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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.

Court was, therefore, bound to execute the decree passed by the High Court.

Manekshah J. Taleyarkhan, for the defendant:—Assuming that the Court at Zanzibar is a District Court, the Judge of that Court [736] was wrong in making this reference under s. 617 of the Civil Procedure Code (Act XIV of 1882). For a reference under that section lies only where the decree is final. But this decree, which was sent for execution to Zanzibar, was not a final decree. It was a decree of a division Court against which there might be an appeal. And an order made in execution of that decree would be a decree under s. 244 against which an appeal would lie. The question, therefore, ought not to have been referred.

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ORDER.

SARGENT, C. J.—The question referred by the Judge of the Consular Court is one arising in execution of a decree. But s. 617 of the Code of Civil Procedure (Act XIV of 1882) only allows of a reference for the decision of this Court in the execution of a decree when the decree was final—which was not the case here. The Judge of the Consular Court must, therefore, decide the question for himself and dispose of the application for execution. The party aggrieved by it will then have his appeal to this Court. Costs to be costs in the case.

Order accordingly.

17 B. 736.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting) and Mr. Justice Candy.

DATTATRAYA RAYAJI PAI (*Original Plaintiff*), *Appellant v. SHRIDHAR NARAYAN PAI (Original Defendant), Respondent.** [7th October, 1892.]

Landlord and tenant—Tenant expending money on land with landlord's knowledge and consent—Standing by—Estoppel—Right of tenant on eviction to be recouped the money so expended—Buildings erected on land held under lease—Removal of such buildings.

The defendant entered into occupation of certain land with the permission of the plaintiff, who was the owner, and erected buildings and otherwise expended money upon it. The plaintiff and the defendant were relations and lived near each other. The plaintiff constantly visited the land and knew what the defendant was doing, but made no objection. Subsequently the plaintiff, being anxious to obtain from the defendant an acknowledgment of his (the plaintiff's) title, induced (but without misrepresentation or fraud) the defendant to sign a rent-note. The Court found that although this rent-note was, in terms, a lease for one year, yet the intention of the [737] parties was not that the defendant should at the expiration of the year, or on any subsequent demand, hand over to the plaintiff the land with the buildings which had been erected by the defendant with the plaintiff's implied consent, without being recouped for the expenditure thus incurred; that subsequently to the execution of the rent-note the defendant had erected other buildings, and that the plaintiff knew of this, and made no objection.

Held, that the plaintiff could not recover possession of the land, or require the removal of the buildings, without recouping the defendant the money he had expended. The plaintiff was estopped from denying the claim of defendant. He had stood by in silence while his tenant had spent money on his land.

[R., 20 B. 1 (6); 20 B. 298 (300); 22 B. 1; 27 M. 211. (222)=14 M.L.J. 25; 7 Ind. Cas. 202 (203)=8 M.L.T. 258; 18 Ind. Cas. 799=63 P. R. 1913=113 P.L.R. 1913=112 P.W.R. 1913; D., 27 C. 570 (586); 1 Bom. L. R. 191 (199).]

* Second Appeal No. 398 of 1891.