Before Mr. Justice Trevelyan and Mr. Justice Beverley.

1896 *Aug.* 11.

BENI PERSHAD KUARI (PLAINTIFF) *v.* NAND LAL SAHU AND OTHERS (DEFENDANTS).

Second Appeal—Remand to the Appellate Court—Additional evidence in Appellate Court—Finding of fact upon evidence taken after remand—Procedure in the second Court of Appeal—Civil Procedure Code (Act XIV of 1882), sections 568, 584, 585, 587.

In a second appeal, the High Court set aside the decrees of the lower Courts on the ground that certain issues raised in the suit were not considered by those Courts, and remanded the case to the lower Appellate Court for a proper decision of the case. The lower Appellate Court took evidence on the issues not tried before, and came to findings of fact on that evidence.

Held, that the lower Appellate Court tried the case, not as an original case, but as an appeal, and acting under the powers given to it took fresh evidence.

Held, that on second appeal the High Court is precluded by the Code of Civil Procedure from going into facts, and that restriction of power is not confined only to cases where evidence is taken in the first Court.

Gopal Singh v. *Jhakri Rai* (1) followed. *Balkishen* v. *Jasoda Kuar* (2) referred to. *Hindo* v. *Brayan* (3) not followed.

THE facts material to this report and the arguments on either side appear from the judgment of the High Court. The material portion of the previous order of the High Court remanding the case to the lower Appellate Court was :—

"For the foregoing reasons, the judgments of the Courts below cannot stand, and for the proper decision of the case the following questions require determination :—

"*First.*—Whether the sale to the plaintiff was made with intent to defeat or delay the defendants who were judgment-creditors of Sheolochan, and whether the plaintiff purchased otherwise than in good faith and for fair value?

"*Second.*—Whether the conduct of the plaintiff, in asking for and obtaining time to complete his purchase with an offer to pay

* Appeal from Appellate Decree No. 1107 of 1895, against the decree of G. G. Dey, Esq., District Judge of Shahabad, dated the 13th of March 1895, affirming the decree of A. C. Mitter, Esq., Subordinate Judge of that District, dated the 21st of December 1891.

(1) I. L. R., 12 Calc., 37. (2) I. L. R., 7 All., 765.
(3) I. L. R., 7 Mad., 52.

off all the decree-holders of Sheolochan, in any material way misled the defendants or influenced their conduct as to their mode of seeking satisfaction of their decree against Sheolochan?

"If either question is answered in the affirmative the plaintiff must fail, but if both are answered in the negative, he will succeed.

"The result then, is, that the decrees of the Courts below must be set aside, and the case sent back to the lower Appellate Court for the determination of the case in accordance with the directions contained in this judgment."

The plaintiffs appealed to the High Court.

Mr. *Pugh*, Babu *Hem Chandra Banerjee*, Babu *Raghunandan Pershad* and Babu *Jogendra Chandra Ghose* for the appellant.

Dr. *Rash Behari Ghose* and Dr. *Asutosh Mukerjee* for the respondents.

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

This case comes up to us on appeal from an order made by the District Judge of Shahabad on a remand by this Court.

The first and only important question in the case is whether the appellant is entitled to treat the appeal as a first appeal on the question decided by the lower Appellate Court on the evidence which has been taken subsequent to the remand. As we expressed ourselves after the argument on this portion of the case had been concluded, we are of opinion that the ordinary rules of second appeals apply to this appeal, and that it is not competent for us to interfere with the findings of the lower Appellate Court on the facts.

The question has arisen in this way:—

Two of the issues framed, the 1st and the 7th, were not considered by either of the lower Courts. When the case came up on appeal to this Court, the learned Judges forming the Division Bench by which the appeal was heard, after discussing the other questions in the appeal, considered that those issues should be tried. They framed two issues, which evidently were intended to put in clear and unambiguous language the questions which the parties had raised in the 1st and 7th issues. The first of

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those issues as raised in this Court was, "whether the sale to the plaintiff was made with intent to defeat or delay the defendants, who were judgment-creditors of Sheolochan, and whether the plaintiff purchased otherwise than in good faith and for fair value;" and the second was, "whether the conduct of the plaintiff, in asking for and obtaining time to complete his purchase with an offer to pay off all the decree-holders of Sheolochan, in any material way misled the defendants or influenced their conduct as to their mode of seeking satisfaction of their decree against Sheolochan?" Having pointed out that the judgment of the lower Appellate Court could not stand, the learned Judges set aside not only the decree of the lower Appellate Court, leaving the appeal to be determined on those issues by that Court, but *also the decrees of the first Court*. They did not send the case back to the first Court whose decree was set aside, but they sent it to the lower Appellate Court "for the determination of the case in accordance with the directions contained in this judgment." The learned Judges did not in their judgment expressly say whether fresh evidence was to be taken, but inasmuch as no evidence had been taken with regard to one of the issues at any rate, the 1st, the taking of fresh evidence was obviously contemplated.

