APPELLATE CIVIL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

1922, April 18.

MALAYATH VEETIL RAMAN NAYAR AND OTHERS (DEFENDANTS) APPELLANTS,

v.

KRISHNAN NAMBUDRIPAD (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), ss. 105 and 107, O. XLI, r. 23, and O. XLIII, r. 1 (u)—Preliminary point—Construction of grant—Evidence disallowed—Remand by lower appellate Court for taking evidence and disposal—Appeal against order of remand, whether competent.

A preliminary point under Order XLI, rule 23 of the Civil Procedure Code, is any point the decision of which avoids the necessity for the full hearing of the suit.

Such points comprise not only points like limitation, jurisdiction and res judicata, but also points such as, that evidence tendered was not admissible, or that there was no case for the defendant to answer, or that there was no proof of publication in a libel suit. In all these cases the points are preliminary to the final disposal of the suit.

Where, therefore, a District Munsif held that the true construction of a service grant was clear, and that evidence of the consideration for the grant and of whether services were in fact rendered or not, was irrelevant; but on appeal the lower Appellate Court held that such evidence was relevant, and remanded the case to the original Court for disposal according to law.

Held, that the lower Appellate Court was competent to pass the order of remand under section 107 and Order XLI, rule 23, Civil Procedure Code, and that there was a right of appeal against that order under Order XLIII, rule 1 (*u*) of the Code.

APPEAL against the order of M. NARASINGA RAO, Subordinate Judge at Palghat, in Appeal No. 99 of 1919, preferred

* Appeal against Order No. 351 of 1920.

against the judgment of K. R. KRISHNASWAMI AYYANGAR, District Munsif of Palghat, in Original Suit No. 199 of 1916.

The plaintiff instituted this suit to redeem a kanom alleged to have been executed by his predecessor in title in favour of the defendants' tarwad and to recover possession on payment of the kanom amount due to the defendants on a kanom deed and marupat dated 16th March 1890. The defendants pleaded that they had an Adimayavana Avakasam right on the said lands that such right was a perpetual and irredeemable one, and that the plaintiff was not entitled to recover possession on redemption. The plaintiff contended that the lands were in any event held on service tenure, that services were not rendered by the defendants, and that he was consequently entitled to resume the lands on account of forfeiture for non-performance by the defendants of the services. The District Munsif held that, on the true construction of the kanom deed and kychit and recitals therein, the defendants had an Adimayavana Avakasam right; and, as there was no allegation in the plaint as to forfeiture by defendants for non-performance of services, and as the document was clear and unambiguous, that the plaintiff was not entitled to let in evidence as to the consideration for the grant and forfeiture by non-performance of services. He accordingly decreed only payment by the defendants of a certain amount for arrears of rent due to the plaintiff, and dismissed the rest of the claim relating to recovery of possession of the lands on redemption. On appeal by the plaintiff, the Subordinate Judge held that the principal question was whether the Adimayavana grant should be held to be attached to the land itself, or to a portion of the profits of the land, whether it was granted for past or future services, or for both, or as a mark of favour, whether such services

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were ever performed and were discontinued by the defendants, and that evidence on these points was admissible to explain them as the documents were silent as to them. He accordingly reversed the decree of the District Munsif and remanded the suit for disposal in accordance with law in the light of the observations in his judgment. Against this order of remand, the defendants preferred a Civil Miscellaneous Appeal to the High Court under section 105 (2) and Order XLIII, rule I, clause (*u*) of the Civil Procedure Code. On this appeal coming on for hearing before OLDFIELD and VENKATASUBBA RAO, JJ., a preliminary objection was taken by the respondent, that no appeal lay under Order XLIII, rul 1 (*u*), as the appeal in the lower Appellate Court was not remanded by that Court on a preliminary point under Order XLI, rule 23, Civil Procedure Code and that it could not be appealed against under Order XLIII, Civil Procedure Code. The learned Judges referred the question to a Full Bench.

ORDER OF REFERENCE TO A FULL BENCH.

