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We are informed that Lakhpat Rai has not paid up any portion of his fine and that there is no likelihood whatever of his ever doing so. Be that as it may, it seems to us that if the fine or any portion of it is realized and paid over to Sri Lal as compensation, then to that extent Rameshwar Das will have a right to get a refund from the decree-holder.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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GOKUL PRASAD HAR PRASAD (DEFENDANTS) *v.* RAM KUMAR (PLAINTIFF.)*

Civil Procedure Code (1908), sections 107, 151; order XLI, rule 23—Remand—Inherent powers of court to order remand—Appeal from remand under inherent powers—Scope of order XLI, rule 23.

In a suit for rendition of accounts of certain partnership transactions, the court appointed a commissioner to examine the accounts and on the basis of his report passed a preliminary decree. The plaintiff appealed to the Court of the District Judge, who remanded the case to the first court for re-trial, but without definitely stating under what provision of the Code of Civil Procedure he did so. On appeal from this order it was contended that no appeal lay, the order of remand having been passed, not under order XLI, rule 23, but under the inherent powers of the court apart from order XLI.

Held that it was not necessary to decide whether such inherent powers of remand as may have been exercised by High Courts from time to time were or were not possessed by District Judges; but, inasmuch as the policy of the Court had always been to allow as wide a meaning as was reasonably possible to the provisions of order XLI, rule 23, the remand might be taken to have been made under that order.

Observations as to the inherent powers of remand possessed by High Courts. *Ghuznavi* v. *The Allahabad Bank, Ld.*, (1) and *Habib Bakhsh* v. *Baldeo Prasad* (2) referred to.

THE facts of this case are fully set forth in the judgment of the Court.

Mr. *B. E. O'Conor*, Dr. *S. M. Sulaiman*, Mr. *A. P. Dube* and Dr. *Kailas Nath Katju*, for the appellants.

Mr. *S. A. Haidar* and Munshi *Kumuda Prasad*, for the respondent.

PIGGOTT, J. :—This is an appeal against an order of remand passed by the District Judge of Cawnpore under the following

* First Appeal No. 22 of 1921, from an order of E. H. Ashworth, District Judge of Cawnpore, dated the 16th of November, 1920.

(1) (1917) I. L. R., 44 Calc., 929. (2) (1901) I. R. L., 23 All., 167.

circumstances. The plaintiff alleged that he was the proprietor of a certain trading firm and that, in this capacity, he had entered into a number of partnership transactions with the defendants' firm, extending over a period stated in the plaint itself. He complained that he was unable to get proper accounts from the defendants; he desired either an order that the partnership be dissolved, or a finding that it had already been dissolved, and that a proper and complete account from the defendants' firm be rendered. Reading between the lines of the plaint, it is fairly obvious that this was one of those unfortunate cases in which the plaintiff has very little chance of proving his claim except by means of documentary evidence in the possession of the defendants, in this case by means of account-books in the possession of the defendants' firm. The written statement denied various allegations of fact contained in the plaint, but there was a plain admission that there had been partnership dealings between the parties during certain years. The issues originally fixed by the trial court, although drawn up in somewhat general terms, seem fairly to cover the questions raised by the pleadings of the parties. That court then proceeded to appoint a commissioner to examine accounts, and handed over to him for examination and report the account-books which had been placed before the court by the plaintiff and by the defendants, respectively. It is by no means clear from the record that the production of these account-books was accompanied by any affidavit, or sworn testimony, to the effect that the accounts produced by the various parties were original and genuine, or that they included the whole of the documents in the possession of either party bearing on the partnership transactions. The commissioner submitted a report favourable on the whole to the defendant's case. The plaintiff raised a number of objections. The findings on these points were in favour of the acceptance of the commissioner's report as it stood, and the court then proceeded to draw up a very lengthy preliminary decree, in which the substance of the findings arrived at is embodied and also various matters, such as the appointment of a commissioner for a further examination of the

