APPELLATE CIVIL.

1885
June 24.

Before Sir W. Comer Petheram, Kt. Chief Justice, and Mr. Justice Tyrrell.

JAGRAM DAS (PLAINTIFF) *v.* NARAIN LAL (DEFENDANT)*

Civil Procedure Code, Chapter XV, ss. 191, 198—Hearing of suit—Power of Judge to deal with evidence taken down by his predecessor.

A Subordinate Judge, having taken all the evidence in a suit before him, and having completed the hearing of the suit except for the arguments of counsel on both sides, was removed, and the case came on for hearing before his successor. The new Subordinate Judge took up the case from the point at which it had been left by his predecessor, and proceeded to judgment and decree.

Held that the only power given by the Civil Procedure Code in such cases is to allow the evidence taken at the first trial to be used as evidence at the second trial, and not to allow the two hearings to be linked together and virtually made one; that the Subordinate Judge should have fixed a day for the entire hearing of the suit before himself, and should first have heard the opening statement on behalf of the plaintiff, the evidence produced by both sides, and the arguments on behalf of both, and then finally decided the case which he had himself heard and tried; that he might, in accordance with the provisions of s. 191 of the Civil Procedure Code, have allowed the depositions which had been taken before his predecessor to be put in; and that, in neglecting to take this course, and in deciding the case upon materials which were never before him, his action was illegal, and the judgment and decree were nullities.

THE facts of this case are sufficiently stated, for the purposes of this report, in the judgment of Petheram, C. J.

Messrs. *T. Conlan* and *A. H. S. Reid*, for the appellant.

Pandits *Ajudhia Nath* and *Bishambar Nath*, and Munshi *Kashi Prasad*, for the respondent.

PETHERAM, C. J.—I am of opinion that this appeal must be allowed, and the cause remanded to the Subordinate Judge of Aligarh for trial, on the ground that the cause has never really been tried, and that the papers before us, which purport to be a judgment and a decree, cannot properly be so called. The facts of the case are as follows:—Maulvi Samiullah Khan was the subordinate Judge of Aligarh, and the present suit was instituted in his Court, and the proceedings went on in a perfectly regular and proper manner until the hearing of the case under the provisions of Chapter XV of the Civil Procedure Code. A day was fixed under that chapter for the hearing before Maulvi Samiullah Khan, and

* First Appeal No. 146 of 1884, from a decree of Rai Cheda Lal, Subordinate Judge of Aligarh, dated the 10th September, 1884.

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the cause came on before him. The plaintiff's counsel opened his case and called witnesses to prove it, who were cross-examined by counsel for the defendant. After this, the defendant's counsel called his witnesses, and they were cross-examined by the other side. All that remained was for the plaintiff's counsel to sum up and for the defendant's counsel to reply. At this point Maulvi Samiullah Khan was sent on a special mission to Egypt, and another Subordinate Judge, named Rai Cheda Lal, was appointed to officiate in his place, and the present case came before him among others which were pending in his Court. His business was to try the case according to law; and if he did not so try it he had no jurisdiction to try it at all. All that he could properly do was to take up the case at the point which it had reached before the commencement of the hearing under Chapter XV of the Code. He should have fixed a day for the entire hearing of the suit before himself, and, in that case, the regular course would have been for the plaintiff's counsel to have opened his case and proved it by evidence, and for the defendant's counsel to have followed him. The Subordinate Judge should then have heard arguments on both sides, and should finally have decided the case which he had himself heard and tried. He might have called in aid the provisions of s. 191 of the Civil Procedure Code, which enacts that a Judge, in the hearing of a cause which was partly heard by another, may allow the evidence which was previously taken, to be used before himself. If he had taken that course, the trial would have been perfectly regular, and if, upon the day fixed for the hearing, he had first heard the opening statement on behalf of the plaintiff, and then allowed the plaintiff to prove his case by putting in the depositions which had been taken before his predecessor, his proceedings would not have been open to objection. But he did nothing of the kind. He fixed no date for the hearing of the case as for a new trial; but he practically arranged that it should be heard from the point at which his predecessor left off. In my opinion, this was an absolutely illegal course, and one which cannot be justified by any system of law, and certainly not by the Civil Procedure Code. The only power given by the Code is to allow the evidence taken at the abortive trial to be used as evidence at the new trial.

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The law nowhere says that the two hearings may be linked together and virtually made one. That this was not the meaning of the Legislature is shown by s. 199 of the Code, which occurs in Chapter XVII, relating to judgment and decree. That section provides that a Judge who has not heard the case may pronounce the judgment of his predecessor who has heard it, if the judgment is written and signed by him That shows the intention of the Legislature to have been that the case should be heard by one Judge, and that the judgment should be that of the Judge who has heard the case, though it may be delivered by another. There is nothing to show that a Judge may decide a case upon materials which have never been before him. I am therefore of opinion that the judgment and decree in this suit are absolute nullities, and that therefore the appeal must be allowed, and the cause remanded to the Subordinate Judge, who will fix a day and re-hear it from beginning to end.

I am glad to have an opportunity of expressing my disapproval of any system which makes it possible for a man to decide a case upon materials which are not before him. It may be said that these observations are applicable to the proceedings of an appellate Court, which is obliged to decide questions of fact upon evidence which it has not itself heard. But it must be remembered that the appellate Court has the advantage of the judgment of the Judge of first instance, who had the evidence before him. It is probable that the Subordinate Judges themselves will be glad to be told that they are not to decide questions upon which they have not themselves taken the evidence; and it is obvious that such a course is not in accordance with the interests of justice.

The costs of all proceedings will be costs in the cause.

TYRRELL, J.— I am of the same opinion. It appears to me that the Subordinate Judge who gave the judgment in the case, without having heard a word of the evidence or the pleadings made by or on behalf of the parties, under Chapter XV of the Civil Procedure Code, cannot be taken to have been a Court competent to proceed to judgment upon evidence duly taken, and after having fully heard the parties, according to the terms of s. 198.

Cause remanded.