of correction by a Court of appeal." Then the section goes on further, and, in two carefully-framed clauses, indicates the class of "cases in which the Court may properly exercise a discretion *not* to decree specific performance;" and again in another clause indications are given of the intentions of the Legislature as to the nature of cases in which Courts may award such relief. There are, of course, further provisions in the following few sections regulating the awarding of specific performance. Now, no such rules, or elaborate indications, of restrictions are to found in the Act with reference to declaratory decrees. And I have said all this in order to answer the question whether, in a case such as the present, and granting that the plaintiff had *locus standi* to maintain the suit, and that the decree of the Court of first instance was sound upon the merits, the lower appellate Court would have been justified in reversing the decree simply upon the ground that the discretionary relief was improperly exercised in the affirmative by the Munsif.

I am of opinion that the question must be answered in the negative, and I hold that, so long as a Court of first instance possesses jurisdiction to entertain a declaratory suit, so long as that Court entering into the merits of the plaintiff's case arrives at right conclusions, and awards a declaratory decree, such a decree cannot be reversed in appeal simply because the discretion has been improperly exercised. I know that in saying this I am laying down a strong proposition of law, and I am anxious to justify it further by the statutory provisions themselves. I have already shown that whilst the discretion to decree specific performance of contracts is expressly declared to be "capable of correction by a Court of appeal," no such provision exists in the Specific Relief Act as to declaratory decrees. I will say nothing as to the effect

of the word" *shall*" in the proviso to s. 42, because, even if the plaintiff's whole case be accepted, that proviso would not apply to this case—he not being entitled " to ask further relief than a mere declaration of title " within the meaning of the statute. Putting the proviso, therefore, out of the question, I hold that an improper exercise of discretion under s. 42 of the Specific Relief Act has no higher footing than that of an " error, defect, or irregularity, whether in the decision or in any order passed in the suit or otherwise, not affecting the merits of the case or the jurisdiction of the Court, " within the meaning of s. 578 of the Civil Procedure Code. That section contains one of the most salutary rules of law which the Code provides. The obvious aim of the clause, in keeping with many another provision in the Code, is to prevent technicalities from overcoming the ends of justice, and from operating as a means of circuity of litigation, which the old method of English Common Law Courts so much encouraged. And in applying the clause to declaratory decrees in the manner in which I have suggested, it seems to me that we should be only giving effect to the policy of the Legislature. For I fail to understand what possible harm can arise where *A*, being admittedly entitled to a right against *B*, goes to a Court of competent jurisdiction, and after a full trial of his cause obtains from that Court a declaration consistent with the actual merits of the dispute. Such a declaration may possibly have been improperly made, owing to the absence of sufficient reasons for awarding such a relief. But, after all, such a declaration, though irregular, only asserts a fact and confirms a right. The holder of such a decree obtains a conclusive evidence against his antagonist ; and if the decree is sound upon the merits, the ends of justice are promoted by the issues not being re-opened and re-tried at a later period, when, by the lapse of time, the muniments of title and the evidence of witnesses may have disappeared.

Nor is the view which I have taken wholly unsupported by the case-law. I am aware that there are cases to be found in the Reports (under s. 15 of the Code of 1859), which may not be wholly consistent with my opinion. But the law has since been newly formulated by the express interference of the Legislature; and it is clear that a great deal of what I have said proceeds upon

