calculated at the rate of eight annas per bigha of the decreed lands from the beginning of 1291 Amli until the date of possession, the plaintiffs shall get two-thirds of 14-annas share, in accordance with the decision of the 6th issue," and in lieu thereof to order and declare that the plaintiffs do recover from the defendants No. 1 a sum of money calculated at the rate of two-thirds of seven annas per bigha a year for 4,128 bighas, as compensation in respect of the exclusive use and benefit by the defendants No. 1 of 4,128 bighas, from the beginning of the year 1291 Amli to the 4th of January 1886, the date of the said decree; also to affirm the decree of the District Judge so far as it relates to costs.

It may be right to mention, with reference to that portion of the decree above recommended which relates to compensation, that the rate of eight annas per bigha was not disputed by the Watson appellants, and that the High Court were not prepared to dissent from the finding of the District Judge in fixing the area of the khas lands at 4,128 bighas.

The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: Messrs. *Freshfield & Williams.*

Solicitor for the respondents: Mr. *E. Kimber.*

C. B.

DURGA CHOWDHRANI (PLAINTIFF) *v.* JEWAHIR SINGH CHOWDHRI (DEFENDANT).

*P.C.** 1890. *March* 11. *April* 25.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

Second appeal—Civil Procedure Code, s. 584*—Grounds of second appeal.*

Under the Code no second appeal will lie, except on the grounds specified in section 584. There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of

* *Present:* LORD MACNAGHTEN, SIR B. PEACOCK, and SIR R. COUCH.

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the finding. *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani* (1) and *Pertab Chunder Ghose* v. *Mohendra Purkait* (2) referred to and followed. *Futtehma Begum* v. *Mohamed Ausur* (3) and *Nivath Singh* v. *Bhikki Singh* (4) overruled.

APPEAL from a decree (30th July 1886) of the Judicial Commissioner, passed on second appeal, and affirming a decree (1st May 1886) of the Commissioner of the Nerbudda Division, who had reversed a decree (28th September 1885) of the Assistant Commissioner of Nursingpur.

This appeal involved a question as to the right construction of section 584, Civil Procedure Code. The suit was brought to establish the appellant's right in some villages which had belonged to her late husband, but were now in the possession of his brother, the respondent. The widow's right depended on her establishing that a partition of the family property had taken place. This question was decided in favour of the appellant by the Assistant Commissioner, who found that there was a partition in Sambat 1914, corresponding to 1857, and that separate possession of the shares commenced in that year. Finding that the plaintiff was in possession, he made a declaratory decree as to her right.

The Commissioner on appeal reversed this decree. He found that the plaintiff was out of possession; also that partition had not been made out; and held that she was not entitled to a declaratory decree.

On a second appeal the Judicial Commissioner considered whether there was any evidence upon which the Commissioner might have come to the conclusion that no partition had taken place. He was of opinion that there was evidence in support of the finding of the Appellate Court below, and that only a question of fact had been raised before him. He dismissed the appeal on grounds expressed as follows :—

"The lower Appellate Court decides that there was no partition, but it does not give fully the grounds on which this decision is based. However, *I do not consider, after hearing the careful argument of* the learned

(1) L. R., 14 I. A., 101; I. L. R., 14 Calc., 740.
(2) L. R., 16 I. A., 233; I. L. R., 17 Calc., 291.
(3) I. L. R., 9 Calc., 309.
(4) I. L. R., 7 All., 649.

Advocate for the appellant, that this finding is open to second appeal. It is a finding of fact, and if there is evidence to support it, I do not think that it is open to a Court of Second Appeal to rehear the case and reconsider the evidence. I might perhaps come to a different conclusion from that arrived at by the Court of First Appeal, but that clearly would not justify my interference with the finding."

On the application under section 602, the Judicial Commissioner said :—

"Under the circumstances I have felt considerable doubt as to whether I should give the certificate asked for. There is, I think, great weight in the respondent's contention that the appeal does not involve a question of law. By the words 'the appeal must involve some substantial question of law,' I understand that by the appeal the Appellate Court must be asked to decide a question of law which substantially or materially affects the decision in the case. In the present case it may be said that the appeal does not so involve a question of law. It does not appear to allege that the decree of this Court is based on an error of law, but it assumes the existence of certain facts on which the judgment of this Court does not proceed, and on this assumption contends that the judgment is wrong.

"On the other hand, however, it may be said that the grounds of appeal amount to this that, considering the judgment of the Court of First Appeal, this Court was wrong in holding that it was bound by the findings of fact arrived at by that Court. Viewed in this light the appeal does involve a question of law, namely, whether this Court was right in holding that the findings of fact had been legally arrived at by the Court of First Appeal, and were binding on the Court of Second Appeal. It is to be observed also that there are not concurrent findings of facts by two Courts. The two Courts which had to decide the facts of the case disagreed. I think, therefore, though with some hesitation, that I may grant the certificate that the case is a fit one for appeal to Her Majesty in Council.