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documentary evidence and the preparation of a final account between the parties, have been embodied, which might well have been left out of the preliminary decree and dealt with by the court in a subsequent order. The plaintiff appealed to the court of the District Judge. His memorandum of appeal is a lengthy document, but in substance he objected that he had been prejudiced by the procedure followed by the trial court. He suggested that the commissioner's report should not have been accepted as sufficient evidence to prove all the points which the trial court had determined in favour of the defendants. He protested against the finding that the plaintiff's books of account were unreliable and could not be treated as proving any part of the plaintiff's case. There is a paragraph obviously intended to suggest that the account-books put in by the defendants, and acted upon by the commissioner, were not really the original accounts of the transactions in question, but account-books specially written up for the purpose of this case. This appeal raised first of all the question whether the plaintiff had been prejudiced by any error of procedure in the trial court; secondly, the question whether the findings of that court embodied in the preliminary decree were fairly sustainable on the evidence on the record. The learned District Judge seems to have been oppressed by his belief that the trial in the first court had not been a satisfactory one. He takes a point—it does not appear to be raised by the pleadings of either party—as to whether there really was a partnership in the proper sense of the word at all. He inclines to the view that there had been a disconnected series of partnership transactions. It is difficult to see on what he bases this opinion. There had been undoubtedly a number of partnership transactions, extending over a considerable period of time; but so far as the case has gone at present, it would seem that all those transactions were governed by an original agreement as to the terms on which the parties were to deal with one another, and, if that is so, there seems no reason whatever why the suit should not be treated, as both the parties were quite willing to treat it

in the trial court, as an ordinary suit for dissolution of partnership and rendition of accounts. Moreover, the learned District Judge himself admits that the point is a purely academic one, because, even in his view of the case, the plaintiff would have been allowed to join his various causes of action in respect of each separate transaction in a single suit. I can find nothing in this to justify interference with the procedure of the trial court. Then the learned District Judge thinks that the plaint required radical alterations before justice could be done between the parties and that both parties ought to have been required to amend their pleadings. There was no petition to this effect on the part of the plaintiff, either in the trial court or before the lower appellate court itself, and my examination of the record, so far as it has gone, does not disclose any adequate reason for holding that the suit could not have been fought out on the pleadings and on the issues framed by the trial court. In effect the lower appellate court has not dealt with any of the substantial pleas raised by the memorandum of appeal before it. It brushed aside the whole proceedings of the trial court as unsatisfactory, set aside the preliminary decree and sent the case back for a new trial.

At the hearing of this appeal a point was taken on behalf of the plaintiff respondent, to the effect that no appeal lies to this Court from the order in question. The contention is that only an order of remand passed under the provisions of order XLI, rule 23, of the Code of Civil Procedure is open to appeal as an appeal from order, that in the present case the order of remand does not purport to be passed under that rule and cannot be regarded as covered by the terms of that rule. From this it is contended further that the lower appellate court must be presumed to have acted in virtue of the inherent powers of an appellate Court and on the strength of the recognition given by section 151 of the present Code of Civil Procedure to the existence of certain inherent powers in all courts. There has been considerable conflict of judicial opinion on the question of this alleged inherent power of an appellate court to remand a suit for retrial. This High Court has undoubtedly exercised a very general power of remand, not necessarily troubling itself to

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consider whether the remand order in every case was covered by the provisions of order XLI, rule 23, of the Code of Civil Procedure; but the High Court possesses wide powers of supervision not necessarily possessed by the courts of District Judges. In the High Court at Calcutta, after various conflicting decisions, the point was finally settled by a Full Bench in the case of *Ghuznavi* v. *The Allahabad Bank, Limited* (1), in favour of the existence of an inherent power of remand, independent of the provisions under section 107 of the Code of Civil Procedure or of order XLI, rule 23, of the same Code. There is one reported case of this Court, *Habib Bakhsh* v. *Baldeo Prasad* (2), in which a very similar view seems to have been taken. There has, however, so far as I am aware, never been a Full Bench decision of this Court on the subject, and it would not be difficult to quote rulings in which orders of remand purporting to be under order XLI, rule 23, of the Code of Civil Procedure have been set aside on the ground that they were not warranted by the terms of that rule. I regard the whole question, so far as this Court is concerned, as still somewhat unsettled. Further, the respondent has to contend that when a court of first appeal passes an order of remand on the strength of this presumed inherent jurisdiction no appeal lies to this Court from that order. He has quoted three cases in support of this conteniton, only one of which, *Raghunandan Singh* v. *Jadunandan Singh* (3), has found its way into any of the authorized reports. The other two are *Mohendra Nath Chakravarti* v. *Ram Taran* (4), and *Vijayaraghava Reddi* v *Komarappa Reddi* (5). Not only is there no authority of this Court to this effect, but there have been beyond all question numbers of decisions in which this Court has entertained, without question raised, appeals from orders of remand where, on the very face of the record, the remand order either did not purport to be under order XLI, rule 23, of the Code of Civil Procedure, or could only with great difficulty be brought within the purview of that rule. In the very case above referred to, that of *Habib Bakhsh* v. *Baldeo Prasad* (2), this

