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authority to that effect, and it seems to us that the words of section 561 indicate the intention of the Legislature with sufficient clearness. From the words of paragraph 3 of section 561, "unless the respondent files with the objection a written acknowledgment from the appellant or his pleader of having received a copy thereof, the appellate Court shall cause such a copy to be served," it is manifest that it would be contrary to the ordinary practice of the Court to allow objections to be made against persons who have not appealed. We cannot see why in this case there should be any exception. It seems to us that the decision of the first Court, acquiesced in by the plaintiff, practically operated as *res judicata* against him. A case has been cited to us which, though under another Act, is in effect an authority upon this question. It is the case of *Baboo Chote Lall* v. *Kishun Suhoy* (1), which was decided by a Full Bench of this Court. The case of *Timmayya Mada* v. *Lakshmana Bakhta* (2), has been cited to us on the other side by Mr. *Abdul Raoof*. We find ourselves wholly unable to apply to this case the reasoning of the learned Judges of the Madras High Court in that case, inasmuch as that reasoning is based upon the provisions of Act No. XII of 1879, the language of which materially differs from the Code of Civil Procedure now in force. We set aside the decree of the lower appellate Court in so far as it affects the applicants. The respondent Lal Das will pay the costs of this application.

Appeal allowed.

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November 13.

APPELLATE CIVIL.

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

BANKE LAL AND OTHERS (PLAINTIFFS) v. JAGAT NARAIN AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, section 596—Application for leave to appeal to Her Majesty in Council—"Substantial question of law."

The expression "involve some substantial question of law" as used in section 596 of the Code of Civil Procedure must be construed with reference to the practice of the Privy Council not to interfere with concurrent findings

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* Privy Council Appeal No. 10 of 1900.

(1) S. D. A., N.-W. P., 1863, Vol. II, 360. (2) (1883) I. L. R., 7 Mad., 215.

of fact of the Courts below," and, this being so, it cannot be said that a question which only arises if the concurrent findings of fact of the Courts in India are disregarded, a question which can never arise so long as the Privy Council maintains those concurrent findings of fact, is a "substantial question of law" which the appeal to the Privy Council "involves." *Moran* v. *Mittu Bibee* (1), *Gopi Nath Birbar* v. *Goluck Chunder Bose* (2) and *In re Vishwambhar Pandit* (3) referred to.

The facts of this case sufficiently appear from the order of Strachey, C. J.

Pandit *Sundar Lal*, for the applicants.

Mr. *D. N. Banerji* and Pandit *Moti Lal Nehru*, for the opposite parties.

STRACHEY, C. J.—These are three applications for leave to appeal to Her Majesty in Council from the decrees passed by this Court in certain connected appeals—First Appeals Nos. 115 and 116 of 1898, and Second Appeal No. 405 of 1897. These were disposed of in this Court by a single judgment, which will be found reported in the Indian Law Reports, 22 All., page 168. The applications have been resisted by the respondents with reference to the provisions of section 596 of the Code of Civil Procedure. It was objected in respect to the property which was the subject-matter of First Appeal No. 115, called Begam Bagh, that the amount or value of the subject-matter of the suit was less than Rs. 10,000. In the view which we take of this application we need not decide that point; but we will assume that the objection is untenable, and that the value of the subject-matter in the case of each appeal fulfils the requirements of the section. It was further objected, with reference to the last paragraph of section 596, that the decrees in the First Appeals affirmed the decision of the Court below, and that the proposed appeal to Her Majesty in Council did not involve any substantial question of law.

The first question is whether the decrees in the First Appeals did or did not affirm the decision of the Court of first instance in this case. Now the suits were brought by the purchasers of certain immovable property, which was sold in execution of a decree, against subsequent purchasers of the same property at a second execution sale under another decree, to recover possession of that property. The sale to the plaintiffs had been set aside, and

(1) (1876) I. L. R., 2 Calc., 228. (2) (1884) I. L. R., 16 Calc., 292, note.
(3) (1895) I. L. R., 20 Bom., 699.

