

APPELLATE CIVIL.

Before Jenkins C. J., and N. R. Chatterjea J.

1915
 May 26.

MANI MOHAN MANDAL

v.

RAMTARAN MANDAL.*

Remand—Remand on a preliminary point—Powers of lower Appellate Court to reverse and remand—Civil Procedure Code (Act V of 1908) s. 107, sub-s. (1) cl. (b), sub-s. (2); O. XLI, r. 23.

As the body of the Code creates jurisdiction (while the rules indicate the mode in which it is to be exercised), it is expressed in more general terms, but has to be read in conjunction with the more particular provisions of the rules.

S. 107 sub-s. (1) cl. (b) of the Code is subject to the conditions and limitations prescribed by the rules : and in the case of a lower Appellate Court, the power of reversal and remand is limited to the position described in rule 23, Order XLI.

SECOND APPEAL by Mani Mohan Mandal and Upendra Nath Mandal and Shamdhon Mandal, heirs and legal representatives of Adwaita Mandal (deceased), and Rai Mohan Biswas, the defendants Nos. 5 and 6.

The facts connected with this case appear from the judgment passed in appeal by A. Mellor Esq., Additional District Judge of Alipore, dated 12th February 1913. The full text of the judgment is as follows :—

“ This was a suit for recovery of possession of 33 bighas odd of land which was leased to plaintiff (Ramtaran Mandal) in the year 1900 by the Court of Wards, then managing the Estate of Barada Proshad Roy Chowdhury who is defendant No. 8 in the suit. Plaintiff alleged that the land was in Taluk No. 333 which belongs to their landlord and that he had been

* Appeal from Appellate Decree, No. 1424 of 1913, against the decree of A. Mellor, Additional District Judge of 24-Parganas, dated Feb. 12, 1913, reversing the decree of Haripada Mazumdar, Munsif of Alipur, dated Feb. 22, 1912.

dispossessed by defendants Nos. 5 and 6. The case of the principal defendant No. 8 is that the land is not in Taluk No. 333, but is in other taluks and has been leased to him by other landlords.

The learned Munsif dismissed the suit, finding that the boundaries given in the plaint include over 200 bighas of land and the land in suit has not been properly identified.

He considered that the plaintiff should have had a local enquiry made to ascertain whether the disputed land actually fell in Taluk No. 333 or not. The plaintiff has appealed and his contentions will appear from the remarks which I shall make. He says that he is a poor man and could not afford the expense of a Commission for local investigation as his landlord gave him no help in fighting the case. He thought that his evidence was sufficient to prove his case and still maintains this position.

The case is one of some hardship. There can be no doubt that the appellant got settlement of 33 bighas of land and paid rent for it. He has filed receipts granted by the Court of Wards, about which there can be no suspicion. Exhibit B proves that the Court of Wards bought up 151 bighas of land in execution of a decree against tenants. Of this area appellant took settlement of 33 bighas comprising the holdings of Paran Mandal (30 bighas) and Hatem Molla (3 bighas) odd. The landlord is admittedly in possession of 11 bighas odd, the holding of Kinu Molla, and leased out the remaining 106 bighas 4 cottas to the contesting defendant Adwaita. The latter has executed a *kabuliat* in respect of the 106 bighas acknowledging Barada Babu, as his landlord and mentioning the lease of the appellant. He admits the purchase of 151 bighas by Barada Babu. The 45 bighas situated in Taluk No. 333 comprise the 33 bighas leased to appellant and the 11 bighas occupied by the landlord himself. There can, therefore, be no doubt of appellant's title to 33 bighas and his possession is proved by his *dakhilas* and by *kabuliats* executed by persons to whom he sublet parts of the holding.

It is, therefore, inequitable that he should be deprived of this land by a trespasser, because he did not consider it necessary to have a local investigation held or because he could not afford to do so. He asks this Court to allow him to remedy the defect even now and in the interests of justice, I think he should be allowed.

