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the bond on which this suit has been brought. He had then attained the full age of sixteen years, and had thus reached his majority under the Muhammadan Law, which was applicable to him before Act IX of 1875 came into force. He was consequently competent in respect of age to make a contract in the sense of s. 11 of the Indian Contract Act.

We hold that the "law applicable to" the respondent under s. 2, cl. (*c*) of Act IX of 1875, was the Muhammadan Law, and not the statute law contained in s. 26, Act XL of 1858, because it seems to us that the rule of that section is limited by its terms to "the purposes of that Act," which provides exclusively for the care of the persons and property of one class of minors, that is to say, minors possessed of property which has not been taken under the protection of the Court of Wards. It is to such persons, and to them only, when they have been brought under the operation of the Act, as in it provided, that in our view the prolongation of nonage under s. 26 applies. We have not overlooked the rulings to the contrary effect on this point, in forming the conclusion above stated. We may observe, however, that no ruling has been cited to us in which it has been held in terms that a Muhammadan who had not been made amenable to the provisions of Act XL of 1858 was a minor for the purposes of making a contract till he had reached the age of eighteen years.

We therefore set aside the decree of the Court below, and decree this appeal with costs.

Appeal allowed.

FULL BENCH.

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June 4.

Before Sir W. Comer Petheram, Kt, Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

BAL KISHEN (DEFENDANT) *v.* JASODA KUAR (PLAINTIFF)*.

Second appeal—Finding on issue of fact remitted—Civil Procedure Code, ss. 565, 566, 568.

Held by the Full Bench (TYRRELL, J., dissenting) that the findings upon issues remanded by the High Court in second appeal cannot be challenged upon

* Second Appeal No 1731 of 1883, from a decree of A. Sells, Esq., District Judge of Cawnpore, dated the 17th September, 1883, affirming a decree of Maulvi Farid-ud-din, Subordinate Judge of Cawnpore, dated the 21st December, 1882.

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the evidence as in first appeals, but objections to these findings must be restricted to the limits within which the original pleas in second appeal are confined. *Nivath Singh* v. *Bhikki Singh* (1) referred to.

Per PETHERAM, C. J., and TYRRELL, J., —Ss. 565 and 566 of the Civil Procedure Code are, as far as may be, incorporated in Chapter XLII of the Code relating to second appeals, and when the evidence for disposing of the real issues in the case has been taken and exists on the record, it is the duty of the High Court on the hearing of a second appeal, to itself fix and determine such issues on the evidence on the record, and not to put the parties to the expense and delay involved by a remand.

Per STRAIGHT, J.—S. 587 of the Civil Procedure Code does not mean that the provisions of Chapter XLI relating to first appeals are to be applied indiscriminately or in their entirety to second appeals, and implies no warrant for the decision by the High Court of questions of fact in any shape or at any stage of a second appeal. *Ramnarain* v. *Bhawanidin* (2) and *Sheoambar Singh* v. *Lallu Singh* (3), referred to.

Per TYRRELL, J.—The jurisdiction of Courts of second appeal in respect of questions of fact is restricted, insomuch as the appeal may not be entertained on "grounds" of fact, but, under the circumstances of s. 566 of the Code, no less than under the abnormal circumstances contemplated by the ruling of the Full Bench in *Nivath Singh* v. *Bhikki Singh* (1), the Court may take cognizance of omitted issues of fact, and must determine them if there be evidence upon the record sufficient for that purpose. In cases where the Court, still acting under s. 566, has been obliged, in the absence of evidence on the record, to supplement the defect through the agency of the Court below, its jurisdiction in respect of such evidence does not become limited thereby or by reason only of the circumstance that the evidence is accompanied by a "finding" of the inferior Court,—the term "finding" being used in s. 566 in its restricted sense of an answer to the proposition referred for inquiry, and not of an award or decision of the issue before the Court.

THIS was a reference to the Full Bench by Petheram, C. J., and Brodhurst, J. The point of law referred was as follows:—

"Whether, when a case comes before the Court on second appeal, and an issue of fact has been remitted, the finding on that issue can be challenged upon the evidence as in first appeals."

The second appeal in which this reference was made arose in a suit for possession of certain immoveable property, which the plaintiff alleged had been purchased by her in the name of the defendant. The Court of first instance gave the plaintiff a decree,

(1) *Ante*, p. 649. (2) Weekly Notes, 1882, p. 101.
(3) Weekly Notes, 1882, p. 158.

