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(1) and with the majority of the Bench which decided the case of *Azizan* v. *Matuk Lal Sahu* (2). The plaintiff in this suit, if any adjustment of the decree took place out of Court, ought to have taken steps to have that adjustment certified to the Court. I do not think that his negligence in failing to take such steps can give the Court a jurisdiction which is clearly barred by the provisions of section 244. It may be that he may have some other relief against his decree-holder, for instance, by a suit for damages, but I do not think that he can maintain a suit which would have the effect of nullifying a decree regularly obtained in a suit between him and the present defendant. For these reasons I would dismiss the appeal with costs.

BY THE COURT:—The order of the Court is that the appeal is dismissed.

Appeal dismissed.

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February 1.

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

BRIJ BHUKHAN (PLAINTIFF) *v.* DURGA DAT AND OTHERS (DEFENDANTS).*

Jurisdiction—Civil and Revenue Courts—Act No. 1 *of* 1877 *(Specific Relief Act), section* 42*—Letters Patent, section* 10*—Appeal—Appellant not entitled to be heard on points not argued before the single Judge—Practice.*

A plaintiff brought his suit in a Civil Court asking for a declaration of his right to the possession of certain lands as a tenant at fixed rates, or in the alternative for possession, alleging that the lands were the property of a joint Hindu family, of which he was a member, that the family still remained joint and that he was entitled as a member of such joint Hindu family to a one-third undivided share in this ancestral property.

Held that the Civil Court was competent to give the plaintiff a decree declaring that he was a member of the joint Hindu family, that the family still remained joint, that the property in dispute was ancestral and had not been partitioned, and that the plaintiff was entitled to a one-third undivided share; further that section 42 of the Specific Relief Act would not apply to the suit, inasmuch as the Civil Court, if the plaintiff was found to be out of possession, was not competent to grant consequential relief in the shape of a decree for possession as a tenant at fixed rates.

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* Appeal No. 47 of 1897 under section 10 of the Letters Patent.

(1) I. L. R., 15 Mad., 302. (2) I. L.R., 21 Calc., 437.

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Held also that in appeals under the Letters Patent, section 10, an appellant is not entitled to be heard on points which he has not raised before the Judge against whose decree he is appealing.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Haribans Sahai*, for the appellant.

Munshi *Gobind Prasad*, for the respondents.

EDGE C. J. and BURKITT J.—The zamíndár of the village in which Brij Bhukhan Pande, the plaintiff in this suit, claims to be a tenant, sued Brij Bhukhan and other persons for arrears of rent. Brij Bhukhan's co-defendants denied that he was a tenant of the holding, which apparently was a fixed rate holding. That we do not decide. The first Revenue Court decreed the claim for arrears of rent against the other defendants, but dismissed the claim against Brij Bhukhan on the ground that he had not been properly entered in the Revenue papers as a tenant, and that a decree for rent could not be made against him until he had obtained an amendment of the record of rights and had been properly entered in the record as a tenant. It is obvious that the Revenue Court did not actually or impliedly decide that Brij Bhukhan was not in fact a tenant of the land in respect of which the rent was claimed. There was an appeal to the Collector, which was dismissed, but the Collector did not decide whether or not Brij Bhukhan was a tenant. He appears to have disposed of the case on the same lines as the first Court. Brij Bhukhan has brought this suit in a Civil Court, alleging that the lands in respect of which the suit for rent was brought in the Court of Revenue were ancestral lands belonging to a Hindu family of which he was a member, that the family was joint and that he was entitled as a member of that joint family to a one-third undivided share in this ancestral property. He asked for a declaration that he was a tenant at fixed rates of the lands and in joint possession of them with the other defendants to the suit in the Court of Revenue, who are defendants here, and for maintenance of such possession, and, the event of its being found that he was out of possession,

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he asked for a decree for joint possession as a tenant at fixed rates. The first Court dismissed the suit. The Court of first appeal, partly on findings of fact and partly on admissions of the parties, found that the tenancy in question was part of the ancestral property of the joint Hindu family of which the plaintiff and the defendants are members and that there had been no partition, and gave in general terms a decree decreeing the plaintiff's claim. It probably would puzzle the Court of first appeal to say now precisely what was the decree which it gave, the relief claimed being in the alternative and the decree merely decreeing the plaintiff's claim generally. That is not the way in which decrees should be made.

