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PRIVY COUNCIL.

SHIVABASAVA (PLAINTIFF) *v.* SANGAPPA (DEFENDANT).

P. C.*
1904,
July 6, 7, 29.

[On appeal from the High Court of Judicature at Bombay.]

Second appeal—Grounds of appeal—Reversal by High Court on second appeal of lower Appellate Court's decision—"Substantial error or defect of procedure"—Civil Procedure Code (Act XIV of 1882), sections 584, 585—Suit to set aside adoption—Question whether adoption was real and binding.

In a suit in which the plaintiff prayed that it might be declared that the defendant was not her properly and legally adopted son, that the ceremony of adoption did not take place, and that if it did it was ineffectual and invalid owing to misrepresentation, coercion and fraud, the first Court found that there was a real adoption binding on the plaintiff. The lower Appellate Court found that though an adoption had taken place it was not, and was not intended to be, a real adoption, but was a sham transaction entered into by collusion for the purpose of deceiving the Government, a case which was not set up by the parties, nor warranted by the evidence.

Held (affirming the decision of the High Court), that such a disposal of the suit was a "substantial error or defect of procedure" within the meaning of section 584 of the Civil Procedure Code (Act XIV of 1882), and that the High Court therefore had jurisdiction to set aside the finding on second appeal.

Anangamanjari Chowdhrani v. *Tripura Soondari Chowdhrani*(1); and *Durga Chowdhrani* v. *Jewahir Singh Chowdhri*(2), referred to.

APPEAL from an interlocutory judgment (December 2nd, 1896) of the High Court at Bombay which set aside a judgment (August 21st, 1896) of the Assistant Judge of Bijápur, and from a final

* *Present:*—LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

(1) (1887) L. R. 14 I. A. 101 (110): I. L. R. 14 Cal. 740 (747).

(2) (1890) L. R. 17 I. A. 122 (127): I. L. R. 18 Cal. 23 (30).

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judgment (August 11th, 1897) of the same High Court dismissing the appellant's suit.

The suit was brought by Shivabasava, the widow of one Amingavda, who died while a minor in 1876. He left no issue and the plaintiff was the sole heir to his estate, which included Desgat and Patilki Vatan lands and other property, of which, after her husband's death, she was in possession, but, being a *parda* lady and unacquainted with business, she left the whole management of her property to her Mukhtyar Hanmant Kudagli. The Desgat Vatan was subject to the Gorden settlement (which provides that Vatans shall be continued without objection so long as there is any male heir in existence), and in February, 1885, the Government of India issued a Resolution directing that all Vatans subject to the settlement should be entered in the names of the nearest male heirs. Accordingly in April, 1885, the Mámlatdár of the táluq in which the plaintiff's Desgat Vatan was situate issued an order directing the plaintiff to attend and state who was the male heir to her Desgat Vatan.

In her plaint the plaintiff stated that she thereupon consulted her Mukhtyar and her relative Ramappa, the father of the defendant Sangappa, who represented to her that by reason of the above order she was in danger of losing the Desgat Vatan, and that the only way to protect herself from such loss was to go through the form of adopting a son; that they further represented to her that the son so adopted would be entitled on her death to the Desgat Vatan, but that she would continue in the full enjoyment of such property during her life and would retain full power to dispose of the remainder of her property both during her life and at her death; that being ignorant of her legal position and in fear of losing her property, and having no separate or independent advice, but having full confidence in the representations and advice given to her by Hanmant and Ramappa, she on 15th June, 1885, went through a form or ceremony by which she purported to take the defendant Sangappa as her son, and subsequently signed a memorandum dated 15th June, 1885, and a further document dated 24th June, 1885, stating that she had adopted him as her son; that after the ceremony the defendant went to live with Ramappa, and was at no time

