MISCELLANEOUS CIVIL

Before Mr. Justice G. H. Thomas and Mr. Justice Ziaul Hasan

FIRM HIRA LAL BAJPAI (APPELLANT) *v.* SRI RAM JANKI AND OTHERS (RESPONDENTS)* 1937 *February*, 5

Civil Procedure Code (Act V of 1908), order XLI, rules 23 and 25 and section 151—Remand of case by appellate court—Power of remand, if restricted by order XLI, rules 23 and 25—No complaint that parties did not get opportunity of producing all evidence—Order of remand, if proper order.

It cannot be laid down that an appellate court has no power to remand a case to the trial court unless the case falls strictly within the purview of rule 23 or rule 25 of order XLI of the Code of Civil Procedure. These rules do not make provision to meet the contingency in which the evidence on record is not considered sufficient by the appellate court for a correct decision of the point in issue. But where there is no reason to think that the parties did not get an opportunity of producing all the evidence that they desired to produce before the trial Judge the order of remand is not a proper order. *Case law discussed.*

Mr. *Hargovind Dayal*, for the appellant.

Mr. *R. P. Varma* (*R. B.*), for the respondents.

THOMAS and ZIAUL HASAN, JJ.:—This is an appeal against an order of the learned District Judge of Bara Banki remanding a case to the learned Additional Civil Judge of that place "for further inquiry". The case arose out of an objection of the judgment-debtors respondents under section 47 of the Code of Civil Procedure to the effect that the property sought to be sold by the decree-holder appellant was trust property and not liable to be attached and sold. The learned Additional Civil Judge on the evidence produced before him came to the conclusion that the judgment-debtors had failed to prove that the property in question was trust property.

*Miscellaneous Appeal No. 4 of 1935, against the order of Mr. R. F. S. Baylis, I.C.S., District Judge of Bara Banki, dated the 13th of December, 1934.

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The judgment-debtors appealed to the District Judge who came to the following conclusion:

> "While the burden lay on the objector to prove that the property in suit was trust property, at the same time I do not feel that there is enough material on the record from which the court can come to a definite finding as to whether or not this property is trust property. I would not record a finding that the learned Sub-Judge's statement 'There is no trust and no trust property' is incorrect. At the same time I am not satisfied that it is correct. I think it is a suitable case for remanding the objection to the lower court for further inquiry."

The case was accordingly remanded to the lower court and the learned Civil Judge was directed to "go into the matter more fully and himself dispose of the objection after inquiry". The decree-holder appeals against this order and his learned counsel has argued that the learned District Judge's order was illegal and that he had no jurisdiction under the law to remand the case when there was evidence on record and a clear finding of the trial court thereon. It is argued that the powers of an appellate court to remand a case to the trial court are restricted to the provisions of order XLI, rules 23 and 25 and as the case was not decided by the trial court on any preliminary point nor was any issue left undecided by that court, no remand could be made either under rule 23 or under rule 25. On the other hand the learned counsel for the respondents contends that rules 23 and 25 of order XLI, are not exhaustive and that a court has inherent powers at least under section 151 of the Code of Civil Procedure to order a remand when it considers it necessary to do so.

Various cases have been cited on behalf of both parties and after a careful consideration of those cases we have come to the conclusion that though it cannot be laid down that an appellate court has no power to remand a case to the trial court unless the case falls strictly within the purview of rule 23 or rule 25 of order XLI of the Code of Civil Procedure, the order in question was not a very proper order.

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The learned counsel for the appellant decree-holder relies on the case of *Injad Ali* v. *Mohini Chandra Adhikari* (1), but the facts of that case were quite different. In that case the plea of limitation was taken for the first time in the first appellate court and that court remanded the case to the trial court for a decision on that point. Mr. Justice RICHARDSON remarked:

> "In the first place the Code makes no provision for a remand in such circumstances. In the second place no reason appears why the point raised, which was a point of law, should involve the investigation of any facts which had not already been investigated at the trial. The liberty given to the parties to adduce additional evidence was therefore wholly unnecessary. Issues had been settled; the case had been fully tried and it is difficult to conceive what materials the parties could supply for the decision of the point of limitation other than those then on the record."

The second case relied on by the learned counsel for the decree-holder is that of *Srinivasa Raghava Patrachariar* v. *T. K. Srinivasa Raghava Iyengar* (2), but in that case also it was not laid down that an appellate court has no power to remand a case independently of rules 23 and 25 of order XLI. In that case the trial court had dismissed the suit on three preliminary points. On appeal the Subordinate Judge remanded the suit on the ground that all the three points involved mixed questions of fact and of law but he did not reverse the findings of the trial court on those three points. Here also it was remarked:

> "On the merits it is difficult to see what further facts the Subordinate Judge requires before deciding the preliminary points"

and further—

> "No oral evidence seems to be necessary and even if it is necessary, the appellate Court may proceed under order XLI, rule 27 to direct the district Munsif to take such evidence and send it with or without a fresh finding".

