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which belong to theplaint iff as to the village Sisai Sipah, such title stands or falls, according as the plaintiff establishes or fails to establish her claim against him. There cannot therefore properly be said to be two causes of action: on the contrary, there is a single cause of action, namely the infringement of the plaintiff's right by the defendant Gur Prasad, out of which has flowed the title asserted by the defendant Bank and denied by the plaintiff. For these reasons I think the learned Subordinate Judge was wrong in the view he took, and in applying the Full Bench ruling to the present case. I allow the appeal, and reversing his decree, direct him to restore the suit to his file of pending cases and to dispose of it according to law. Costs will be costs in the suit.

MAHMOOD, J.—I agree in all that has been said by my brother Straight in respect of this case; and as I was the only dissentient Judge in the Full Bench case of *Narsingh Das* v. *Mangal Dubey* (1), I wish to say that I am very glad to adopt the interpretation which my brother has put upon that ruling, and concur in the order which he has made.

Cause remanded.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

CHEDA LAL AND ANOTHER (PLAINTIFFS) *v.* BADULLAH AND OTHERS (DEFENDANTS).*

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May 23.

Practice—Appeal on full court-fee from decree dismissing suit in part—Remand of whole case, though no cross-appeal or objections preferred—Dismissal of whole suit on remand—High Court competent in second appeal to consider validity of remand order not specifically appealed—Civil Procedure Code, ss. 544, 561, 562, 578.

A plaintiff whose suit had been decreed in part appealed from so much of the first Court's decree as was adverse to him, and stamped his memorandum of appeal with a stamp which would have covered an appeal from the whole decree. The defendant did not appeal or file cross-objections. The lower appellate Court remanded the whole case to the first Court under s. 562 of the Civil Procedure Code, the plaintiff

* Second Appeal No. 2086 of 1886, from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 24th July, 1886, confirming a decree of Muhammad Ezid Bakhsh, Munsif of Moradabad, dated the 22nd December, 1884.

(1) I. L. R., 5 All. 163.

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not appealing under s. 588 (28) from the order of remand. The first Court now dismissed the whole suit, and, on appeal by the plaintiff, the lower appellate Court confirmed the decree. On a second appeal to the High Court—

Held (i) that the High Court was competent to consider the validity or propriety of the order of remand, though it had not been specifically appealed against; (ii) that the order of remand was *ultra vires*, so far as it related to that part of the first Court's decree which was favourable to the plaintiff, the lower appellate Court not having jurisdiction, in the absence of any appeal or objections by the defendant, to disturb that part of the decree; (iii) that the order of remand was not made valid by the subsequent appearance of the plaintiff before the first Court or by the appeal from the first Court's decree on the remand; and (iv) that the case was not covered by s. 578 of the Code.

Per MAHMOOD, J.—S. 544 had no application to the case, that section relating only to cases where one or more of the parties arrayed on the same side appealed against a decree passed on a ground common to all, and not to cases where either of two opposite parties appealed from a part of the decree upon a court-fee sufficient for an appeal from the whole.

Maharajah Moheshur Sing v. *The Bengal Government* (1), *Forbes* v. *Ameeroonissa Begum* (2), and *Shah Mukhun Lall* v. *Baboo Sree Kishen Singh* (3) referred to.

THIS case was referred to a Division Bench by Mahmood, J. The facts are sufficiently stated in the judgment of Edge, C.J.

Babu *Ratan Chand*, for the appellants.

Munshi *Madho Prasad* and Mir *Zahur Husain*, for the respondents.

EDGE, C. J.—The plaintiffs brought their suit in the Munsif's Court of Moradabad. They claimed possession of land and to have a door which had been recently opened by the defendants closed. The Munsif decreed the plaintiffs' claim as to the land, and dismissed their suit as to the door. The plaintiffs appealed as to so much of that decree as dismissed their suit to the door. The defendants filed objections to so much of that decree as decreed the plaintiffs' claim to the land. The Subordinate Judge on that appeal and on those objections remanded the whole case under s. 562 of the Code of Civil Procedure. The Munsif on that remand again decreed the plaintiffs' claim as to the land and dismissed their claim as to the

(1) 7 Moo. I. A., 283. (2) 10 Moo. I. A., 340.
(3) 12 Moo. I. A., 157.

