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QUEEN-EMPRESS v. SINHA.

A preliminary objection was taken on behalf of the Crown to the hearing of the application on the ground that the sentence could not be interfered with.

Mr. *A. Strachey*, for the applicant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banerji*), for the Crown.

DUTHOIT, J.—The applicant has served his term of imprisonment, and a preliminary objection is urged by the learned Junior Government Pleader to the effect that as, since the application was filed, the effect of the finding of the Magistrate has become complete, this Court cannot interfere with that finding. I am unable to admit the force of this contention. I can find nothing in the terms of the law to prevent this Court from interfering with a conviction, even though, in consequence of the expiry of the sentence, it may not be possible to interfere with the latter. And cases in which such interference should not be summarily refused may easily be supposed, as, for instance, where a man's *status* is altered by his conviction, (as in convictions under Chapter XII or XVII of the Indian Penal Code, or under the Common Gambling Act), or where, as here, the convict's prospect of future employment depends in a great measure upon the existence or the annulment of the conviction.

(The learned Judge then proceeded to deal with the application on the merits).

APPELLATE CIVIL.

1884
November 4.

Before Mr. Justice Mahmood and Mr. Justice Duthoit.

SOHAN LAL (PLAINTIFF) *v.* AZIZ-UN-NISSA BEGAM AND OTHERS (DEFENDANTS).*

Remand—Appeal from order of remand—Civil Procedure Code, ss. 562, 564, 566, 584, 588 (28), 590.

Where a lower appellate Court, instead of remanding a suit under s. 566 of the Civil Procedure Code, erroneously remands it under s. 562, and the party aggrieved by its order appeals to the High Court, under clause (28), s. 588, the High Court cannot deal with the case as if it were a first appeal from a decree.

* First Appeal No. 11 of 1884, from an order of Mirza Abid Ali Beg, Subordinate Judge of Shâhjahânpur, dated the 3rd December, 1883.

All that the High Court can do is to rectify the procedure of the lower appellate Court, and to direct that it decide the case itself on the merits.

Badam v. *Imrat* (1) distinguished. *Ramnarain* v. *Bhawanidin* (2) and *Sheoamber Singh* v. *Lallu Singh* (3) referred to.

THE suit in which this appeal arose was one for the sale of certain property mortgaged by the defendants to the plaintiff on the 22nd September, 1874. It was stated in the instrument of mortgage that the mortgagors should retain possession. On the 25th September, 1874, three days after the mortgage, the defendants gave the plaintiff a lease of the mortgaged property for five years, and the plaintiff subsequently obtained possession. The defence to the suit was that the plaintiff was in possession of the mortgaged property as an usufructuary mortgagee, and the mortgage-money had been repaid from the usufruct of the property. The plaintiff's contention was that the mortgage was only a simple mortgage, and he was not in possession as a usufructuary mortgagee, but merely as a lessee. The Court of first instance (Munsif) allowed the plaintiff's contention and gave him a decree for the sale of the property, in the terms provided by ss. 86 and 88 of the Transfer of Property Act, 1882. On appeal by the defendants the lower appellate Court (Subordinate Judge) was of opinion that the lease "was simply a plan adopted for payment of the mortgage-money," and that further inquiry should be made "whether the plaintiff-mortgagee held possession as a lessee," and "whether the mortgage amount with interest had been paid up from the lease-money." The Court accordingly decreed the appeal, reversed the decree of the Court of first instance, and remanded the case to the Munsif for the determination of the questions above referred to.

The plaintiff appealed to the High Court, on the grounds that the order of remand by the lower appellate Court was opposed to the clear terms of the lease and the mortgage; that it was unsupported by evidence; and that it proceeded on the assumption that oral evidence was admissible to vary or add to the terms of the documents in question.

Pandit *Ajudhia Nath* and Munshi *Kâshi Prasad*, for the appellant.

(1) I. L. R., 3 All. 675. (2) Weekly Notes, 1882, p. 104,
(3) Weekly Notes, 1882, p. 158.

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SOHAN LAL v. AZIZ-UN-NISSA BEGAM.

Mr. *T. Conlan* and the *Junior Government Pleader* (Babu *Dwarka Nath Banerji*), for the respondents.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment :—

MAHMOOD, J.—This is a first appeal from an order of the lower appellate Court, remanding the case to the Court of first instance under s. 562 of the Civil Procedure Code for trial *de novo*.

Having considered the judgment of the lower appellate Court, we have no doubt that the order contravenes the express provisions of s. 562 and s. 564 of the Civil Procedure Code. Under the former of these sections, the only ground for setting aside the decree of the Court of first instance can be that "the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point, so as to exclude any evidence of fact which appears to the appellate Court essential to the determination of the rights of the parties, and the decree upon such preliminary point is reversed in appeal." S. 564 expressly prohibits the remand of a case for a second decision except as provided in s. 562.

