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pears not to have been taken before the Munsif. The suit appears to have been conducted as if this was admitted, and when that is the case, we think an objection of want of evidence of the fact cannot be taken on a special appeal. *Stracy* v. *Blake* (*a*) and *Doe d. Child* v. *Roe* (*b*) are instances of the application of this principle.

We are asked by the appellants' counsel to make a decree for redemption of the six annas share; but, even supposing it would be right to do so after the lapse of upwards of sixty years, the appellants cannot have such a decree upon the present plaint.

Decree affirmed.

(*a*) 1 M. & W., 168. (*b*) 1 E. & B., 279.

Special Appeal No. 734 *of* 1864.

Jan. 25.

MOTI' BHAGVA'N .....*Appellant.*
HARJI'VAN GIRDHARDA'S .....*Respondent.*

Issues, Framing of—Finding on—Question of Fact—Remand.

The High Court will not, in a special appeal, remand the case, where there has been a distinct finding by the District Judge on the only issue framed by him, although he may have omitted to find on another issue raised before the Munsif, but not called for by either party in appeal.

THIS was an appeal from the decision of C. H. Cameron, Judge of the District of Súrat, in Appeal Suit No. 169 of 1863, reversing the decree of the Munsif of Balsád, in Original Suit No. 860 of 1862.

Harjívandás Girdhardás sued Motí Bhagván and Rámdás Jayachand to remove an attachment from, and to establish his ownership to, a house attached under a decree held by the defendants. The suit was brought on a deed of sale passed by Amthá Rasikdás to the plaintiff, dated the 26th of November 1861, by which the house in dispute was sold for Rs. 751, being the principal and interest due on a *sán* mortgage of the same house dated the 10th of August 1860.

The defendants contended that the sale by Amthá to the plaintiff was collusive and without consideration, and that

Amthá had no right to sell the house in question, which he had inherited from his maternal uncle Nágar Bhagván, until he had satisfied the debt due by him as heir of Nágar to the defendants, and for which the decree under which the house was attached was obtained.

The points for decision laid down by the Munsif were: (1) Was the sale by Amthá to the plaintiff collusive; (2) Was Amtha, as heir of the deceased Nágar Bhagván, competent by Hindú law to sell the property of the deceased without paying his debt.

The Munsif found that the plaintiff, in collusion with Amthá, took from him the deed of sale (No. 2); and that it was not proved that any money had been paid or received under the previous mortgage bond. After recording at considerable length the reasons for this finding, the Munsif concluded as follows:—

"Thus there are many important discrepancies in the evidence of the plaintiff Harjivan's witnesses. Therefore, the Court is not satisfied in any way that the bonds Nos. 11 and 2 were passed *bonâ fide*, that they were signed and attested when they were passed, and that the money stated in them was paid and received; but it distinctly appears that both the bonds were passed collusively.

"In addition to the said discrepancies the Court finds that the vendor of the house, Amthá Rasik, has been taking his meals in the house of the plaintiff, Harjivan, for the last three or four years, and residing there during the last year, and that the attesting witnesses to the exhibits Nos. 2 and 11 are the plaintiff's clerks, debtors and near relations. And the Court has no doubt but that Amthá, having colluded with the plaintiff, with a view to save the property from sale for the debts of Amthá's uncle Nágar Bhagván, whose heir Amthá was, passed the bonds *malâ fide*."

It being unnecessary to find on the second issue, he rejected the plaintiff's claim with costs.

On appeal, the District Judge laid down the issue for

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decision to be: "Has plaintiff, Harjivándas, proved his ownership of the house;" and found as follows:—

"My finding on this issue is that the plaintiff, Harjívandás, has satisfactorily proved his ownership. The deed No. 11 is proved by witnesses Nos. 43—45, and is acknowledged by Amthá Rasik, No. 23. This is the principal deed which was passed by Amthá to the plaintiff, Harjívandás. It appears that after this, and within the three years' limit, at which time, by deed No. 11, the property mortgaged was to be considered as sold, the son, Prán̤jívandás, obtained another deed (No. 2), which Amthá Rasik also acknowledges. The execution of this deed, No. 2, is the main point on which the allegation of collusion and deceit rests; but the explanation given by Harjívandás is quite consistent with probability. The son, not being certain about deed No. 11, got deed No. 2 executed. His having done so does not affect the validity of No. 11, but rather increases its force. The evidence of Dáyábhái (No. 32) and Haríbhái (No. 34) shows that they are in possession of the property as tenants of Harjívandás; and against this the defendants offer no proof. Had plaintiff's claim rested solely on deed No. 2, there might have been some ground for suspecting collusion; but as No. 2 is merely in continuation of No. 11, however unnecessary its execution may have been, it does away with the reason for suspicion, and adds to the weight of the proof adduced in favour of No. 11. The plaintiff cannot be said to have perjured himself in this case. It seems his son, Prán̤jívandás, does manage all business affairs for him now; and his acknowledgment respecting this, and that he, Prán̤jívandás, got the deed No. 2 executed, cannot be looked on in the light of false evidence wilfully and maliciously given."

"No further issue was called for by either party.

"On the above facts, I reverse the decree of the Munsif of Balsád, and allow the plaintiff Harjívandás's claim, adding all costs of both original and appeal courts on defendants."

The case was heard before COUCH, NEWTON, and WARDEN, JJ.

Reid and *Dhirajlál Mathurádás*, for the appellants:—The

Munsif correctly laid down two issues; but having found for the defendants on the first, it was unnecessary to decide the second. The Judge framed a single issue, which was far too broad, and appears to have entirely excluded from his consideration the second point, left undecided by the Munsif. This was "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:" Act VIII. of 1859, Sec. 372. Moreover, the reasons given by the Judge for the conclusion he comes to on the question of collusion will not bear examination; and he has not found whether there was in point of fact any consideration, either for the mortgage or for the sale. The case should be remanded, and the attention of the Judge called to the questions he has left undecided.

Nánábhái Haridás, for the respondent, was not called upon by the Court.

COUCH, J.:—We cannot see any grounds for remanding this case, except it may be that the Judge came to a wrong conclusion on a question of fact; and, sitting here in a special appeal, we have no power to remand on that ground. The defendant did no ask for any other issue in the lower appellate court.

Decree affirmed.

NOTE.—Compare with this case the decision in *Rámdás Sákharlál* v. *Gangádhar R. Dongre*, *post*, p. 186.—ED.