

criminal prosecutions. Such prosecutions must be conducted according to the rules applicable to summary trials. The Magistrate is bound, therefore, before sentencing a defaulter to pay a rate, to satisfy himself as to the extent of his legal liability, and did not, in the present case, act without jurisdiction by enquiring into its merits. He has, however, reduced the rate without first finding on evidence, duly recorded, that the accused had no *khalkundi* and no tub on his premises. It was only on such a finding that he could legally hold that the case fell under class F, sub-s. 1, of the rules and not under the first part of class F. We reverse the Magistrate's order and direct him to re-hear the case.

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*Order reversed.*

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APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.*

PARVATISHANKAR DURGASHANKAR (*Original Plaintiff*), *Appellant v.*  
BAI NAVAL (*Original Defendant*), *Respondent*.\* [4th October, 1892.]

*Civil Procedure Code (Act XIV of 1882), s. 562—Remand—Practice—Procedure.*

The defendant in a suit on a mortgage applied, on the day fixed for the hearing, for an adjournment on the ground of illness. Her application was refused, and the Court heard the case *ex parte* and passed a decree for the plaintiff. The defendant appealed to the District Judge, who reversed the decree and remanded the case, on the ground that the defendant's application for an adjournment ought to have been granted. On appeal to the High Court.

[734] *Held*, discharging the order of remand, that the suit having been tried on the merits, the District Judge could not remand the case under s. 562, but ought to have proceeded under ss. 568 and 569.

[Diss., 30 M. 54=16 M.L.J. 479 (486)=1 M.L.T. 263; R., 1 Ind. Cas. 329=12 O.C. 25 (28).]

THIS was an appeal from a remand order passed by J. B. Alcock, District Judge of Surat.

Suit to recover Rs. 1,199 due upon a mortgage.

The defendant, Bai Naval, widow of Bhavanising Gumansing, applied for an adjournment on the ground that she was ill and had not been able to file her written statement. The Court granted a month's adjournment. On the appointed day the defendant applied for a further adjournment, pleading continued illness and want of assistance as an excuse. The Court rejected the application and proceeded to hear the case. A decree was passed for the plaintiff.

The defendant appealed, and the District Judge reversing the decree remanded the case for trial, on the ground that the defendant's application for adjournment ought to have been granted.

The plaintiff appealed.

*Nagindas Tulsidas Marphatia*, for the appellant:—The Judge was wrong in remanding the case. A remand can only be made under s. 562 of the Civil Procedure Code (XIV of 1882). The lower Court did not decide the case on a preliminary point. The case was heard, the mortgage was proved by evidence, and the plaintiff's claim on the mortgage

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was allowed. If there was any defect in the trial, the District Judge ought to have cured that defect himself.

*Kalabhai Lallubhai*, for the respondent:—The case was decided *ex parte*, and, therefore, it cannot be said to have been decided on the merits.

#### JUDGMENT.

SARGENT, C. J.—As the Subordinate Judge decided the suit on the merits, and not on a preliminary point, the District Judge could not remand the case under s. 552 of the Civil Procedure Code (XIV of 1882), but ought to have proceeded as directed by ss. 568 and 569. He must, therefore, discharge the order of the Court below, and send back the case for disposal by the lower appeal Court according to law. Costs to abide the result.

*Order discharged.*

17 B. 735.

#### [735] APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.*

ORIENTAL LOAN ASSOCIATION, LIMITED (*Plaintiffs*) v.  
GEORGE PELHAM HATCH AND ANOTHER (*Defendants*)\*.  
[6th October, 1892.]

*Civil Procedure Code (Act XIV of 1882), s. 617—Reference in execution of a decree—Final decree.*

A question arising in execution of a decree cannot be referred for the decision of the High Court under s. 617 of the Civil Procedure Code (Act XIV of 1882) except where the decree is final.

THIS was a reference made by W. B. Cracknell, Judge of the Consular Court at Zanzibar, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

In execution of a decree (No. 461 of 1891) dated the 17th November, 1890, passed by the High Court of Judicature at Bombay (Original Sides) against George Pelham Hatch and another, a moiety of the pay which Hatch received from the Navab of Zanzibar as the commander of the army and police at that time, was sought to be attached at Zanzibar at the instance of the plaintiffs. The defendant contended that the decree of the High Court was a decree of a foreign Court under s. 14 of the Civil Procedure Code (Act XIV of 1882), and that, therefore, it could not be executed, but that the plaintiffs' proper course was to bring a suit upon it at Zanzibar. The Judge of the Consular Court of Zanzibar was of opinion that the decree could be executed by his Court, but submitted the question for the decision of the High Court.

*Rivet-Carnac* (with *Chalk*), for the plaintiff:—By s. 8 of the Zanzibar Order in Council of 1884, † the provisions of the Civil Procedure Code (Act XIV of 1882), have been made applicable to Zanzibar, and by s. 21 of the Code the Court at Zanzibar is constituted a District Court of that place under the jurisdiction of the High Court at Bombay. That

\* Civil Reference No. 14 of 1892.

† See *Bombay Government Gazette* for 1885, Part I, p. 533.