The defendants appealed to this Court from the decree in first appeal. The appeal came before a single Judge of this Court, and it was argued on behalf of the plaintiff, respondent to the appeal, on the basis that he was entitled to a decree declaring his right as a tenant and his right to be maintained as a tenant or to be put in possession as a tenant at fixed rates. On the case so presented our brother Blair properly applied the decision in *Ajudhia Rai* v. *Parmeshar Rai* (1) and allowed the appeal. No matter how the case had been presented to our brother Blair, it would have been necessary for him in any event to have allowed the appeal to some extent, for the decree of the Court of first appeal declaring Brij Bukhan's title as a tenant at fixed rates of the holding and his right to possession as such tenant and giving him possession as such tenant was a decree which the Civil Court had no jurisdiction to pass. Our brother Blair allowed the appeal, and, setting aside the decree of the Court of first appeal, restored the decree of the first Court dismissing the suit. The plaintiff has brought this appeal under the Letters Patent from the decree of our brother Blair.

Probably we should be right in dismissing this appeal, and certainly it will be necessary to dismiss it so far as it is based on the case which was argued before our brother Blair. It was many

(1) I. L. R., 18 All., 340.

years ago decided by the High Court at Calcutta, and rightly in our opinion, that in appeals under the Letters Patent an appellant was not entitled to be heard on points which he had not raised before the Judge whose decree he was appealing, that is, that it was not intended that in an appeal under the Letters Patent an appellant should be entitled to make a new case. That is a rule which is approved by all the Judges in this Court, and which certainly has been, and, so long as the Court is constituted as at present, will be followed.

However, in this appeal Brij Bhukhan's case has been presented, not probably as an absolutely new case, certainly in a different light from that in which it must have been put by another vakíl who appeared for him before our brother Blair. Mr. *Haribans Sahai* has contended, and we think rightly, that the Full Bench decision in *Ajudhia Rai* v. *Parmeshar Rai* (1) does not preclude a Civil Court in such a case as this from giving a member of a joint Hindu family a decree that the family has been and still is joint; that he is a member of it; that the lands or property in dispute are and were ancestral property in the hands of the family and have not been partitioned. He has also contended that it is immaterial whether his client is or is not in possession, as the proviso to section 42 of the Specific Relief Act would not bar Brij Bhukhan's claim to such a declaration, the Civil Court being the only Court which could make the declaration, and the Civil Court having no jurisdiction to grant further consequential relief in the shape of a decree for possession as a tenant. We consider that that argument is well founded. We allow this appeal, and we set aside the decree of this Court, and vary the decree of the Court of first appeal by giving the plaintiff a declaration that the holding, whatever its nature may be, is part of the ancestral property of a joint Hindu family; that it has not been partitioned; that the plaintiff and the defendants are members of that joint Hindu family, and that the plaintiff's interest is a one-third undivided share of that ancestral property; in other

(1) I. L. R., 18 All., 340.

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respects the suit of the plaintiff is dismissed. As this suit was necessitated by the action of these defendants in taking a very technical objection in the Court of Revenue, which in fact was an objection without substance or merits, we give the plaintiff Brij Bhukhan Pande his costs in all Courts in this civil suit.

Appeal decreed.

1898
February 1.

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

HADI ALI (DEFENDANT) *v.* AKBAR ALI (PLAINTIFF).*

Muhammadan law—Dower—Widow's lien for dower purely personal and not heritable.

The lien which a Muhammadan widow whose dower is unpaid may obtain on lands which have belonged to her deceased husband is a purely personal right and does not survive to her heirs. *Ali Muhammad Khan* v. *Azizullah Khan* (1) and *Ajuba Begam* v. *Nazir Ahmad* (2) **referred to.**

THIS was an appeal under section 10 of the Letters Patent from a judgment in second appeal of Banerji, J. The facts of the case appear from that judgment, which is as follows:—

"The appellant brought the suit out of which this appeal has arisen to recover possession of his share out of the estate of his deceased uncle, Karim Bakhsh, one of whose heirs he was. The suit was brought against Huran Bibi, the widow of Karim Bakhsh, and Hadi Ali, the donee of a portion of the property from Huran Bibi. Hadi Ali is the son of a daughter of Karim Bakhsh, who predeceased Karim Bakhsh. The Court of first instance decreed the claim. An appeal was preferred by Huran Bibi and Hadi Ali. Huran Bibi's appeal had reference to that portion of the estate which was not included in the gift to Hadi Ali. During the pendency of the appeal Huran Bibi died. Her legal representatives were her three daughters, who are admittedly alive, and not Hadi Ali, the son of a fourth predeceased daughter. The right as regards the property not comprised in the gift did not survive to Hadi Ali, therefore he alone could not maintain the appeal. As he was not one of the legal repesentatives of Huran

* Appeal No. 43 of 1897 under section 10 of the Letters Patent.

(1) I. L. R., 16 All., 50. (2) Weekly Notes 1890, p. 115.