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which, on appeal by the defendant, the lower appellate Court affirmed. On second appeal by the defendant, the High Court (Oldfield and Mahmood, JJ.) being of opinion that the lower appellate Court had lost sight of the real issue in the case, namely, whether the plaintiff had actually found the money by which the estate in dispute had been purchased, remanded this issue to the lower appellate Court for trial. The lower appellate Court decided that the plaintiff had actually found the money by which the estate in dispute had been purchased. On the return of this finding, the defendant took objections to its propriety. The case came before Petheram, C. J., and Brodhurst, J., who referred the question stated above to the Full Bench.

Mr. *C. H. Hill*, for the appellant.

Mr. *Shivanath Sinha*, Pandit *Ajudhia Nath*, and Munshi *Kashi Prasad*, for the respondent.

The following judgments were delivered by the Full Bench :—

PETHERAM, C. J.—This reference raises the question—How far is the decision of the first appellate Court final on questions of fact which have been remanded to it for trial by the High Court on second appeal ?

It has been decided by a Full Bench decision of this Court (1), that it is lawful for the Court on the hearing of a second appeal to look into the evidence for the purpose of ascertaining whether the findings of fact are of such a character as to contravene the rules laid down in that case.

In my opinion, it follows as a necessary consequence from that decision that, as the Court has the power to look into the evidence, it must have the power to remand issues for trial when it appears that the issues necessary for the determination of the dispute have not been tried, *and the evidence necessary for the trial of such issues has not been taken*; and consequently I think that in such a case the provisions of s. 566 are, "as far as may be," incorporated in the chapter relating to second appeals; but inasmuch as the findings on the remanded issues and the evidence upon them are, when returned, part of the record in the second appeal, the findings are, in my opinion, subject to the same incident as the other findings of fact in the case, and can only be disputed on the grounds

(1) *Nivath Singh* v. *Bhikki Singh*, *ante*, p. 649.

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prescribed by the judgment of the Court in the recent Full Bench decision.

It follows from these remarks that, in my opinion, s. 565 and s. 566 are, as far as may be, incorporated in the chapter which relates to second appeals, and that when the evidence for disposing of the real issues in the case has been taken and exists on the record, it is within the powers, and is the duty of the High Court on the hearing of a second appeal, to itself fix and determine such issues on the evidence on the record, and not to put the parties to the expense and delay involved by a remand. My answer to the reference is in the negative.

STRAIGHT, J.—As I understand the question put by this reference, we are asked whether the findings to issues remanded by this Court in second appeal can be impeached upon their return, as if they had come from a Court of first instance. If this be a correct interpretation of the inquiry addressed to us, my answer must be in the negative. It is true that by s. 587 of the Code the provisions of chapter XLI, regulating first appeals, are declared to be applicable, "as far as may be," to second appeals, but it is obvious this does not mean that they are to be adopted indiscriminately or in their entirety. As an illustration, I will take a case in which a first Court, though recording all the evidence essential to the determination of the rights of the parties, has disposed of the suit upon a preliminary point of, say, *res judicata* or limitation, and the lower appellate Court, without dealing with it on the merits, has upheld its decision. In second appeal, this Court would have before it all the materials sufficient to enable it to pronounce judgment, and finally determine the case; but no one would seriously contend, nor has it ever been decided, that in such a state of things this Court can proceed to dispose of the suit upon the merits. In such an event, our duty and practice is to remand the case to the lower appellate Court, and direct it to proceed under s. 565, or, in certain contingencies, under s. 566. Take another instance, in which a first Court has acted in the manner indicated in my illustration, but the lower appellate Court, disagreeing with its determination of the preliminary point, enters fully into the merits under s. 565, and disposes of all the matters raisedby the pleadings as it is by law bound to do. Here it will

be observed that the lower appellate Court entertains and decides the issues of fact virtually as a Court of first instance, and for the first time, yet we cannot disturb those findings in second appeal unless they are open to the objections set forth in the recent ruling of the majority of the Full Bench, and then only to the extent of sending back the case for re-determination according to law. But suppose it appears to this Court that the lower appellate Court has omitted to frame or try an essential question of fact, of which there is, or is not, evidence on the record, then adopting the provisions of s. 566, as far as they can conveniently be applied, it has long been the practice to remand the issue for trial, that is to say, to direct the lower appellate Court to do what it ought to have done under ss. 565, 566 or 568, as the circumstances required, and then to return the results of its findings to this Court. If this course has been adopted, I fail to see how the position is in any way altered from what it would have been had the lower appellate Court properly fulfilled its functions under ss. 565 or 566 when originally disposing of the appeal; or why its findings of fact in obedience to the remand are to be treated on a different footing to what they would have been had they come up with the record when the second appeal was first preferred. I may add, without going at greater length into the matter, that I concur in the views expressed by Mahmood, J., in *Ramnarain* v. *Bhawanideen* (1) and *Sheoambar Singh* v. *Lallu Singh* (2), and I cannot hold that any sanction is to be implied from s. 587 of the Code to this Court's deciding questions of fact in any shape or at any stage of a second appeal. My answer to the reference, putting it into explicit terms, is, that objections to findings upon issues remanded in second appeal by this Court must be restricted to the limits within which the original pleas in second appeal are confined.