(1) (1917) I. L. R., 44 Calc, 929.
(2) (1901) I. L. R., 23 All., 167.
(3) (1918) 3 Pat. L. J., 253.
(4) (1919) 23 C .W. N., 1049.
(5) (1912),15 Indian Cases, 367.

Court considered on the merits the propriety of the order of remand under appeal before it even while holding that the provisions of the former Code of Civil Procedure now embodied in order XLI, rule 23, did not cover the case and that the court must be presumed to have acted in the exercise of inherent jurisdiction.

A further question arises out of the appellant's contention, and that is whether, in the event of our agreeing that the order before us is not an order against which a first appeal is allowed, it would not *ipso facto* become a decree, within the meaning of the definition in section 2 of the Code of Civil Procedure and be subject to a second appeal. It is not a complete answer to this contention to say that the appeal before us has not been filed as a second appeal, because it would obviously be open to us to allow the appellants an opportunity of amending the heading of their memorandum of appeal and paying an additional court fee, if we thought such a course was absolutely necessary in order to give us jurisdiction to deal with this matter. After giving full consideration to the various arguments which have been addressed to us, I do not propose to pronounce a definite decision on the general question of the existence of an inherent right of remand in the Court of District Judges, or as to the appealability of orders of remand passed in the exercise of such a presumed right. In all the decisions in which this inherent right of remand has been recognized the learned Judges have taken considerable pains to lay down that such a right, assuming it to exist, must be exercised with great caution and only under exceptional circumstances. If the learned District Judge in the present case had given detailed reasons for holding that in the interests of justice and after due regard to the provisions of section 99 of the Code of Civil Procedure, he felt that he could not deal with this litigation satisfactorily by the exercise of any of the powers conferred upon him by order XLI, rules 23 to 29 (inclusive), of the Code of Civil Procedure, and felt compelled to fall back upon a power inherent in his court, and recognized by section 151 of the Code of Civil Procedure, it would then have been necessary for us to record a definite finding on the objection raised by the present respondent to the entertainment of this appeal. The present case we propose to dispose of by saying simply

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that we see no adequate reason for treating the order under appeal as an order passed in the exercise of any inherent jurisdiction which the learned District Judge of Cawnpore believed himself to possess. He does not purport to be exercising such inherent jurisdiction and has not attempted to give any reasons for so doing. The policy of this Court has always been to allow as wide a meaning as is reasonably possible to the provisions of order XLI, rule 23, of the Code of Civil Procedure, and I am not satisfied that the learned District Judge did not conceive himself to be acting simply under those provisions. On these grounds we have determined to set aside the preliminary objection taken by the respondent and proceed to dispose of this appeal.