door. The plaintiffs again appealed as to so much of the decree as dismissed their suit as to the door. The defendants did not appeal or file objections. The plaintiffs stamped their appeal with a stamp which would have covered an appeal against the whole decree. On that appeal the Subordinate Judge again remanded the whole case under s. 562. The Munsif heard the case again, and on this occasion dismissed the whole of the plaintiffs' suit. From that decree the plaintiffs appealed. On appeal the Subordinate Judge confirmed the decree of the Munsif and dismissed the appeal. From that decree of the Subordinate Judge this second appeal has been preferred. As to so much of this appeal as relates to the plaintiffs' claim to have the door closed, Mr. *Ratan Chand* for the appellants does not contend that we can interfere with the findings below, those findings being findings of fact, so we need not consider that portion of the case. Mr. *Ratan Chand* contends that the second order of remand, namely, that of the 10th December, 1885, was *ultra vires* so far as that portion of the decree of the 25th September, 1885, which related to the plaintiffs' claim to the land was concerned, and that the only valid decree relating to the plaintiffs' claim to the land is the decree of the 25th September, 1885, which was not the subject of appeal, and as to which the defendants did not file objections. On the other hand, it is contended that we cannot in second appeal consider whether the order of remand of the 10th December, 1885, was good or bad, as it was not specifically appealed against as it might have been under s. 588 (28) of the Code of Civil Procedure, and that the plaintiffs by appealing from the last decree of the Munsif waived any right to object to the order of the 10th December, 1885, and further that this is a case within s. 578 of the Code of Civil Procedure.

As to our power in second appeal to consider the validity or propriety of the order of the 10th December, 1885, there can be no doubt. There are two or three decisions of the Privy Council which show that that is a power we can now exercise. Was the order of the 10th December, 1885, so far as it related to the land, *ultra vires* or not? The Subordinate Judge thought that because

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the plaintiffs had stamped their appeal with a stamp which would cover an appeal on the whole case, he might treat the appeal which, in truth, was only in respect of so much of the Munsif's Court's decree as dismissed the claim to close the door, as if the plaintiffs were appealing against the whole decree. It is an extraordinary proposition that a Subordinate Judge is to look at the stamp on a memorandum of appeal and not at the memorandum itself in order to see which part of a decree is the subject of an appeal before him. The plaintiffs' claim as to the land having been decreed on the 25th September, 1885, they could not have appealed against that portion of the decree: it gave them what they asked. The Subordinate Judge could no more deal with a part of a decree which was not challenged by a memorandum of appeal or by objections filed by the opposite party than he could pass an order reversing the decree of a Munsif when that decree was not in appeal before him. The memorandum of appeal or objections when filed are what give the Judge on appeal jurisdiction to interfere with the decree below. He cannot of his own motion deal with a decree which is not the subject of appeal to him, or with a portion of a decree against which portion there has been no appeal and no objections filed.

In so far as he assumed to set aside the decree of the Munsif of the 25th September, 1885, which decreed the plaintiffs' claim as to the land, he acted without any jurisdiction whatever. The fact that the plaintiffs on that remand appeared before the Munsif could not give the Munsif jurisdiction to re-open the question as to the land. The appeal against the decree of the Munsif could not validate the portion of the order of remand of the 10th December, 1885, which was made without jurisdiction. The parties by appearing before a Court which has no jurisdiction cannot give that Court jurisdiction in the absence of legislative enactment. In my opinion nothing which had taken place did make or could make that portion of the order of the 10th December, 1885, which remanded the case as to the land, valid. As to the contention that this is a case within s. 578 of the Code of Civil Procedure, the

answer to that is threefold. First of all, there is here more than an irregularity, it is an exercise of jurisdiction where there was none. Secondly, the act of the Subordinate Judge did affect the merits of the case in this way, that the plaintiffs rightly or wrongly having got a decree establishing their right to the land, and that portion of the decree not being before the Subordinate Judge on appeal, they had established their title so far as a Court of law could establish it for them. Thirdly, it is a question affecting the jurisdiction of the Court. In my opinion the Subordinate Judge had absolutely no jurisdiction to deal with that portion of the decree which was not the subject of the appeal before him. I am of opinion that this appeal should be dismissed with costs so far as it relates to the claim to close the door, and that it should be allowed with costs here and below so far as it relates to the claim to the land, and that so much of the Subordinate Judge's order of the 10th December, 1885, and of his last decree as relates to the plaintiffs' claim to the land must be reversed, and the decree of the Munsif of the 25th September, 1885, be restored.