received or treated by her as her son, or as the son of her late husband, nor did he perform any of the religious rites which an adopted son ought to perform; that in 1889 Ramappa on behalf of the defendant claimed to oust the plaintiff from the whole of her property and that thereupon for the first time she took proper advice as to her rights, in consequence of which she found out, as she alleged, that there was no real or valid adoption by her of the defendant. She stated that the ceremony which took place on 15th June, 1885, was not a legal or proper ceremony of adoption according to the law of her (the Lingáyat) caste, the ceremony consisting only of a gift of the defendant by Ramappa to the plaintiff as her son (and not as the son of her late husband), and not being accompanied by any sufficient religious rite, and that there was no religious motive for the alleged adoption; that it was never intended or understood by the parties that the ceremony should constitute a real adoption, and that she went through the ceremony without understanding its effect. The plaintiff further alleged that the representations of Hanmant and Ramappa which induced her to go through the ceremony were untrue; that she found that she had been in no danger of losing her Desgat Vatan or other property; and that if no adoption had been made she would have continued in full enjoyment of her property, whilst the effect of the adoption (if valid) was to deprive her of the power of dealing with or disposing of it.

The prayer of the plaint was for a declaration (*a*) that the defendant Sangappa was not the properly and legally adopted son of the plaintiff; (*b*) that the ceremony of adoption did not take place; and if the defendant should contend that it did take place, it might be declared that it was ineffectual and invalid owing to the misrepresentations and fraud stated in the plaint.

Ramappa was appointed guardian *ad litem* of the defendant, and put in a written statement which supported the adoption as being valid, and denied fraud or misrepresentation.

The issues are set out in their Lordships' judgment.

The suit was heard by the Subordinate Judge of Bágalkot, who, on 22nd June, 1892, held that the adoption was real and valid so far as the Desgat Vatan was concerned, but that the

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plaintiff was entitled to a declaration that as regarded the Patilki Vatan and the other property not being Desgat Vatan, the adoption would take effect only after the plaintiff's death.

Both parties appealed to the District Court of Bijápur.

The Assistant Judge of Bijápur formulated three issues which are set out in their Lordships' judgment. On the first issue he found that there was not a real adoption. On the second issue he recorded no finding. On the third issue he found that the plaintiff was entitled to a declaration that the adoption was not real and was invalid. The material portions of his judgment were as follows:—

"The case as presented in this Court differed from that set up in the lower Court, in that the allegations of fraud and wilful misrepresentation were withdrawn. Plaintiff's Counsel admitted that a formal and regular adoption did in fact take place, and did not endeavour to prove that plaintiff's assent thereto was obtained by deliberate fraud. He argued that the adoption was a mere sham: that plaintiff's assent was obtained under a misapprehension as to the effect of certain Government orders—a misapprehension probably shared by the defendant's father and advisers, and that plaintiff, a young *gosha* widow, was not aware of the full consequences of her act. On these grounds, and on these grounds alone, he asserted that the adoption was null and void. Defendant's Counsel, on the other hand, addressed himself to the task of demonstrating the general *bonâ fides* of the whole transaction. In concluding these preliminary remarks, I need only add that the case now put forward on behalf of the plaintiff, although receiving less attention in the lower Court than the allegations of undue influence and fraud, is fully covered by the assertions in the plaint. Plaintiff pleads that but for the misrepresentations (not necessarily wilful) made to her, and but for her ignorance of the effect which an adoption would have on her position and rights, she would not have consented to the measure.

"*Issue 1.*—It is necessary first to arrive at a clear understanding of the meaning of this issue. It is admitted that a formal and regular ceremony of adoption took place, that a deed was duly executed and registered, and that effect was given in the records of Government to some of its legal consequences. The question may be expanded thus: Was all this transaction a *bonâ fide* reception by the plaintiff of defendant as her son, or was it a mere sham, in which both parties colluded in order to avert certain dreaded contingencies? * * * * I find it clearly proved therefore that the act of adoption was a transaction into which the parties entered with the sole object of averting the threatened transfer of the *Desgat Vatan* from the plaintiff's hands, and that this was understood between them at the time: that the ceremony performed and the papers executed by the parties did not constitute a *bonâ fide* reception by the plaintiff of defendant as her son, and that there was therefore no real adoption.

