APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

BHAUSING WALAD RAGHO, APPLICANT *v.* CHAGANIRAM HURCHAND, OPPONENT.* 1918. *January* 24.

Civil Procedure Code (Act V of 1908), sections 115, 151, Order XLI, Rule 23—Remand of case by lower appellate Court—Refund of Court fees paid on memorandum of appeal—Court-Fees Act (VII of 1870), section 13—Refusal to pass the order—Application to High Court.

The lower appellate Court remanded a case under Order XLI, Rule 23, of the Civil Procedure Code, 1908, but declined to order refund of Court fees paid on the memorandum of appeal. The appellant having applied to the High Court against the order,

Held, that the application was not within the scope or intention of section 151 of the Civil Procedure Code, 1908.

Held, further, that the application must be allowed under section 115 of the Code, as the lower appellate Court, in refusing to pass the order had acted with illegality or with material irregularity.

Per BEAMAN J.:—"I think it is very clear that that section (151) is intended to empower Courts to deal with their own decrees and orders and was not intended to give authority to superior Courts by way of conferring supplemental jurisdiction to that conferred by section 115."

THIS was an application under extraordinary jurisdiction against an order passed by C. C. Dutt, Assistant Judge at Dhulia.

The applicant brought a suit which was disposed of by the Court of first instance on a finding that the applicant was not an agriculturist.

This finding was, on appeal, reversed by the Assistant Judge, who remanded the case to the first Court for trial on its merits. When the applicant next applied to the Assistant Judge for refund of the Court fees paid on the memorandum of appeal, the learned Judge declined to pass the order.

*Civil Extraordinary Application No. 57 of 1917.

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The applicant applied to the High Court.

P. V. Nijsure, for the applicant :—The lower appellate Court having reversed the decree of the trial Court on a preliminary point and remanded the suit for trial on merits, was bound to order refund of Court fees under section 13 of the Court-Fees Act. The High Court has inherent jurisdiction to correct such an error under section 151 of the Civil Procedure Code, 1908. If not under that section, the High Court can interfere under section 115 of the Code.

P. V. Kane, for the opponent :—Section 13 of the Court-Fees Act does not apply here; it speaks of a remand under Order XLI, Rule 23. Here, the Court of first instance recorded findings on all issues. The lower appellate Court came to a different conclusion on one issue, and sent down the case under Order XLI, Rule 33. But further, there is no occasion here for the exercise of jurisdiction under section 115 of the Civil Procedure Code for all that the lower appellate Court did was to interpret a section wrongly.

BEAMAN, J. :—I think it necessary to express my own emphatic opinion that an application of this kind is not within the scope or intention of section 151 of the Civil Procedure Code. Nor does that section confer upon us jurisdiction to deal with errors of this kind. I think it is very clear that that section is intended to empower Courts to deal with their own decrees and orders and was not intended to give authority to superior Courts by way of conferring supplemental jurisdiction to that conferred by section 115. But I think that this is a good case under section 115. What has happened is very clear. The trial Court held that the present applicant was not an agriculturist on the ground that the question was *res judicata*. On appeal, the learned Judge held that the question was not *res judicata* and remanded the case under Order XLI,

Rule 23. Of that there can be no doubt whatever. Where that happens section 13 of the Court-Fees Act makes it compulsory upon the Court to grant the certificate mentioned in that section. The Court has no discretion in the matter. The learned Judge of the lower appellate Court appears to have confused the matter before him in such a way as to have entirely lost sight of the imperative requirements of section 13 of the Court-Fees Act. Were it necessary to examine his reasoning, it would be, I think, very easy to show that he entirely missed the point and overlooked the obvious policy and intention of that section. It is, however, quite enough to say that as soon as he made his order of remand under Order XLI, Rule 23, he was bound by section 13 of the Court-Fees Act to grant the certificate which the applicant now prays for. As he refused to do so, he clearly acted with illegality or with material irregularity, whichever word be preferred, and the relief which the applicant prays for must be granted, and the Court below must be directed to grant him the certificate which he asks for under section 13 of the Court-Fees Act.

As the opponent in spite of our opinion upon this point, given before he opened the argument, has elected to resist the application, in which, as far as I can see, he had no interest whatever, there is no reason why the application should not now be granted with costs against him, and I would so order. The Rule should be made absolute in the terms of the above judgment.

In respect of the remaining six applications of like nature (viz., Civil Extraordinary Applications Nos. 164 to 169 of 1917) Mr. Kane for the opponent withdraws all further opposition, and we think that, while they will all be governed by the judgment just delivered, the opponent need pay no more than his own costs in

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each of them. The order, therefore, at the foot of the judgment in each of those cases will be that the Rule is made absolute, each party here bearing his own costs.

HEATON, J. :—I agree. I say nothing as to whether the District Judge's order disposing of the appeal was correct in form or not. It has not been appealed against and therefore remains. Taking it as it is, I can account for it only by supposing that it was made under Rule 23 of Order XLI, because there is no other provision in the Code which empowers the Court of first appeal to set aside a decree and remand the case to be decided according to law. As it was a disposal of an appeal under Rule 23 of Order XLI, the provisions of section 13 of the Court-Fees Act automatically came into operation and the Appellate Court was bound to grant a certificate, and as my learned brother has said its refusal to do that is a refusal to do what the law specifically says the Court must do and is either an illegality or material irregularity. Therefore, the matter comes, in my opinion, within section 115 of the Code. I agree entirely that it cannot come within section 151, because I feel quite sure that the powers of this Court of interfering with the orders of the Subordinate Courts are to be found either in sections relating to appeal or in the section relating to revision, or, it may be, in the Charter of the High Court or the Letters Patent. And I feel perfectly certain that section 151 of the Code was not intended to extend those powers but was intended, as its words to my mind clearly indicate, to show what the trial Court can do whilst it is seized of the case.

I think, therefore, that the order proposed is the correct order to be made in this case.

Rule made absolute.

R. R.