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MUNIR-UD-DIN KHAN v. ABDUL RAHIM.

On appeal it was contended on behalf of the appellants that the order confirming the sales in favour of the respondent was illegal, inasmuch as the respondent as the holder of the decree, having obtained permission of the Court executing the decree to bid for and purchase the property in dispute, ought not to be allowed to take advantage of his right of pre-emption, but ought to take his chance with other bidders; and inasmuch as he had not carried out the provisions of ss. 306 and 307 of Act X. of 1877, as a pre-emptor could not be allowed to set off purchase-money against the amount of the decree.

Pandit *Nand Lal*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Shah *Asad Ali*, for the respondent.

The judgment of the Court (SPANKIE, J., and OLDFIELD, J.), was delivered by

SPANKIE, J.—It is very doubtful whether there was any appeal at all. Appellant is the auction-purchaser, so that he cannot be said to be appealing from an order under s. 244, Act X. of 1877. The sale was confirmed by the lower Court, but the appeal is not directed to any ground under paragraph 1, s. 312, or s. 313, nor can it be regarded as an appeal from an order under s. 294, since the decree-holder had permission to bid though he did not purchase, but, after the purchase by appellant, claimed as pre-emptor under s. 310. The order is not appealable under cl. (16), s. 588, Act X. of 1877, and there is no appeal by that section against an order under s. 310. We dismiss the appeal and affirm the order with costs.

Appeal dismissed.

FULL BENCH.

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April 4.

Before Sir Robert Stuart, Kt., Chief Justice, Mr Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

BADAM (DEFENDANT) *v.* IMRAT AND ANOTHER (PLAINTIFFS).*

Remand under s. 562 of Act X of 1877 (Civil Procedure Code)—Extent of appeal from order of remand.

An appeal from an order on appeal remanding a suit for re-trial is not to be confined to the question whether the remand has been made contrary to the

* First Appeal. No. 116 of 1880 from an order of H. G. Keene, Esq., Judge of Meerut, dated the 22nd July, 1880.

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provisions of s. 562 of Act X. of 1877 or not, but the question whether the decision of the appellate Court on the preliminary point is correct or not may also be raised and determined in such an appeal.

THE plaintiffs in this suit claimed to be maintained in possession of a share in a certain thoke in a certain village, and to have a decree dated the 29th March, 1880, set aside as collusive and fraudulent. They alleged in their plaint that such share had been put up for sale in execution of a decree against their deceased father, Sheo Lal, and had been purchased by one Nand Ram; that Nand Ram had nominally sold such share to one Disa and certain other persons for Rs. 2,500, the instrument of sale being date the 5th March, 1879; that the defendant in this suit, Badam, a share-holder in the plaintiffs' village, sued to enforce a right of pre-emption in respect of such sale, and collusively and fraudulently obtained a decree on the 29th March, 1880; that they, as sons of Sheo Lal and co-sharers in the same thoke, had a preferential right to purchase such share under the terms of the *wajib-ul-arz*, the defendant being a co-sharer in another thoke; and that they were in possession of such share notwithstanding the defendant's decree. The defendant set up as a defence to the suit that it was barred by limitation; and that he was a co-sharer in the same thoke as Sheo Lal, and the plaintiffs had therefore no preferential right of purchase. The Court of first instance, treating the suit as one to enforce a right of pre-emption, held that, as the plaintiffs were in possession, the period of limitation began to run either from the date of the execution of the deed of sale, the 5th March, 1879, or the date of the registration of that instrument, and as more than one year had elapsed from those dates at the time the suit was instituted, the suit was barred by limitation under No. 10, sch. ii of Act XV of 1877. On appeal by the plaintiffs the lower appellate Court held that the suit was not one to enforce a right of pre-emption, but to set aside a decree fraudulently obtained, and therefore No. 95, and not No. 10, sch. ii of Act XV of 1877, was applicable; and that the suit was within time, as although it was not stated in the plaint when the fraud became known to the plaintiffs it could not have become known earlier than the date of the decree impeached, and three years had not elapsed from that date. The lower appellate Court, in accordance with

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these rulings, remanded the case for retrial, observing that the issues were, Was the decree obtained by fraud to which the other side was a party? If so, can any relief accrue to the plaintiffs, and if so, what?