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. D. Mayne*, for the appellant, contended that it was open to the Judicial Commissioner to consider the question of partition, as "error or defect in the decision of the case upon the merits" had taken place following upon what might be termed "substantial error or defect in the procedure." The case might be brought within sub-section (*c*) of section 584. They referred to *Luchman Singh* v. *Puna* (1), *Nivath Singh* v. *Bhikki Singh* (2), *Futtehma Begum* v. *Mohamed*

(1) L. R., 16 I. A., 125 ; I. L. R., 16 Calc., 753.

(2) I. L. R., 7 All., 649.

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Ausur (1), *Assanullah* v. *Hafiz Mahomed Ali* (2). [SIR R. COUCH referred to *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani* (3).]

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the respondent, were not called upon.

Their Lordships' judgment was delivered on 25th April by—

LORD MACNAGHTEN.—This is an appeal against a decree of the Judicial Commissioner of the Central Provinces, passed on second appeal, affirming a decree of the Commissioner of the Nerbudda Division, which had reversed a decree of the Assistant Commissioner of Nursingpur.

The appeal comes before this Board with the usual certificate from the Judicial Commissioner to the effect that it involves a substantial question of law.

The Judicial Commissioner on second appeal had no jurisdiction to rehear the case on the merits. The only grounds on which a second appeal can be brought are stated in section 584 of the Civil Procedure Code, Act XIV of 1882. They are these:—

"(*a*) The decision being contrary to some specified law, or usage having the force of law.

"(*b*) The decision having failed to determine some material issue of law, or usage having the force of law.

"(*c*) A substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits."

In sub-section (*a*) the word "specified" obviously means specified in the memorandum or grounds of appeal.

At the outset of the argument their Lordships were informed that, according to Indian authorities, the appeal might be supported under sub-section (*c*), if it did not fall within sub-section (*a*), but they were told that it was impossible to state the point intended to be raised without going into the facts of the case.

(1) I. L. R., 9 Calc., 309.
(2) I. L. R., 10 Calc., 932.
(3) L. R., 14 I. A., 101; I. L. R., 14 Calc., 740.

The facts are few and simple. The appellant, who was plaintiff in the lower Court, is the widow of the younger son of one Beni Singh, who died in 1878. The suit was brought to establish her right to certain villages which had been in her husband's possession and registered in his name, but which after his death in 1883 were registered in the name of his elder brother, the respondent Jewahir Singh. The appellant's right as heiress to her husband depended upon her establishing that a partition of the family property had taken place in the year 1857. It was not disputed that Beni Singh did make a division of the family property in 1857 between himself and his two sons. The appellant contended that this division was an absolute partition. The respondent maintained that it was merely a convenient arrangement for the purposes of management.

In support of the appellant's case witnesses were produced who deposed to conversations alleged to have taken place at the time of the division of the property. A copy of a petition was put in, purporting to proceed from Beni Singh, but not signed by him, which was filed in the Revenue Court in October 1864, and which contained this sentence,—"It is now five or six years since I divided the villages between my sons." Moreover, it was proved that the father and the two sons kept separate accounts with the same native banker, and lived separately.

On the other hand, it appeared that in 1864, at a settlement, when the investigation into proprietary rights was made, neither the respondent nor the appellant's husband set up any claim to any part of the property. Beni Singh claimed to be solely entitled, and the Settlement Officer awarded to him, and to him alone, proprietary rights in the whole estate. From 1864 to 1878, when Beni Singh died, the estate was entered in the Collector's register as Beni Singh's property.

The Assistant Commissioner found in favour of the appellant that the property was partitioned in 1857. From this finding the respondent appealed, relying mainly upon the following grounds of appeal:—

"3. That the property being ancestral, and there being no deed of partition to prove that a partition was effected in Sambat 1914,

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i.e., about 1857, A.D., the Court ought to have held that no partition was effected.

"4. That the oral evidence produced by the plaintiff to prove partition is utterly worthless and unreliable.

"5. That the entry of Beni Singh's name as sole proprietor of the villages in the settlement records, and his name appearing in the jammabandis till his death, conclusively disprove the statement of the plaintiff that a complete partition of the villages was effected in Sambat 1914.

"6. That Beni Singh not having mentioned anything about the partition alleged by the plaintiff at the time of the settlement, and his subsequently bringing rent suits in his own name and signing the rent receipts of the tenant, disproved the partition alleged by the plaintiff.

"7. That the lower Court ought to have rejected the copy of a petition, dated the 12th of October 1864, filed by the plaintiff, and alleged by her to have been presented to the Settlement Superintendent as being not proved, and therefore not admissible in evidence.

* * * *

"10. That the lower Court was wrong in holding that the defendant, living separately and having separate dealing, established partition."

The judgment of the Commissioner, so far as material for the present purpose, was as follows:—

"The facts of the case are stated in the lower Court's judgment. On the pleas, which were very fully argued on both sides, I find as follows—

* * * *

"*Plea* 3.—This plea also is, I think, sound. I agree with appellant's pleader that the burden of proving partition fell on plaintiff, and that plaintiff quite failed to prove it. The settlement proceedings alone, in my opinion, disprove it, while oral evidence as to an event 29 years old is of little weight, and there is absolutely no documentary evidence.

"This disposes of pleas 4, 5, 6.

