

Ghose v. Ashutosh Dhara ⁽¹⁾ and *Upendra Nath Kalamuri v. Kusum Kumari Dasi* ⁽²⁾. The contention of the petitioner, that no appeal lay to the District Judge must therefore prevail. The order of the learned District Judge is without jurisdiction and must be set aside. I would accordingly allow this application and set aside his order. There will be no order as to costs.

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DAS, J.—I agree.

Order set aside.

LETTERS PATENT.

Before Dawson Miller, C. J. and Mullick, J.

GANPAT RAO BANKA PURI

v.

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May, 10.

Second Appeal—Remand of issue, High Court's power.

Where an issue has been raised in a manner sufficient to permit of a decision on the question to which it relates and evidence on the issue has been adduced and a distinct finding on it has been arrived at both by the trial court and the lower appellate court, the High Court has no power to remand the case for a re-hearing on the very point involved in the issue.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

Appeal under the Letters Patent by the plaintiff.

Saroshi Charan Mitter, for the appellant.

Narendra Nath Sen, for the respondent.

DAWSON MILLER, C. J.—The question for decision in these appeals is whether the learned Judge of this Court in second appeal was justified in remanding the case to the trial court for the hearing and

* Letters Patent Appeals Nos. 73 and 76 of 1921.

(1) (1912) 1. L. R. 39 Cal. 298, F. B. (2) (1915) 1. L. R. 42 Cal. 440.

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determination of an issue which he considered had not been properly raised or tried in the first instance. The facts of the case shortly are that the defendant No. 4, Mussammatt Sareba Kuar, in the years 1908 and 1910 obtained a mortgage interest under a *rehan* deed of certain property which constitutes part of the property in suit. She was recorded in the record-of-rights as being the usufructuary mortgagee and Tulsi Singh, her husband's brother's son, was recorded as being an under-*raiyat* of the property. In the year 1911 a further holding was purchased in the name of Sareba Kuar and she was recorded as holding the *raiyati* interest in that property with Tulsi Singh as under-*raiyat*. In 1916, Sareba Kuar transferred both these properties, that is, her mortgage interest and her *raiyati* holding, to the plaintiff. Subsequently the plaintiff being under the impression that Tulsi Singh was the under-*raiyat* sued him for rent. In that suit Tulsi Singh contended that he was not an under-*raiyat* of the property at all, that in fact he was a co-sharer with the other members of his family and that the property had only been purchased in the name of Sareba Kuar as *benamidar* for the family. The rent suit which was brought in 1917 was decided in favour of Tulsi Singh and against the present plaintiff and in so far as that decision acts as *res judicata* the decision is not disputed in the present case.

The present suits were instituted in May 1918, claiming recovery of possession of the holding and of the *rehan* property. In the plaint the plaintiff set up a case that the property in suit in fact belonged to Sareba Kuar and was purchased by her as her own property but as an alternative case he pleaded that the defendants Nos. 1 and 2 who were Raj Kumar Singh, the brother-in-law of Sareba Kuar and Tulsi Singh his son had given the plaintiff to understand by their words deeds and acts that the Mussammatt was the real *rehandar* and that it was upon the strength of these proceedings and evidence that the plaintiff purchased

the *rehan* property and the other property from Mussammat Sareba Kuar.

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When the case came for trial various issues were raised for determination which are not material for present purposes but issue No. 4 was whether Sareba Kuar was owner of the disputed property or a *farzidar* of the other defendants. The case all along made by the defendants was that Sareba Kuar was really their *farzidar* and that the property never belonged to her from start to finish. Issue No. 6 which is the important issue to be considered in the appeal was to this effect :—

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“Whether the deed of transfer by Sareba Kuar in favour of the plaintiff is valid and binding on the other defendants.”

The case put forward at the trial on behalf of the plaintiff which arose upon that portion of the pleadings which I have referred to and upon the sixth issue which I have just set out was that under section 41 of the Transfer of Property Act even if the defendants 1 and 2 were the real owners of the property in suit they had in fact, by their representations and their acts, induced the plaintiff to believe that Sareba Kuar was the real owner of the property, and they had thereby impliedly consented that she who was undoubtedly the ostensible owner should transfer the property to the plaintiff. Her name was entered in the record-of-rights as the owner and she in fact was allowed to keep possession of the title deeds and these facts were known to the plaintiff, but in order to show that he had complied with the provisions of section 41 of the Transfer of Property Act he called evidence to show that he had taken reasonable care to ascertain that the transferrer had power to make the transfer. That evidence consisted of that of a *patwari* of the village, and his evidence was to the effect that he had made enquiries and he had informed the plaintiff as to the nature of the enquiries he had made. In considering the issue No. 6 the only question which the learned Munsif dealt with was the question of whether the provisions of section 41 of the Transfer of Property

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Act had been complied with, and having considered the evidence put forward on behalf of the plaintiff, *viz.*, that of the *patwari*, he was not satisfied that the plaintiff had taken proper care to ascertain whether Sareba was really in possession of the property or not and therefore having found that the property in fact belonged to the other defendants 1 and 2 he dismissed the suit. It is important to bear in mind that that was the only question which was discussed in deciding the sixth issue.

