Before Mr. Justice Piggott and Mr. Justice Walsh.

RAJKALI AND ANOTHER (DEFENDANTS) *v.* GOPI NATH NAIK (PLAINTIFF).* 1921 *November*, 25.

Civil Procedure Code (1908), *section* 24; *order XLI, rule* 23—*Remand*—*Transfer of case remanded by High Court—Jurisdiction.*

Held that an order of the High Court remanding a case to a District Judge for disposal on the merits will not have the effect of limiting the powers of the District Judge under section 24 of the Code of Civil Procedure unless the Court's order is drawn up in express terms so as to disclose a clear intention of limiting those powers. *Sita Ram v. Nauni Dulaiya* (1) not followed. *Pandohi* v. *Sheo Bharose* (2) referred to.

THE facts of this case are fully set forth in the judgment of PIGGOTT, J.

Munshi *Shiva Prasad Sinha*, for the appellants.

Mr. *Sankar Saran*, for the respondent.

PIGGOTT, J. :—This appeal comes before us under curious and somewhat complicated circumstances. There was a suit instituted in the court of the Subordinate Judge of Gorakhpur upon a hypothecation bond. The plaintiff filed a copy of the bond and pleaded loss of the original. The trial court held that the plaintiff had failed to prove by credible evidence the loss of the original, that the suit was not maintainable upon the copy and dismissed it accordingly. There was an appeal to the District Judge of Gorakhpur and this appeal was heard by Mr. R. L. Yorke who then held the office of the District Judge. The effect of his order was to set aside the finding of the trial court, although he did not in terms reverse it. The operative portion of his order was that he remanded the suit to the first court to be tried out on the merits. This order was dated the 4th day of September, 1919, and against it there was an appeal to this Court. In the meantime, however, the trial court was proceeding with the suit, and, on the 19th day of December, 1919, it passed a decree in favour of the plaintiff in the usual form. This Court's order on appeal was passed on the 21st day of May, 1920. For reasons given in the judgment, a Bench of this Court allowed the appeal, set aside the order of the Judge of Gorakhpur and directed as follows :—"That the appeal be and it hereby is returned to the court of the said Judge to be re-admitted on

* First Appeal No. 118 of 1921, from an order of R. L. Yorke, Additional Judge of Gorakhpur, dated the 21st of March, 1921.

(1) (1899) I. L. R., 21 All., 230. (2) (1914) 12 A. L. J., 1094.

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the file of pending appeals and disposed of according to law." When this order reached the Gorakhpur district the office of District Judge was filled by Mr. Moir, and Mr. Yorke was holding, in the same judgeship, the office of Additional Judge. Mr. Moir, no doubt believing that this Court desired and intended that the appeal should return, if possible, to the same officer who had passed the order of the 4th day of September, 1919, availed himself of his powers of transfer under section 24 of the Code of Civil Procedure (Act V of 1908) to send the appeal to Mr. Yorke for disposal. The parties were represented by counsel before Mr. Yorke and although counsel for the defendants seems in the first instance to have stated that he had no instructions, the question in issue was argued before him. Mr. Yorke then recorded a definite finding to the effect that the loss of the original document was proved and that the plaintiff was entitled to maintain his suit upon a copy. He felt himself apparently in a difficulty as to the proper orders to pass in consequence of this finding, because it seemed useless to re-affirm his original order of remand when this had in the meantime been carried out by the trial court and had eventuated in the decree of 19th day of December, 1919. It may be also that he relied upon a passage in the judgment of this Court in which it was said that if the District Judge on further consideration found that the loss of the original document was satisfactorily proved then "an order of remand was correct." It seems useless to speculate as to what the learned Additional Judge would have done if his attention had been called to a ruling of the Full Bench of this Court in *Uman Kunwari* v. *Jarbandhan* (1), but he contented himself with passing an order which, as it stands, declares a certain sum of money to be due to the plaintiff as a mortgage charge upon certain property, but contains no specific directions fixing any date for the payment of the sum, or laying down the consequences that are to follow upon default of such payment. The District Judge probably believed that a final decree for sale would eventually follow, not upon this decree of his, but upon the trial court's decree of 19th day of December, 1919. It seems to me, however, that we cannot possibly anticipate what complications may arise, or what

(1) (1908) I. L. R., 30 All., 479.

difficulties the plaintiff may encounter upon making application for a decree absolute for sale. We have to deal with the appeal before us, which is an appeal by the defendants against the order of the Additional Judge, dated the 21st day of March, 1921, the effect of which has been stated above.

A preliminary objection has been taken to the effect that this order as it stands is not an appealable order at all. Technically I am of opinion that this objection is well-founded; although, if this were the only point to be taken against the appellants, I should have been quite prepared to consider the advisability of allowing them to make such amendments, and to take such other necessary steps, as would convert the appeal before us into a second appeal from a decree. Taking this view of the matter, we have actually heard the appellants on the points taken in their memorandum of appeal. They are clearly not entitled to attack the finding of fact arrived at by the Additional District Judge upon evidence duly considered by him. The one point argued on their behalf has been that, inasmuch as this Court's order of 21st day of May, 1920, directed a remand of the appeal to the court of the Judge of Gorakhpur (obviously meaning thereby the District Judge), that court had no authority to transfer the appeal to the Additional District Judge for disposal and the subsequent proceedings in the court of the Additional District Judge, up to and including the order under appeal, were without jurisdiction. There is some authority for this contention in the case of *Sita Ram* v. *Nauni Dulaiya* (1). Authority to the contrary has been quoted in some cases decided by the Calcutta High Court, but I think it quite sufficient to point out that this very point was considered by a single Judge of this Court in *Pandohi* v. *Sheo Bharose* (2). The learned Judge pointed out that there had been a change in the law in consequence of the redrafting of the present section 24 of the Code of Civil Procedure, corresponding with section 25 of the former Code of 1882. He held that the older decisions based upon the Code of 1882 were no longer applicable and gave strong reasons for his opinion that, in a case like the present, any order of remand passed by this Court would have no effect to limit the powers of the District Judge