"Having arrived at the same conclusion on the facts as that held by the Subordinate Judge, it is necessary that I should justify my action in interfering with his findings and order. He has found that the deed of unconditional adoption was obtained by fraud, but that the adoption is valid *qua* the *Desgat Vatan*, evidently meaning that the omission of the condition that it referred solely to this *Vatan* was fraudulent. Or perhaps I may define his meaning better as a conclusion that plaintiff intended to make a conditional adoption, and that defendant's father fraudulently caused her to execute an unconditional deed. In the first place, I do not think this warranted by the evidence. Looking at the probabilities of the case, I consider it more than likely that plaintiff was as loth to make any mention of the condition as was defendant's father. The deed had to go through the hands of Government officers, and she apprehended that any disclosure of its real purpose would defeat its object. Of course, there was nothing really fraudulent in the transaction, that is to say, she was fully entitled to adopt a son subject to the condition that she should enjoy the property during her life-time: but it can be well understood that she dreaded the aspect in which it might present itself to Government. There were the collateral heirs to be considered, too. In point of fact, two of them did subsequently sue the plaintiff, but they were met by the production of the adoption-deed now repudiated, and, I believe, defeated. I am informed, too, that the law on the subject of conditional adoptions is in a somewhat indeterminate shape at present: and plaintiff, if she had legal advice, may not have cared to run the risk of dispossession by relying on a document of dubious legal value. All the probabilities therefore point to the fact that plaintiff knowingly executed the deed in its present form. Whatever fraud attached to the transaction did not appear on the surface, but, if existent, existed only in the natural father's mind.

"Nextly, the Subordinate Judge seems to have fallen into some confusion of ideas. He is evidently of opinion that the transaction was solely designed to defeat Government, and that it was understood between the parties that the adoption was to be purely nominal, and yet he treats it as if it were real and *bonâ fide*, and accords it full legal effect on the death of the plaintiff. He has failed to distinguish, I think, between the meaning of the adjectives *real* and *formal*. Because the ceremonies were duly performed, and the deed properly registered, he thinks that the adoption must have legal effect: that because it was formal, it was necessarily real. But it is evident that the first necessary and essential ingredient of a valid adoption is that the parties should be in whole-hearted and honest agreement, the one to confer, and the other to assume, the full status of son in the adopting family. In the present case I find it impossible to affirm that the plaintiff ever contemplated the reception of the defendant as her son. He obviously could not be her son *qua* one portion of her property, and not her son *qua* the rest: and I must therefore hold that the Subordinate Judge erred in according the adoption any legal value at all."

The decree of the Subordinate Judge was therefore reversed; and the defendant preferred a second appeal to the High Court.

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That Court (*Farran, C. J.*, and *Hosking, J.*), after reading the remarks of the Assistant Judge upon the meaning of his first issue, observed:

"Upon the first issue as thus expanded and explained the Assistant Judge found that the adoption was not a real adoption, or, in other words, that Ramappa and plaintiff in collusion went through the ceremony of giving and receiving the defendant in adoption, not intending that he should cease to be the son of the former or become the son of the latter, in order to deceive Government into the belief that the defendant was the adopted son of the plaintiff.

"In second appeal it was argued before us for the appellant that the issue thus expanded and explained was not an issue which the parties ever presented to the Court; that the Court has in fact made a new case for the plaintiff which she did not make for herself; and that there is no evidence on the record to support its finding. The respondent contended that the case thus made was not a new one, and that there was evidence upon the record to support the finding upon it, and that this Court has, therefore, no jurisdiction to interfere with the finding of the lower Appellate Court on a question of fact.