In the present case, the judgment of the Court of first instance did not proceed upon any preliminary point, nor did that Court exclude any evidence of fact within the meaning of s. 562. The lower appellate Court's judgment is obviously framed in language adapted to an order of remand under s. 566 of the Civil Procedure Code, and the reasons given by that Court could not necessitate a remand under s. 562. The lower Court's order cannot stand ; but the learned pleader for the appellant asks us to dispose of the case finally, without sending it back to the lower appellate Court. He contends on the authority of the Full Bench ruling of this Court in *Badam* v. *Imrat* (1) that we are bound, even at this stage, to enter into the merits of the whole case, and to dispose of it finally.

We are of opinion that this contention is not sound. The Full Bench ruling upon which the learned pleader relies does not go to the extent of supporting his contention. All that was ruled in that case was, that an appeal from an order remanding a suit for re-trial is not to be confined to the question whether the remand has been made contrary to the provisions of s. 562 of the Civ

(1) I. L. R., 3 All. 675.

Procedure Code; but that the question whether the decision of the appellate Court on the preliminary point is correct or not, may also be raised and determined in such an appeal. In the case before us the judgment of the lower appellate Court does not, as we have already said, proceed upon any preliminary point which we can determine at this stage. The judgment professes to deal with the merits of the case, though the result of the reasons would be a remand under s. 566, and not under s. 562.

It is to be observed that the case from which this appeal has arisen is one which can come up before us only in second appeal, and we are of opinion that the circumstance that this appeal is a first appeal from order under the provisions of cl. (28), s. 588 of the Civil Procedure Code, would not alter the nature of the powers to be exercised by us in second appeals under s. 584 of the Civil Procedure Code. In other words, we cannot deal with the case as if it were a first appeal from a decree. In the case of *Ram Narain* v. *Bhawanidin* (1) and in *Sheoambar Singh* v. *Lallu Singh* (2) to both of which one of us was a party, the powers of this Court in its jurisdiction as the second appellate Court were discussed. The observations made in those cases appear to us to be applicable in principle to the present case. S. 590 of the Civil Procedure Code renders Chapter XLI of the Code applicable to such appeals as the present only *mutatis mutandis*; and we cannot regard that section as binding us to enter into the merits of the whole case simply because the lower appellate Court, instead of remanding the case under s. 566, has erroneously remanded it for new trial under s. 562. In our opinion the functions of this Court in appeals under cl. (28), s. 588, are limited to disposing of such points as properly fall within the scope of s. 562. No such point exists in this case, and all that we are called upon to do is to rectify the procedure adopted by the lower appellate Court in the matter of the remand, and to direct that Court to decide the case itself on the merits. The questions raised before us in the memorandum of appeal may be proper questions for disposal after the lower appellate Court has pronounced its final judgment and decree; but they cannot be disposed of at this stage. The logical consequence of the contrary view would be, that in every case in which the

(1) Weekly Notes, 1882, p. 104. (2) Weekly Notes, 1882, p. 158.

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lower appellate Court passes an erroneous order of remand for re-trial under s. 562, and an appeal is preferred to this Court under cl. (28) of s. 588, the functions of this Court, in cases like the present, instead of being confined to matters described in s. 584 of the Code, would be converted into those of the first appellate Court; in other words, an erroneous order of remand by the lower appellate Court would have the effect of converting into a first appeal a case which could only be the subject of second appeal.

For these reasons we decree this appeal, and setting aside the order of the lower appellate Court, remand the case to that Court, with directions to restore the case to its own file, and to dispose of it according to law. The costs of this appeal will be otsst in the cause.

Appeal allowed.

1884
November 5.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) *v.* RAM UGRAH SINGH AND OTHERS (PLAINTIFFS).*

Liability of land to assessment of revenue—Jurisdiction of Civil Court—Declaratory decree—Act XIX of 1873 (*N.-W. P. Land Revenue Act*), *s.* 241.

The Civil Courts are not debarred by s. 241 of Act XIX of 1873 (N.-W. P. Land-Revenue Act) from taking cognizance of a suit for a declaration that land, which the revenue officers seek, under the provisions of that Act, to assess to revenue, is included in an area which has already been permanently settled, and is therefore not liable to further assessment.

A title to hold land free from assessment to revenue cannot be acquired by any length of possession revenue free.

The Goverment v. *Rajah Rāj Kishen Singh* (1); *Collector of Futtehpore* v. *Munglee Pershad* (2); *Rajah Raghonath Suhaee* v. *Bishen Singh* (3); *Zoolfikar Ali* v. *Ghunsam Baree* (4); and *Sri Uppu Lakshmi Bhāyamma Garu* v. *Purvis* (5) referred to.

THE fact of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *T. Conlan* and the *Senior Government Pleader* (Lala *Juala Prasad*), for the appellant.

Mr. *C. H. Hill*, Munshi *Hanuman Prasad*, Munshi *Sukh Ram*, Babu *Sital Prasad*, and Lala *Jokhu Lal*, for the respondents.

* First Appeal No. 81 of 1881, from a decree of Maulvi Muhammad Abdul Majid Khan, Subordinate Judge of Ghazipur, dated the 28th April, 1881.

(1) 9 W. R. 427.
(2) N.-W. P. S. D. A. Rep., 1854, p. 167.
(3) N.-W. P. S. D. A. Rep., 1855, p. 302.
(4) N.-W. P. S. D. A. Rep., 1865, p. 92.
(5) 2 Mad. H. C. Rep., 167.