

*Special Appeal No. 228 of 1868.*

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Sept. 10.

TEMULJI RUSTAMJI ..... *Appellant.*  
FARDUNJI KA'VASJI *et al.* ..... *Respondents.*

*Jurisdiction—Remand—Power of Lower Appellate Court on remand to raise the question of Jurisdiction.*

When the High Court has remanded a suit for re-trial on the merits the lower appellate court has no authority to raise a question of jurisdiction for the first time.

THIS was a Special Appeal from the decision of H. Phillips, Acting Senior Assistant Judge of Súrat at Broach, in Appeal No. 48 of 1868, annulling the decree of A'zam Bhikáji Rámchandra, Mámlatdár of Broach.

The plaintiff sued the defendants to compel them to allow him the use of a roadway through their fields to his own.

The defendants denied the right of way set up by the plaintiff.

The Mámlatdár gave a decree in favour of the defendants, which was reversed, on appeal, by the Acting Senior Assistant Judge. In special appeal, the High Court considered that, as only one witness deposed in support of the plaintiff's claim, and as he was disbelieved by the court of first instance, the Acting Senior Assistant Judge ought not to have reversed the decree of that Court without examining the further evidence tendered in exhibit No. 45 by the defendants. The High Court, therefore, remanded the case to the lower appellate court, in order that the wanting evidence might be taken, and a new decree passed on the merits. On re-trial, the Acting Senior Assistant Judge, however, finding for the first time that, the suit not having been referred in the first instance by the Collector to the Mámlatdár, as required by Reg. VI. of 1830, the latter officer had acted without jurisdiction; and annulled the Mámlatdár's decree.

The Special Appeal was heard before WARDEN and GIBBS, JJ.

*Nánábhái Haridás*, for the special appellant:—This case having been remanded to enable the defendants to pro-

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duce the evidence prayed for in exhibit No. 45, and they having failed to prove the lease therein mentioned, the Acting Senior Assistant Judge ought to have passed the same decision as before, especially when he had no reason to alter his opinion as to the evidence of witnesses. The High Court having remanded the case for a particular purpose, he ought not to have for the first time taken an objection not raised by either party; that this objection referred to a question of jurisdiction is immaterial. In *Ganpatráv v. Bechar and others* (S. A. No. 100 of 1868, decided on the 15th of June 1868 by COUCH, C.J., and NEWTON, J.) the technical objection as to jurisdiction, taken by the respondent for the first time in special appeal, was disallowed. Here there is in addition a remand. [GIBBS, J.:—That case should not be quoted as determining such a wide proposition. When the objection was taken before the High Court for the first time, that the suit had not been referred for trial by the Collector to the Mámlatdár, the learned Judges remarked that the question whether it had been referred or not was a question of fact which had not been found, and they would not, at that late stage of the case, send it down for such a purpose.]

At all events, when the Acting Senior Assistant Judge found that the court which originally tried the case had no jurisdiction, he ought to have referred it for re-trial by a court which had jurisdiction.

*Dhirajlál Mathwádás*, for the special respondents:—The point of jurisdiction can be raised at *any* stage: *Bháí v. Tomu (a)*; *Motilál v. Jamnádás* (S. A. No. 812 of 1864, decided by COUCH, NEWTON, and WARDEN, JJ., on the 2nd of February 1865); *Temulji v. Ichhálál* (S. A. No. 604 of 1867, decided by WARDEN and GIBBS, JJ., on the 21st of November 1867).

PER CURIAM:—The Court are of opinion that, as the case was remanded by them for re-trial on its merits, the Acting Senior Assistant Judge had no authority to look into the question of jurisdiction, which was then raised before him for the first time. He was also in error in not issuing sum-

monses for the appearance of the witnesses to the lease, if he required them, calling on the party in whose favour they were to testify to pay the *báttá*. The Court also observe that the lease was only produced from the Senior Assistant Judge's records on the very day that the decree was passed, so that the defendants had no time or opportunity to produce the witnesses thereto. We are, therefore, constrained to remand the case again for this purpose; and the decree of the Senior Assistant Judge is accordingly reversed, and the case remanded for re-trial on its merits.

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*Decree reversed and case remanded.*

*Special Appeal No. 752 of 1867.*

Sept. 15.

LA'LECHAND AMBA'IDA'S, heir of AMBA'IDA'S

NA'GANDA'S ..... *Appellant.*

SAKHARA'M valad CHANDRA'BHA'I et al. .... *Respondents.*

*Limitation—Sale in Execution of Decree—Suit to recover possession of Lands sold—Act XIV. of 1859, Sec. 1., cl. 3 & 12—Civ. Proc. Code, Secs. 246 and 269.*

The plaintiff's tenant having been ejected from certain immoveable property of the plaintiff under an auction sale in execution against a third party, the plaintiff made no application to the Court, under Sec. 246 or 269 of the Civ. Proc. Code, to prevent or set aside the sale.

*Held* that he was not bound to do so, but that he was entitled to file a regular suit to establish his title and recover possession at any time within twelve years from the date of the dispossession, under cl. 12, Sec. 1., Act XIV. of 1859.

*Krishnáji V. Joshi v. Mukund Chimanshet* (2 Bom. H. C. Rep. 18) overruled.

THIS was a Special Appeal from the decision of A. Bosanquet, Acting Judge of the District of Ahmednagar, in Appeal Suit No. 251 of 1867, modifying the decree of the Munsif of Sangamner.

The appeal was argued before COUCH C.J., and NEWTON, J.

*Shántarám Náráyan* for the appellant.

*Nánábhái Haridás* for the respondents.

The facts of the case fully appear from the following judgment, delivered by