"While we are of opinion that the respondent is correct in contending that this Court, sitting in second appeal, is not entitled to consider whether upon the evidence before it the lower Appellate Court was correct or not upon a question of fact, we do not entertain doubt that this Court would be acting within its jurisdiction in holding (if the fact were so) that the lower Appellate Court had made a new case for the parties not warranted by the pleadings and evidence and in reversing its decree upon that ground; or that this Court would be within its powers in reversing the decree of an Appellate Court, if without any evidence to support its finding it reversed the decree of the Court of first instance. The former would, we think, be an error of procedure on the part of the lower Appellate Court, which, in *Durga Chowdhrani* v. *Jewahir Singh Chowdhri*(1), their Lordships of the Privy Council carefully distinguished from an erroneous finding of fact. The latter is, we think, an error either of procedure or of law. Their Lordships have dealt with it in each aspect. In *Hemanta Kumari Debi* v. *Brojendra Kishore Roy Chowdri*(2) Sir R. Couch, in delivering the judgment of the Privy Council, says: 'When the judgments come to be looked at, it appears that he' (the District Judge) 'has reversed the decree of the first Court in the absence of any evidence—certainly in the absence of any evidence upon which he might reasonably come to the conclusion that the deed of compromise was not for the benefit of the adopted son. This appears to be a case in which, under the provision of the law that there is a second appeal where there has been a substantial error or defect in the procedure of the lower Court, the High Court was right in

(1) (1890) L. R. 17 I. A. 122: I. L. R. 18 Cal. 23.
(2) (1890) L. R. 17 I. A. 65 (69): I. R. L. 17 Cal. 875 (882).

reversing the decree of the District Judge and leaving, as it did, the decree of the first Court . . . to stand.' In *Anangamanjari Chowdhrani* v. *Tripura Soondari Chowdhrani*[1] the proposition is expressed thus: 'But it was in the opinion of their Lordships, within their jurisdiction to dismiss the case if they were satisfied that there was, as an English lawyer would express it, no evidence to go to the jury, because that would not raise a question of fact such as arises upon the issue itself, but a question of law for the consideration of the Judge.' We are, however, fully sensible that as observed in *Pertab Chunder Ghose* v. *Mohendra Purkait*[2] 'the limitations to the power of the Court by sections 584 and 585, in a second appeal, ought to be attended to, and the appellant ought not to be allowed to question the finding of the first Appellate Court upon a matter of fact.'

"Such being the law as we apprehend it, we proceed to consider the objections raised by the appellant to the decrees of the Courts below. And first we turn to see what is the case made by the plaint. It is, as the prayer shows, an alternative one. (1) It alleges that there was no adoption by the plaintiff of the defendant in fact; (2) that she was a minor and could not adopt; (3) that, if her informing the Government officials that she had adopted a son, and pretending that she had done so and executing a deed of adoption and giving notice of it to the Sarkar amounted to an adoption, she did these acts under misrepresentation and coercion on the part of Ramappa with whom her karkun Hanmant was in league, and the adoption was brought about by misrepresentation and fraud. It would however, we think, be too narrow a construction of such a plaint to hold that it did not seek to set aside an actual adoption on the ground of fraud, though no actual adoption is admitted in the plaint. The prayer of the plaint, therefore, we think, fairly represents the substance of the plaintiff's case and summarizes the relief to which the plaintiff considered that she was entitled and the grounds upon which she claimed that she was entitled to it * * * * .

"This was the case made for the plaintiff: that no adoption took place; that under advice the plaintiff untruthfully said that she had adopted the defendant and signed documents alleging the same fact; and that she acted so under fraudulent advice given her by Ramappa and Hanmant. The exact significance of the form of the third issue is thus explained. The Subordinate Judge was therefore correct, we think, in the manner in which he dealt with it.

"This being the case which the defendant had to meet, it appears to us that he met it when he proved that the adoption actually took place. He had not to meet the case that he and the plaintiff in collusion went through an idle ceremony which meant nothing, a state of facts which no one alleged. He had of course to disprove the allegations of fraud made against him.

