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and the grounds thereof and submitted the proceedings to the High Court. It is only at that stage that the power to suspend a pleader arises. On all these grounds the order of the District Magistrate, dated 12th July, 1935, suspending the applicant from practice, was passed without jurisdiction, and this order is, therefore, set aside.

[*25th Aug. 1936.* The proceedings and findings of the Honorary Magistrates were submitted to the High Court (Civil Misc. Application No. 48 of 1936), and the matter came up before Goodman Roberts C.J. and Dunkley J. Their Lordships did not propose to take any further action save to issue a warning to the pleader to exercise more care in the manner of conducting his cases and his behaviour in Court.]

APPELLATE CIVIL.

Before Mr. Justice Dunkley.

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Mar. 25.

PAPA AMMAL
v.
PANCHAVARNAM AMMAL AND OTHERS.*

Court of last resort—Question of law raised for the first time—Entertainment of plea—Second appeal—Remand of case for evidence to decide point—New and different right raised.

When a question of law is raised for the first time in a Court of last resort upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is competent for the Court to entertain the plea.

Connecticut Fire Insurance Company v. *Kavanagh*, 1892 A.C. 473—*followed.*

But the High Court will not entertain a point of law raised for the first time in second appeal if the point cannot be decided without remanding the case for further evidence.

Jarip Sardar v. *Jogendra Nath*, 24 C.W.N. 53 ; *Pershottam* v. *Kasturbhai*, 32 Bom. L.R. 1001—*referred to.*

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* Special Civil Second Appeal No. 139 of 1935 from the judgment of the District Court of Insein in Civil Appeal No. 32 of 1934.

And a point of law cannot be taken for the first time in second appeal, if it sets up a new right differing in kind from that asserted throughout the trial.

Rachawa v. *Shivayogappa*, I.L.R. 18 Bom. 679—*referred to.*

The respondents' case, as set up in the Courts below, was based upon an alleged purchase of the property in suit for the benefit of the second respondent. They now set up a case that the second respondent acquired the property by right of inheritance from her grandmother.

Held, that such a new point of law on the evidence on the record could not be taken for the first time on second appeal.

Jaganathan for the appellant.

Datta for the respondents.

DUNKLEY, J.—The suit brought by the plaintiff-appellant in the Township Court of Insein was a suit for recovery of possession of a house and site. The facts which were found by the Township Court have not been disputed in this appeal. The property originally belonged to one Kamachi Ammal. She died without leaving any male issue and, consequently, the property was inherited on her death by her only daughter, named Pakiri Ammal. Pakiri Ammal had three sons, Krishnasami, Muthusami and Narayansami, and one daughter, Kamachi Ammal, who is the second defendant-respondent.

According to the ordinary Hindu law of inheritance, on the death of Pakiri Ammal this house and site were inherited by her three sons to the exclusion of her daughter. Narayansami purchased the shares of Krishnasami and Muthusami in this property by paying them Rs. 100 each in cash, and so became the sole owner of the property. He and his wife Papa Ammal, who is the plaintiff-appellant, lived in this house until his death in 1928. Meanwhile, the respondent, Kamachi Ammal, had been living with her husband, Subrayalu Naidu, who is the third defendant-respondent, in India. Prior to Narayansami's death they came over from India and lived with Narayansami and the appellant in

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this house. During Narayansami's lifetime he exercised all the rights of ownership over this property. He paid the municipal taxes and he twice mortgaged the house and site. He also let it to tenants and received and enjoyed the rents. He died in 1928 without issue, and consequently the appellant succeeded to his rights in the property as her widow's estate. After his death the second and third respondents ousted the appellant from possession and then set up a claim to this house and site in themselves. They twice mortgaged it to the fourth defendant-respondent and ultimately sold it to the first defendant-respondent. All these facts were set out in the plaint of the appellant, and the first respondent in her written statement denied these facts and set up that she had purchased the property for good consideration from the second and third respondents. The fourth respondent merely set up that he was not a necessary party to the suit as he was not the purchaser of the property; he is the husband of the first respondent. The second and third respondents did not file written statements at all, but they gave evidence in the suit. In her evidence the second respondent Kamachi Ammal took advantage of the accidental similarity of her name with that of her grandmother, and set up a story that this house and site were purchased for her benefit by a person named Narayansami Maistry when she was a child of 2 or 3 years of age, and that she had throughout been the beneficial owner of this property. In support of her case she produced an unregistered document whereby two Burmans purported to sell this property to Kamachi Ammal in 1897, and the learned Additional Township Judge has rightly held that this is the document whereby the original Kamachi Ammal