BRODHURST, J.—The question referred to the Full Bench for determination is—"Whether, when a case comes before the Court on second appeal, and an issue of fact has been remitted, the finding on that issue can be challenged upon the evidence as in first appeals?" Under my view of the law, findings by a lower appellate Court on a remand made to it by this Court, under

(1) Weekly Notes, 1882, p. 104. (2) Weekly Notes, 1882, p. 153.

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s. 566 of the Civil Procedure Code, have not the effect of converting a second appeal into a first appeal, and this Court is not, I think, competent to consider and deal with evidence recorded on remand in second appeal in the same way that it would have done had that evidence been taken on a remand in first appeal.

This Court should, in my opinion, accept findings of fact recorded by a lower appellate Court under s. 566 of the Code, unless those findings are clearly open to the objections referred to in *Nivath Singh* v. *Bhikki Singh* (1). In their judgment in *Mahomed Kamil* v. *Abdool Luteef* (2), Couch, C. J., and Ainslie, J., observed :—"In the special appeal, our learned colleague appears to have thought that, as fresh evidence had been taken by the Subordinate Judge, the case might be heard as if it were a regular appeal, and the learned Judge considered whether the new evidence was worthy of credit, and came to the conclusion that it was not, and disbelieved it. We are not aware that there was any authority that the fact of the lower appellate Court taking additional evidence made the special appeal liable to be heard and decided as if it were a regular appeal. It does not appear to us that this is the effect of the lower appellate Court taking additional evidence, and so far we cannot agree with the learned Judge." The Code of Civil Procedure that was in force when the judgment above referred to was delivered, was Act VIII of 1859, but the ruling appears to me to be equally applicable under the present law, and the practice of the Court has hitherto, I believe, been in accordance with that ruling.

My reply to the reference is in the negative.

TYRRELL, J.—I am not aware of any reason, whether of rule or principle, why we should be deemed to be precluded from determining a question of fact by reason only of the circumstance that it arises in the hearing of a second rather than of a first appeal. It is true that a case is not made amenable to our jurisdiction under Chapter XLII because of errors in the decision of issues of fact, but where the "substantial defect in the procedure" of the Courts below [s. 584 (*a*)] has been their neglect to decide a question of fact essential to the decision of the case upon the merits (*ibid*), I do not see why this Court should not follow the

(1) *Ante*, p. 649. (2) 23 W. R. 51.

rule of s. 566, which forbids the reference of an omitted issue for trial when the evidence on the record is sufficient to enable the Court to determine such issue or question for itself. Indeed, I am unable to appreciate the practical distinction between a personal verdict and the unquestioning adoption of the verdict of another on an issue. It seems to me that the jurisdiction of Courts of second appeal in respect of questions of fact is restricted in so much as the appeal may not be entertained on "grounds" of fact (s. 584), but that, under the circumstances of s. 566, no less than under the abnormal circumstances contemplated by the recent Full Bench ruling in *Nivath Singh* v. *Bhikki Singh* (1), we may take cognizance of omitted issues of fact, and must determine them if there be evidence upon the record sufficient for that purpose. I agree therefore with the learned Chief Justice in thinking that the rule of s. 566 is applicable in its entirety to Courts of second appeal.

An issue to be tried in this way will, with all the evidence bearing upon it, be *res integra* before the High Court, and, as such, open to unrestricted consideration from any point of view that may be present to the Court in the argument on the evidence and otherwise. It follows then, to my mind, that in cases where the Court, still acting under s. 566, has been obliged, in the absence of evidence on the record, to supplement the defect through the agency of the Court below, its jurisdiction in respect of such evidence does not become limited thereby or by reason only of the circumstance that the evidence is accompanied by a "finding" of the inferior Court. This word "finding" is of course used in s. 566, in its restricted sense of an answer to the proposition referred for inquiry, and not of an award or decision of the issue before the Court.

It seems to me that we have the evidence returned to us under s. 566 before us as fully and as much open to examination as the evidence if taken by ourselves under s. 568 would be.

That the provision of s. 568 can be adopted under Chapter XLII. will, I suppose, not be disputed, as it is covered by the authority of the Privy Council and the Indian High Courts in many decisions.

(1) *Ante*, p. 649.