

Special Appeal No. 111 of 1870.

1870.
July 18.

GANPATRÁV RANCHHODJI*Appellant.*
BÁI SURÁJ, widow of RANCHHODJI*Respondent.*

Jurisdiction—Remand—Civ. Proc. Code, Sec. 6.

A plaint, presented to a Court not being the Court of the lowest grade competent to try it, was returned to the plaintiff. It was subsequently registered by the same Court, in obedience to an order of the District Judge, and a decree was passed in the plaintiff's favour. On appeal, the defendant pleaded want of jurisdiction in the Court below. The plea was overruled, and the case remanded for retrial on its merits. The Court of first instance again passed a decree in favour of the plaintiff, and the defendant again urged his plea of jurisdiction in appeal, but the Judge declined to go into a second time.

Held that, the suit not having been instituted in the Court of the lowest grade competent to try it, the District Judge had no power to direct the Court of first instance to hear the case, and, although no special appeal was preferred against the decree of the District Judge in which he remanded the case for retrial, it was still open to the defendant in special appeal to raise the plea of jurisdiction.

THIS was a special appeal from the decision of C. G. Kemball, Judge of the District of Surat, in Appeal Suit No. 195 of 1869, affirming the decree of Mukundrái Manirái, First Class Subordinate Judge of Surat.

The plaintiff alleged that she was the heir of her husband, Ranchhodji, who died at Barodá in 1854, leaving property part of which is situated at Ankleshwar; and that she applied to the Senior Assistant Judge at Broach for a certificate of heirship. Her application was refused, and she was referred to a Civil suit. She now (*i.e.*, November 1865) sued in the court of the First Class Subordinate Judge at Surat, for a decree declaratory of her title to inherit the property of her husband.

The defendant answered that the action was barred by the law of limitation, the cause of action having arisen at the date of the plaintiff's husband's death, and not when the Senior Assistant Judge refused to grant her a certificate of heirship; that the defendant himself, having been adopted by the said Ranchhodji, who was his uncle, with the

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sanction of His Highness the Gaikwad, and in the presence and by the acquiescence of the plaintiff, was the rightful heir; and that the plaintiff's real place of abode was Baroda.

The first Class Subordinate Judge at first considered that the defendant levied beyond his jurisdiction, and that the cause of action also arose beyond his jurisdiction, and, therefore, returned the plaint to the plaintiff; but being ordered by the Judge to go on with the case, he did so, and passed judgment for the plaintiff, on the ground that even if the adoption of the defendant by the husband of the plaintiff were provide the transaction was contrary to Hindu law.

On appeal, the judge reversed the decree of the Subordinate Judge, and returned the case to him for retrial on the merits, as he found that the court of first instance, having disposed of the case under a misapprehension regarding the effect of an illegal adoption, did not take such evidence of the fact of adoption as was necessary in order to ascertain the rights of the parties.

The Subordinate Judge again passed a decree in favour of the plaintiff, on the ground that the defendant had failed to prove the adoption set up by him.

The Judge, on appeal, declined to reopen the question of jurisdiction, and agreeing with the lower court in the appreciation of evidence, confirmed its decree.

The special Appeal was heard before LLOYD and MELVILL, JJ.,

Nanabhai Haridas, for the special appellant:—The order of the District Judge directing the court of first instance to receive the plaint, which it returned to the plaintiff for want of jurisdiction, is *ultra vires*, there being no appeal against such an order. The Court of the First Class Subordinate Judge was not the court of the lowest grade competent to try this suit, and this incompetency is not removed by any illegal order of the Judge. This objection is fatal: *Bidhobudden v. Doorga (a)*.

Dhirajlal Mathuradas, Government Pleader, for the special respondent :—The proper time for raising the question of jurisdiction had gone by. When the District Judge remanded the case for retrial on the merits by the Court of first instance a special appeal should have been made to this court, and the question of jurisdiction raised. It was held in the case of *Temulji Rustamji v. Fardunjt Kavasji* (b) that after a remand by the High Court for retrial of a suit on the merits, the lower appellate court had no authority to raise a question of jurisdiction for the first time. *Bhai Trimbakji v. Toma valad Kutur* (c) was also referred to.

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LLOYD, J. :—This suit not having been instituted in the court of the lowest grade competent to try it, the District Judge had no power to direct the court of first instance to hear the case, and although no special appeal was made against the decree of the District Judge, in which he disposed of the question of jurisdiction, and remanded the case for retrial, we are of opinion that it is now open to the defendant to make the objection he has done, as a question of jurisdiction may be taken notice of at any time it may be raised.

We, therefore, annul the decrees of the lower courts, and direct the plaint to be returned to the plaintiff, in order that she may present it in a court having jurisdiction.

Decree reversed and plaint returned

(b) 5 Bom. H. C. Rep. A. C. J. 137.
(c) 2 Bom. H. C. Rep. 192 (2nd ed.).