It is contended before us that the practical effect of this order is to make the lower Appellate Court retry the case on remand as an original Court, and that there is an appeal to this Court on the facts. The learned Judges of this Court did not order the case to be tried by the lower Appellate Court otherwise than in exercise of the jurisdiction which it possessed in this case as a Court of Appeal, and the case when it went down was treated in the lower Appellate Court as an appeal. The learned Judge treats it as an appeal throughout his judgment, and, as far as we can see, the parties did the same.

The idea that this was an appeal on the facts was not present to the minds of the legal advisers of the parties when this appeal was first presented to this Court. Although, of course, the appellant ought not to be impeded by any mistaken view, if it was a mistaken view, of his legal advisers, at any rate this indicates that the parties treated this order of remand as an order to

the lower Appellate Court to try the appeal before him. In our opinion the lower Appellate Court tried the case as an appeal, and acting under the powers given to it took fresh evidence. So the question reduces itself really to this, whether, when a lower Appellate Court takes fresh evidence, the High Court can in second appeal consider that evidence. There is no doubt that that question has been expressly determined by a Division Bench of this Court in the case of *Gopal Singh* v. *Jhakri Rai* (1); and the same question was determined by a Full Bench of the Allahabad High Court in *Bal Kishen* v. *Jasoda Kuar* (2). There are remarks made in a case, *Hinde* v. *Brayan* (3), which might tend to a contrary conclusion.

We are of opinion that the decision of this Court is one which we ought to follow. It has not, as far as we know, been doubted by any subsequent decision, and we believe it to be in accordance with what was intended by the Civil Procedure Code. If it was intended that there should be any general rule that in every case where evidence is taken on a question of fact the parties would be entitled to the decision of two Courts, such general intention would have been expressed in the Code. On second appeal we are precluded by the Code from going into facts, and that restriction of our powers is not confined only to cases where the evidence is taken in the first Court. If it was intended that we should go into and discuss the evidence taken by the lower Appellate Court, we should expect to find an exception providing for that event included in the section which deals with our powers in second appeals. In our opinion we cannot go into the facts. So it remains for us to see whether there is any exception to be taken to the findings arrived at by the lower Court. Those findings are expressly directed to the issues which were laid down for the decision of the lower Appellate Court by this Court. As to the first issue the first portion of it, it is true, is answered in favour of the appellant, but the second portion is answered against him, and it is found that he did not purchase in good faith or for fair value. Therefore, the first question is not answered in the negative, one portion of it being answered in

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the affirmative. It follows, therefore, according to the decision in this case that the plaintiff fails. We are not competent, in appeal after remand, to question in any way the decision of this Court in the case.

Some observations were addressed to us as to whether the arrangement in this case could be treated otherwise than one come to in good faith. There is undoubtedly evidence upon which the lower Appellate Court could arrive at the conclusion it has come to in this matter. Leaving aside everything else, the arrangement as to the gift of the garden and house to the son is one which any Court dealing with facts must have viewed with the greatest suspicion, even if it did not affirm that it tainted the whole transaction with fraud. An arrangement of that kind could only have been come to for the purpose of defeating at any rate some classes of creditors. It is difficult to conceive how it could be otherwise. That circumstance of itself is abundant evidence upon which the learned Judge could arrive at the conclusion he has come to.

With regard to the other question, that has been found in the affirmative. Therefore the plaintiff fails.

In our opinion this appeal fails, and must be dismissed with costs. In order to prevent any misapprehension as to the effect of our judgment, we think we ought to make it clear by saying that the appeal is dismissed, and the suit stands dismissed with all costs.

S. C. C. *Appeal dismissed.*

ORIGINAL CIVIL.

Before Mr. Justice Sale.

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Sept. 17.

CALCUTTA TRADES ASSOCIATION *v.* RYLAND.*

Attachment—Subjects of attachment—Pay of Military Officer in Indian Staff Corps—Officer not officer of Regular Forces—Civil Procedure Code (Act XIV of 1882), section 266, clause (h)—Army Act (1881) section 151—Public Officer.

An Officer of the Indian Staff Corps is a "Public Officer" within the meaning of clause (*h*) of section 266 of the Civil Procedure Code, read with

* Suit No. 43 of 1895.