The decree of the lower Court is, therefore, *set aside and the case is remanded*. The Munsif will issue a commission for local investigation to determine the situation of the land and decide the exact situation of the 45 bighas of land which lie in Taluk No. 333 and which include the 3 bighas in dispute. After considering the report and taking such further evidence as he may consider necessary, he will proceed to determine the suit. Costs to abide the final result."

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The contesting defendants Nos. 5 and 6 being dissatisfied with this decision of the Additional Judge reversing that of the learned Munsif of Alipore dated 22nd February 1912 and remanding the case, preferred this second appeal to the Hon'ble High Court.

Babu Bipin Bihari Ghose (junior), for the appellants. The lower Appellate Court considered it a hard case because the plaintiff could not afford to have a local investigation to discover whether his lands fell within taluk number 333, and has directed the issue of a commission, though plaintiff maintained that his evidence was sufficient to dispose of the suit. I submit that is taking new evidence, and the case ought not to have been remanded for a local investigation: *vide* Order XLI, rule 27 of the Code of Civil Procedure.

[N. R. CHATTERJEA J. But see Order XLI, rule 28.]

Suppose the plaintiff did not choose to adduce evidence, can he now ask for additional evidence to be taken after appeal? Here the lower Appellate Court has acted under Order XLI, rule 23 and I complain that he cannot do so as the Court of first instance did not dispose of the case on a preliminary point but on the merits after discussing the whole of the evidence that the parties without any restriction placed before it. The lower Appellate Court is also not entitled to take additional evidence under Order XLI, rule 27, but that matter is not now before this Court. If the Appellate Court does take additional evidence, I have the right to appeal.

The only question that has to be considered at present is whether a lower Appellate Court has the power under Order XLI, rule 23 of reversing and remanding.

[JENKINS C.J. The Judge can hear the appeal on the merits and then he can exercise all the powers given to an Appellate Court.]

Yes, he can.

Babu Shib Chandra Palit, for the respondent. I submit the Court has very wide powers now under Order XLI, rule 33 which is a new provision.

Rule 23 of Order XLI is not exhaustive, as clause (b) of sub-section (1) of section 107 of the Code says in general terms that an Appellate Court shall have power to remand a case. Under the circumstances this case should go back.

JENKINS C. J. This is an appeal from a decision by the lower Appellate Court. For that decision there can be no justification unless it can be brought within the terms of rule 23 of Order XLI. But that clearly cannot be done for the Court of first instance did not dispose of the case on a preliminary point but on the merits after discussing the whole of the evidence that the parties, without any restriction, placed before it.

It has been suggested before us that rule 23 is not exhaustive, and for that purpose we have been referred to section 107, sub-section (1), clause (b) of the Code where, no doubt, it is said in general terms that an Appellate Court shall have power to remand a case. But this argument overlooks the opening words of the section which provide that subject to such conditions and limitations as may be prescribed a Court shall have that power. If we turn to the definition clause we find that "prescribed" means prescribed by rules, and "rules" means rules and forms contained in the first schedule or made under section 122 or section 125. These rules provide that in the case of a lower Appellate Court the power of reversal and

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remand is limited to the position described in rule 23, Order XLI. And this is the general rule except under special conditions which have no application in the circumstances of this case.

I may here point out what is obvious on a perusal of the Code as a whole that the Code, consists (i) of that which is termed "the body of the Code" and (ii) of the rules.

The body of the Code is fundamental and is unalterable except by the Legislature; the rules are concerned with details and machinery and can be more readily altered. Thus it will be found that the body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. It follows that the body of the Code is expressed in more general terms, but it has to be read in conjunction with the more particular provisions of the rules.

In this case it appears to us that the learned Judge clearly had no authority to reverse and remand. We must, therefore, set aside his decision and direct that the case be restored to his file and that he should proceed with the hearing of the appeal according to law. When it comes before him it will be open to him to exercise all the powers that are vested in a Court of Appeal and in particular those mentioned in sub-section (2) of section 107 of the Code. What powers he should exercise in the particular circumstances of this case, it would not be right for us to indicate. But all we now do is to direct a re-hearing of the case by the lower Appellate Court.

Costs will abide the result.

N. R. CHATTERJEA J. concurred.

G. S.

Appeal allowed: case remanded.