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of suits between those parties. That, however, is not the case here. The question before us is not a pure question of law. It is a mixed question of law and fact. The question is not the general question whether a stipulation for the payment of *abwab* between the parties to the present suit is rendered valid by reason of a previous decision between the same parties; but the question is whether a particular stipulation contained in a particular *kabuliat* having been held to be valid as between the parties, it is open to the Court subsequently to try the issue whether that particular stipulation is valid or not; and to that question we think the answer ought to be in the negative. The view we take is in accordance with the decision in the case of *Rai Churn Ghose* v. *Kumud Mohon Dutta Chaudhuri* (1). It is also supported by the cases of *Gowri Koer* v. *Audh Koer* (2) and *Phundo* v. *Janginath* (3); as for the case of *Parthasaradi Ayyangar* v. *Chinna Krishna Ayyangar* (4), if it goes further than the case of *Chamanlal* v. *Bapubhai* (5), with all respect for the learned Judges who decided it, we must dissent from the view therein expressed, and follow the decision of our own Court to which reference has already been made.

As to the third reason, it is enough to say that there has been no change in the law on the point under consideration by the enactment of the Indian Contract Act; the law on the point having always been what is laid down in ss. 23 and 24 of that Act.

The reasons then upon which it is sought to be shown that the previous decision ought not to operate as *res judicata* are, in our [324] opinion, unsound; and the decision in the previous case must, therefore, be held to operate as *res judicata* and to conclude the question in favour of the plaintiff-respondent. That being so, it is not necessary for us, nor is it open to the Court, to go into the first question raised in this appeal.

The decree of the Lower Appellate Court must therefore be affirmed and this appeal dismissed with costs.

Appeal dismissed.

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Before Mr. Justice Banerjee and Mr. Justice Brett.

MOHESH CHANDRA DASS (*Plaintiff*) *v.* JAMIRUDDIN MOLLAH AND OTHERS (*Defendants*).* [17th and 18th January, 1901.]

Civil Procedure Code (Act XIV of 1882), ss. 562, 566, 578, 588—Jurisdiction, meaning of the term—Remand order in contravention of s. 564—Whether the remand and the subsequent proceedings null and void—Whether legality of the remand order could be questioned on an appeal from the final decree.

The term jurisdiction in s. 578 of the Civil Procedure Code is used in the sense of pecuniary or local jurisdiction, or jurisdiction relating to the subject-matter of a suit. It does not mean the legal authority of a Court to do certain things.

A suit having been decided by the Court of First Instance not upon a preliminary point, but upon the merits, the Lower Appellate Court reversed the decision of the First Court and remanded the case under s. 562 of the Civil

* Appeal from Appellate Decree No. 1205 of 1898, against the decree of Babu Behary Lall Mullick, Subordinate Judge of Faridpore, dated the 30th of March 1898, modifying the decree of Babu Mohim Chunder Chakravarti, Munsiff of that District, dated the 31st of July 1897.

(1) (1897) 1 C. W. N. 687.
(2) (1884) I. L. R. 10 Cal. 1087.
(3) (1893) I. L. R. 15 All. 327.
(4) (1882) I. L. R. 5 Mad. 304.
(5) (1897) I. L. R. 22 Bom. 669.

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Procedure Code. On remand a partial decree was passed by the Court in favour of the plaintiff. On appeal the decree was modified by the Lower Appellate Court.

On a second appeal by the plaintiff to the High Court—

Held, that having regard to the provisions of s. 578 of the Civil Procedure Code, the remand order and the subsequent proceedings were not null and void, as by the remand there was no error affecting the jurisdiction of the Court or the merits of the case.

Rameshur Singh v. *Sheodin Singh* (1) dissented from.

Held also, that the legality of a remand order and the subsequent proceedings could be questioned on second appeal from the final decree, [325] although no appeal had been preferred against the order itself under s. 588, cl. (28) of the Civil Procedure Code.