(1) (1924) Cal., 148. (2) (1928) Mad., 1200.

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The third case referred to by the learned counsel for the decree-holder is *Khushi Muhammad* v. *Musammat Barkat Bibi* (1), which contains the following general observation by Mr. Justice AGHA HAIDER:

> "When the Legislature has made special provisions in order to meet a particular contingency, it is not open to a party in my humble judgment to have recourse to the residuary and more or less nebulous powers inherent in Courts to do justice under section 151, Civil Procedure Code."

The principle laid down in this case is no doubt sound, if we may respectfully say so; but we think it could be argued, and we think not without reason, in this case, that rules 23 and 25 of order XLI of the Code of Civil Procedure do not make provision to meet the particular contingency arising in the present case, in which the evidence on record was not considered sufficient by the appellate court for a correct decision on the point in issue.

The learned counsel for the respondents relies on the cases of *Tirbhuwan Dat* v. *Someshar Dat* (2), *Sarabjit Singh* v. *Farahatullah Khan* (3), and *Moti Lal* v. *Nandan* (4), in all of which it was recognized that an appellate court has power of remand independently of the provisions of rules 23 and 25 of order XLI, Code of Civil Procedure. In fact, it was pointed out in *Sarabjit Singh* v. *Farahatullah Khan* (3), and *Moti Lal* v. *Nandan* (4), that the alteration made in clause (*u*) of rule 1 of order XLIII of the Code of Civil Procedure by the Allahabad High Court and this Court was intended to cover orders of remand which do not come within the four corners of the language of rule 23 of order XLI and in both the cases of *Tirbhuwan Dat* v. *Someshar Dat* (2), and *Sarabjit v. Farahatullah Khan* (3), it was said that an order of remand could be made under section 151 of the Code of Civil Procedure. We are therefore of opinion that the contention put forward on behalf of the decree-

(1) (1927) Lah., 622.
(2) (1927) Oudh, 629.
(3) (1930) Oudh, 366.
(4) (1930) All., 122.

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holder that an appellate court's powers of remand are circumscribed within the limits of order XLI, rules 23 and 25 of the Code of Civil Procedure, is not correct. At the same time we think that the order of the learned District Judge was not a very good order. Whatever evidence the parties chose to produce before the trial court was there on the record and the learned Judge of the trial court came to a definite finding on that evidence. In these circumstances it was wholly unnecessary for the learned Judge of the appellate court to remand the case for further inquiry and we think it was his duty to have come to a finding on the evidence already on the record. In *Promotha Nath Mazumdar* v. *Nagendra Nath Mazumdar* (1), RANKEN, J. remarked:

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> "I entirely fail to understand the procedure of the learned Subordinate Judge in directing a *de novo* trial by the first court. Having several difficult questions before him which had been determined by the trial court in one way, it was the duty of the Subordinate Judge, if he was dissatisfied with the view taken by the first court to come to a conclusion on the evidence for himself after arriving at the necessary finding of facts and of law. I must strongly deprecate delivering a lecture on points of law to the trial court and sending a case back for *de novo* trial to that court when there is no reason whatever to think that either party had not an opportunity of producing all the evidence that it desired to produce in the first instance. That appears to me to amount merely to throwing the work of the court on somebody else. It multiplies proceedings."

In the present case also there is no reason to think that the objectors did not get an opportunity of producing all the evidence that they desired to produce before the learned Civil Judge. Similarly in the case of *Lekhan Singh* v. *Babu Ram* (2). Mr. Justice SULAIMAN, (as he then was) remarked:

> "It was the duty of the lower appellate court to go into the question of accounts itself and find what amount was actually due to the plaintiffs on the evidence that was be-

(1) (1929) 33 C.W.N., 1211. (2) (1925) 23 A.L.J., 880.

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fore it. It has no power to remand the case when the first court has already expressed its opinion clearly on the reliability of the account book produced by the mortgagee. It would not be fair to the first court to ask it to reconsider its opinion and decision."

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The result therefore is that while we do not hold that the order of remand passed by the learned District Judge was illegal or without jurisdiction, we do not consider it to be a proper order and we would like to draw the attention of the lower courts to the remarks made above.

We may also mention that we have been informed, and the learned counsel for the appellant admits, that the trial court has reconsidered the matter after recording further evidence and passed an order allowing the objections on the 2nd of February, 1935, and that we would have dismissed the appeal on this very ground but for the fact that the jurisdiction of the lower appellate court to pass the order of remand was questioned before us.

The appeal is dismissed but in the circumstances of the case we make no order as to costs.

Appeal dismissed.