There is preliminary objection in this case to the hearing of the appeal that no appeal lies against the order before us. That order is one of remand. But it cannot be contended that it was passed in consequence of any error on the part of the trial Court on a preliminary point. It is accordingly urged by Mr. Anantakrishna Ayyar for the respondent that it must be taken to have been passed not under Order XLI, rule 23 of the Code of Civil Procedure, but in the exercise of the inherent power of the Court recognized in section 151, and that it therefore cannot be displaced in appeal or in proceedings in revision. We add that we have considered whether it would be our duty in any case to treat the appeal as a revision petition and use our revisional powers on the appellants' behalf.

The first question that arises then is whether the lower Court's order setting aside the District Munsif's decree and remanding the case for re-trial in the light of its own observations is an exercise of any power recognized by section 151. Mr. Anantakrishna Ayyar, in support of his contention that it is so, has relied mainly on a series of decisions in this Court beginning with *Anthappa Chetty* v. *Ramanathan Chetty*(1). It is unnecessary for us to refer to later decisions in the same sense in detail, since they add nothing to the considerations then relied on and since in fact all the decisions of this Court are based ultimately on *Ghuznavi* v. *The Allahabad Bank, Limited*(2).

To deal with the arguments which have been placed before us on the provisions of the Code, we find a general provision relating to the Court's powers in appeal in section 107. Under that section, the Appellate Court shall have power to determine the case finally, to remand the case, to frame issues and refer them for trial and to take additional evidence. Those powers are stated to be exercised subject to such conditions and limitations as may be prescribed. That can only be taken as referring to the conditions and limitations, which were prescribed by rules under the Code or might be so prescribed in future. The only rule relating to remands is Order XLI, rule 23, restricting them to cases in which the suit has been disposed of upon a preliminary point. Those are the provisions of the Code and the rules dealing directly with orders of remand, and they do not, in our opinion, authorize the order of remand in such a case as the present, where no preliminary point arose. In *Ghuznavi* v. *The Allahabad Bank, Limited*(2), already referred to, the restriction in section 107 to conditions

(1) (1919) 37 M.L.J., 536. (2) (1917) I.L.R., 44 Calc., 929 (F.B.).

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and limitations on the powers conferred does not appear to have attracted attention. There, however, as here, stress was laid on the fact that in the present Code there is nothing corresponding to section 564 of the Code of 1882 and section 352 of Act VIII of 1859, the inference suggested being that the present rule relating to remand was not intended to be exhaustive. With all respect we find some difficulty in following that argument. For we doubt whether the mere omission of a restrictive provision can enlarge the scope of any provision, which in itself is clearly worded. It may be added that the existence of an inherent power can usually be established most easily by reference to precedents for its recognition and to instances in which it has been exercised; but such instances must necessarily be inconclusive, if they have occurred in defiance of a distinct provision of law, unless indeed that cannot be attributed to mere mistake and their justification with reference to the alleged inherent power is explicitly stated. Such instances, if they are to be conclusive, must be looked for before the enactment of any such distinct provision; that is, before the Code of 1859. It is needless to say that no instance of the exercise of this alleged inherent power prior to that year has been adduced.

The course of authority in this Court has been that in *Seshan Pattar* v. *Seshan Pattar*(1), an order in many respects resembling that now before us was set aside as not justified by the Court's powers. In *Ramachandra Joshi* v. *Hazi Kassim*(2), however, a contrary opinion prevailed, as it has done recently in *Kuppalan* v. *Kunjuvalli*(3). The objection to the last mentioned decision is that no reference was made in it to *Seshan Pattar* v.

(1) (1900) I.L.R., 23 Mad., 447. (2) (1893) I.L.R., 16 Mad., 207.
(3) (1911) 9 M.L.T., 373.