THIS appeal arose out of an action brought by the plaintiff to recover possession of a plot of land on establishment of his title thereto. The allegation of the plaintiff was that the land in dispute appertained to his *jote* under the landlord; that the defendants Nos. 15 and 17 held under him a portion of the said *jote*; that the principal defendants dispossessed the plaintiff of his *jote* as well as the defendants Nos. 15 and 17, who being thus dispossessed relinquished the land in favour of the plaintiff. The defence *inter alia* was that the land claimed was not properly described; that the defendants did not dispossess the plaintiff, and that the land appertained to their *jote*. The Court of First Instance gave the plaintiff a decree. On appeal the learned Subordinate Judge reversed the decision of the First Court and remanded the case under s. 562 of the Civil Procedure Code. The material portion of his judgment was as follows:—

The lower Court has based its judgment mainly upon the Amin's report and admission of the defendants said to have existed in certain documents mentioned in its judgment. These admissions are clearly explainable, if the correct position of the river Padma, at the time of the execution of those documents, be fixed with certainty. The zemindar's *chitta* does not help the plaintiff; it rather supports the defendants' case. In order to decide the case it would be necessary to determine exactly the position and area of the defendants' land and plot No. 292 mentioned in his *kabuliat*, dated 75th Pous 1294 B. S., and the lands of the plots Nos. 296 and 297 belonging to Jamiruddin Mollah, and the position of *halat* No. 295. This has not been done; the plaintiff can have only that portion of the land which remained after giving the lands to defendant Jamiruddin mentioned in his *kabuliat*, dated 27th Pous 1294 B. S. This cannot be done without local investigation. It is difficult to determine these questions on the evidence on the record, and I have no other alternative than to remand the cases under s. 562 of the Civil Procedure Code, without which there can be no full justice to the parties.

On remand the case was retried by the First Court and a decree was made in favour of the plaintiff, but not a decree in full as had been originally granted to him. The defendant again preferred an appeal, and the Lower Appellate Court modified the decree of the First Court. Against this decision the plaintiff appealed to the High Court.

[326] 1901, JAN. 17. Dr. *Ashutosh Mookerjee* for the appellant.—As the suit was not disposed of upon a preliminary point the remand order was bad in law; that being so, all subsequent proceedings were null and void. See the cases of *Rameshur Singh* v. *Sheodin Singh* (2), *Subba Sastri* v. *Balachandra Sastri* (3), *Mahesh Chandra Das* v. *Madhub Chandra Sirdar* (4). The appellant not having appealed against that decree, he could question it, having appealed from the final decree. See

(1) (1889) I. L. R. 12 All. 510.
(2) (1889) I. L. R. 12 All. 510.
(3) (1894) I. L. R. 18 Mad. 421.
(4) (1868) 2 B. L. R. (Short notes), XIII.

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Savitri v. *Ramji* (1), *Kanto Prashad Hazari* v. *Jagat Chandra Dutta* (2), *Maharajah Moheshur Sing* v. *The Bengal Government* (3).

Babu *Saroda Churn Mitter* (with him Babu *Dasarathi Sanyal*) for the respondent.—The main question is whether the remand order and the subsequent proceedings are *ultra vires*. I submit it is not. It cannot be so, if the error, if there was any, in remanding the case does not affect the jurisdiction of the Court or the merits of the case. See s. 578 of the Civil Procedure Code. In this case there is no error which affected the jurisdiction of the Court or the merits of the case. The view taken by the Allahabad High Court is not quite correct. In the case of *Mallikarjuna* v. *Pathaneni* (4) the provisions of s. 578 of the Civil Procedure Code were held to be applicable in curing the defect of an erroneous order of remand, where it did not affect the merits of the case.

1901, JAN. 17, 18. Dr. *Ashutosh Mookerjee* in reply.—The remand affected the merits of the case, and, therefore, it was a question affecting the jurisdiction. The following cases were also relied upon: *Birj Mohun Thakur* v. *Rai Umanath Chowdhry* (5), *Mathura Nath Sarkar* v. *Umes Chandra Sarkar* (6), *Nusserwanjee* [327] v. *Meer Mynoodeen Khan* (7), *Luchman Singh* v. *Shumshere Singh* (8).

The judgment of the High Court (BANERJEE and BRETT, JJ.) was as follows:—

This appeal arises out of a suit brought by the plaintiff-appellant to recover possession of certain immoveable property.

