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dent here, was no party to the original decree of the 24th January 1880, the order which is the subject of appeal is not such an order as can be called a decree either in the regular sense of the terms as understood in the regular suit, or a decree within the explanation of it in s. 2 of the Code of Civil Procedure, and therefore no first appeal could lie under s. 540 of the Code. Mr. *Dwarka Nath Banerji* in support of his contention has relied upon *Soudagar Mal* v. *Abdul Rahman Khan* (1), in which the learned Chief Justice and Mr. Justice Brodhurst concurred in holding that no appeal lies from an order under s. 293 of the Code of Civil Procedure for recovery from a defaulting purchaser of a deficiency of price happening on a re-sâle of the property, such order not being a "decree" within the meaning of s. 2 of the Code. This view of the law was followed by my brother Tyrrell in *Tapesri Lal* v. *Deoki Nandan Rai* (2).

In view of these two rulings Mr. *Moti Lal* frankly concedes that he cannot support the appeal so far as the preliminary objection is concerned. Following the principle of the rulings cited I hold that no appeal lies, and I dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

1891
June 26.

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

NATHAN AND OTHERS (DEFENDANTS) *v.* KAMLA KUAR AND ANOTHER (PLAINTIFFS)*

Land-holder and tenant—Suit for possession of fallen wood of self-sown trees growing on an occupancy-holding—Burden of proof.

A zamindár claiming a right to the fallen wood of self-sown trees which had been growing on an occupancy-holding must prove some custom or contract by which he is entitled to take such wood. The English law as to ownership under similar circumstances cannot be applied, and (*sed quære*) there is no general rule in India to decide that there is a right in the landlord or a right in the tenant by general custom to the fallen wood of self-sown trees.

* Miscellaneous application No. 128 of 1890, under s. 617 of the Civil Procedure Code, with a reference by H. B. Punnett, Esq., District Judge of Saháranpur, dated the 5th August 1890.

(1) Weekly Notes, 1890, p. 85. (2) Weekly Notes, 1890, p. 89.

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NATHAN v. KAMLA KUAR.

THIS was a reference from the District Judge of Saháranpur for decision of the following question:—"Does the burden of proving the right to fallen wood in the case of self-grown trees in an occupancy tenant's holding fall on the landlord or on the tenant?" The facts out of which the reference arose are sufficiently stated in the judgment of the Court.

The Hon'ble Mr. *Spankie*, for the appellants.

Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the respondents.

EDGE, C. J., and KNOX, J.—This is a reference by the late Officiating Judge of Saháranpur. The plaintiffs were zamíndárs. The defendants were two occupancy tenants of the plaintiffs. The plaintiffs brought this suit alleging a right to the fallen wood of a pipal tree, which, as we gather from the reference, had grown within the occupancy-holding of the defendants. It is stated, and we must take it to be the fact, that the tree was not planted by the zamíndárs or by the tenants, and that it was a self-planted tree. The question which we are asked is, "does the burden of proving the right to fallen wood in the case of self-grown trees in an occupancy tenant's holding fall on the landlord or on the tenant?" We have been referred to several authorities, but none of them appear to us to apply to a case like this. The case of *Deoki Nandan* v. *Dhian Singh* (1) does not apply. That was a case in which the landlord claimed a right to cut down and remove fruit bearing trees which were growing on his tenant's holding. That, apart from special custom or contract, he clearly could not have a right to do. The other cases do not relate to self-grown wood. On behalf of the tenants Mr. *Spankie* has contended that they had the right not only to take the fallen wood of self-grown trees but to prevent such trees growing. We certainly think that a tenant would clearly be entitled to prevent the growth of any trees which were not growing at the time of the commencement of his tenancy, and the growth of which would interfere with the purpose for which the land was let to him, provided that there was no custom or contract

(1) I. L. R., 8 All., 467.

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to the contrary. However, that does not assist us to answer this question. We are not aware of any authority in India which enables us to decide that there is a right in the landlord or a right in the tenant by general custom to the fallen wood of self-grown trees. In our opinion a person who brings his suit, claiming that the fallen timber of self-grown trees within an occupancy-holding belongs to him must prove his right by showing a general custom of the district, a particular custom of the village, or a contract which gives him the right. In this case there was a *wájib-ul-arz*. The learned Officiating District Judge did not consider that that *wájib-ul-arz* could be treated as satisfactory evidence. We do not intend to decide whether it can or not, but we merely point out that it was a *wájib-ul-arz* made as long ago as 1867, and that it should be a question possibly for the consideration of the District Judge what effect should be given to the *wájib-ul-arz* if he found that it had been acted upon and the correctness of it had not been disputed until quite recently. We ought to say, as our opinion is invited on the point, that the law in England relating to fallen timber could not, in our opinion, be accepted as evidence of custom or representing what the law is in India on this point.

The papers will be returned to the District Judge of Saháranpur with the answer which we have given.

APPELLATE CIVIL.

1891.
July 15.

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

RADHA KISHEN AND OTHERS (DEFENDANTS) *v.* RAJ KUAR (PLAINTIFF.)*

Justice and equity and good conscience—Succession to out-casted Brahmin—Brothers of deceased remaining in caste—Sons of deceased by Bania widow.

Khuman, a Brahmin, lived with a Bania widow, for which offence he was out-casted. He left his family and his village and went to live elsewhere, taking the widow with him. He had sons by her, and he and his family lived as cultivators and acquired property. Khuman died in his new home and left the widow and their sons

* Second Appeal No. 84 of 1889, from a decree of W. H. Hudson, Esq., District Judge of Farakhabad, dated the 24th September 1888, reversing a decree of Rai Ishri Prasad, Subordinate Judge of Farakhabad, dated the 22nd August 1888.