purchased the property. He, in fact, held that the second respondent's story was utterly false and that, therefore, she and her husband had no title to this property which they could convey to the first respondent. This decision was reversed on first appeal to the Assistant District Court of Insein. The learned Assistant District Judge did not question the correctness of the learned Additional Township Judge's findings of fact. He based his decision on the conclusion that the transaction whereby Narayansami, the husband of the appellant, purchased the shares of his two brothers was a sale of immovable property which required a registered deed. It is now admitted that this conclusion is wrong in law and that the arrangement was a family arrangement between the three brothers, who were the heirs of their mother, and could legally be made orally. The learned Assistant District Judge rightly held that as the appellant was out of possession the burden was upon her to prove her title, and he further held that the mere facts that Narayansami had twice mortgaged the house, and received the rents and profits thereof and paid the taxes thereon for a number of years, was insufficient to establish his title.

In argument before me no attempt has been made to support the decision of the learned Assistant District Judge on the grounds advanced by him, but in this appeal an entirely fresh point of law has been raised on behalf of the respondents. It is now contended that this property was the *stridhana* of the original Kamachi Ammal, that on her death her daughter Pakiri Ammal only acquired a limited interest therein, and that on Pakiri Ammal's death the property descended, not to the heirs of Pakiri Ammal, but to the next heir of the *stridhana* of Kamachi Ammal, who is the second respondent Kamachi Ammal.

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This is a new point raised for the first time on second appeal, and the question is whether the respondents should be permitted to raise it now. The contention on behalf of the respondents is that this is a pure point of law which can be raised for the first time in second appeal, and the cases of *Jan Ali* v. *Khondkar Abdoor Rahman* (1) and *Maung San Ya and one* v. *Maung San Pe* (2) are cited in support of this contention. But in *Jan Ali* v. *Khondkar Abdoor Rahman* (1) it was held that a ground should not be allowed to be taken in special appeal for the first time, where it would have to be dealt with in connection with the evidence in the cause, and on behalf of the appellant it has been urged that the point now raised on behalf of the respondents cannot be decided without the record of further evidence. It has been held in numerous cases that the High Court will not entertain a point of law raised for the first time in second appeal if the point cannot be decided without remanding the case for further evidence ; see *Jarip Sardar and others* v. *Jogendra Nath Chatterjee and others* (3) and *Pershottam Bhaichand* v. *Kasturbhai Lalbhai* (4). In *Connecticut Fire Insurance Company* v. *Kavanagh* (5) Lord Watson said :

" When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the

(1) Suther. W.R. Vol. 14, Civil, 420.
(2) (1926) I.L.R. 4 Ran. 500.
(3) 24 C.W.N. 53.
(4) 32 Bom. L.R. 1001.
(5) (1892) App. Ca. 473, 480.

Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."

This passage was quoted with approval by their Lordships of the Privy Council in the case of *M. E. Moolla Sons, Limited* v. *Burjorjee* (1). It is clear that the point which has now been raised on behalf of the respondents cannot be decided without a decision on the fact as to whether or not this property was originally the *stridhana* of the grandmother Kamachi Ammal, and the lower Courts have not even considered this fact, and it could not be satisfactorily decided without the record of further evidence. Moreover, a point of law cannot be taken for the first time in second appeal, if it sets up a new right differing in kind from that asserted throughout the trial. See *Rachawa and others* v. *Shivayogappa* (2). The case of the respondents, as set up in the Courts below, was based upon an alleged purchase of this property for the benefit of the second respondent. They are now setting up a case entirely inconsistent with their original case, namely, that the second respondent acquired this property by right of inheritance from her grandmother.

For all these reasons this new point of law cannot be taken for the first time in this second appeal. The respondents have not attempted to support the decision of the Assistant District Court on first appeal on any other ground, and on the case as presented in the Courts below the decision of the Township Court was undoubtedly correct. This appeal is, therefore, allowed, the judgment and decree of the Assistant District Court on first appeal are set aside, and the judgment and decree of the Township Court of Insein are restored, with costs throughout, advocate's fee in this appeal three gold mohurs.

(1) (1932) I.L.R. 10 Ran. 242. (2) (1893) I.L.R. 18 Bom. 679.