Seshan Pattar(1), and to the former that the effect of section 564 at its date was not considered. *Jambulayya* v. *Rajamma*(2), is another decision relied on in *Anthappa Chetty* v. *Ramanathan Chetty*(3), as supporting the statement that rightly or wrongly the lower Courts have been instructed by this Court that they have an inherent power to remand, and it is no doubt justified by some expressions in it. These expressions, however, include no reference to *Seshan Pattar* v. *Seshan Pattar*(1), and the case was plainly one of error on a preliminary point of procedure, the learned Judges holding that the decision before them was based on no evidence and that there had been no regular hearing. In these circumstances it is not clear that there is any course of authority in this Presidency, which entails adherence to the principles laid down in *Anthappa Chetty* v. *Ramanathan Chetty*(3), or *Ghuznavi* v. *The Allahabad Bank, Limited*(4).

As regards general considerations, we are not satisfied with the general recognition of an inherent power such as is alleged.

On the second question raised by Mr. Ananthakrishna Ayyar, whether this Court can revise an exercise by a lower Court of its inherent powers, there is again some conflict of authority. *In Sheik Muhammad Maracayar* v. *Rangasawmi Naidu*(5), it was held that there is such power of revision. On the other hand the last sentence of the judgment in *Vijayaraghava Reddi* v. *Komarappa Reddi*(6), implies that there is one; and effect has been given to that view by the learned Judges in *Pakran* v. *Chathukutti Nayar*(7), *Ramasawmi Naidu* v. *Murugan Moopan*(8). The issue on this point is shortly,

(1) (1900) I.L.R., 23 Mad., 447. (2) (1913) I.L.R., 36 Mad., 492.
(3) (1919) 37 M.L.J., 536. (4) (1917) I.L.R., 44 Calc., 929 (F.B.).
(5) (1922) 16 L.W., 515. (6) (1912) 22 M.L.J., 409.
(7) C.R.P.N. 229 of 1921 (unreported).
(8) C.R.P.N. 492 of 1921 (unreported).

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as stated in *Sheik Muhammad Maracayar* v. *Rangasawmi Naidu* (1), whether an order of remand in such a case should be treated as improper, in the sense that the Appellate Court should in the exercise of its discretion have taken the course indicated in Order XLI, rule 27 or illegal in the sense that it had no jurisdiction to pass it; and the basis of the decisions on the one side appears to be that no order at all passed in the exercise of the inherent jurisdiction is liable to revision, on the other that such orders are liable to revision in cases, in which it cannot be shown that the ends of justice might not have been secured with equal ease by some other method of disposal authorized by the Code. It does not seem necessary for our present purpose to offer any discussion of the different considerations on either side.

On the questions thus raised there is a conflict of authority, and they also are in our opinion of general importance. We therefore refer them for the opinion of a Full Bench in the following terms:

(1) Is the order under appeal one which the lower Appellate Court was competent to pass in the exercise of its inherent powers under section 151, Civil Procedure Code, or otherwise?

(2) If the order was passed in the exercise of the lower Appellate Court's inherent powers, can this Court interfere with it in revision?

C. S. Swaminathan for appellant.

C. V. Anantakrishna Ayyar for respondent.

OPINION.

SCHWABE, C.J.

SCHWABE, C.J.—The District Munsif held in this suit that the true construction of a service grant was clear and that evidence of the consideration for that

(1) (1922) 16 L.W., 515.

grant and of whether services were in fact rendered or not was irrelevant. On appeal, the Subordinate Judge took a different view of the construction of the grant and held that such evidence was relevant. He accordingly remanded the case with that direction to be determined according to law. On appeal to the High Court from that order of remand a preliminary objection is taken that no appeal lies, and it was also contended that the Subordinate Judge had no power to remand the case. The High Court has referred those matters for determination to a Full Bench. The questions are of general interest as they raise points of procedure which have frequently arisen and have resulted in a conflict of judicial decision.

The right of appeal is by section 104 of the Civil Procedure Code, 1908, expressly limited to cases enunciated in that section or expressly provided for by the rules.

The rule giving a right of appeal is Order XLIII which includes as appealable an order under Order XLI, rule 23, remanding a case.

The power to remand is given by section 107 which gives power to all Appellate Courts to remand a case subject to such conditions and limitations as may be prescribed. That no doubt means prescribed by rules. The only rule dealing with remand is Order XLI, rule 23, which is in the following terms :

"Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case."