MAHMOOD, J.—I agree in all that has fallen from the learned Chief Justice and in the order which he has made. This being a case referred by me for decision, I wish to add a few observations. I understand the case now as I did when I made my order of reference of the 28th July, 1887, and that order enunciated the three points on which the decision of the case depends. As to the first of these points I have to refer to s. 544 of the Code of Civil Procedure, which is the only section on which any reliance could be placed for the contention that when the plaintiff who has only partly succeeded had appealed from such portion of the decree as was against him upon the stamp valued in proportion to the whole amount of the claim in the appellate Court, he would be placed on a worse footing than that on which he stood before he had preferred an appeal. S. 544 of the Code of Civil Procedure applies in my opinion only to appeals by parties arrayed on the same side of a litigation in the original Court, and against whom judgment on a common ground has been passed and only some of them appeal from such judgment

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on behalf of themselves and others who do not join in the appeal. That section does not relate to cases in which a party (be he plaintiff or defendant in the original Court) who has been unsuccessful only to a certain extent of the subject-matter of the litigation in appeal from so much of the decree as has been passed against him, happens to value the appeal as if it related to the whole subject-matter of the litigation, or to pay court-fees on such amount. No Court could take a matter such as the payment of the court-fees stamps as a test whereby its jurisdiction is to be decided. I hold, therefore, on the first point in the referring order that that question should be answered in the negative. As to the second question enunciated in my order of reference I agree with the learned Chief Justice in holding that so much of the decree of the first Court as was not appealed from was not within the scope of the jurisdiction of the lower appellate Court, and that Court in making its order acted *ultra vires* or without jurisdiction, because no tribunal has any power to deal with the subject-matter of the litigation which is not brought before it as the subject for adjudication. On the third question as stated by me in the order referring the case, I have no doubt, for the reasons which have been stated, that the provisions of s. 578 of the Code do not cover the case even though in consequence of the remanding order of the 10th December, 1885, which was passed under s. 562 of the Code of Civil Procedure, a trial *de novo* has taken place in this case and a decree has been passed by the first Court dismissing the claim, and that decree has been confirmed by the lower appellate Court. The scope of that section cannot be so extensive as to bring within the scope of adjudication matters not subject to adjudication in the Court of first instance or in the Court of appeal, and therefore the interference by the lower appellate Court which it made by the order of the 10th December, 1885, was illegal, and, as such, fit for being interfered with by us even at this stage. It has been argued that because the lower appellate Court's order of the 10th December, 1885, might have been appealed from under s. 588 of the Code of Civil Procedure, and, inasmuch as such appeal was not preferred, it

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is no longer open to us in second appeal to consider the validity of that order. Orders of remand such as s. 562 contemplates are necessarily orders of an interlocutory character because they do not definitely purport to dispose of the litigation with which they deal. Such orders may no doubt be appealed from, and the Court of appeal can adjudicate on them with such power as to finality as the appellate Court possesses. But when in a case such as this such order is not appealed from, and, having been carried out, adjudication in pursuance thereof has been made, I do not think that the circumstance of such order not being appealed from would preclude the parties from bringing up such questions when the final decree in the case has been made and is rendered the subject of an appeal. The learned Chief Justice has stated why this should be so on legal reasoning, and indeed, if any further reason were required, I should say that the rulings of their Lordships of the Privy Council in *Maharajah Moheshur Sing* v. *The Bengal Government* (1), *Forbes* v. *Ameeroonissa Begum* (2) and *Shah Mukhun Lall* v. *Baboo Sree Kishen Singh* (3) were authorities for this proposition. These rulings proceeded no doubt on earlier law, but I am not aware that the rule has been modified in the Civil Procedure Code by which this case is covered. The effect of this view is to agree with the decree of the learned Chief Justice.

Appeal allowed in part.

FULL BENCH.

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June 2.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Brodhurst and Mr. Justice Mahmood.

KHUMAN SINGH AND OTHERS (DEFENDANTS) *v.* HARDAI (PLAINTIFF).*

Pre-emption—Wajib-ul-arz—Construction—"Karibi", meaning of.

The word "*karibi*" used by self in the pre-emptive clause of a *wajib-ul-arz* to indicate shareholders "near" to the vendor, is ambiguous and inadequate to express the intentions of the shareholders.

(1) 7 Moo. I. A., 283. (2) 10 Moo. I. A., 340
(3) 12 Moo. I. A., 157.