As regards the appeal itself, I do not think that the order of remand before us was justified by the pleadings in the lower appellate court, or that the learned District Judge has given adequate reasons for passing such an order. In my opinion the case must go back to that court in order that the appeal may be reheard and disposed of in some different way. It will be open to the learned District Judge to consider whether each and all of the directions which the trial court has embodied in its preliminary decree is either (1) a proper subject-matter for inclusion in such a preliminary decree, or (2) adequately supported by evidence on the record. It will be open to him, further, to consider any application that the plaintiff may make, even at this stage, asking for a fuller, more formal and more regular disclosure of documentary evidence on the part of the defendants and for a further inquiry on the merits into the question of the genuineness and reliability of the accounts produced by himself and by the opposite party, respectively. The District Judge, being seised of the appeal, has power to look into this matter and to consider whether the plaintiff can make out a good case for the admission of fresh evidence on appeal, the nature of the evidence to be thus admitted, the court before which such evidence requires to be taken and so forth. The questions really at issue between the parties are shown by the order of the District Judge himself to lie within a fairly narrow compass and it ought to be possible to arrive at an adjudication on the merits without in effect ordering the suit to

be tried all over again, as the learned District Judge has attempted to do. I would, therefore, set aside the decree or order under appeal, and send the case back to the District Judge of Cawnpore, with directions to re-admit the same on to his file of pending appeals and to dispose of it. I think that the costs here and hitherto should be costs in the cause, that is to say, should be left to be dealt with in the discretion of the lower appellate court, after there has been further inquiry into the merits of the case, when that court will be in a better position than we are at present to determine how the costs of the litigation should be equitably assessed between the parties.

WALSH, J.:—I entirely agree. I only want to add a word which might be of practical service in other cases. The machinery for discovery contained in the Code of Civil Procedure is practically the same as contained in the rules of the Supreme Court of England. It is the result of years of practical experience and is invariably found to work well, if understood. It is provided and intended for all cases, but it is peculiarly appropriate and essential for such cases at this, where the plaintiff suing for an account may be either one partner suing another, or an agent suing his principal who keeps no account of his own and is necessarily without the requisite materials and documentary evidence which are necessary for framing issues and certainly for proving his claim. The first step which he ought to take is to apply to the court (and the rules are abundantly sufficient for the purpose) to compel his opponent to disclose on oath all the materials and relevant documents in his (the defendant's) possession and to produce them for inspection before the trial, or he may apply for the appointment of a commissioner; otherwise the court to some extent, and the parties themselves, have merely to grope in the dark and feel their way without the vital materials for the decision of the case. Once the parties have disclosed and provided to one another and to the court, all the materials and documents which are relevant as between themselves, the settling of the issues to be determined and the point in controversy ought to be and does become a perfectly simple and almost automatic matter. Certainly none of the tangles which have arisen in this case would have occurred if the proper

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procedure had been followed. To this extent I regard the plaintiff and his advisers responsible for all the trouble which has arisen in this case. It is hoped that, at any rate in Cawnpore, the legal practitioners will make some effort to acquaint themselves with the necessary information for carrying on their business and advising their clients properly. No legal practitioner with a grain of common sense in a claim of this kind ought to allow his client to go to court for trial without the available materials and the relevant documents. It is heart-breaking, to me at any rate, to see how lawyers, practitioners and men of business go blindly along a beaten path without giving themselves the trouble to understand what their clients really want and without availing themselves of the machinery which the Legislature has provided with such scrupulous care. As regards this particular case these observations are only relevant on the question of costs, because the mischief has been done. Speaking for myself, if I found that, in the ultimate result, the plaintiff had gained very little from the appeal which he has brought from the first court together with all the subsequent proceedings which have arisen out of it, I would saddle him with costs of those proceedings, which I regard as due to his own neglect or to that of his legal advisers. If, on the other hand, in the result it turns out that the plaintiff is entitled to a great deal more than he has got or that the defendant has been wilfully concealing the relevant materials, then certainly it would be just to punish the defendant because he had not disclosed the relevant material. I entirely agree with the order.

BY THE COURT:—Our order, therefore, is that we set aside the decree or order under appeal and send the case back to the District Judge of Cawnpore, with directions to re-admit the same on to his file of pending appeals and to dispose of it. We direct that the costs here and hitherto should be costs in the cause, that is to say, should be left to be dealt with in the discretion of the lower appellate court after there has been further inquiry into the merits of the case, when that court will be in a better position than we are at present to determine how the costs of the litigation should be equitably assessed between the parties.

Order set aside and cause remanded.