he opened and dried and put on board 60,000 nuts in three days, was not confirmed by any other witness, and is not trustworthy himself as to this his main allegation. The Judge, though he doubts the evidence of the "Raghunath's" crew, speaks favourably of the demeanour of the other crews. Relying on them and finding corroboration in the circumstances, he held the charge proved. The story of the alleged wreck is almost incredible; and similar vessels, which started at the same time from Aleppy, arrived safely at Bombay. The evidence of the story of the defence as regards what passed at Goa is not supported, as it might have been, by ample evidence.

On the whole we agree with the Judge in his view of the case and confirm the conviction and sentence.

Conviction and sentence upheld.

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14 B. 232.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Parsons,

SAVITRI (*Original Defendant No. 3*), *Appellant v.* RAMJI (*Original Plaintiff*), *Respondent.** [4th September, 1889.]

Remand order—Objections to its validity taken in appeal against final decree—Omission to appeal from the order—Civil Procedure Code (Act XIV of 1882), ss. 588, 590—Practice.

A party aggrieved by an interlocutory order of remand may object to its validity in his appeal against the final decree, though he might have appealed against the order under s. 588 of the Civil Procedure Code (Act XIV of 1882), and has not done so.

[F., 23 C. 335; 28 C. 324=5 C.W.N. 509; 32 P.L.R. 1906; Appr., 34 M. 228=20 M. L.J. 805=8 M.L.T. 72=6 Ind.Cas. 239=(1910) M.W.N. 226; U.B.R. (1892—1896) 525; R., 14 A. 348; 24 C. 725 (740); 18 M. 421; 12 C.P.L.R. 119 (123); 5 Ind. Cas. 764=7 M.L.T. 93; 14 Ind. Cas. 673=8 N.L.R. 42; 9 O.C. 80; 71 P. R. 1907=37 P.L.R. 1908.]

SECOND appeal from the decision of Khan Bahadur M. N. Nanavati, First Class Subordinate Judge of Poona, A. P., in appeal No. 140 of 1886.

The plaintiff sued to recover possession of certain fields, alleging that they had been mortgaged to him with posession by [233] defendant No. 1, and that he had been dispossessed by the defendants Nos. 2 and 3.

The Subordinate Judge, who heard the case in the first instance, held the mortgage not proved, and, therefore, rejected the plaintiff's claim.

On appeal the District Court reversed the decree and remanded the case for a decision on the merits.

Thereupon the Subordinate Judge, to whom the case was referred, found, on the evidence already recorded, that the mortgage was proved, and decided in plaintiff's favour.

This decision was confirmed, on appeal, by the District Court.

The defendant No. 3 alone appealed to the High Court.

Ghanasham Nilkant, for appellant.—The order of remand was illegal. It is opposed to the provisions of s. 562 of the Code of Civil Procedure.

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* Second Appeal No. 203 of 1888.

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14 B. 232.

The first Court did not dispose of the suit on a preliminary ground without taking any evidence. It decided the case on the merits. The appellate Court was, therefore, not competent to remand the case. If so, the proceedings subsequent to the remand are also invalid.

Nagindas Tulsidas, for respondant.—It is not open to the appellant to take any objection to the remand order in this appeal. He ought to have appealed against the remand order, under s. 588 of the Civil Procedure Code. Not having done so he must be taken to have submitted to the order, and to all proceedings subsequent thereto. Even assuming that he has the right to contest the validity of the order, still it is not shown that it affects the merits of the case or the jurisdiction of the Court. No fresh evidence was taken by the Court after the removal order. This Court cannot, therefore, disturb the decision of the lower Courts.

Ghanasham Nilkant in reply.—Our omission to appeal direct from the remand order does not preclude us from objecting to it in our appeal from the final decree. The invariable practice of this Court and of the other High Courts is in my favour: see [234] *Vithal Vishwanath* v. *Ramchandra Sadashiv* (1); *Har Narain Singh* v. *Kharag Singh* (2); *Goodall* v. *The Moosoorie Bank, Limited* (3).

JUDGMENT.

