APPELLATE CIVIL.

Before Stephen and Mullick, JJ.

1913

June 9.

NABIN CHANDRA TRIPATI
v.
PRANKRISHNA DE.*

Remand—Civil Procedure Code (Act V of 1908) ss. 99, 107 (1) (b), O. XLI, r. 23—Appellate Court, power of—Whether power wider than under former Code (Act XIV of 1882) ss. 562, 564—Statute composed of Sections and Rules—Canon of interpretation.

An Appellate Court has no wider powers of remand under s. 107 of the Civil Procedure Code of 1908, read with O. XLI, r. 23, than it had under ss. 562 and 564 of the Civil Procedure Code of 1882.

Zohra Bibi v. *Zobeda Khatun* (1) dissented from.

When an act is divided into sections and rules the proper canon of interpretation is that the sections lay down general principles and the rules provide the means by which they are to be applied, and they cannot be otherwise applied.

An order of remand improperly made is an irregularity within the meaning of s. 99 of the Civil Procedure Code, 1908.

Mohesh Chandra Dass v. *Jamiruddin Mollah* (2) followed.

SECOND APPEAL by the plaintiff, Nabin Chandra Tripati.

In this suit, which was one for partition, a preliminary decree was made ordering partition to be effected with as little disturbance to the parties in possession as possible. The commissioner of partition proceeded to effect the partition and a decree in terms of his allotment was made by the Munsif.

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* Appeal from Appellate Order, No. 32 of 1912, against the order of Rajani K. Chatterjee, Subordinate Judge of Chittagong, dated Oct. 30, 1911, reversing the order of Rash Behari Burman, Munsif of Patiya, dated Aug. 29, 1910.

(1) (1910) 12 C.L.J. 368. (2) (1901) I. L. R. 28 Calc. 324.

Certain of the defendants appealed to the Subordinate Judge complaining that their possession had been disturbed without compensation.

The Subordinate Judge allowed the appeal with costs and ordered the case to be remanded with certain directions for effecting the partition. Against this order the plaintiff appealed.

Babu Kshitish Chandra Sen, for the appellant. The learned Subordinate Judge had no power to remand the case: *Rani Dassi* v. *Asutosh Roy Chowdhuri*(1).

[STEPHEN, J. That was a case under the old Code.]

I submit that there has been no change in the law. It is true that section 564 of the old Code has not been repeated in terms in the present Code but this is because the present Code consists of sections whose application is limited by rules.

Under section 107 of the present Code an Appellate Court can only remand a case "subject to such limitations as may be prescribed."

"Prescribed" means prescribed by rules, *see* Civil Procedure Code 1908, section 2 (16). Therefore any order of remand that is not covered by Order XLI, rule 23, must be bad.

This is not a preliminary point within the meaning of the rule. Section 99 of the Code is inapplicable as this order is not a decree.

Babu Dhirendra Lal Kastgir, for the respondents. An Appellate Court has an inherent power of remand: *Zohra Bibi* v. *Zobeda Khatun*(2). The power of remand is wider under the present than under the former Code: *Gora Chand Haldar* v. *Basanta Kumar Haldar*(3). If the Legislature had not intended to confer wider power of remand on Appellate Courts,

(1) (1910) 15 C. L. J. 310. (2) (1910) 12 C. L. J. 368.
(3) (1912) 15 C. L. J. 258.

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section 564 of the former Code would have been re-enacted.

In any event the case is covered by section 99 of the present Code, and the Court should, therefore, not interfere with the order of the learned Subordinate Judge: *Mohesh Chandra Dass* v. *Jamiruddin Mollah*(1), *Trailokya Mohini Dasi* v. *Kali Prosanna Ghose*(2).

Cur. adv. vult.