The first Court gave the plaintiff a decree. On appeal by the defendant No. 1 the Lower Appellate Court held that the first Court's judgment was based upon an admission of the defendant which could be explained, if a certain question of fact, namely, what was the position of the river Padma at a certain date, was correctly determined, and as that question the Lower Appellate Court found had not been properly determined, it remanded the case to the first Court. But instead of remanding it under s. 566 of the Civil Procedure Code, as it ought to have done, it made its remand order under s. 562 of the Code, after setting aside the decree of the first Court, and it directed that Court to decide the suit itself. No appeal was preferred against this erroneous remand order, although an appeal could have been preferred under cl. 28 of s. 588 of the Code. After remand the case was retried by the first Court, and a decree was made in favour of the plaintiff, but not a decree in full as had been originally granted to him. The plaintiff was satisfied with that partial decree, but the defendant again preferred an appeal, and upon that appeal the Lower Appellate Court modified the decree of the first Court and gave the plaintiff something less than what the first Court on the second occasion had given him. Against the last-mentioned decree of the Lower Appellate Court the plaintiff has preferred this second appeal, and it is contended on his behalf, *first*, that as the remand was in contravention of the provisions of ss. 562 and 566 of the Code of Civil Procedure, it and all subsequent proceedings should be treated as a nullity and the case sent back to the Lower Appellate Court in order that it may try, according to law, the original appeal that had been preferred against the first decree of the first Court; and *secondly*, it is contended

(1) (1889) I. L. R. 14 Bom. 232.
(2) (1895) I. L. R. 23 Cal. 335 (338).
(3) (1859) 7 Moo. I. A. 283 (302).
(4) (1896) I. L. R. 19 Mad. 479.
(5) (1892) I. L. R. 20 Cal. 8.
(6) (1897) 1 C. W. N. 626.
(7) (1855) 6 Moo. I. A. 134.
(8) (1874) L. R. 2 I. A. 58.

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that even if the order of remand be not treated as [328] an absolute nullity and void for want of jurisdiction, and if s. 578 of the Code of Civil Procedure be applicable to this case, still the remand order and all subsequent proceedings ought to be set aside on the ground of the error in making that order having affected the merits of the case.

A preliminary question may arise for consideration, the question, namely, whether it is open to the appellant to raise the abovementioned objections now, he not having preferred any appeal against the remand order under cl. 28 of s. 588 of the Code of Civil Procedure. Having regard to the provisions of s. 591 of the Code, and the cases of *Maharajah Moheshur Singh* v. *The Bengal Government* (1) and *Savitri* v. *Ramji* (2) we are of opinion that the preliminary question ought to be answered in favour of the appellant. That being so, let us now see how far the two contentions urged on his behalf are well sustained.

In support of the first contention it is argued, that as the jurisdiction of the Lower Appellate Court is founded upon the provisions of the Code of Civil Pocedure, and s. 562 is limited in its application to cases where a suit has been disposed of by the first Court on a preliminary point and the decision of that Court on such preliminary point is reversed, and s. 564 expressly provides that the Appellate Court shall not remand any case for a second decision except as provided in s. 562, we must hold that the erroneous remand of a case under s. 562 is an act of the Lower Appellate Court in excess of its jurisdiction, or in other words is an error affecting the jurisdiction of the Lower Appellate Court, and therefore not cured by s. 578.

In support of the contention stated above, the learned vakil for the appellant relies upon the cases of *Rameshur Singh* v. *Sheodin Singh* (3), *Subba Sastri* v. *Balachandra Sastri* (4) and *Mahesh Chandra Das* v. *Madhub Chunder Sirdar* (5), mainly, and [329] incidentally upon certain other cases which are not necessary to be noticed just now.

We shall first consider the argument based upon the language of the Civil Procedure Code, and then deal with the authorities cited in support of it.

The gist of the contention is that the error of the Lower Appellate Court in remanding the case under s. 562 of the Code of Civil Procedure when that section was not applicable to the case, and when a remand for a second decision was expressly prohibited by s. 564, was an error affecting the jurisdiction of that Court within the meaning of s. 578, and that the erroneous order being made by the Court in excess of its jurisdiction, it and all proceedings held thereunder should be treated as a nullity. The determination of this point depends upon the meaning to be attached to the term "jurisdiction." That word is used in two different senses. It may either mean what is ordinarily understood by the term "jurisdiction" when used with reference to the local jurisdiction of a Court, or pecuniary jurisdiction of a Court, or its jurisdiction with reference to the subject-matter of a suit, or it may mean the legal authority of a Court to do certain things. It is only in this latter sense that an erroneous order of remand by an Appellate Court can be treated as an order made without jurisdiction. But the Court which made the remand order in this case clearly had jurisdiction to deal with the appeal, if the term "jurisdiction"

(1) (1859) 7 Moo. I. A. 283
(2) (1889) I. L. R. 14 Bom. 232.
(3) (1889) I. L. R. 12 All. 510.
(4) (1894) I. L. R. 18 Mad. 421.
(5) (1868) 2 B. L. R. (Short notes), XIII.