It has been held in several cases, and most recently by a majority of a Full Bench in Calcutta *Ghuznavi* v. *The Allahabad Bank, Limited*(1), that this rule is a limitation

(1) (1917) I.L.R., 44 Calc., 929 (F.B.).

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on the exercise of the powers of remand under section 107; I venture to doubt if this is correct, but in the view I take of this case, it is not necessary for the decision, nor do I think it was necessary for the proper decision of any of those cases. Feeling, apparently, that in a case like the present which it was supposed was not covered by rule 23, that there ought to be a power to remand, the Full Bench in the Calcutta case referred to above, and Judges in various cases here and elsewhere have held that there is an inherent power in the Court under section 151 to remand, and in other cases it has been held that there is power under section 99. Further as no appeal is provided for from orders made under the inherent power of the Court, resort has been had to the powers of the High Court in revision.

In my view, section 99 has no application, and if I agreed that rule 23 limited the power to remand to cases within its terms, I should not readily accede to the proposition that where the Code expressly limits the power of a Court, there can co-exist an inherent power in that Court to disregard that limitation.

The remanding of cases or, as it is there called, the granting of a new trial, is of every day occurrence in England in any case where, by reason of the Appellate Court reversing the decision of the trial Court, there remain matters still to be decided in the suit, and it would be remarkable if the Code and rules here did not give similar powers, for the absence of such powers would involve the result that in such cases it would be necessary for the Appellate Court to retain the suit before it and remit issues to be determined by the trial Court and so take away from the trial Court its proper function of giving judgment in the first instance. Further if there was no appeal, the whole of the time and money spent on the proceedings on remission would be wasted, if it

ultimately turned out that the trial Court had been right in the first instance. But in my judgment none of these results follow because on the true construction of rule 23 all Appellate Courts have power to remand in almost every case where such a power is required.

The question turns on the meaning of the words "preliminary point" in that rule. In my judgment the only meaning that can be properly given to these words in this context is any point the decision of which avoids the necessity for the full hearing of the suit. There are many instances of such points such as, that a suit is barred by limitation ; that the Court has no jurisdiction, e.g., under the Estates Land Act ; that evidence tendered was not admissible ; that on the plaintiff's evidence there is no case for the defendant to answer ; in a libel suit, that there is no proof of publication. In all these cases, if the decision is held to be wrong, the case remains to be decided on what is sometimes referred to as the merits of the case. The points are preliminary to the final disposal of the case. In my judgment the first two of the appeals reported in *Anthappa Chetty* v. *Ramanathan Chetty*(1) were wrongly decided, for the points were preliminary points. In one it was held that a settlement with an agent bound his principal, and so the rights as between the two principals, if this decision was wrong, were left undecided ; in the other, evidence was improperly excluded, and so the case was disposed of without being fully heard.

In *Kuppelan* v. *Kunjuvalli*(2), an action on a will, it was held that the will was a forgery and therefore the questions in the case assuming the will to be genuine were not decided. In *Jambulayya* v. *Rajamma*(3) the trial Judge held a receipt was a settlement of a suit out

(1) (1919) 37 M.L.J., 536.

(2) (1911) 1 M.W.N., 199. (3) (1913) I.L.R., 36 Mad., 492.

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of Court, and therefore did not hear the suit on its merits at all. These are all, in my judgment, instances of decisions on preliminary points and in none of those cases was it necessary to resort to the inherent powers of the Court.

