

APPELLATE CIVIL.

1916
November, 8.*Before Mr. Justice Walsh and Mr. Justice Stuart.*KAMTA AND OTHERS (DEFENDANTS) v. PARBHU DAYAL AND ANOTHER
(PLAINTIFFS).**Civil Procedure Code, 1908, order XLI, rule 23—Remand—Preliminary point—Issues framed and evidence taken, but suit decided upon one issue only.*

Held that it is competent to an appellate court to remand a case under order XLI, rule 23 of the Code of Civil Procedure, 1908, where the court of first instance having framed issues and recorded all the evidence, has decided the suit with reference to its finding upon one of the issues framed by it, leaving the other issues undecided. *Mata Di v. Jamma Das* (1) followed.

THE plaintiffs sued for a declaration of their ownership of certain property by right of inheritance from their maternal grandfather Ajudhia, and for possession of the property after cancellation of two deeds of mortgage executed by Ajudhia's widow in favour of defendant No. 1. The defendants raised various pleas in defence and the court of first instance framed four issues, namely, (1) whether the property had belonged to Ajudhia; (2) whether the mortgages were executed by Ajudhia's widow (3) whether they were executed for legal necessity; and (4) whether the suit was barred by 12 years' rule of limitation. Both parties adduced their evidence on all the issues. On the first issue the court of first instance came to a conclusion adverse to the plaintiffs, and thereupon dismissed the suit without deciding the other issues. The lower appellate court reversed the finding on the first issue and remanded the suit under order XLI, rule 23, to the first court for disposal. The defendants appealed against the order of remand.

Babu Sheo Dihal Sinha, for the appellants :—

This case did not fall within the provisions of order XLI, rule 23, and the remand under that rule was wrong. The case was not decided on a preliminary point. Both sides produced their evidence on the whole case. The parties had nothing more to do with respect to the issues left undetermined. The proper procedure for the lower appellate court would be to remand the case under order XLI, rule 25. The first court decided the suit

* First Appeal No. 83 of 1916, from an order of E. Bennet, Subordinate Judge of Mirzapur, dated the 12th of February, 1916.

(1) (1905) I. L. R., 27 All., 691.

1916

KAMTA
v.
PARBHU
DAYAL.

on the merits and not on a preliminary point. Rules 23 and 25 should be differentiated. An incorrect order of remand under rule 23 instead of rule 25 necessitates a fresh appeal from the fresh decree of the first court. The case of *Mata Din v. Jamna Das* (1) was decided under section 562 of the Code of 1882, and there is some difference in language between that section and the present order XLI, rule 23.

Munshi *Newal Kishore*, for the respondents, was not heard.

WALSH and STUART, JJ. :—In this case four issues were framed. The Munsif decided the first issue in favour of the defendants and dismissed the suit. Now the first issue was an issue which if decided in favour of the defendants, finally disposed of the suit. If on the other hand it was decided in favour of the plaintiffs, it left other issues undetermined, and the suit therefore came up to the appellate court in the condition that if the first issue was wrongly decided, the remaining issues had not been decided at all, and it was necessary to decide them. Having regard to the previous decisions in this Court and particularly to the decision in *Mata Din v. Jamna Das* (1), we think that that was a preliminary point within the meaning of order XLI, rule 23. It is important that on these questions of practice the decisions of the Court should be consistent. We think therefore that the case was a proper one for remand under that order. We are not disposing of the suit which still remains to be decided on the result of issues 2, 3, and 4 in the Munsif's court. This appeal must be dismissed with costs.

Appeal dismissed.

1916
November, 20.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

PACHAN SINGH (PLAINTIFF) v. JANGJIT SINGH AND ANOTHER
(DEFENDANTS).*

Sale of immovable property—Agreement by vendee to pay revenue—Reservation of portion out of the property sold—Agreement not binding on transferee.

The vendor of a village reserved for her maintenance 196 bighas, and the vendee also agreed not to ask for rent of those 196 bighas. The vendee further did not insist upon payment of the proportionate share of Government revenue due from the vendor, but paid it himself.

*Appeal No. 112 of 1915, under section 10 of the Letters Patent.