

## APPELLATE JURISDICTION. (a)

*Special Appeal No. 63 of 1862.*

NILAYATATCHI.....Appellant.

VENKATACHALAM MUDALI.....Respondent.

When an issue has been directed and the finding and evidence returned, a special appellant cannot take an objection going to the merits which otherwise would not properly be open upon special appeal.

Sec. 25 of Act XXIII of 1861 gives no rights inconsistent with Sec. 372 of Act VIII of 1869.

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THIS was a special appeal against the decree of E. W. Bird, the Acting Civil Judge of Negapatam, in Appeal Suit No. 132 of 1861, affirming the decree of the District Munsif of Tranquebar in original Suit No. 18 of 1859.

The question raised in the original suit was whether a sale of family-property had been made without the consent of the plaintiff, a co-sharer, and whether therefore such sale was invalid to the extent of his share. On a former hearing the High Court directed an issue, the finding on which was returned with the evidence. To this finding the appellant, the first defendant, filed a memorandum of objection on the ground that the Civil Judge ought under the circumstances in evidence to have found acquiescence on the part of the plaintiff. The question now was whether the special appellant could on the evidence and finding take an objection going to the merits which otherwise would not properly be open upon special appeal?

*Branson* for the special appellant, the first defendant. There has been an issue directed to the Civil Court: the finding thereon has been returned together with the evidence: such finding and evidence has become part of the record: I am therefore entitled, under Act VIII of 1859, Section 354, to take an objection going to the merits. That section enacts that "if the lower court shall have omitted to raise or try any issue, or to determine any question of fact which shall appear to the Appellate Court essential to the right determination of the suit upon the merits, and the evidence upon the record is not sufficient to enable the Appellate Court to determine such issue or question of fact, the Appellate Court may frame an issue or issues for trial by the

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Lower Court, and may refer the same to the lower Court for trial. Thereupon the Lower Court shall proceed to try such one or issues and shall return to the Appellate Court its finding thereon, together with the evidence. Such finding and evidence shall become part of the record in the suit and either party may, within a time to be fixed by the Appellate Court, file a memorandum of any objection to the finding: and after the expiration of the period so fixed, the Appellate Court shall proceed to determine the appeal."

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SCOTLAND, C. J.:—This is a special appeal, which only lies on the grounds mentioned in Section 372 of the Code of Civil Procedure, namely, on the ground of the decision appealed from being contrary to some law or usage having the force of law, or of a substantial error or defect in law in the procedure or investigation of the case, which may have produced error or defect in the decision of the case upon the merits, and on no other ground. It is clear that if Mr. Branson's construction were to be upheld we should be indirectly getting out of the effect of that provision. He says that as there has been an issue directed to the Civil Court, and the finding thereon has been returned, together with the evidence, and such finding and evidence have become part of the record, he is entitled, under Section 354 of the Civil procedure Code, to take the objection that the finding is contrary to the evidence. But to that extent the provisions contained in Section 354 only relate to *general* appeals, and the special appellant in the present case can clearly not avail himself of them. Then there is Section 25 of Act No. XXIII of 1861, which provides that when the application for the admission of a special appeal is correctly drawn up, it shall be registered as therein mentioned, and the case shall proceed in all other respects as a regular appeal, and shall be subject to all the rules therein before provided for such appeals so far as the same shall be applicable. But it is clear that this section is to be read in connection with the provision relating to the grounds of special appeals. The application, it is expressly provided, must state some ground on which a special appeal will lie under Section 372 of Act VIII of 1859. And on the whole it is obvious that no rights are given by Section 25 of Act XXIII of 1861 which are inconsistent with Section 372 of the former Act. We must therefore now confine ourselves

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to such objection, if any, as are made consistently with that section: Mr. Branson grants that the Civil Judge's decision is not contrary to law or usage, and that there has been no substantial error or defect *in law* in the procedure or investigation of the case; and we must accordingly dismiss this appeal.

FRERE, J. concurred.

*Appeal dismissed.*

APPELLATE JURISDICTION. (a)  
*Special Appeal No. 576 of 1861.*

NĀYAN MANNI and others.....*Appellants.*

GODA SHANGARA.....*Respondent.*

Before the enactment of Act VIII of 1859, a suit could not be brought for a mere declaration of title without consequential relief.

A suit cannot be brought against several defendants to eject one and to obtain a declaration of title against the rest.

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THIS was a special appeal from the decision of E. Collin, the Principal Sadr Amin of Cochin, in Appeal Suit No. 128 of 1857, affirming the decree of the District Munsif of Vellanjode, in Original Suit No. 35 of 1855. The suit was brought to eject one defendant, the 108th who did not appear, and to obtain a declaration of right against the two hundred and twenty-one others. The Munsif and, on appeal, the Principal Sadr Amin decreed for the plaintiff. Eight of the defendants now specially appealed.

*Branson (Sadagopāchārū and Rājagopālachārū with him) for the appellants.*

*Norton (Karunāgara Menavan with him) for the respondent, the plaintiff.*

A written judgment, from which the following is an extract, was delivered by

STRANGE, J.:—At the period when this suit was brought no law existed sanctioning suits for mere declaration of title without prayer for consequential relief. Upon this ground alone that part of the action with which we are now dealing

(a) Present: Strange and Holloway, J. J.