APPELLATE CIVIL.

Before Adami and Kulwant Sahay, J.J.

1926.

July, 8.

PERMANAND KUMAR

v.

BHON LOHAR.*

Remand—inherent powers—remand of whole case by appellate court, whether appealable—Code of Civil Procedure, 1908, (Act V of 1908), section 2(2).

Held, that where an order of remand made in exercise of a court's inherent powers merely sets aside the decree of the trial court and does not itself decide any of the points raised for determination and does not determine the rights of the parties with regard to the matters in controversy in the suit, it is not a decree within the meaning of section 2(2) of the Code of Civil Procedure, 1908, and, therefore, no appeal lies from such an order.

Ram Chandra Rao v. *Narain Lal* (1), and *Bhairab Chandra Dutt* v. *Kali Kumar Dutt*(2) disapproved.

Raghunath Das v. *Jhari Singh*(3) and *Achuta Singh* v. *Hit Narain Singh* (4), referred to.

Appeals by the plaintiffs.—

The facts of the case material to this report are stated in the judgment of Kulwant Sahay, J.

L. K. Jha, for the appellants.

T. N. Sahai and *A. N. Lal*, for the respondents.

KULWANT SAHAY, J.—These are appeals by the plaintiffs filed against the decision of the Subordinate Judge of Muzaffarpur whereby he remanded the suits to the trial court for fresh trial laying down certain issues for consideration.

*Second Appeal nos. 1302 to 1309 of 1925, from a decision of Babu Suresh Chandra Sur, Subordinate Judge of Muzaffarpur, dated the 13th August, 1925, reversing a decision of Babu Satyaranjan Prasad Sinha, Munsif of Sitamarhi, dated the 10th April, 1925.

(1) (1920) 58 Ind. Cas. 909.
(2) (1923) 37 Cal. L. J. 491.
(3) (1918) 3 Pat. L. J. 99.
(4) S. A. No. 1382 of 1922.

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A preliminary objection is taken on behalf of the respondents that no Second Appeal lies in these cases. The objection is based on the ground that the remand was made not under the provisions of Order XLI, rule 23, of the Civil Procedure Code against which an appeal would lie under Order XLIII, rule 1, clause (*u*), but that the remand was under the inheret power of the Court and, that, therefore, no appeal would lie to this Court as an appeal from an order; and that the order making the remand was not a decree within the meaning of the Code of Civil Procedure and, therefore, the present appeals as appeals against the appellate decrees of the Subordinate Judge were not maintainable.

On behalf of the appellants it is contended that the orders of the learned Subordinate Judge were decrees and, therefore, second appeal would lie to this Court as an appeal against a decree.

The question for determination, therefore, is whether there was any decree made by the Court of Appeal below against which an appeal would lie to this Court.

The learned advocate for the appellants relies on four decisions; three of which are decisions of this Court and one is a decision of the Calcutta High Court. The decisions of this Court relied upon are *Ram Chandra Raon* v. *Narain Lal*(1), *Achuta Singh* v. *Hit Narain Singh*(2) and *Raghunath Das.* v. *Jhari Singh*(3). The decision of the Calcutta High Court relied upon is in *Bhairab Chandra Dutt* v. *Kali Kumar Dutt*(4). It is necessary to consider these decisions in detail.

The case of *Ram Chandra Rao* v. *Narain Lal*(1) was decided by Jwala Prasad, J., sitting alone. It appears that this appeal was originally filed as an

(1) (1920) 58 Ind. Cas. 909.
(2) S. A. No. 1382 of 1922.
(3) (1918) 3 Pat. L. J. 99.
(4) (1923) 37 Cal. L. J. 491.

