1874

MAJORAM OJHA v. RAJA NILMONEY SINGH DEO.

consider essential, can a remand be directed under s. 351 of the Act. The lower Court decided this case on the evidence, and not on a preliminary point. [PONTIFEX, J.—Why did you not appeal from the order of remand? Is it not too late to raise that objection now that you have submitted to that order.] It is submitted it is not; see *In re Mirza Himmat Bahadur* (1). A special appeal lies from the decision of the lower Court in its entirety, and that could not be until the case was decided on the remand. It is submitted that under such circumstances as the present the law does not prohibit an appeal, although the appellants might not be allowed their costs. The principle of *In re Mirza Himmat Bahadur* (1) has been applied to subsequent cases—*Mahesh Chandra Das* v. *Madhab Chandra Sirdar* (2) and *Brindabun Dey* v. *Bisona Bibee* (3). Any interlocutory order

(1) B. L. R., Sup. Vol., 429
(2) 2 B. L. R., S. N. xiii.
(3) Before Mr. *Justice Phear* and Mr. *Justice D. Mitter*,

The 26th January 1870.

BRINDABUN DEY (DEFENDANT) *v.* BISONA BIBEE (PLAINTIFF).*

Suit for a Kabuliat—Grounds of Enhancement—Trial—Enhancement of Rent—Proof—Remand—Act VIII of 1859 ss. 352 *&* 354.

Mr. *G. A. Twidale* for the appellant.

Baboo *Anund Gopal Paulit* for the respondent.

THE judgment of the Court was delivered by

PHEAR, J.—The judgment of the lower Appellate Court is clearly wrong on the face of it.

The plaintiff sued the defendant for a kabuliat at enhanced rates of rent and the ground of enhancement on which she relied was the prevailing rate paid by adjacent occupiers of similar land. With regard to this the Judge says:—"It is said that there were no witnesses on the spot who actually paid at the rate claimed by plaintiff, but there was ample evidence to show that, if the rates were re-adjusted, they would come up to the rate claimed, and for that reason he appears to be of the opinion that the plaintiff has established her ground of enhancement.

I confess I am utterly unable to see that there was any evidence, according to the Judge's own account, before him which could justify this conclusion. The probability, or even the certainty, that, if the rates of the neighbouring occupants were re-adjusted, they would come up to the rate claimed does not, to my mind, make out that the rate claimed is actually being paid by neighbouring ryots.

But not only is the judgment of the lower appellate Court now sent up to us in my opinion bad in law,

* Special Appeal, No. 2264 of 1869, against the decree of the Officiating Assistant Judge of Zilla Chittagong, reversing a decree of the Deputy Collector of that district, dated the 13th February 1869.

can be set right in appeal—*Mussamut Wuzeerun Beebee* v. *Sheikh Warris Alli* (1) and *Vithal Vishvanath Prabhu* v. *Ramchandra Sadashiv Kirkire* (2). It is not necessary to appeal but the remand order made by the Judge in May 1867 was I think improperly made. It runs thus:—"Plaintiff sues for a kabuliat at an enhanced rate of rent and relies on a decree, gained four years ago by another man against this defendant, for rent at the rate now claimed, and the evidence of five witnesses. This is not enough in my opinion. Plaintiff must prove distinctly that defendant holds as much land as she says he does; because defendant put it at a rather lower amount. She must also prove that the rate claimed is fair and equitable. This is not to be proved by one decree gained some years ago. It must be shown that the prevailing rate of such lands as defendant holds is that claimed by plaintiff. This has not been shown, but I think it right to give plaintiff a further chance of proving her case by means of measurement and local enquiry, and for this purpose I remand the case, which will be returned with the result of the enquiry for final decision."

Now the lower Appellate Court has no authority to remand a cases which comes before it for trial, excepting when the Court of first instance has disposed of a case on a preliminary point, so as to exclude any evidence of fact which shall appear to the Appellate Court essential to the determination of the rights of the parties, and the decree of the first Court on such preliminary point has been reversed by the Appellate Court. In such a case the Appellate Court might remand the case for trial on the merits. But s. 352 of the Procedure Code enacts that it is not competent to the Appellate Court to remand in any other case.

It is true that, although the Judge in this case did remand it, he himself considered that, in so doing, he acted under the provisions of s. 354. But under s. 354, if the circumstances existed which could give him the discretion provided for by that section, he ought not to have remanded the case, but to have framed an issue or issues for trial by the lower Court; upon which the lower Court would have been bound to try those issues and to return to the Appellate Court its finding thereon together with the evidence. Now the importance of following the procedure thus laid down by this section is this, that the lower Appellate Court would have been obliged in the commencement of its action to frame an issue or issues between the parties which the first Court had omitted to raise or to try, and which were such that the Appellate Court could not itself determine them by means of the evidence on the record.

If the Judge in this case had set himself to frame such an issue, he would have discovered that there was truly no material issue between the parties left untried by the lower Court, and certainly no issue on which the plaintiff's claim could rest, and which he had not himself disposed of in the first part of his remand order, for he there distinctly states that the

(1) 1 W. R., 51.

(2) 7 Bom. H. C. Rep., 149.