"*Plea* 7.—I agree in this plea. The document was not trustworthy, and there was no trustworthy evidence about it.

"*Plea* 10.—This plea is also sound, and in accordance with common custom."

Having stated the facts of which a summary has been given, and having read the Commissioner's judgment, the learned Counsel for the appellant proceeded to argue that it was open to the Judicial Commissioner, and therefore open to their Lordships, to review the Commissioner's finding, on the ground that his decision involved or amounted to a substantial error or defect in procedure.

In support of this view Counsel referred to several authorities in India, of which the most important are *Futtehma Begum* v. *Mohamed Ausur* (1) and *Nivath Singh* v. *Bhikki Singh* (2). In the former case the judgment of the Court contains the following passage:—

"It is not the ordinary course of procedure for this Court to interfere in second appeal with any findings of fact which have been arrived at by the lower Appellate Court; but we are well within the scope of the authorities in holding that where the lower Appellate Court has clearly misapprehended what the evidence before it was, and has thus been led to discard or not give sufficient weight to important evidence, and to give weight to other evidence to which it is not entitled, and has thus been led not into any mere accidental mistake, but totally to misconceive the case, this Court may interfere."

These observations were cited with approval in the Allahabad case, where the Full Bench (*diss.* PETHERAM, C.J.) apparently came to the conclusion that an erroneous finding of fact under similar circumstances might be treated as an error or defect in procedure within the meaning of section 584.

The learned Counsel for the appellant contended that these rulings covered the present case. The lower Appellate Court, it was said, had clearly misapprehended the effect of the settlement proceedings in 1864; undue weight had been attached to the registration in Beni Singh's sole name; the oral evidence had been wholly discarded; sufficient weight had not been given to the important statement in Beni Singh's petition, or to the separate

(1) I. L. R., 9 Calc., 309.
(2) I. L. R., 7 All., 649.

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dealings of his two sons; the Court had thus been led to misconceive the case entirely, and to find for the defendant when the finding should have been for the plaintiff.

It would be an unprofitable task to inquire how far this contention is well founded, because their Lordships cannot accept the rulings of the High Courts of Calcutta and Allahabad as a correct statement of the law. Nothing can be clearer than the declaration in the Civil Procedure Code that no second appeal will lie except on the grounds specified in section 584. No Court in India or elsewhere has power to add to or enlarge those grounds. It is always dangerous to paraphrase an enactment, and not the less so if the enactment is perhaps not altogether happily expressed. Their Lordships therefore will not attempt to translate into other words the language of section 584. It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding: *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani* (1), *Pertab Chunder Ghose* v. *Mohendra Purkait* (2).

Their Lordships are unable to dispose of the case without expressing their regret that the Commissioner should have dealt with the matters before him in so meagre a fashion. They have no reason to doubt that all the evidence was fully and duly considered by him, but they cannot help thinking that a judgment more carefully expressed might have prevented an idle appeal.

Their Lordships must also express regret that the Judicial Commissioner having rightly treated the case as one depending entirely on issues of fact which he had no jurisdiction to review, should yet have felt himself constrained by authority to give a certificate to the effect that a substantial question of law was involved in the appeal.

(1) L. R., 14 I. A., 101; I. L. R., 14 Calc., 740.
(2) L. R., 16 I. A., 233; I. L. R., 17 Calc., 291.

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Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Watkins & Lattey.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Wilson, and Mr. Justice Pigot.

1890 *July* 2.

IN THE MATTER OF THE INDIAN COMPANIES ACT, 1882,

and

IN THE MATTER OF THE GANGES STEAM TUG COMPANY, LIMITED.

EX PARTE THE DELHI AND LONDON BANK, LIMITED.*

Company—Voluntary liquidation—Liquidator, borrowing powers of—Assets—Principal and Agent—Election—Subrogation—Indian Companies Act (VI of 1882), ss. 144 (f), 177 (g).

Case in which it was held that a liquidator of a company being voluntarily wound up had power to borrow for the purposes of the winding up, including the working of steamers and docks, on the credit of the assets of the company, without security written or otherwise, and that the loan in question was within his powers and was in fact made to the company, though the liquidator also made himself personally liable.

Per PETHERAM, C. J.—*Held*, that a person contracting with an agent may look directly to the principal unless by the terms of the contract he has agreed not to do so, whether he was or was not aware when he made the contract that the person with whom he was dealing was an agent only. *Calder* v. *Dobell* (1) referred to.

Per WILSON and PIGOT, JJ.—*Held*, that the realised assets of a company divided among the shareholders in pursuance of a resolution are assets within the meaning of section 144 (*f*) of the Indian Companies Act.

Per PIGOT, J.—*Held*, that if it were necessary to hold so, the principle of *Baroness Wenlock* v. *River Dee Company* (2) would apply to the case.

THIS was an appeal from an order of Norris, J., dismissing the claim of the Delhi and London Bank, Limited, to rank as a

* Original Civil Appeal No. 36 of 1889, against the decree of Mr. Justice Norris, dated the 9th of September 1889.

(1) L. R. 6 C. P., 486. (2) L. R. 19 Q. B. D., 155.