"We think, therefore, that the Assistant Judge has decided the appeal before him upon a case not made by the parties and that his judgment on that

(1) (1887) L. R. 14 I. A. 101 (110): I. L. R. 14 Cal. 740 (747).
(2) (1889) L. R. 16 I. A. 233 (239): I. L. R. 17 Cal. 291 (298).

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ground cannot stand. Furthermore, we are of opinion that in the absence of oral assertion as to the adoption being a sham in the sense attributed to that expression by the Assistant Judge, there is no evidence upon the record to support his finding. The circumstances on which he relies to prove it are all equally consistent with a finding in the opposite sense. It is not suggested in argument that there are any other circumstances which support his finding. Indeed it is practically conceded that there are not.

"It is now admitted that the adoption was carried out with all requisite forms and ceremonies, and it is common ground that the immediate cause of the plaintiff taking a boy in adoption was the apprehension on her part that, if she did not adopt, the Desgat Vatan might lapse to Government."

The High Court set aside the finding of the Assistant Judge and restored that of the Subordinate Judge on the question whether the adoption of the defendant was a real adoption, and remitted the case to the District Court for trial of the issue whether the adoption was binding on the plaintiff.

On the remand another Judge of the District Court found that the adoption was binding on the plaintiff in every respect; and on receipt of such finding the High Court (*Farran, C. J.*, and *Candy, J.*) on 11th August, 1897, dismissed the suit with costs.

On this appeal *G. Cave, K. C.*, and *A. F. C. Luxmoore* for the appellant contended (*a*) that there was evidence to support the decision of the District Court, and that, therefore, the High Court had no jurisdiction on second appeal to set it aside on a question of fact. Reference was made to sections 584 and 585 of the Civil Procedure Code (Act XIV of 1882): *Anangamanjari Chowdhrani* v. *Tripura Soondari Chowdhrani*[1] and *Durga Chowdhrani* v. *Jewahir Singh Chowdhri*; (*b*) that no real and binding adoption took place or (in the alternative) that it was a conditional adoption and therefore invalid. The alleged ceremony of adoption was not sufficient to make a binding adoption under the circumstances; from the mere execution of deeds a valid adoption was not to be inferred; some proof of the giving and taking of the child was necessary: *Shoshinath Ghose* v. *Krishnasundari Dasi*[3] was cited. Also, the adoption was made without any religious motives; when so made an adoption is void: *Collector of Madura*

(1) (1887) L. R. 14 I. A. 101: I. L. R. 14 Calc. 740.
(2) (1890) L. R. 17 I. A. 122: I. L. R. 18 Calc. 23.
(3) (1880) L. R. 7 I. A. 250: I. L. R. 6 Calc. 381.

v. *Mutu Ramalinga Sathupathy*(1); *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*(2); *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(3); *Ramchandra Bhagavan* v. *Mulji Nanabhai*(4); and *Mahableshvar Fondba* v. *Durgabai* (5) were referred to. There was no intention on the appellant's part to make a legal adoption, nor any understanding by her of the nature and effect of the ceremony performed; she was a woman acting without independent legal advice, was induced to make the adoption by misrepresentations, and was incapable of resisting the pressure put on her to make it. Reference was made to *Bayabai* v. *Bala Venkatesh Ramakant*(6); and to cases where marriages had been declared void when there was a want of understanding as to the effect of the ceremony: *Scott* v. *Sebright*(7) and *Ford* v. *Stier*(8). As to the adoption being void as being a conditional adoption, *Chitko Raghunath Rajadiksh* v. *Janaki*(9) and *Bhasba Rabidat Singh* v. *Indar Kunwar*(10) were referred to.