The matter then went on appeal to the District Judge and the learned District Judge took a different view on the facts from that arrived at by the Munsif. He pointed out that the *patwari*, Lalji Lal stated that he had made enquiries on behalf of the purchaser and that he had learnt that Sareba Kuar was the real *tehandar* and that witness was not in fact cross-examined by the defendants. He was the *patwari* of the village and after the transfer was completed he was engaged as a servant of the plaintiff. The Munsif had considered that his evidence was not trustworthy because he was not at the time he was alleged to have made the enquiries a servant of the plaintiff but only became so afterwards. The learned District Judge did not consider that this was sufficient ground for rejecting his evidence and he thought that the village *patwari* was a very likely man to have been employed to make enquiries of this sort, and, accepting his evidence as he did, the learned District Judge came to the conclusion that the case under section 41 of the Transfer of Property Act had been made out. I may mention that apart from this question of enquiries there were many other circumstances in the case which led the court to come to the conclusion that Sareba Kuar had been holding it as the ostensible owner.

From that decision the defendants appealed to the learned Judge of this Court. The learned Judge came to the conclusion that as there had been no direct issue raised as to whether section 41 of the Transfer of Property Act applied or not he doubted whether the

attention of the parties had been properly drawn to it or whether they had called the evidence upon that point which they would have done if the issue had been more distinctly raised, and, therefore, he remanded the case back to the trial court to re-hear the issue No. 6 with special reference to the question arising under section 41 and gave the parties leave to adduce further evidence. He further ordered that the District Judge on receiving the decision upon this issue of the Munsif should give his opinion upon it and remit it to the High Court. The only question which has been argued in appeal before us to-day is whether or not upon the facts which I have stated the learned Judge was justified in remanding the case. That must depend in the first instance upon whether the plea arising under section 41 of the Transfer of Property Act was sufficiently raised by the issues settled before the trial. In my opinion there can be no doubt that in the paragraph of the plaint which I have referred to this issue although perhaps not very scientifically put was clearly raised, *viz.*, that it was with the consent express or implied of the defendants that Sareba Kuar was the ostensible owner of the property and that in these circumstances they cannot complain if she had transferred the property to a *bonâ fide* purchaser. Again when the case came for trial as I have pointed out although the sixth issue did not in terms mention section 41 of the Transfer of Property Act it could hardly have had reference to any other question than that which I have just referred to, and which alone is dealt with by the learned Munsif in determining the issue. The issue no doubt was a little wider than was necessary merely to include a point arising under section 41 but the issue as framed clearly admitted of the question being decided in the case and I can see myself no other reason at all why this issue should have been raised except for the fact that it was foreshadowed in the pleadings, and the parties had notice of it. In these circumstances it seems to me that the matter having been raised and determined by the first appellate

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 _____ in second appeal to remand the case for a re-hearing
 upon this very issue. Had the issue not been
 GANPAT RAO BANKA PURI determined then obviously it would have been within
 v. the competency of this Court to remand the case for
 RAJ KUMAR SINGH. that purpose. But where you have an issue raised
 DAWSON which is quite sufficient for the purpose, and you have
 MILLER, evidence upon that issue and you have a distinct
 C. J. finding both by the trial court and the first appellate
 Court, I do not think, with great respect to the learned
 Judge, that it is any longer open to him to refer the
 case back for re-hearing upon that very point. In my
 opinion these appeals should be allowed, the decrees
 appealed from should be set aside and the decrees of
 the learned District Judge on first appeal should be
 restored. The appellant is entitled to his costs
 throughout.

MULLICK, J.—I agree.

Appeals allowed.

APPELLATE CIVIL.

Before Jwala Prasad and Bucknill, J.J.

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May, 5.

Code of Civil Procedure, 1908 (Act V of 1908), section 47, Order XXI, rule 2, section 103—Adjustment of decree—application by judgment-debtor during execution proceedings, rejection of—Appeal, whether maintainable—Second Appeal—issues left undecided by lower court—power of High Court to

* Appeal from Appellate Order No. 195 of 1921, from an order of R. L. Ross, Esq., District Judge of Patna, dated the 8th August, 1921, confirming an order of Babu Nut Bihari Chattarji, Subordinate Judge of Patna, dated the 30th April, 1921.