APPELLATE CIVIL.

Before Holmwood and Imam JJ.

1916

Jan. 25.

UZIR ALI SARDAR

v.

SAVAI BEHARA.*

Remand—Remand after addition of parties by Appellate Court—Amendment of plaint—Whether whole case remanded in consequence—Civil Procedure Code (Act V of 1908) s. 107, O. XLI, rr. 23, 25.

There are other possible cases of remand which are not included in O. XLI.

Nabin Chandra Tripati v. *Prankrishna De* (1) distinguished.

In the Code of Civil Procedure, 1908, the Legislature has given the power of amendment to the Court of Appeal and, as a necessary outcome, it has the power of remanding the whole case when an amendment of plaint is granted and when parties are added.

The general provision in s. 107 for a remand is not governed or limited by O. XLI alone, but is subject to such conditions and limitations as may be prescribed in the rules and orders, the amendment of a plaint and addition of parties in a Court of appeal being among them.

SECOND appeal by Miah Uzir Ali Sardar, the plaintiff.

The plaintiff brought this suit in the Court of the Subordinate Judge of Jessore to eject the defendants from 19 plots of land measuring 39 bighas and 14 cottas situated in mauza Solemanpur, alleging that he had come into exclusive possession by partition. The land had been granted to the predecessors-in-

* Appeal from Appellate Order No. 358 of 1912 against the order of G. S. Dutt, Additional District Judge of Jessore, dated April 15, 1912, reversing the order of Tarak Nath Dutt, Subordinate Judge of Jessore, dated May 31, 1911.

(1) (1913) I. L. R. 41 Calc. 108.

1916

UZIR ALI SARDAR v. SAVAI BEHARA.

interest of the defendants as service-tenure for bearing *palkies*, but they had refused to perform the service when called upon by the plaintiff. The defendants admitted that the land had been originally granted as service-tenure, but contended that the proprietors subsequently resumed the service-tenure and re-settled the land with their predecessors-in-interest as *jamai* land giving them a transferable right, and they accordingly sold their *jamai* tenancy to one Mr. McLeod and then took settlement from him as his under-raiyat. The learned Subordinate Judge decreed the suit holding that the fact of resumption had not been proved by the defendants. On appeal, the Additional District Judge of Jessore reversed that decree and remanded the whole case for production of certain documents after adding necessary parties including Mr. McLeod.

Babu Mahendra Nath Roy (with him *Babu Amarendra Nath Bose*), for the appellant. I submit that O. XIII, r. 1 of the Code of Civil Procedure for the production of papers is imperative. It is not a transferable holding and it has come to an end. The Privy Council decisions are in my favour. The Court had jurisdiction to add certain parties for the proper adjudication of the question in issue, but he directs us to make them parties.

[IMAM J. He says in one place—let Gobardhone be made a party.]

Whatever affects the merits of the case prejudices me. Reads O. XLI, rr. 23 and 25. This is not a decision on a preliminary point, and the remand of the whole case is bad in law, *Nabin Chandra Tripati* v. *Prankrishna De* (1).

[HOLMWOOD J. I have lately differed from that

(1) (1913) I. L. R 41 Calc. 108.

1916

UZIR ALI SARDAR v. SAVAI BEHARA.

decision. A remand after amendment of plaint in appeal under section 107 of the new Code of Civil Procedure entails *de novo* trial by the first Court, for the newly-added defendants can claim the right to file a written statement and adduce evidence.]

This irregular remand order does affect the merits of the case.

Mr. H. D. Bose, *Babu Siva Prasanna Bhattacharji* and *Babu Tarakeswar Pal Chowdhury*, for the respondent, were not called upon.

HOLMWOOD AND IMAM JJ. This is an appeal from an order remanding a case on appeal. The plaint was filed so long ago as the 13th May, 1910. The judgment of the Subordinate Judge in the Court of first instance is dated the 31st May, 1911 and the judgment now under appeal before us is dated the 15th April, 1912. We are now at the end of January, 1916. It is in our opinion very lamentable that this matter should be still undecided, more especially as, for the reasons which we are about to give, there does not appear to have been any substance in the appeal.

