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only as to the former between those "provided for" and those not "provided for"—Mitak. c. 2, s. 2, sl. 1, 2, 3. 4; Mayukha, chap. IV, s. VIII; sl. 11 and 12. The language of these texts is, in our opinion, too distinct in giving an unconditional preference to maiden daughters to allow of any equitable consideration arising from the special circumstances of the case being deemed to qualify that right.

We must, therefore, hold with Mr. Justice Jardine that the defendants, Sakerbai and Jivabai, are entitled to the residue as contemplated by the 18th clause of the will.

Appellant must pay the respondents, Sakerbai and Jivabai, their costs of this appeal. Those of the Advocate-Genaral and the trustees under the will to be paid out of the estate as between attorney and client.

Attorneys for the appellant :—Messers. *Jefferson, Bhaishankar, Dinsha, and Kanga.*

Attorneys for the respondents :—Messrs. *Mansukhlal, Damodar and Jamsetji* and Messrs. *Little, Smith, Frere and Nicholson.*

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[14] FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Scott and Mr. Justice Nanabhai Haridas.

BHAU BALA (*Original Defendant*), *Appellant v.* BAPAJI BAPUJI (*Original Plaintiff*), *Respondent.** [7th February, 1889.]

Practice—Civil Procedure Code (Act XIV of 1882), *s. 562—Remand order—Power of the High Court to go into the merits on appeal from a remand order.*

The Court of first instance dismissed a suit as barred by limitation. In appeal, that decision was reversed, and the case was remanded under s. 562 of the Civil Procedure Code (Act XIV of 1882). Against the order of remand the defendant appealed to the High Court under cl. 28 of s. 588 of the Civil Procedure Code. It was contended by the plaintiff that the High Court had no power to decide the point of limitation, but could only consider whether the order of remand satisfied the requirements of s. 562 of the Civil Procedure Code.

Held by the Full Bench that in an appeal against such an order of remand the power of the High Court is not confined to the question whether that order satisfies the requirements of s. 562; but may also determine the correctness of the lower appellate Courts's decision on the preliminary point on which the Court of first instance disposed of the case.

Badam v. *Imrat* (1) approved of and followed.

[F., 15 Ind. Cas. 181=15 O.C. 33; Appr., 16 A. 252=14 A.W.N. 64; 20 M. 152 (155); R., 1 P.R. 1903 (F.B.)=1 P.L.R. 1903; D., 19 M. 422 (424).]

THIS was a reference to a Full Bench by the Division Bench consisting of Mr. Justice Birdwood and Mr. Justice Jardine.

The reference was as follows :—

"The decree of the Court of first instance, dismissing the present suit as barred by time, has been reversed by the lower appellate Court, which has remanded the suit, under s. 562 of the Code of Civil Procedure, as

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* Appeal No. 41 of 1888, reference in.

(1) 3 A. 675.

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amended by s. 49 (2) of Act VII of 1888, for determination on the merits. The defendant appeals to this Court under s. 588, cl. (28), against the order of remand.

"The question which we refer to a Full Bench is whether, on the hearing of the appeal, this Court has the power to confirm or reverse the decision of the lower appellate Court on the preliminary point of limitation.

"We are inclined to hold that the High Court has no such power, and that it is only open to us, on hearing the appeal, to consider whether the District Judge's order of remand satisfies the requirements of s. 562, as now amended.

"[15] Under that section, if the Court of first instance disposes of a suit upon a preliminary point, and its decree upon such point is reversed in appeal, the appellate Court may, if it thinks fit, by order remand the case for determination on the merits. This is the course which the lower appellate Court, in the exercise of its discretion, has adopted in the present case. Its order is strictly such an order as it is specially empowered to make under the section.

"If that order is upheld, and the case is decided on its merits, then, if the decree of the Court of first instance is again appealed from, and if the appellate Court finally makes a decree against the defendant, there will still lie a second appeal to this Court in which the District Judge's decision on the question of limitation could be questioned. So that the refusal of this Court now to deal with that question does not leave the defendant without ultimate redress.