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appeal from an order and it was directed against an order of remand which did not come under Order XLI, rule 23. The Registrar was of opinion that the appeal was incompetent and he referred the case to the Bench for orders. The matter came up before the Hon'ble the Chief Justice and Adami, J., and their Lordships made the following order on the 13th June, 1919: "The learned Vakil for the appellant consenting, let this appeal be admitted as an appeal from the decree of the lower Appellate Court reversing the decree of the Munsif. Send for the record and issue the usual notices. This order is subject to a further report from the Stamp Reporter as to the sufficiency of the stamp on a memorandum of appeal on the above basis. The memorandum must be amended accordingly". The appeal was accordingly admitted as an appeal against the decree and it ultimately came on for hearing before Jwala Prasad, J., sitting alone, when an objection was taken on behalf of the respondents that the appeal did not lie. Jwala Prasad, J., overruled this objection. His Lordship observed that the remand in that case was not under Order XLI, rule 23, and, therefore, no appeal lay under Order XLIII, rule 1, clause (*u*), but an appeal lay against the decree made by the lower appellate court setting aside the decree of the trial court. His Lordship relied upon a decision of this Court in *Brijmohan Pathak* v. *Deobhajan Pathak*(1), and upon the order of the learned Chief Justice and Adami, J., dated the 13th June, 1919, referred to above. His Lordship also referred to the decision in *Bhadai Sahu* v. *Sheikh Manowar Ali*(2). No reasons are given by his Lordship for holding that the order setting aside the decree of the trial court was itself a decree. In *Brijmohan Pathak* v. *Deobhajan Pathak*(1), relied upon by the learned Judge, it was merely held that a remand which was not made under rule 23 of Order XLI of the Civil Procedure Code was not appealable. There was no

(1) (1920) 1 Pat. L. T. 509. (2) (1919) 4 Pat. L. J. 645.

decision in this case that the order could be appealed against as a decree. In the order of the learned Chief Justice and Adami, J., dated the 13th June, 1919, directing the appeal to be admitted as an appeal against the decree of the lower appellate court no reasons are given as to how the order appealed against could be treated as a decree. In *Bhadai Sahu* v. *Sheikh Manawar Ali*(1), the question as to whether an appeal could be filed against an order of remand treating it as a decree was not raised or discussed. The question raised there was whether the order appealed against came under rule 23 or rule 25 of Order XLI. Their Lordships observed that there was no reason why there could not be at one and the same time an order both under rule 23 and under rule 25 of Order XLI. In such a case the orders although made upon one piece of paper would in effect be quite separate, and the party affected would be competent to pursue the remedy by an appeal provided by the Code in respect of each; that, with regard to the order under rule 23 he could appeal against the decree or against the remand order itself under Order XLIII, clause (*u*); and, that, the order under rule 25 could be attacked in a second appeal against the final decree in the suit. Now, when their Lordships observed that with regard to the order under rule 23 the party affected could appeal against the decree, I apprehend that what was intended was that an appeal would lie against the final decree made in the case and in that appeal the order of remand under rule 23 could be challenged. It was not laid down that the order of remand itself under rule 23 could be appealed against as an appeal against a decree. The language used by their Lordships is: "With regard to the order under rule 23 it is open to him either to appeal against the whole decree or to appeal against the order of remand only under Order XLIII". Their Lordships merely pointed out that it was open to the party to appeal against that portion of the order which was under

(1) (1919) 4 Pat. L. J. 645.

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rule 23 or he would wait and appeal against the final decree and in that appeal object to the order under rule 23 I am, therefore, of opinion that the cases relied upon by Jwala Prasad, J., in *Ram Chandra Rao* v. *Narain Lal* (1), do not support the contention that an appeal would lie against the decree of the lower appellate court remanding a case to the trial court, the remand being under the inherent power of the court and not under Order XLI, rule 23, of the Code.

The decision of Bucknill, J., in Second Appeal no. 1382 of 1922 merely follows the decision of Jwala Prasad, J., in the case referred to, and the order of the learned Chief Justice and Adami J., made on the 13th June 1919 referred to above. His Lordship gives no reason whatsoever for holding that the order appealed against could be treated as a decree and an appeal could lie against it as an appeal from decree. It is remarkable that the judgment of Bucknill, J., in Second Appeal no. 1382 of 1922, was appealed against in Letters Patent Appeal no. of 1925; but the question of maintainability of the Second Appeal as an appeal against a decree was not raised or decided in the Letters Patent Appeal.

