Before Mr. Justice Field and Mr. Justice O'Kinealy.

JATINGA VALLEY TEA COMPANY, LIMITED (PLAINTIFFS) *v.* CHERA TEA COMPANY, LIMITED (DEFENDANTS).*

1885
June 19.

Local investigation, Power of Court to direct, when parties do not ask for it—Remand order, Proceedings taken by Court of first instance pending appeal against—Civil Procedure Code (Act XIV of 1882), ss. 562, 588—Proceedings taken on remand order made without jurisdiction.

In a suit for land where the question was as to whether the land lay within the boundaries of the plaintiffs' or the defendants' land, the Court of first instance suggested to the parties that the proper mode of determining the case was in the first instance to hold a local investigation, and that such local investigation should be applied for by one or other of the parties. Both parties resolutely refused to make such application, and the Court thereupon dealt with the case upon the materials before it, and passed a decree. Upon appeal the lower Appellate Court remanded the case for the purpose of a local investigation being held at the cost of the plaintiff in the first instance.

Held, that inasmuch as neither of the parties desired to have a local investigation, the Court was wrong in remanding the case, and that it was bound to decide it upon the evidence before it.

Held, also, that all proceedings taken by the Court of first instance, after the remand, and pending the hearing of the appeal against the remand order, were null and void, inasmuch as the jurisdiction of that Court to hear the case upon remand depended upon the validity of the remand order. An appeal therefore lay from the order of remand notwithstanding the Court of first instance had subsequently made what purported to be a final decree in the case.

THE plaintiff-company in this suit sought to recover possession of 129 acres of land, alleging that it had belonged formerly to one Kluba Dao and others by right of settlement, and had been purchased from them by the Company. The plaint further alleged that the plaintiff-company had been in possession of the land in suit since the date of their purchase, but that owing to a claim set up by the defendant-company, the Deputy Commissioner, in the exercise of his criminal jurisdiction, had issued an injunction

* Appeal from Appellate Order No. 67 of 1885, against the order of J. Kennedy, Esq., Officiating Deputy Commissioner of Cachar, dated the 18th of November 1884, reversing the order of Baboo Nritya Gopal Chatterji, Munsiff of that District, dated the 21st of April 1884.

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restraining both parties from taking possession of the disputed land until the question of title had been decided by a Civil Court. The plaintiff-company had, therefore, been forced to institute this suit. The defendant-company based their claim to the land upon the *potta* granted to them at the date of the settlement with them, and alleged that the land in dispute fell within their boundaries.

Among the issues framed the principal question raised was as to whether the land in suit lay within the boundaries covered by the *potta* of the plaintiff or that of the defendant. At the hearing before the Court of first instance, it was suggested by the Court that an *amin* should be deputed to make a local investigation, and that it was usual in such cases for the parties to ask that such a course should be taken. Both parties, however, resolutely refused to apply for a local investigation, and thereupon the Court, whilst regretting the course taken by the parties, proceeded to hear and determine the case upon the evidence placed before it, and ultimately gave the plaintiff-company a decree.

The defendant-company thereupon appealed, and the judgment of the lower Appellate Court was as follows:—

"There can be only one order in this appeal. The whole question is one of the position and boundaries of the land sued for, and can only be settled by a local investigation. For this the plaintiff must in the first case pay the costs, as he cannot, without such an investigation, establish his title to the land."

The case was, therefore, remanded under s. 562 to the lower Court for the purpose of a local investigation being held, and for the suit thereafter to be decided on its merits.

The plaintiffs now preferred a special appeal to the High Court against the last mentioned remand order.

Mr. *M. P. Gasper* and Messrs. *Watkins & Co.* for the appellants.

Mr. *Pugh* and Messrs. *H. Adkin* and *W. K. Eddis* for the respondents.

At the hearing of the appeal it was brought to the notice of the Court that, after the remand order, the Court of first instance had called upon the plaintiff-company to deposit the costs of the local investigation within two days, and upon that order not being

complied with, had taken the case up and passed a final decree dismissing the suit, and it was contended that all such proceedings taken after the remand order, and pending the hearing of the appeal to the High Court, were void and should be set aside.