The words "preliminary point" occur in section 562 of the Civil Procedure Code of 1882 which corresponded to the present Order 41, rule 23, and are interpreted in the same manner as I interpreted them above by MAHMOOD, J., in *Ram Narain* v. *Bhawanidin*(1), at page 32, where he lays down that the words are not confined to such legal points only as may be pleaded in bar of suit, but comprehend all such points as may have prevented the Court from disposing of the case on the merits, whether such points are pure questions of law or pure questions of fact; and he gives as an instance a mortgage suit in which it is held that the plaintiff is not a son and heir of the mortgagor and therefore the suit is dismissed without entering into the merits of the various pleas relating to the mortgage. The same view is expressed in *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan*(2), at page 322 by EDGE, C.J., and on page 343 by MAHMOOD, J. The same view is expressed in different words in *Ramachandra Joishi* v. *Hazi Kassim*(3), by MUTTUSWAMI AYYAR and BEST, JJ., and also by SESHAGIRI AYYAR and ODGERS, JJ., in *Anthappa Chetty* v. *Ramanathan Chetty*(4), though, as I have stated in my view, they misunderstood or misapplied the principle enunciated.

It was in my judgment wrongly admitted before the referring Bench that the point was not a preliminary one. My answer to the first question is that the lower Appellate Court was competent to pass the order under

(1) (1887) I.L.R., 9 All., 29 (footnote). (2) (1888) I.L.R., 10 All., 289.
(3) (1893) I.L.R., 16 Mad., 207. (4) (1919) 37 M.L.J., 536.

section 107 and Order XLI, rule 23. There is a right of appeal from that order under Order XLIII and therefore the second question does not arise.

OLDFIELD, J.

OLDFIELD, J.—The first of the questions referred was framed, as the order of reference shows, to obtain a decision as to the existence and extent of the alleged inherent power of the Appellate Courts to remand, and in particular as to the correctness of the unrestricted recognition of that power in *Ghuznavi* v. *The Allahabad Bank, Limited*(1), and *Anthappa Chetty* v. *Ramanathan Chetty*(2).

With all respect, I am not prepared to assume that Appellate Courts in India have inherently, or in virtue of section 107, Civil Procedure Code, any such general power to order a new trial as is conferred in Order XXXIX under the English Judicature Act. For, here, there is never any question of the parties' right to the finding of a jury on issues of fact, which can be obtained only in the Court of first instance; and there is reason, when the litigant has once reached the Appellate Court and the stage of a general consideration of the evidence, against authorizing that Court to abandon control over the case and leave it to take its chance of an early trial in competition with others of later institution. It is, however, unnecessary to pursue this assumption further, or to consider whether it is reconcilable with the provisions of section 107 and Order XLI under the Code, because I agree that rule 23 of that Order covers the case before us, if the word "preliminary" in it receives its proper interpretation.

It was alleged, and not disputed, before the referring Judges that the point, on which the case had been decided by the Court of first instance, was a preliminary one. But it was then, it is not disputed, supposed that a

(1) (1917) I.L.R., 44 Calc., 929 (F.B.). (2) (1913) 37 M.L.J., 536.

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preliminary point must be one independent of the merits. That supposition might have been consistent in some degree with the reference to remand in section 562 in the Code of 1882, as for the purpose of "investigating" and in the amended Code of 1888 as for the purpose of "determining" the suit on its merits; and there was also the omission from the section in the latter of the description contained in the former of the disposal on a preliminary point, as "excluding any evidence of fact which appears to the Appellate Court essential to the determination of the rights of the parties." But, whatever the implication of this wording, there is nothing corresponding to it in the present Code or the order under it; and there is therefore no reason for treating only those points as "preliminary", which, like pleas of res judicata or jurisdiction, are strictly independent of the merits. The decisions in *Ram Narain* v. *Bhawanidin*(1), and *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan*(2), were given on the Code of 1882 and before the omission above mentioned. But I respectfully follow my Lord in adopting at least the portion of them referred to by him, as a correct statement of the law as it now stands, and concur in the opinion he proposes.

COUTTS TROTTER, J.

COUTTS TROTTER, J.—I agree with my Lord that this is a preliminary point, which I take to mean a point which, when decided in the way in which it is in fact decided, determines the result of the suit, and discharges the Court from the duty of trying all or some of the other issues in the case. If this conclusion be correct, it renders it unnecessary to go into the wider questions raised in the argument. I concur in the answers propounded.

K.R.

(1) (1887) I.L.R., 9 All., 29 (foot note). (2) (1888) I.L.R., 10 All., 289.