Cohen, K. C., and *C. W. Arathoon* for the respondents contended that the High Court had rightly reversed the decision of the District Court. That Court had decided the case on points not raised in the pleadings or issues, and on which no evidence had been given. Such a disposal of the suit was a ground for setting aside the decision on second appeal under section 584 of the Civil Procedure Code (Act XIV of 1882). Reference was made to the judgment of the High Court and to the cases there cited on this point. From the evidence it appeared that the appellant was of full age, and that she well understood what she was doing; and it was submitted that, under the circumstances, there was a real and binding adoption, as had been held by the Courts below after remand. The motives for the adoption

(1) (1868) 12 Moore's I. A. 397 (442): 1 B. L. R. P. C. 1 (17).
(2) (1876) L. R. 3 I. A. 154 (192): I. L. R. 1 Mad. 69 (82).
(3) (1876) L. R. 4 I. A. 1 (14): I. L. R. 1 Mad. 174 (191).
(4) (1896) I. L. R. 22 Bom. 558.
(5) (1896) I. L. R. 22 Bom. 199.
(6) (1866) 7 Bom. H. C. Appx. I (XXI, XXII).
(7) (1886) L. R. 12 P. D. 21.
(8) (1896) P. D. 1.
(9) (1874) 11 Bom. H. C. R. 199.
(10) (1888) L. R. 16 I. A. 53: I. L. R. 16 Calc. 556.

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could not be gone into; the presumption in such a case was that the motive was a proper one.

Cave, K. C., replied.

The judgment of their Lordships was, on the 29th July, 1904, delivered by—

SIR ARTHUR WILSON:—This is an appeal from two decisions, one interlocutory and the other final, of the High Court of Bombay. The suit disposed of by those judgments was originally brought in the Court of the Subordinate Judge of Bágalkot, and was one of a very peculiar character, being brought by a widow against her adopted son, adopted by herself, for the purpose of negativing, or getting rid of the effects of, her adoption.

The story told in the plaint was that no adoption of any kind had in fact taken place, but that the plaintiff was induced by the fraud and duress of the defendant's natural father, and of her own Wat-Mukhtyar, to pretend to Government that she had adopted the defendant, and to execute what she called "a hollow deed of adoption," which acknowledged the adoption to have been made nine days before the date of the deed. She prayed for a declaration that the defendant is not her properly and legally adopted son, for a declaration that the ceremony of adoption did not take place, and if the defendant should contend that the ceremony of adoption did take place, for a declaration that it is ineffectual and invalid by reason of fraud. The written statement affirmed the adoption, and traversed the allegations of fraud. The issues raised so far as now material were: (2) Does she (plaintiff) prove that the deed of adoption and other documents in support of it were obtained from her by fraud or other unlawful means? (3) Does she prove that the alleged adoption is false? and (4) Is the adoption invalid on any ground?

The Subordinate Judge held that the ceremony of adoption had taken place with all necessary formalities. He arrived at certain other findings now superseded, and in the result he decreed that the adoption was proved, that at present the adoption was limited in its effect to the Vatan property, and that as to all other property it would take effect after plaintiff's death.

From that decree both parties appealed to the Court of the Assistant Judge of Bijápur. The learned Judge in that Court stated the issues, as formulated before him, thus: (1) Was there a real adoption? (2) If so, is it binding on the plaintiff? (3) To what relief, if any, is plaintiff entitled? He stated that the fact of the adoption was no longer disputed and the charges of fraud were abandoned. He found the first of the above three issues in the negative. On the second he did not formally find. On the third he found that the plaintiff was entitled to a declaration that the adoption was not real and is invalid. He decided the case in favour of the plaintiff, resting his conclusion upon reasoning which is not altogether easy to follow, holding that, though the adoption was made in fact, and the charges of fraud were unfounded, the adoption ceremony was a mere farce, and of no binding effect. His decree cancelled the adoption.

The defendant took the case on second appeal to the High Court of Bombay. Such second appeal can lie only (sections 584 and 585 of the Civil Procedure Code) on the ground of (*a*) the decision being contrary to some specified law or usage having the force of law; (*b*) the decision having failed to determine some material issue of law or usage having the force of law; (*c*) a substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits.

