APPELLATE CIVIL.

1894
December 22.

Before Mr. Justice Knox and Mr. Justice Aikman.

GANGA PRASAD (PLAINTIFF) *v.* LAL BAHADUR SINGH AND ANOTHER (DEFENDANTS) *

Civil Procedure Code, ss. 566, 574—*Issue not disposed of by the lower appellate Court—Procedure.*

In a suit for money due under a bond the plaintiff tendered three witnesses in the Court of first instance to prove execution of the bond. That Court having examined one of such witnesses declined to examine the others, being satisfied on his evidence of the genuineness of the bond, and passed the decree in favor of the plaintiff. On appeal by the defendant the lower appellate Court disposed of the sole issue in the appeal, *viz.*, execution or non-execution in the following words:—"I do not think the claim made out by the plaintiff on his own evidence."

Held, that under the circumstances above described it was competent to the High Court in second appeal to act under s. 566 of the Code of Civil Procedure and refer an issue as to the execution or non-execution of the bond in suit to the lower appellate Court, that issue having practically not been tried at all by the said Court.

Kanhai Lal v. *Manorath Ram* (1), *Madho Singh* v. *Kashi Singh* (2) and *Durga Dihal Das* v. *Anoraji* (3) referred to.

THE facts of this case were as follows:—

The plaintiff sued to recover money upon a bond alleged to have been executed in his favor by the defendants. The defendants denied execution. An issue was framed by the Court of first instance (Munsif of Cawnpore) as to whether the bond was or was not executed by the defendants in favor of the plaintiff. The plaintiff upon the day appointed for the hearing tendered three witnesses in support of his allegation that the bond had been so executed. The Court examined only one of the three, and, being satisfied upon the evidence of that witness that the bond was duly executed, decreed the plaintiff's claim: but the Court declined to examine the other witnesses for the plaintiff, apparently on the ground that it considered the evidence of the first witness sufficient to establish the plaintiff's claim.

* Second Appeal No. 262 of 1894, from a decree of J. J. McLean, Esq., District Judge of Cawnpore, dated the 2nd January 1894, reversing a decree of N. L. Banerji, Munsif of Haveli, Cawnpore, dated the 5th December 1892.

(1) Weekly Notes 1894, p. 19. (2) I. L. R., 16 All., 342.
(3) Weekly Notes 1894, p. 190.

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The defendants appealed. The lower appellate Court (District Judge of Cawnpore) disposed of the sole issue before it, *viz.*, execution or non-execution of the bond in suit, in the following terms :— "The evidence on the record is very meagre, but I observe that plaintiff only called one witness to prove the bond, Moti Lal, patwâri, the writer, and none of the four attesting witnesses to it (Debi, Baldeo, Bhawani and Gokul) were called? The patwâri may or may not be an independent witness. The bond is not registered. It appears that appellant's zamíndâri property is mortgaged to plaintiff for Rs. 2,000. Under these circumstances, if plaintiff did make a further advance at all, he would have done it on better security than an unregistered bond. The appellant's plea as to witnesses seems also well founded. The case had been adjourned owing to plaintiff's absence and defendant had to summon his witnesses for the adjourned hearing. They did not attend. Apparently defendant asked a further opportunity which was refused, but the record is not very clear as to this. However, I do not think the claim made out by the plaintiff on his own evidence." The Court proceeded to allow the appeal and dismiss the plaintiff's suit.

The plaintiff thereupon appealed to the High Court.

Munshi *Ram Prasad* and Munshi *Gobind Prasad*, for the appellant.

The respondents were not represented.

