

the English Courts that when a party enters into a contract without power to perform that contract, and subsequently acquires power to perform the contract, he is bound to do so. In this case the defendant No. 1 by his own action rendered himself temporarily unable to perform the contract. Certainly his position, in our opinion, can be in no sense better than that of a person who laboured under the same disability before he entered into the contract. In the absence of authority to the contrary, and holding a strong opinion that the decree of the lower appellate Court is sound upon the principles of equity and justice, we dismiss this appeal with costs.

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SARJU
PRASAD
SINGH.
v.
WAZIR ALI

Appeal dismissed.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

RAM PIARI (DEFENDANT) v. KALLU AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, sections 584, 568—Appeal—Admission of additional evidence in appeal—Discretion of Court.

1900

December 6.

The refusal by an appellate Court to exercise the discretion vested in it by section 568 of the Code of Civil Procedure with respect to the admission of additional evidence would be an error or defect in procedure within the meaning of section 584 of the Code, because section 568 distinctly implies that discretion must be exercised. But a refusal in the exercise of discretion to admit additional evidence is undoubtedly not such an error or defect.

THIS was an appeal under section 10 of the Letters Patent, 1866, from the following judgment of a Judge of the Court sitting singly.

“The sole ground taken in the memorandum of appeal in this case is that the lower appellate Court was wrong in refusing to admit additional documentary evidence, which was tendered at the hearing of the appeal. In my opinion such ground does not fall within any of the grounds set forth in section 584 of the Code of Civil Procedure. It is a matter in the discretion of the appellate Court to admit additional evidence. If it refuses to exercise that discretion, I do not think that such refusal is a substantial error or defect in procedure. It was held in the case of *Beckwith v. Kisto Jeebun Buckshee* (1) which was followed in *Golam Mukdoom v. Mussamat Hafeezoonissa* (2)

* Appeal No. 37 of 1900 under section 10 of the Letters Patent.

(1) (1863) Marshall, p. 278.

(2) (1867) 7 W. R., C. R., 489.

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no special appeal lay in such a case. The same view was taken in *Kulpo Singh v. Thakoor Singh* (1). It is true that these decisions were under section 365 of the former Code, but the language of that section does not differ in any material point from the language of section 568 of the present Code. In my opinion this appeal does not lie. I dismiss it with costs."

In appeal Mr. *R. Malcomson* for the appellant urged the same points which had been taken before the Single Bench, namely, that the learned Subordinate Judge was wrong in refusing to consider copies of certain documents tendered to him under section 568 of the Code of Civil Procedure. The facts of the case sufficiently appear from the judgment of the Chief Justice.

STRACHEY, C. J.—The appeal from the Court below was dismissed by Mr. Justice Aikman on the ground that it would not lie under section 584 of the Code of Civil Procedure. The only ground taken in appeal was that the lower appellate Court was wrong in refusing to admit additional documentary evidence, which was tendered at the hearing of the appeal. The learned Judge says that "it is a matter in the discretion of the appellate Court to admit additional evidence. If it refuses to exercise that discretion, I do not think that such refusal is a substantial error or defect in procedure." Now if the learned Judge meant to lay down that a refusal by a Court entertaining an application under section 568 to exercise its discretion would not be a substantial error or defect in procedure, within the meaning of section 584, I should not be able to agree with him. Under section 568, in my opinion, the Court is bound to exercise a judicial discretion. If the learned Judge meant, as I think he did mean, that the refusal of a Court, in the exercise of its discretion, to admit additional evidence is not a substantial error or defect in procedure within the meaning of section 584, then I agree with him. In other words, a refusal to exercise discretion would be an error or defect in procedure, because section 568 distinctly implies that discretion must be exercised; but a refusal, in the exercise of discretion, to admit additional evidence is undoubtedly not such an error or defect. The first paragraph of section 568 expressly lays down that the parties to an appeal shall not be entitled to produce

additional evidence, and there is nothing in the section which in any case requires a Court to allow such evidence to be produced. The cases referred to by the learned Judge in his judgment do not go any further than the view which I have just explained. Therefore, what I have to see here is, whether the lower appellate Court, in refusing to admit additional evidence, exercised the discretion which it was bound to exercise under section 568; and if it did, then I quite agree that we cannot in second appeal go on to consider whether the refusal was erroneous. Now the application under section 568 was made under these circumstances. The appellant was defendant in a suit for redemption of a mortgage, and had in the first Court contested the suit upon the footing that her deceased husband was the mortgagee of the property, and that there was a subsisting mortgage. Her memorandum of appeal to the lower appellate Court proceeded upon the same view. Before the hearing of the appeal she presented the application under section 568, and the documents for which she sought admission were, she said, documents showing that there had been an actual sale of the property to her husband, who, at the time of his death, consequently held not merely mortgagee rights, but absolute proprietary rights in the property, so that there was no mortgage which the plaintiffs were entitled to redeem. The lower appellate Court in its order rejecting that application set forth as its reason that neither in the pleadings nor in the memorandum of appeal was there any suggestion as to the sale now set up by the appellant; that the documents in question appeared to have been in existence at the time of the trial of the suit in the Court below; and that, in the opinion of the Court, the appellant had all along been aware of their existence. It appears that the principal document tendered was a copy produced from the Registrar's office. The application was silent as to the original of that copy, and was also silent as to when it was that the appellant first became aware of the existence of the document. *Prima facie*, one would expect the original to have been in the possession of the appellant's husband, and after his death in that of the appellant. Under these circumstances, it seems to me that, whether rightly or wrongly, the lower appellate Court did exercise its discretion in considering the application under section 568, and

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that therefore its refusal to admit the evidence was not an error or defect in procedure within the meaning of section 584. The learned Judge was right in dismissing the appeal before him, and this Letters Patent appeal must also be dismissed.

BANERJI, J.—I am of the same opinion. Under section 568 of the Code, a party to an appeal is not entitled to produce additional evidence in appeal as of right, but the Court may in its discretion admit additional evidence. Where the Court has exercised its discretion and in the exercise of its discretion has refused to admit additional evidence, it cannot be said that a substantial error or defect in procedure has taken place which affords a ground of second appeal under section 584.

Appeal dismissed.

1900
December 21.

APPELLATE CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

QUEEN-EMPRESS v. BHOLU AND OTHERS.*

Act No. XLV of 1860 (Indian Penal Code), section 402—Assembling for the purpose of committing dacoity—Evidence.

Several persons were found at 11 o'clock at night on a road just outside the city of Agra, all carrying arms (guns and swords) concealed under their clothes. None of them had a license to carry arms, and none of them could give any reasonable explanation of his presence at the spot under the particular circumstances. *Held*, that these persons were rightly convicted under section 402 of the Indian Penal Code of assembling together with intent to commit dacoity. *The Deputy Legal Remembrancer v. Karuna Baistobi* (1), *Balmakand Ram v. Ghansam Ram* (2) and *Queen-Empress v. Papa Sani* (3) referred to.

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

Mr. *E. A. Howard*, for the appellants.

The Government Advocate (Mr. *E. Chamier*), for the Crown.

KNOX and BURKITT, JJ.—The five appellants in this case have been convicted by the Sessions Court at Agra of an offence under section 402 of the Indian Penal Code, and sentenced each of them to seven years' rigorous imprisonment.

*Criminal Appeal No. 685 of 1900.

(1) (1894) I. L. R., 22 Cal., 164. (2) (1894) I. L. R., 22 Cal., 391.
(3) (1899) I. L. R., 23 Mad., 159.