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the construction of s. 42 of the Specific Relief Act. But apart from this, there is a judgment of that eminent Indian Judge, the late Mr. Justice Dwarkanath Mitter, in *Ram Kanaye Chuckerbutty* v. *Prosunno Coomar Sein* (1), where the learned Judge laid down the rule of law which seems to me to be best suited to the conditions of litigation in this country, and to be consonant with sound principles of procedure. Referring to s. 15 of Act VIII of 1859 (which corresponds with s. 42 of the Specific Relief Act), and s. 350 of the same Act, which has been replaced and practically reproduced in s. 578 of the present Code, the learned Judge went on to say:—"It is true that it is entirely in the discretion of the Court to make a declaratory decree under s. 15, Act VIII of 1859; but after this discretion has been already exercised by a Court of competent jurisdiction, it does not lie within the power of a Court of appeal to set aside the decree of the lower Court upon an objection like this, which does not affect the merits of that decree, and which was not even taken at the time when it was passed." Whilst accepting this enunciation of the law, I will guard myself against being understood to say that, even in cases where the discretionary power to award declaratory relief has been exercised wholly arbitrarily, and in a manner grossly inconsistent with judicial principles, the Court of appeal would have no power to interfere. I will lay down no rule upon this subject because, as I have already shown, the point does not arise in the case. It is sufficient to say that in *Sadut Ali Khan* v. *Khajeh Abdool Gunnee* (2) the Lords of the Privy Council, referring to the discretionary power as to declaratory decrees, expressed the principle that where a Court "has exercised its discretion in a matter wherein the law gives it a discretion, their Lordships would not upon light ground interfere with the exercise of that discretion." And I may further add, as supporting my view, that in the case of *Sheo Singh Rai* v. *Dakho* (3) the Lords of the Privy Council denominated the objections as to the impropriety of maintaining the declaratory suit, when raised in appeal, as "somewhat technical," and declined to entertain them. The present case seems to me to be similar to *Damoodur Surmah* v. *Mohee Kant Surmah* (4), and if the allegations of the plaintiff

(1) 13 W. R. 175.
(2) 11 B. L. R. 203; L. R., Ind. Ap., Sup. Vol., 165.
(3) I. L. R., 1 All. 688; L. R., 6 Ind. Ap. 87.
(4) 21 W. R. 54.

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are substantiated, he can, in my opinion, maintain the suit, and reasonably claim declaratory relief But unfortunately the manner in which the lower appellate Court has viewed this case, has prevented it entirely from entering into the merits of the case, upon the issues of fact raised by the parties. The defendants went the length of denying that the plaintiff's mother, Musammat Mohra, was the daughter of Ram Fakir. They alleged that Ram Fakir was not divided from his brothers, whom the defendants represent. There were also minor allegations of facts upon which the parties did not agree, but none of these points have been considered or determined by the lower appellate Court, and there is not even a finding as to whether the family of Ram Fakir and his brothers was joint or divided,—a point which is of course all-important in this case.

Under these circumstances, I think it is impossible to dispose of this appeal finally here, and I would therefore decree this appeal, and, setting aside the decree of the lower appellate Court, remand the case to that Court, under s. 562 of the Civil Procedure Code, for disposal upon the merits, with reference to the observations already made. Costs to abide the result.

STRAIGHT, Offg. C. J.—I agree to the order proposed by my brother Mahmood.

Case remanded.

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May 21.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

ABDUL HAYAI KHAN (PLAINTIFF) *v.* CHUNIA KUAR (DEFENDANT).*

Amendment of decree—Execution of decree—Objection to validity of amendment—Civil Procedure Code, s. 206.

The Court in a suit upon a bond gave the plaintiff a decree, making a deduction from the amount claimed of a sum covered by a receipt produced by the defendant as evidence of part-payment, and admitted to be genuine by the plaintiff. The decree was for a total amount of Rs. 1,282. Subsequently, on application by the decree-holder, and without giving notice to the judgment-debtor, the Court which passed the decree, purporting to act under s. 206 of the Civil Procedure Code, altered the decree, and made it for a sum of Rs. 1,460. The decree-holder took out execution, and the judgment-debtor objected that the decree was for Rs. 1,282 and had been improperly altered. The Court executing the

* Second Appeal No 164 of 1885, from an order of W. T. Martin, Esq., Additional Judge of Aligarh, dated the 2 nd April, 1885, affirming an order of Maulvi Sami-ullah, Subordinate Judge of Aligarh, dated the 22nd March, 1884.