The judgment of the High Court (FIELD and O'KINEALY, JJ.) was delivered by

FIELD, J.—We think that the Judge in the Court below was wrong in making the remand order in this case. The Munsiff states in his judgment that both parties resolutely refused to have a local enquiry; and it is admitted that the correctness of this statement was not challenged on appeal to the Deputy Commissioner. The Deputy Commissioner has remanded the case in order that there may be a local investigation. He says: "The whole question is one of the position and boundaries of the land sued for, and can only be settled by a local investigation." We think that the parties were themselves the best judges as to what evidence they desired to put before the Court, and that when the parties "resolutely refused" to have a local investigation, the Judge below was bound to decide the case upon the evidence put before him; and was wrong in remanding the case for a local investigation, which the parties were not desirous to have.

It has been contended before us that this appeal ought not to be heard. It is said that after the remand order, the Munsiff proceeded to make a final decree; and the existence of that final decree is a bar to the hearing of this appeal against the order of remand. We are unable to concur in this contention. The law, sub-section 28 of s. 588 of the Code of Civil Procedure, expressly gives an appeal against an order under s. 562 remanding a case. That provision is not, in any way, qualified. The Code does not say that there shall be an appeal only if the case has not been finally determined in the Court of first instance, before that appeal is preferred or comes on for hearing. We cannot, therefore, import into the Code a provision which does not there exist. The Munsiff's jurisdiction to hear the case upon remand depended upon the remand order. If the remand order were badly made, the decree, and, indeed all the proceedings taken under that remand order, are null and void.

We set aside the remand order, and the decree made after and

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based upon that remand order, and we direct the Deputy Commissioner to proceed to try the appeal. The Deputy Commissioner will of course determine the appeal upon the evidence on the record at the time when the appeal was preferred. Costs in this Court will abide the result.

Appeal allowed and case remanded.

Before Mr. Justice Wilson and Mr. Justice Beverley.

1885 *July* 16.

ALIM BUKSH FAKIR (DEFENDANT No. 1) *v.* JHALO BIBI AND ANOTHER, MINOR, BY HER GUARDIAN AND NEXT FRIEND JHALO BIBI (PLAINTIFFS.)*

Minor, Suit by—Next friend—Certificate under Act XL of 1858*—Objection to frame of suit.*

In a suit brought on behalf of a minor by his next friend, it is not necessary for the next friend to have a certificate under Act XL of 1858, provided he have in fact permission of the Court to sue.

Where a suit was brought in the name of *A*, for self and as guardian of her daughter *B*, a minor, and it was objected that it should have been brought in the names of *A*, and of *B*, a minor by her next friend and guardian, *held*, that, as no one was misled or injured by the improper form of the plaint, the objection ought not to be held fatal, but the decree must be taken to be in favour of *A* and of *B* suing by *A* as if the suit had been properly framed.

THIS was a suit for the recovery of certain lands, brought by the plaintiff Jhalo Bibi, widow of late Genda Fakir, "for self and as guardian of her minor daughter Safina Bibi."

In the Munsiff's Court of Sherepore, where the suit was originally heard, the first, and, for the purposes of this report, the only material issue raised, was: "Can the plaintiff sue on behalf of the minor daughter without a certificate under Act XL of 1858?" On this issue the Munsiff gave judgment as follows: "One Genda Sheik has filed an affidavit to the effect that the plaintiff Jhalo Bibi is the next friend of her minor daughter Safina Bibi, accordingly Jhalo Bibi has been allowed to conduct the suit on behalf of the latter. The properties sued for are not large, and I think the plaintiff can sue on behalf of the minor daughter,

* Appeal from Appellate Decree No. 1479 of 1884, against the decree of Baboo Parbati Coomar Mitter, First Subordinate Judge of Mymensingh, dated the 14th of May 1884, affirming the decree of Baboo Sashi Bhusan Basu, Munsiff of Sherepore, dated the 3rd of August 1883.