It is contended, first, that inasmuch as the Court of first instance did not decide the case upon a preliminary point the order of remand ought to have been made under Order XLI, rule 25, and that the Appellate Court should have kept the case on its own file. In this connection it is conceded that the irregularity cannot be given effect to, unless the appellant was prejudiced by the procedure adopted; and in order to establish that he was so prejudiced, it is pointed out that two orders, which are alleged to be erroneous in law, were passed incidentally by the lower Appellate Court. The first was that three documents were admitted which had been rejected by the first Court as out of time, and the second was that the Judge has

1916

UZIR ALI SARDAR v. SAVAI BEHARA.

directed the plaintiff to add three persons as defendants before proceeding with the case.

Now, curiously enough neither of these points has any substance in it. It is clearly found by the learned Judge in the Court of Appeal below that the documents were not out of time, and his finding of fact entirely disposes of the question and shows that the Subordinate Judge very improperly rejected these papers on one excuse on the 25th April, 1911, and on another and wholly different excuse on the 26th April, when a second attempt was made to file them. We need not go into details which are fully set out in the judgment of the lower Appellate Court.

As regards the second point, we do not think that a somewhat confused sentence in the penultimate paragraph of the judgment was intended to mean that the burden of adding these defendants should be thrown upon the plaintiff. In another passage in the judgment the Judge clearly directed that they should be added and the case should proceed. We are clearly of opinion that Mr. McLeod was a necessary party. It is contended before us that the alleged landlord set up by the persons whom the plaintiff seeks to éject need not be made a party to the suit, and certain judgments of the Judicial Committee are relied upon in which it is held that it is not necessary for the plaintiff in a suit for ejectment to make any one a party who is not in possession, merely because the defendant sets him up as his landlord. But these cases can easily be distinguished from the present case where it is found as a fact that there was a transfer of the tenancy right from the defendants to Mr. McLeod and as a fact that Mr. McLeod was rightly or wrongly admitted to the defendants' possession as tenants and that the defendants are holding under him as subtenants by paying him rent. Under the circumstances

1916

UZIR ALI SARDAR v. SAVAI BEHARA.

it is clearly not only necessary but to the interest of the plaintiff to get rid of Mr. McLeod.

As regards the other two persons Gobardhan and Indu, whom the defendants put forward as their co-sharers, the adding of co-sharers as parties when a retrial is necessary is a matter of discretion with the Court, and it is certainly to the interests of the plaintiff as well as to the interest of every one else that there should be some finality in this litigation and that all the co-sharers should be added.

This brings us to a reconsideration of the very first objection that the remand was incompetent in the form in which it is made. With all respect for the decision of the learned Judges in the case of *Nabin Chandra Tripati* v. *Prankrishna De* (1), it may be pointed out that that decision differs from several previous cases by which we are bound, and as the learned Judges declined to refer the question to a Full Bench, because they were of opinion that it did not directly arise, the case being disposed of on another ground, it is not therefore an authority for the very general proposition that there is no other possible case of remand which is not included in Order XLI. Now, this very matter of amendment of a plaint in an Appellate Court with necessary addition of parties is on the face of it a case which cannot possibly fall under Order XLI, rule 23 or rule 25. It is not a decision on a preliminary point, therefore it may be said that the whole case cannot be remanded; but it is not a case in which certain issues can be framed and certain additional evidence can be taken under rule 25, for new parties having been added and the plaint having been amended, the added defendants as well as the original defendants have a right to file fresh written statements and to have the whole case

(1) (1913) I. L. R. 41 Calc. 108.

1916

Uzir Ali Sardar
v.
Savai Behara.

re-opened. It seems to have been overlooked that in the new Code of Civil Procedure the Legislature has given this power of amendment to the Court of Appeal; and it is a necessary outcome of that power that the Court must have the power of remanding the whole case when an amendment of plaint is granted in appeal and when parties are added. There is a general provision in section 107 of the Code of Civil Procedure for a remand. The consideration which we have just pointed out must lead to the conclusion that that section is not governed or limited by Order XLI alone, but it is subject to such conditions and limitations as may be prescribed in the rules and orders; and the amendment of a plaint and addition of parties in a Court of Appeal is one of the conditions prescribed in the rules and orders. Section 107, therefore, is just as much subject to that condition as it is to the conditions laid down in Order XLI.

We therefore hold, *first*, that this remand was not improperly made; *secondly*, that if it had been irregularly made, it did not prejudice anybody; *thirdly*, that the District Judge would have been grossly wanting in his duty had he not admitted those three documents; and *lastly* that Mr. McLeod is a necessary party and that the Judge exercised a wise discretion in adding the alleged co-sharers Gobardhan and Indu. The result is that appeal is dismissed with costs.

G. S. *Appeal dismissed.*