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under section 24 of the Code of Civil Procedure, unless this Court's order were drawn up in express terms so as to disclose a clear intention of limiting those powers. In the present instance the reverse is the case. The operative portion of this Court's order merely directed the District Judge to dispose of the appeal according to law. One of the ways in which a District Judge can dispose of an appeal according to law is to transfer it to the court of an Additional Judge of his judgeship for disposal. I have no doubt whatever, speaking as one of the Bench which passed this Court's order of 21st day of May, 1920, that if the whole position had been laid before us we should have said that it was better, unless the parties could show cause to the contrary, that the appeal should go back to the particular officer, i.e., Mr. Yorke, who had passed the order of the 4th day of September, 1919. At any rate I am satisfied that there is no force in the contention that the order now under appeal before us is one wholly without jurisdiction and liable to be set aside on that account. This finding is sufficient to dispose of the appeal before us and I would dismiss it with costs.

WALSH, J. :—I entirely agree that the appeal fails. It seems to me that the points raised are unsubstantial and that in any event the appellant is debarred by having appeared and taken an order from Mr. Yorke at the second hearing without raising any objection.

As to the existing legal position of the parties it seems to me that there may be ground for future technical controversy and I, therefore, desire, with a view to assisting the parties, if possible, to express my opinion about it for what it is worth. If chronology alone is regarded, it might be argued that the decree passed by the first court in the suit on the merits dated the 19th day of December, 1919, was void and of no effect because the order of the 4th day of September, 1919, which gave rise to it had been interfered with by the High Court in March, 1920, and I can understand the ingenious suggestion that if the foundation is gone the fabric which rests upon it must be taken to have disappeared also. In my humble judgment that would be a fallacy in this case. I have looked at the passages relied on in the judgment of the

Full Bench delivered by Mr. Justice BANERJI in *Uman Kunwari* v. *Jarbandhan*, (1) particularly at page 483 to which I will refer in a moment, and I have come to the conclusion that they are mere *dicta* which were not necessary for the decision of the case. To my mind they go a great deal too far. The only point which the Full Bench had to decide was whether an appeal lay at all and if so, whether it ought to succeed. In this particular case the remand order when interfered with by the decree of this Court was not necessarily erroneous and has never been declared to be bad. It was merely declared by this Court to be premature. One is always entitled to look at the reasons in a judgment for an order or decree which is passed, otherwise law reporting would be a superfluity. The remand order was set aside provisionally. The decree of this Court was absolute in terms, but it invited the Judge below to re-consider the matter, and it was distinctly held by the judgment, as my brother has pointed out, that if the Judge found the loss of the original bond proved an order of remand was correct. The learned Judge found on re-consideration, which he had considered unnecessary in the first instance, that the loss was proved, and therefore his remand order became in the events which happened perfectly right. The present order is to my mind a mere interim order completing that which the High Court had directed him to complete, namely his decision upon the preliminary point. It is not a decision on the merits, and in my opinion the plaintiff would be wrong to treat it as a decree in his suit. A decree has been passed in the suit by the first court. At the time the trial was held and that decree was passed it was a perfectly lawful proceeding. More than that, it was conducted in obedience of the order of the lower court remanding the suit to the first court for trial. In the authority to which I have just referred it is said that the "jurisdiction to hear the suit a second time is derived solely from the order of remand. If that order is erroneous and is set aside everything done in pursuance of the order must fall to the ground and be of no effect." Again, it is said, if the remand order were wrongly made the decree and indeed all the proceedings taken under the remand order are null and void. I think those statements are

(1) (1908) I. L. R., 30 All., 479.

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much too sweeping. It depends on the circumstances in each case and on the nature of the invalidity of the remand order. If the remand order is finally set aside and is such an order as ought not to have been passed at all in any case, it may be that the proceedings in the court below fall with it. But in this case, and it must have happened in many other cases, the proceedings taken in the first court as a result of the remand order against which there is an appeal must be and ought to be held to be *de bene esse*. The subsequent event in this case resulted in the remand order being shown to have been quite right. It seems to me that it would be turning the law into absurdity, and would amount to a denial of justice if a proper trial which has taken place under a remand order made by the appellate court and in obedience to such remand order, were held to be invalid when as the result of the High Court's own decision that remand order turned out to have been perfectly justified.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

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RAM DHAN AND OTHERS (APPLICANTS) *v.* PRAG NARAIN AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code (Act V of 1908), order XLV, rule 7—Act No. XXVI of 1920, section 3 (1)—Extension of time for furnishing security and making deposit—Power of High Court to grant extension limited to sixty days.

Held, on a construction of section 3 (1) of Act No. XXVI of 1920, that the Court has no power to extend the time for furnishing security and making a deposit for translation and printing by a longer period than sixty days.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Nihal Chand*, for the applicants.

Mr. *B. E. O'Conor* and Munshi *Girdhari Lal Agarwala*, for the opposite parties.

MEARS, C.J., and BANERJI, J.:—This is an application by the appellants, who ask the Court to extend the time for furnishing security and making a deposit for translation and printing and other charges. The rule which prescribes the time within which an appellant should furnish security for the costs of the respondent and deposit the amount required to defray the expenses of

* Application No. 24 of 1921 under order XLV, rule 6, clause (*a*), as amended by Act XXVI of 1920.