The defendant appealed to the High Court on the ground (i) that the suit was barred by limitation, as the period of limitation should be computed from the date of the deed of sale; and (ii) that the lower appellate Court was wrong in holding that the suit was not one to enforce a right of pre-emption. The appeal came for hearing before Spankie, J., and Straight, J., and those learned Judges referred to the Full Bench the question whether an appeal from an order of remand should or should not be confined to the point whether such order was or was in conformity with the provisions of s. 562 of Act X of 1877. The order of reference was as follows:—

SPANKIE, J.—This is an appeal from an order of remand under s. 562 of Act X of 1877 in a regular suit. The plaintiff sued to be maintained in possession under right of pre-emption, in accordance with the terms of the village administration-paper and on payment of Rs. 2,500, by setting aside what is called in the plaint a collusive decree of the 29th March of the present year. The defendant contended that the suit was barred by limitation, and that he also was a sharer in the vendor's thoke, and consequently had a right to purchase the property, the plaintiff having no preferen The first Court, referring to the deed of sale, found that it dated the 5th March, 1879, and declared that, if the pla himself was in possession of the holding of which the propert forms a part, then the period of one year should begin to r the date of execution of the sale-deed or from the date of tion, whereas the plaintiff sought to compute the period of from the 29th March, 1880, the date of the decree whic set aside. This computation was not included in art. Act XV of 1877. The Subordinate Judge therefor to be barred by limitation, and without going furth dismissed the claim. In appeal the Judge held not confined to a claim to enforce the right of p main object was to set aside a decree which

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to plaintiff's averment obtained by fraud. But art. 95, sch. ii of the Limitation Act and not art. 10 would govern the claim, and it allowed three years from the time when the fraud became known to the plaintiff. The Judge further held that there was some doubt as to when the fraud became known; and he framed two issues for the Court below to determine, reversing the decree of the first Court, and directing that the suit should be restored to the file and retried. This was the order from which the present appeal has been instituted. The contention of appellant is that as plaintiff's own showing was that limitation should commence from the date of the sale-deed, the Judge's order was not maintainable, and that the Judge was wrong in ruling that the suit was not one to enforce the right of pre-emption; the claim to set aside the decree cannot alter the character of the suit. Hitherto I have entertained the opinion that the appeal allowed in such a case as this is one confined to the order of remand under s. 562 of Act X of 1877. I give the terms of that section in the margin (1). From those terms I gather that, when there is an appeal to this Court from an order of remand, the appellant ought to show that the appellate Court, in reversing the order on the preliminary point, had erroneously found that the Court against whose decree the appeal below had been made had disposed of the suit upon a preliminary point *so as to exclude evidence of fact* which appeared to the appellate Court essential to he determination of the rights of the parties. If no such evidence been excluded, but was to be seen in the record, and was suffi- to enable the appellate Court to pronounce judgment, then Court should have acted under s. 565 and "finally determin- he case. For, except as is provided in s. 562, it is by s. 564, that the appellate Court shall not remand a second decision. In appealing then from the order of think it should be shown that a remand had been made the provisions of s. 562. I find it difficult to hold that rty, when the order of remand is appealed, to con- iety of the appellate Court's ruling with respect to

gainst whose de- de has disposed inary point so e of fact which Court essen- *tial to the determination of the rights* of the parties, and the decree upon such preliminary point is reversed in appeal, the appellate Court may, if it thinks fit, by order remand the case, &c., &c.

the preliminary point, or to go into the merits of the case. So far as the appellate Court's ruling touches these points, I would say that it is open to question whenever the case comes before this Court as a second appeal, but not now in the form of an appeal from the order of remand. It is true that the Courts are bound to dispose of a question of limitation, even when limitation is not set up as a defence. But Illustration (*a*), s. 4 of Act XV of 1877, shows how this works :—"A suit is instituted after the prescribed period of limitation. Limitation is not set up as a defence, and judgment is given for the plaintiff. The defendant appeals. The appellate Court *must dismiss the suit.*" So here, finding the suit not to be barred, but believing the state of the record to be such as that described in s. 562, the Judge remands it to be tried on the merits. Had he found it to be barred by limitation, he would have dismissed the suit, and his decree might have come up in second appeal. So his ruling now on the point of limitation may hereafter come up for consideration, when the case has been retried, but the point for us now to determine is whether the order of remand (not the ruling in the case) is opposed to, or in conformity with, the provisions of s. 562. If I am right as regards the first plea in appeal, it is obvious that the second plea is not one for us to determine at this stage of the case, and I would hold in this appeal that it must be dismissed, as the Judge appears to have acted in accordance with the provisions of s. 562.