"If we were now to deal with that question and were to reverse the District Judge's decision on it and restore the decree of the Court of first instance, we should be practically making a decree ourselves while merely dealing with an appeal from an order. That is, the defendant would obtain a decree after paying a Court-fee of Rs. 2 only, on his petition of appeal, instead of paying the full fee leviable on a first or second appeal from a decree. Such a result could not apparently have been the intention of the Legislature. In this view we are supported by the opinion of Mr. Justice Spankie, (who dissented, however, from the majority of the Full Bench) in *Badam* v. *Imrat* (1); but we hesitate to act on it, as we are aware that this Court has, in several cases, practically adopted a contrary view. Probably, in most of these cases, the particular question now referred was not argued. In a recent case, *Khushal Panachand* v. *Bhimabai* (2), this Court expressed its concurrence in the ruling of the Calcutta High Court in *Noimollah Pramanick* v. *Grish Narain Moonshee* (3), in which Mr. Justice Prinsep said: 'As we understand s. 588, cl. 28, we are competent merely to consider whether, on the findings of fact by the lower appellate Court, that Court was right in remanding the case undsr s. 562.' The judgment seems to imply that questions [16] of law could be dealt with in the appeal under s. 588, cl. (28); and it was so understood by the Court in *Khushal Panachand* v. *Bhimabai* (2). The decision in *Loki Mahto* v. *Aghoree Ajal Lall* (4) may also be referred to.

"We think it desirable that the future practice of this Court should be settled by an authoritative decision of a Full Bench."

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(1) 3 A. 675.
(2) 12 B. 589 (593).
(3) 8 C. 674 (675).
(4) 5 C. 144.

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Daji Ablji Khare, for appellant:—The High Court has the power to consider the case in all respects on an appeal from a remand order. It is not confined only to considering the correctness of the order as satisfying the requirements of s. 562. The course of decisions has established it as a practice that a case on remand can be gone into fully—*Badam* v. *Imrat*(1); *Loko Mahto* v. *Aghoree Ajail Lall* (2); *Khushal Panachand* v. *Bhimabai*(3).

Ghanasham Nilkanth Nadkarni, for respondent:—On an appeal from an order of remand all that the High Court can consider is whether the case remanded was properly remanded under s. 562 of the Civil Procedure Code. The appeal given under s. 588 is limited as to the propriety of the order. When the case comes in appeal, then and then only can the case be gone into. Another reason for confining the Court to the order of remand is that there would be no appeal to the Privy Council from an order that the High Court may pass on the remand order under appeal.

JUDGMENT.

The judgment of the Full Bench delivered by

SARGENT, C. J.—The question referred to us is whether on appeal from an order of remand by the lower appellate Court, under s. 562 of the Code of Civil Procedure, it is open to this Court to do more than consider whether the order satisfies the requirements of s. 562. It is admitted that this High Court has, in several cases, acted upon the view that it was open to the Court to consider the correctness of the decision of the lower Court on the preliminary point, but it may be that the present objection was not expressly taken. However, a Full Bench of the High Court of Allahabad (Mr. Justice Spankie *dissentiente*) held as far back as 1881 that on appeal the correctness of the [17] remand order in all legal respects was before the High Court for adjudication—*Badam* v. *Imrat* (1). In *Loki Mahto* v. *Aghoree Ajail Lall* (2) the same view of the powers of the Court was taken by the High Court of Calcutta, and in *Noimollah Pramanik* v. *Grish Narain Moonshee* (3) followed by this Court in *Khushal Panachand* v. *Bhimabai* (4) it was assumed that the Court could review the correctness of the decision on the preliminary point.

It would be sufficient, we think, to say that a practice so well and so long established by three of the High Courts in India ought not to be departed from. However, we see no reason to doubt the correctness of the practice. The Code itself imposes no restriction as to the grounds on which the appeal lies, as is done in s. 629 of the Code of Civil Procedure with respect to an appeal from an order for the admission of review of judgment, and in the absence of such restriction we agree with Mr. Justice Pearson, who delivered the judgment in the Allahabad Full Bench cases, that "it is reasonable to suppose that the main object of allowing an appeal from an order of remand was to admit of a determination by the superior appellate Court as to the correcteness of the lower appellate Court's adjudication on the preliminary point on which the Court of first instance disposed of the case before effect had been given to the order of remand" (5). We must, therefore, hold that the practice of the Court which has hitherto prevailed should be continued.

(1) 3 A. 675 (680).
(2) 5 C. 144.
(3) 12 B. 589.
(4) 8 C. 674.