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is understood in the former sense. There is no question that it was the Court to which the appeal would lie. And the question, therefore, is reduced to this, namely, whether the term " jurisdiction " used in s. 578 of the Code of Civil Procedure is used in the former sense or in the latter. We are of opinion that regard being had to the scope and object of the section, the term " jurisdiction " must be held to have been used there in the former and not in the latter sense. For, if it be held to be used in the latter sense, that is, in the sense of the power of the Court to make any particular order in a case over which it has jurisdiction, local and pecuniary, as well as jurisdiction with reference to the subject matter, it may sometimes be difficult to draw the line between an error which is **[330]** merely an error of procedure and one that is an error of jurisdiction understood in that sense. There is another way of viewing it, from which it would appear that the term " jurisdiction " could only have been intended to be used in s. 578 in the sense of pecuniary or local jurisdiction, or jurisdiction relating to the subject-matter. Where a Court which is wanting either in local jurisdiction or pecuniary jurisdiction or in jurisdiction with reference to the subject-matter is made to hear a suit or appeal, the error primarily is the error of the party who invokes the Court's jurisdiction, though that error may also be shared by the Court, and there is always good reason for saying that the order of the Court should be treated as a nullity, and the party who finds the order he has obtained is infructuous cannot reasonably complain, because it was he who brought the suit or appeal in a wrong Court. When, however, the defect of jurisdiction is not in the nature of a defect or want of pecuniary jurisdiction or local jurisdiction, or jurisdiction with reference to the subject-matter, but is a defect of jurisdiction consisting in a Court making an order in excess of its power, the error is primarily one of the Court, and may not be at all shared by the party in whose favour the order is made ; and to hold in such a case that the order of the Court and all proceedings had thereunder should be treated as a nullity would be to visit that party for an act for which he may not at all be responsible. The anomaly may be intensified in certain cases. Take for instance a case in which a remand order is made and a decree in favour of the party in whose favour that order is made is eventually passed after remand. That decree may stand unimpugned for years, until it is sought to be used on his behalf, when his adversary may say that it was made wholly without jurisdiction and should be treated as a nullity. If the contention of the appellant is correct, carried to its legitimate consequences it would lead to this result. We do not think such a result was contemplated by the Legislature ; at any rate, it could not have been their intention in a remedial provision like s. 578 of the Code of Civil Procedure, which is enacted to cure technical defects, to use the word " jurisdiction " in a sense which may lead to such anomalous consequences. We are, therefore, of opinion that so **[331]** far as the question depends upon the construction of s. 578, it cannot reasonably be answered in favour of the appellant's contention.

We will now deal with the authorities upon which reliance has been placed. The decision in the case of *Rameshur Singh* v. *Sheodin Singh* (1) rests mainly upon the ground that a distinction ought to be drawn between a Court's omitting to do something which it is required by law to do and its doing something which it is positively prohibited to do, and that when a Court does anything of the latter description, its acts

(1) (1889) I. L. R. 12 All. 510.

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ought to be treated as done without jurisdiction. There is no doubt a distinction between the two classes of acts, but we are not prepared to hold that acts of the latter class are acts which affect the jurisdiction of the Court within the meaning of s. 578 of the Code of Civil Procedure. We may observe that the view taken in this case is to a certain extent inconsistent with that taken by the Privy Council in the case of *Amir Hassan Khan* v. *Sheo Baksh Sing* (1), for the erroneous order or decision that was complained of in that case was the decision of a suit upon a wrong view of the effect of a certain previous decision which was set up as operating by way of *res judicata*. If the contention of the defendant in the case was well founded, the Court by s. 13 of the Code of Civil Procedure was positively prohibited to try the suit, and its trying it in contravention of that positive prohibition was, upon the view taken by the Allahabad High Court, an act done in excess of the Court's jurisdiction. The Privy Council, however, did not take that view, as it held that interference with the decision of the Lower Court under s. 622 was not warranted in that case.

We are referred incidentally to the case of *Birj Mohan Thakur* v. *Rai Umanath Chowdhry* (2) as supporting the appellant's contention, and the view of the law taken by the Allahabad High Court in the case of *Rameshur Singh* v. *Sheodin Singh* (3). **[332]** It is true the case of *Birj Mohun Thakur* is authority for the proposition that when a Court does not do that which it is required by law to do, and does that which the law affords no warrant for its doing, it declines to exercise a jurisdiction vested in it and acts without jurisdiction within the meaning of s. 622 of the Code of Civil Procedure. But that again is a remedial provision with a different object, and having regard to that object, which is to vest the Court of Revision with the discretionary power to rectify certain erroneous orders in non-appealable cases, the term "jurisdiction" may well be taken to have been used in it in a more comprehensive sense than in s. 578. With all respect for the learned Judges who decided the case of *Rameshur Singh* v. *Sheodin Singh* (4) we must say that we cannot assent to the view which they have expressed.