The learned Judges of the High Court held that under this section, if the lower Appellate Court had made a new case for the parties not warranted by the pleadings and evidence, they had jurisdiction to interfere and to reverse its decree upon that ground, and they considered that this error or defect in procedure had occurred in the present case. They held further that they had jurisdiction to reverse the decision of the lower Appellate Court if its decision were without evidence to support its finding, and they considered that this was so.

In accordance with these views the High Court set aside the finding of the Assistant Judge that the adoption was not real, and restored that of the First Court, and remanded the case to the lower Appellate Court to find upon the issue whether the adoption was binding upon the plaintiff. On this remand the lower

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Appellate Court found the issue in the affirmative, and when that finding was returned to the High Court that Court by its final decree dismissed the suit.

Against these decisions of the High Court the present appeal has been brought. The substantial contention urged before their Lordships has been that the High Court had no jurisdiction under section 584 to interfere with the finding of the lower Appellate Court. Their Lordships agree with the learned Judges of the High Court. They think the lower Appellate Court did dispose of the suit upon a case not raised by the parties, and to which the evidence had not been directed, and that this was a substantial error or defect of procedure within the meaning of section 584. They also agree with the High Court in thinking that there was no evidence before the lower Appellate Court upon which that Court could properly arrive at the conclusion of fact at which it did arrive. In *Anangamanjari Chowdhrani* v. *Tripura Soondari Chowdhrani*[1] the rule was laid down in the following terms: "It was, in the opinion of their Lordships, within their jurisdiction" (that is to say, within the jurisdiction of the Judges of Second Appeal) "to dismiss the case, if they were satisfied that there was, as an English lawyer would express it, no evidence to go to the jury, because that would not raise a question of fact such as arises upon the issue itself, but a question of law for the consideration of the Judge." The same rule was laid down in *Durga Chowdhrani* v. *Jewahir Singh Chowdhri*[2], where the rule is treated from the negative point of view: "Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding."

Some minor objections to the final decision of the High Court were raised in argument. As to these it is sufficient to say that they are all points covered by the findings of the Courts in India or which might and ought to have been raised in those Courts.

(1) (1887) L. R. 14 I. A. 101 (110): I. L. R. 14 Calc. 740 (747).
(2) (1890) L. R. 17 I. A. 122 (127): I. L. R. 18 Calc. 23 (30).

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Holman, Birdwood & Co.*

Solicitors for the respondent:—Messrs. *T. L. Wilson & Co.*

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

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SATYABHAMABAI KOM PANDURANG SAKHARAM AND ANOTHER (ORIGINAL DEFENDANTS 7 AND 8), APPELLANTS, *v.* GANESH BALKRISHNA AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 1—6 AND 9—13), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sections 373 and 582—Partition suit—Decree based on an agreement—Appeal by plaintiff—Application for withdrawal of suit—Decree dismissing appeal—Appeal.

A decree for partition was passed in the original Court based in part on an agreement to which the plaintiff and some of the defendants were parties. The plaintiff appealed and subsequently purported to withdraw from the suit. The Judge in appeal passed a decree dismissing the appeal, but determining that the effect of the withdrawal was to set aside the decree passed by the first Court.

Some of the defendants preferred a second appeal.

Held, that when in a partition suit defendants have by concession of the plaintiff acquired rights which otherwise could not have existed, it is not open to the plaintiff, who has made that concession, afterwards to annul its effect by withdrawing from the suit in the Appellate Court.

A question having arisen as to whether or not the decree of the lower Appellate Court was appealable under sections 373 and 582 of the Civil Procedure Code (Act XIV of 1882),

Held, that sections 373 and 582 of the Civil Procedure Code do not support the conclusion that rights actually vested by the decree of the first Court can afterwards be annulled by the plaintiff withdrawing of his own free will and without permission of the Court. The result of the adjudication was that there was a formal expression of an adjudication by the lower Appellate Court upon a right claimed by the defendants (appellants in second appeal) and thus there

* Second appeal No. 429 of 1903.