The judgment of the Court (Jardine and Parsons, JJ.) was delivered by

JARDINE, J.—The first question before us is, whether the order of the District Judge reversing the Subordinate Judge's decree and remanding the case is invalid under s. 564 of the Civil Procedure Code. It was made while s. 562 of the Code of Civil Procedure Act X of 1877 was in force. As the original Court had not disposed of the suit upon a preliminary point, and had not excluded any evidence of fact, we are of opinion that the District Judge's order of remand was wrong: see *Ganesh Bhikaji Juvekar* v. *Bhikaji Krishna Juvekar* (4) and the authorities there quoted. It was the duty of the District Judge under s. 565 to determine the issues and decide the appeal. But he remanded the cause to another Subordinate Judge who had taken some of the evidence. No fresh evidence was produced. The Subordinate Judge to whom the case was referred, passed decision on the evidence. His conclusions were different to those of the Subordinate Judge who originally heard the case. Another appeal being preferred the Subordinate Judge with appellate powers has confirmed his decree.

It has been faintly argued by Mr. Nagindas for the respondent that the appellant (defendant 3) having submitted to the District Judge's order of remand and the later proceedings consequent thereon, must be taken to have waived his right now to object to them. He might have appealed under s. 588. But s. 590 gave him a right to take his objection to the District Judge's interlocutory order of remand after the final decree; see *Vithal Vishwanath Prabhu* v. *Ramchandra Sadashiv Kirkire* (1); *Googlee Sahoo* v. *Premlall Sahoo* (5); *Har Narain Singh* v. *Kharag Singh* (2); *Goodall* v. *The Moossoorie Bank, Limited* (3); and as to the reasons, which probably influenced the Legislature in giving a party [235] the option,

(1) 7 B.H.C.R. A.C.J. 149. (2) 9 A. 447. (3) 10 A. 97.
(4) 10 B. 398. (5) 7 C. 148.

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APPELLATE CIVIL.

14 B. 232.

Maharajah Moheshur Sing v. *The Bengal Government* (1). Their Lordships say:—

"We are of opinion that this objection cannot be sustained. We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit or the consideration of the appellate Court. No authority or precedent has been cited in support of such a propositon, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities. We believe there have been very many cases before this tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory orders, though not brought under their consideration until the whole cause had been decided, and brought hither by appeal for adjudication."

Following this reasoning we are of opinion that the doctrine of waiver is not applicable to appellant's right to appeal.

While we are of opinion that the remand order was wrong, and that the Subordinate Judge to whom the cause was remanded had no jurisdiction to hear the case, we are precluded by s. 578 from reversing or substantially varying the order appealed against, unless the error has affected the merits of the case or the jurisdiction. It has been pointed out that the only effect of reversing the last decree in appeal would be to require the District Court to pass a new judgment of fact on the very same evidence. The cases *Nowcowree Mundul* v. *Mooka Bibee* (2) and *Nussuroodeen Hossein Chowdhry* v. *Lall Mahomed Purmanick* (3) are precedents for holding that illegal orders of remand and the proceedings consequent thereon do not necessarily affect the merits. Whether they do or not is, in our [236] opinion, a question to be determined in each case. We may refer, by way of analogy, to cases where fresh evidence has been taken on an illegal remand. In the case of *Maheshchandra Das* v. *Madhab Chandra Sirdar* (4), where the judgment was mainly founded on the fresh evidence, the High Court thought proper to reverse. Whereas in *Naranbhi Vrijbaukandas* v. *Nareshankar Chandroshankar* (5) where a Munsif had irregularly used evidence taken by another Judge, but no objection was taken at the time, it was held by a Full Bench that the merits were not affected. In the case before us, the only possible way in which the appellant can have been prejudiced is by the effect that the judgment of the Subordinate Judge who tried the case after remand may have had on the mind of the appellate Court. It has not been contended that the perusal of that judgment had any undue influence on the mind of that Court, and we must presume that the Judge who passed the decree now before us examined the evidence in the ordinary judicial manner and passed an independent judgment thereupon.

We, therefore, confirm the decree with costs.

Decree confirmed.

(1) 7 M.I.A. (302, 303).
(2) 2 W. R. C. R. 181.
(3) 13 W. R. C. R 234.
(4) 2 B.L.R. S. N. xiii.
(5) 4 B. H. C. R. A.C.J, 98.