STEPHEN AND MULLICK, JJ. This is a partition suit in which the preliminary decree ordered partition with as little disturbance on allotment to the then possession as possible. The Commissioner proceeded to allot the land disturbing the possession of defendants 6 and 7, who were holding land less in amount than what they were entitled to, and without compensating them in land or otherwise for what he deprived them of, and the Munsif adopted this partition. On appeal the Subordinate Judge in allowing the appeal found that the direction contained in the preliminary decree had not been complied with, pointed out how the partition should have been effected, and remanded the suit directing a partition on the lines he indicated. On appeal to us against this order, it is argued that the Subordinate Judge had no power to order this remand, since it is not on a preliminary point under Order XLI, rule 23, and is not a reference of issues to the lower Court for trial under Order XLI, rule 25. The respondent, however, contends that the Court had an inherent power to remand the suit, because such a power exists wherever, in the words of this Court in *Zohra Bibi* v. *Zobeda Khatun* (3), the Court whose decision is appealed against "has

(1) (1901) I. L. R. 28 Calc. 324. (2) (1907) 11 C. W. N. 380.
(3) (1910) 12 C. L. J. 368.

committed any error, omission or irregularity by reason of which there has not been a proper trial or an effectual or complete adjudication of the suit, and the party who complains of such error, omission or irregularity has been thereby materially prejudiced." This is a proposition with which we are unable to agree. We see no reason apart from legislation for saying that a Court of appeal has a power of remand: and the substitution of the new for the old Code of Civil Procedure does not seem to us to support the conclusion which this Court drew from it in the case referred to. Order XLI, rules 23 and 25 of the new Code take the place of sections 562, 566 of the old one. Section 564 of the old Code enacted that "the Appellate Court shall not remand a case for a second decision except as provided in section 562" and this enactment is not repeated in the new Code. From this, this Court drew the conclusion that an Appellate Court has the inherent power that we have referred to. This argument seems to us to be inconsistent with the method of construction properly applicable to an Act divided into sections and rules as the present Code is. This method we apprehend to be that the sections lay down general principles, and the rules provide the means by which they can be applied, and they cannot be otherwise applied. The result is that the rules restrict the provisions contained in the sections. Applying this construction to the present case, we find that section 107 (1) (*b*) confers on any Appellate Court a power "to remand a case," and then proceeds to limit this power by Order XLI, rule 23. Where the old Code gave a restricted power and then proceeded to enact that the Court had no other power for a similar purpose, this Code confers a general power in the widest possible terms and then restricts its application by an enactment of the former limitations. The

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methods of describing the powers of the Court differ, but the result is the same. Section 564 of the old Code was not re-enacted, but that is because the canon of construction that we have mentioned was recognised, and the enactment became unnecessary. The result follows that an enactment that the Court "shall have power to remand" takes the place of one that a Court "shall not remand" without the law being altered, which may be curious, but is not otherwise worthy of notice. If the canon of construction that we suggest is not correct, we are at a loss to understand why it was that the Court in *Zohra Bibi* v. *Zobeda Khatun*(1) did not seek for a power of remand in section 107 rather than invoke the inherent powers of the Court. If our canon is correct, the inherent powers attributed to the Court seem to be taken away, if they ever existed, by a direct legislative enactment. We therefore cannot agree with the decision we have mentioned, though we may perhaps point out that we are dealing only with the question of the power of a Court to remand in an appeal from an original decree, and not with an appeal from an appellate decree which falls under Order XLII.

Under these circumstances, we should feel ourselves bound to refer the decision we have mentioned to a Full Bench, were it not that, on the authority of *Mohesh Chandra Dass* v. *Jamiruddin Mollah*(2), it is open to us to treat what we consider to have been the mistake made by the Subordinate Judge as an irregularity under section 99 of the Code, and that under the circumstances of this case the merits of the case have not at all been affected by the order before us. We, therefore, dismiss the appeal ; but we make no order as to costs.

H. R. P. *Appeal dismissed.*

(1) (1910) 12 C.L.J. 368.

(2) (1910) I.L.R. 38 Calc. 324