As for the case of *Subba Sastri* v. *Balachandra Sastri* (5), we may observe that in a later case, that is the case of *Mallikarjuna* v. *Pathaneni* (6), s. 578 of the Code of Civil Procedure was held to be applicable incuring the defect of an erroneous order of remand, if it did not affect the merits of the case, and we may add that the learned Chief Justice of the Madras High Court, who was one of the Judges who decided the earlier Madras case, was also a party to the later decision.

The case of *Mohesh Chandra Das* v. *Madhub Chunder Sirdar* (7) is quite distinguishable from the present case, for there it was not only found that the order was bad as a complete remand, but it was further found that there was no ground even for that partial remand that the Code allows, namely, a remand by the Appellate Court retaining the case on its file for taking further evidence on any point, and, if that was so, the order was bad on the simple ground that it affected the merits of the case by allowing one of the parties to do that which he had no right to do, namely, to adduce fresh evidence.

(1) (1884) I. L. R. 11 Cal. 6.
(2) (1892) I. L. R. 20 Cal. 8.
(3) (1894) I. L. R. 12 All. 510.
(4) (1889) I. L. R. 12 All. 510.
(5) (1894) I. L. R. 18 Mad. 421.
(6) (1896) I. L. R. 19 Mad. 479.
(7) (1868) 2 B. L. R. XIII (short notes).

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On the other hand we may refer to the case of *Nussurooddeen Hossein Chowdhry* v. *Lall Mahomed Puramanick* (1), *Savitri* v. [333] *Ramji* (2), and also to the case of *Matra Mondal* v. *Hari Mohun Mullick* (3) as supporting the view we take.

Upon reason then, as well as upon authority, we think that the first contention urged on behalf of the appellant must fail.

It remains now to consider the second question. It has been argued that the erroneous remand order of the Lower Appellate Court in this case, even if it did not affect the jurisdiction of that Court, must be held to have affected the merits of the case, because by that order the favourable judgment which the appellant before us had obtained in the first Court and which the Lower Appellate Court was bound to set aside before it could make the modified decree that has now been made had been wrongly set aside, and the plaintiff appellant had not had the benefit of that judgment when the Lower Appellate Court last disposed of the case. No doubt this matter requires consideration; but, as the Bombay High Court in the case of *Savitri* v. *Ramji* (2) just referred to observed, each case must be considered with reference to its own circumstances in dealing with the question now under consideration; and referring to the circumstances of this case we do not find any good ground for saying that the erroneous remand order has affected the merits of the case. If the right course had been followed, the first Court should have been directed to take further evidence upon the question as to the position of the river Padma at the date referred to in the remand order, and then the first Court ought to have submitted its finding to the Lower Appellate Court, which together with the additional evidence taken on remand would have had to be considered along with the first judgment of the first Court. As events took their course, however, what happened was, instead of the finding of the first Court after remand being laid before the Lower Appellate Court, the judgment of that Court was before it; but the plaintiff was still in the position of a respondent before the Lower Appellate Court as he was originally, and as he ought to have been if the right course had been followed. Moreover there is nothing in the judgment of the Lower [334] Appellate Court on the last occasion which would show that it was influenced in any way by the last judgment of the first Court being treated as a judgment rather than as a finding, nor is it pointed out that the absence of the first judgment of the first Court from its consideration has in any way affected the last decision of the Lower Appellate Court; that being so, the second contention of the appellant must also fail.

We may add that cases may arise, and a perusal of the concluding portion of the first judgment of the Lower Appellate Court which was placed before us shows that the present was a case of that nature, in which, although a complete remand under s. 562 may not be warranted by the Code, still nothing short of a retrial of all the issues, rendered necessary by the previous imperfect trial of them, would satisfy the requirements of justice. In such a case the provisions of the Code have to be strained to a certain extent, in order to enable the Appellate Court to decide the appeal properly. But that of course is a matter for the Legislature to consider.

In the result the appeal fails and must be dismissed with costs.

Appeal dismissed.

(1) (1870) 13 W. R. 284.
(2) (1889) I. L. R. 14 Bom. 232.
(3) (1889) I. L. R. 17 Cal. 155.