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after it had been set aside the same property was sold in execution of the decree under which the defendants purchased, and that second sale was confirmed. Subsequently the plaintiffs brought a suit, as they were entitled to do, to have the order setting aside the sale to them itself set aside, and to have their sale confirmed. To that suit they did not implead the subsequent purchasers, the present defendants, as parties. The only persons whom they made defendants to that suit were the judgment-debtors, whose property had been sold. They obtained a decree against those judgment-debtors, a decree setting aside the order they complained of, and confirming the sale to them. That decree was passed by the High Court in appeal on the 14th May, 1888, and it was on the basis of that decree that they brought these suits against the defendants, claiming a superior title to the property by virtue of their prior purchase confirmed by the High Court in the manner I have described. The defendants resisted the suits and claimed a superior title to the property substantially on two grounds:—(1) that they had purchased it at a time when the plaintiffs' purchase had been set aside, and that the prior confirmation of their own purchase gave them priority; and (2) that the High Court's decree of the 14th May, 1888, could not, as against them, operate as a valid confirmation of the plaintiffs' purchase, inasmuch as it had been obtained by means of fraud and collusion between the plaintiffs and the judgment-debtors, who were the only parties to the suit resulting in the decree. The plea of fraud and collusion was distinctly raised by the defendants in their written statement, and it was made the subject of the fourth issue framed by the Court of first instance. That part of the judgment which deals with that issue is rather obscurely expressed, but this much is clear that the Subordinate Judge finds upon that issue in the defendants' favour, and we think that it is reasonable to infer that he held that the fraud and collusion alleged had been proved. That is the only inference we can draw from these words:—"However, from what has been said above as regards the invalidity of the sale of the 20th November, 1885, it is evident that the defence of Ram Sarup and Behari Lal was a good one, and, had they fought out that case *bonâ fide*, the plaintiffs' suit would probably have been dismissed throughout. The plaintiffs' decree of the 14th May, 1888,

was therefore not a good one." The Court of first instance dismissed the suits. On the appeal to this Court the Court dismissed the appeals, holding that the plaintiffs' suits had been rightly dismissed by the Court below. The judgments of this Court show that the main ground of the dismissal of the appeals was that this Court came to the conclusion upon the evidence that the decree of the 14th May, 1888, had been fraudulently and collusively obtained. In my judgment dealing with the appeal, I gave another reason for dismissing the appeals, namely the view which I was inclined to take of the respective legal rights of these two sets of purchasers. I was disposed to hold that the defendants' purchase was, even apart from the question of collusion, entitled to priority over the purchase of the plaintiffs. At the same time I expressed considerable doubt on that point, and in view of that doubt, which was held still more strongly by my brother Banerji, I did not decide the appeal merely on that ground, but decided it on the further ground of the collusive nature of the decree. That is the only ground which my brother Banerji discussed in deciding the appeal. Therefore I think it is correct to say that the true ground of the decision of this Court was its view, looking at all the evidence, and all the circumstances, that the decree of the 14th May, 1888, was obtained by fraud and collusion. We certainly considered that in that view we were expressing our agreement with the conclusion of the first Court upon the evidence as to collusion. That is expressly stated in the last sentence but one of my brother Banerji's judgment. It is therefore not necessary for us to discuss the argument which was addressed to us to the effect that the words "affirm the decision" in section 596 of the Code must not be limited to a mere affirmance of the decree of the Court below, that the "decision" could not be said to be affirmed, where, although the "decree" was upheld, the High Court in its judgment disagreed with the findings of fact of the Court below. In the present case, assuming that argument to be correct, I think that this Court decided the appeal substantially upon the same view of the facts as to collusion as that of the Court below, and affirmed that Court's decision.