I learn, however, and from examination of the judgments find that a different view has been expressed by a Division Bench of this Court (1). I am unwilling to rule contrary to those decisions without giving all my honorable colleagues an opportunity of expressing their opinions on the point, and I am therefore prepared, should Mr. Justice Straight wish it, to refer the question to the judgment of the Full Bench.

STRAIGHT, J.—As I was a party to both the decisions referred to by my honorable colleague, and as I have since concurring in them had reason to doubt their correctness, I entirely concur in the proposed reference to the Full Bench.

(1) First Appeal from Order No. 18 of 1880, decided the 25th May, 1880; and First Appeal from Order No. 69 of 1880, decided the 20th July, 1880; not reported.

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Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the appellant.

Babu *Baroda Prasad Ghose*, for the respondents.

The following judgments were delivered by the Full Bench :—

PEARSON, J. (STUART, C. J., OLDFIELD, J., and STRAIGHT, J. concurring).—The lower appellate Court's order of remand is based upon its ruling that the suit is not barred by limitation ; and it appears to us impossible to hold that the defendant in appealing against that order is debarred from pleading that the ruling on which it is based is erroneous, or that this Court is precluded from considering and disposing of the plea. Nor do we find anything in the law to warrant the conclusion that the appellant is so debarred or the Court so precluded. It is reasonable to suppose that the main object of allowing an appeal from an order of remand was to admit of a determination by the superior appellate Court, as to the correctness of the lower appellate Court's adjudication on the preliminary point on which the Court of first instance disposed of the case before effect had been given to the order of remand. That object would be defeated if the appellant were restricted to pleading that the remand had been made contrary to the provisions of s. 562 of the Procedure Code, and forbidden to urge the more vital and radical objection to the correctness of the adjudication on the preliminary point. We cannot think that the sole object of the appeal allowed was to prevent remands being made contrary to the provisions of the section. But if the appellant is competent to object to the ruling on the preliminary point, the Court is bound to dispose of the objection, which, if not allowed, might be held to be disallowed, and not to be renewable in appeal subsequently preferred from the decree of the lower appellate Court in the case. The ruling in the present instance that the suit is not barred by limitation may or may not be correct, but, on the hypothesis that it is not correct, it is obviously expedient that the remand order should be quashed at once, and equally undesirable that the time and labour of the lower Courts should be wasted and the parties further harrassed by the protracted investigation of a suit which is barred by limitation.

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SPANKIE, J.—I have heard nothing that alters the opinion expressed in my order of reference. I am not impressed by the authorities cited. The ruling in *Mussamat Mitna* v. *Syed Fuzlrub* (1) can hardly be said to be in point. That decision refers to a case in which a remand order had been made in special appeal. It rules that, where a review of judgment had not been obtained within the prescribed time, the decision of any points of law determined in the order of remand would be conclusive, and could not be questioned in a second appeal. To this I do not object. The Court hearing a special appeal has to determine points of law erroneously held by the lower appellate Court, and its ruling would be, when not set aside by itself, final. But I cannot understand that the Legislature, by allowing an appeal from an order of remand under s. 562, intended in such cases to alter the channel of appeal. If it did so intend, it enables an appellant to obtain by a summary appeal a ruling that sooner or later may have to be questioned in second appeal. As I pointed out in the case before us, had the Judge held the suit to be barred by limitation, he would have made his decree, which might at once have been questioned in second appeal, and so, had he gone on as he ought to have done and heard the case on the merits. Assuming there was evidence on record, he would have, as to the facts, made a decree which also (as he had ruled the point of law as to limitation) would have been carried up to this Court in second appeal. Whereas, if the Judge on hearing an appeal remands a case to be tried on the merits, which he ought to have tried in his own Court, and in regular miscellaneous appeal his order is reversed, litigation is prolonged, and there still may be in due course a second appeal upon other grounds than one of mere limitation. If the ruling of the Court on hearing an appeal from an order under s. 588 is to be decisive on all points in a case, in which there has been a remand by the Court below, then a litigant obtains relief at very much less cost than other litigants can do, where there has been no remand, which seems injurious to the pecuniary interest of the State, as well as unreasonable and inconsistent as regards to suitors.

(1) 6 B. L. R., 148.