KNOX and AIKMAN, JJ.—The appellant in this second appeal, was plaintiff in the Court of first instance. He brought a suit based upon a bond alleged to have been executed by the respondents in his favor. The respondents denied execution. An issue was framed as to whether the bond was or was not executed in favor of the plaintiff by the defendants. Upon the day appointed for hearing the case, the plaintiff tendered three witnesses in support of his allegation that the bond had been so executed. The Court examined only one of the three, was satisfied upon the evidence of that witness that the bond had been duly executed, and decreed the plaintiff's

claim. The evidence of the remaining witnesses tendered by the plaintiff was not taken, because the Court, so far as we can judge from an order endorsed upon the written paper under which plaintiff tendered his witnesses for examination, considered that the evidence of the one witness examined by the Court was sufficient to prove the issue. We do not understand how the Court of first instance could have passed an order virtually prejudging the case before it proceeded to hear the defence set up by the defendants. Unless this action admits of some explanation, which is not before us, we have no hesitation in saying that such action on the part of the Munsif was most improper, and ought never to be repeated. The Munsif passed a decree in favor of the plaintiff.

Upon appeal preferred by the defendants, the lower appellate Court disposed of the issue raised before it, *i.e.*, execution or non-execution of the bond, in a manner which we cannot but characterize as most unsatisfactory. That Court was dealing as a Court of appeal with a question of fact, and its decision upon that is by law final, provided there has been no substantial error or defect in the procedure which may possibly have produced error or defect in the decision of the case upon the merits. In this, and in other cases which have come before us, we have found strong reasons for doubting whether Courts of first appeal fully appreciate the grave responsibility which the law thus imposes upon them. In the present instance it is difficult to understand how the learned Judge could have brought himself to finally dispose of the question of fact before him by the observation—"I do not think the claim made out by the plaintiff, on his own evidence." This is neither a trial of the issue before him nor a proper judgment under s. 574 of the Code. We have therefore before us in second appeal a case in which there has been in our opinion no trial of the sole issue raised in the case by the lower appellate Court before which it was so raised. It is perfectly obvious that, as the parties are entitled to a trial of the issue, and as the issue has not been tried, in some way or another trial of that issue must still be made. Sitting as a Court of second appeal, we are precluded from trying questions of fact, and this

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issue, which is the sole issue, and the trial of which is essential to a right decision of the suit upon the merits, must be tried by the Court or Courts below. The learned vakíl for the appellant moved us to set aside the decree of the lower appellate Court, and to have the case remanded for a second decision. In support of this he cited the cases of *Kanhai Lal* v. *Manorath Ram* (1), *Madho Singh* v. *Kashi Singh* (2) and *Durga Dihal Das* v. *Anoraji* (3). We have very carefully considered all these three decisions, and, as our judgment shows, have been met with the difficulties by which the learned Judges who decided those cases felt themselves pressed. While considering whether we could adopt the procedure laid down in those cases, we find ourselves in this case face to face with the difficulty created by the very positive and imperative provisions of s. 564 of the Code. By that section an appellate Court is expressly debarred from remanding a case for a second decision, except as provided in s. 562. Now in the case before us it is impossible to hold that the lower appellate Court disposed of the appeal before it upon a preliminary point. The case appears to us to fall within the provisions of s. 566. We have above declared that the lower appellate Court has not tried the issue essential to the right decision of the suit upon the merits. We therefore refer that issue for trial to that Court, and as that Court, not having tried, could not legally decide the issue, we direct the lower appellate Court to take all the evidence tendered by the parties, to try the issue before it and to return to this Court its finding thereon together with the evidence. Ten days will be allowed after return within which either party may present a memorandum of objections to the findings.

Issue referred.

Before Mr. Justice Banerji.

1895
January 10.

QUEEN-EMPRESS v. AJUDHIA.

Act No. XLV of 1860 (*Indian Penal Code*) *ss.* 75 457, 511—*Attempt to commit house-breaking by night after previous convictions—Sentence.*

Section 75 of Act No. XLV of 1860, does not apply to the case of an attempt to commit the offence punishable under s. 457 of the Code, after previous convictions

(1) Weekly Notes 1894, p. 19. (2) I. L. R., 16 All., 342.
(3) Weekly Notes 1894, p. 190.