The next question is whether the appeal to Her Majesty in Council involves some substantial question of law. The only

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question of law, which it is said the appeal involves, is the question discussed in the earlier part of my judgment on the appeals to this Court. If the Privy Council should disagree with the findings of this Court and the Court below on the question of collusion, then no doubt that question of law will arise. But can it be said, those findings being as they are, that the appeal "involves" a substantial question of law? The word "involve" implies a considerable degree of necessity. It does not mean that in certain contingencies a question of law might possibly arise. The practice of the Privy Council is not to interfere with concurrent findings of fact of the Courts below. If we are right in holding that there are concurrent findings of fact on the question of collusion, the inference is that the Privy Council will decline to go behind those findings, and in that view it is conceded that no question of law arises, and that the suits were properly dismissed. No doubt it was held by Mr. Justice Pontifex in *Moran* v. *Mittu Bibee* (1), that the questions of law referred to in section 596 were not limited to questions arising out of the facts concurrently found by the Courts below. That view was accepted by Sir Richard Garth, C. J., and Mr. Justice Prinsep in *Gopi Nath Birbar* v *Goluck Chunder Bhose* (2) but only with considerable doubt and hesitation. It is also apparently accepted by Mr. Justice Ranade in *In re Vishwambhar Pandit* (3), but Mr. Justice Jardine refrained from expressing any opinion on the point. When once it is borne in mind that the last paragraph of section 596 has reference to that practice of the Privy Council to which I have referred, I think it is impossible to say that a question which only arises if the concurrent findings of fact of the Courts in India are disregarded, a question which never can arise so long as the Privy Council maintains those concurrent findings of fact, is a substantial question of law, which the appeal to the Privy Council "involves." It cannot be said that an appeal involves a question of law which it is in a high degree improbable that the Privy Council will entertain, having regard to its established practice. That being the case, I think that these appeals do not involve any substantial question of law within

(1) (1876) I. L. R., 2 Calc., 228. (2) (1884) I. L. R., 16 Calc., 292, note.
(3) (1895) I. L. R., 20 Bom., 699.

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the meaning of section 596, and these applications must therefore be dismissed with costs.

BANERJI, J.—I am entirely of the same opinion. I am unable to hold that the appeal to the Privy Council involves a substantial question of law, unless that question arises upon the facts as found by the concurrent judgments of this Court and of the Court below. The mere circumstance that a question of law is raised in the case would not, in my opinion, justify the inference that the appeal involves a substantial question of law if the findings upon the facts do not necessitate a decision of that question. In this case I agree in holding that the Court below, in fact and substance, decided that the decree of the 14th May, 1888, was obtained by collusion and fraud, and there can be no doubt that this Court affirmed that decision. There are thus concurrent judgments upon a question of fact, namely whether the decree of the 14th May, 1888, was a collusive and fraudulent decree. Having regard to this finding of fact and to the practice of the Privy Council, to which the learned Chief Justice has referred, no question of law arises, a determination of which would be called for in the appeal to Her Majesty in Council. The appeal therefore does not involve a substantial question of law within the meaning of the last paragraph of section 596 of the Code, and these applications must be dismissed.

Application dismissed.

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November 26.

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

FAKHR-UD-DIN (DEFENDANT) *v.* GHAFUR-UD-DIN (PLAINTIFF).*

Civil Procedure Code, sections 89, 100, 104—*Ex parte decree—Appeal—Service of summons on defendant residing out of British India—Burden of proof.*

Where a defendant against whom an *ex parte* decree has been passed appeals against that decree, it is sufficient in the first instance to establish that in the Court which passed the *ex parte* decree the necessary proof of service of summons on the defendant was not given by the plaintiff. It is not incumbent on the appellant to show that the summons was in fact not duly served.

Where a summons is sent by post to a defendant residing out of British India, it is not, in the absence of evidence that the person to be served was at the time residing at the place to which the summons was sent, sufficient proof

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* First Appeal No. 59 of 1898, from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 19th January 1898.