In *Raghunath Das.* v. *Jhari Singh*(2), the appeal was originally filed as an appeal from an order of remand under Order XLI, rule 1, clause (*u*). An objection was taken by the respondent that the appeal was really not an appeal from the order of remand but from an appellate decree. The trial court had dismissed the suit on various grounds. On appeal by the plaintiff the District Judge had held that the plaintiff was entitled to the land which he claimed and that the suit was within limitation and therefore, the plaintiff was entitled to a decree for possession and the remand was made by the District Judge for determining the question as to whether the plaintiff was entitled to

(1) (1920) 58 Ind. Cas. 909. (2) (1918) 3 Pat. L. J. 99.

mesne-profits and if so, what; and whether the plaintiff had any cause of action against defendant no. 6. The learned District Judge directed that after determining these issues the lower court will pass a decree accordingly. It was held by this Court that the District Judge did really reverse the decree of the first court on merits and that he should have passed a decree for possession in favour of the plaintiff and sent the case to the court below for inquiry as to mesne-profits. Their Lordships, therefore, treated the order of the District Judge as a decree for possession and held that the defendant's appeal against the decision of the District Judge must be considered as an appeal against an appellate decree. The decision of this Court in that case proceeded on the assumption that the District Judge on appeal had conclusively determined the rights of the parties with regard to some of the matters in controversy in the suit and that such a decision was a decree within the definition of the term as given in the Code of Civil Procedure. In this view of the case it was clear that the decision of the District Judge in that case could be treated as a decree and appealed against as such. This case, therefore, does not help the appellants in the present appeals.

It now remains to consider the decision of the Calcutta High Court in *Bhairab Chandra Dutt* v. *Kali Kumar Dutt*(1). This decision, no doubt, is in favour of the appellants in the present case. There also the appeal was against an order which did not purport to have been made under Order XLI, rule 23, of the Civil Procedure Code, but it had been made in the exercise of the inherent power of the Court as explained by the Full Bench in *Ghuznavi* v. *The Allahabad Bank, Ltd.*(2). The Learned Judges, however, remarked as follows: "The order so made (i.e., in exercise of the inherent power of the Court) is a decree which reverses

(1) (1923) 37 Cal. L. J. 491. (2) (1917) I. L. R. 44 Cal. 929.

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the decree of the Court of first instance and deprives the plaintiffs of the valuable right they had acquired thereunder. The appeal is consequently competent not as an appeal from order under Order XLIII, rule 1, sub-rule (*u*), but as an appeal from a decree under section 96 of the Code read with section 100 ".

With very great respect to the learned Judges, I am unable to agree with the view taken by them. I fail to understand how an order of remand under the inherent power of the Court can be treated as a decree unless the order can be brought within the definition of " decree " as given in the Code of Civil Procedure in other words, unless the Court of appeal making the remand conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit so far as that court is concerned. Where the order of remand merely sets aside the decree of the trial court and does not itself decide any of the points raised for determination and does not determine the rights of the parties with regard to any of the matters in controversy in the suit, I am of opinion that it cannot amount to a " decree " and must be treated as an order; and no appeal would lie against it as a decree. The mere fact that the order reverses the decree of the trial court and deprives the plaintiffs of the valuable right they had acquired thereunder would not make an order of remand a " decree ", unless that order itself determines any of the points arising for determination in regard to the matter in controversy in the suit. Das and Foster, J.J., in admitting the present appeals, now before us, under Order XLI, rule 11, of the Civil Procedure Code expressed grave doubt whether an appeal would lie in the present case. It was conceded before their Lordships that no appeal lay against the order as an order; but it was contended that the order appealed against amounted to a decree and that, as such, it was appealable. Their Lordships observed: " But a decree has been defined in the Civil Procedure Code

as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. In this case there is no expression of an adjudication conclusively or otherwise or at all determining the rights of the parties. All that the Court says is that it is unable to determine the rights of the parties unless certain other matters are decided by the Court of first instance". Their Lordships, however, admitted this appeal in view of the ruling of this Court in *Ram Chandra Rao* v. *Narain Lal*(1), referred to above. I fully agree with the view expressed by Das and Foster J J., in the above order. I, therefore, hold that no Second Appeal lies in this case.

It has then been contended by the learned Advocate for the appellants that the present appeals might be treated as an application in revision and that we ought to set aside the order of remand in exercise of our power of revision under section 115 of the Code. In my opinion there is no question of jurisdiction involved in the case. It is contended that having regard to the finding of the trial court, the Court of Appeal below had no jurisdiction to make the remand and its proper duty was to dispose of the appeal itself. But it appears from the order of remand that the learned Subordinate Judge thought it necessary that certain issues framed by him should be decided before the suit could be finally disposed of. I am, therefore, of opinion that there is no reason to set aside the order of the learned Subordinate Judge in exercise of our revisional powers.

These appeals must be dismissed with costs.

ADAMI, J.—I agree.

Appeals dismissed.

(1) (1920) 58 Ind. Cas. 909.