1874

MAJORAM OJHA v. RAJA NILMONEY SINGH DEO.

from an interlocutory order which does not dispose of the case; such order can be impeached on appeal from the final decree—*Forbes* v. *Ameeroonissa Begum* (1).

The tenure was not liable to enhancement, and the learned Judge was wrong in saying that the plaintiff on his repurchase reverted to his former position.

Baboo *Bhowany Churn Dutt* for the respondent.—The conduct of the appellants has been vexatious and harassing inasmuch as they did not appeal from the remand order. and as in this case the order was a final and not an interlocutory one. Under s. 363 of Civil Procedure Code, an appeal might have been brought—*Mahomed Anjob* v. *Gouripershaud Shaw* (2), [PONTIFEX, J.—The cases go to show that a party may either treat a remand order as a final order and appeal therefrom; or he may at his option treat it as an interlocutory order.]

The lower Appellate Court was unable to come to a decision upon the evidence, and did right to remand the case for a further trial. At any rate the appellants are not entitled to costs.

Baboo *Chunder Madhub Ghose* in reply.

Cur. adv. vult.

The judgment of the Court was delivered by

BIRCH, J. (who after shortly stating the facts) continued.—It is contended that the Judicial Commissioner's order of remand was illegal and ought to be set aside; and further that his judgment reversing the order of the Deputy Commissioner passed on remand is based on an erroneous interpretation of the law.

plaintiff had failed to make out the ground of action on which she placed her right of suit, and I think that, if he had been himself conscious of this, he would never have supposed that s. 354 justified him in remanding the case as he did.

It appears to me clear that that remand order was improper, and should be even now reversed. I have already said that even with the aid of the evidence which has been obtained by virtue of that remand or der according to the judgment of the lower Appellate Court, the plaintiff's case is not made out.

The appeal must be decreed, and the plaintiff's suit must be dismissed with costs in all the Courts.

(1) 10 Moore's I. A., 340.
(2) 6 W. R., 62.

We think that the objection to the remand order can be entertained now. It is true that the special appellants might have preferred a special appeal to this Court against the order of remand, but we are not prepared to say that their omission to prefer an appeal against that order precludes them from questioning its legality when the case comes up in special appeal from the subsequent decision passed after remand.

The Judicial Commissioner was, we think, wrong in law in remanding the case as he did by his order of the 30th January 1872. S. 352 expressly limits the power of the Appellate Court to remand, and says that it is not competent to remand a case for a second decision except as provided by s. 351. The provisions of the latter section cannot apply in this case, as it is apparent that the lower Court went into evidence upon the whole case, and did not dispose of it on the first trial upon any preliminary point. It investigated the merits of the case and passed its judgment upon the evidence. This being so, the Judicial Commissioner was not authorized to remand the case.

In the judgment containing the order of remand, the Judicial Commissioner has held that the plaintiff, by his repurchase of the talook he had granted in patni to Annoda Persad, reverted *ipso facto* to the position he held as proprietor, and is entitled to recover rent from the tenants at the rate he was receiving when he granted the patni, without reference to the amount realized by the talookdar in the interim. Cls. 1 and 3 of s. 11, Reg. VIII of 1819, are cited as vesting the purchaser with such powers. We think that the section quoted cannot bear the interpretation put upon it, and that there is no provision in the patni law which gives the purchaser at a patni sale the power to collect rent at a higher rate than was demandable by his predecessor without establishing his right so to do. The 3rd clause expressly provides that engagements entered into by a patnidar with ryots having certain defined rights shall not be cancelled by a purchaser at a patni sale except by a regular suit, clearly showing that the patni law does not give a purchaser the extraordinary power the Judicial Commissioner assumes it to give. Such a purchaser can in a suit for arrears of rent demand only what was payable to his predecessor until

1874

MAJORAM OJHA v. RAJA NILMONEY SINGH DEO.

he establishes his right to change the arrangement previously subsisting.

Looking to the form of the suit as originally laid, and the simple issue framed therein, "from whom and to what amount can the plaintiff recover rent?" we think that the Judicial Commissioner should not in the order of remand have found that the tenure was a "*khiraji brahmutter* holding at a fixed rent," or declared that "this is not a case in which notice under s. 13, Act X of 1859, could issue." All that could be decided in a suit framed as this was, would be what was the rent payable in the years immediately preceding that for the arrears of which the suit was brought. The Deputy Commissioner has expressed an opinion that notice should have been issued under s. 13, Act X of 1859. That expression of opinion might, if allowed to remain unnoticed, prejudice the defendants in any future litigation. While, therefore, we are of opinion that the decree of the Judicial Commissioner is wrong in law and must be set aside, and the order of the Deputy Commissioner restored, we must express our opinion that the remark in the judgment of the Deputy Commissioner as to the application of s. 13, Act X of 1859, should not have been made, and must not be considered as determining the status of the defendants who have appealed.

We reverse the order of the Judicial Commissioner and restore that of the Deputy Commissiner to the extent of declaring that the sum due to the plaintiff from the defendants who have appeared is Rs. 35-8-9. We observe that an *exparte* decree has been passed against the owner of 13½ annas of the village; that portion of the decree remains untouched.

As the appellants might have appealed against the order of remand, and, by so doing stayed further proceedings, we think that they are not entitled to the costs of this Court. Each party must bear his costs in this appeal.

Appeal allowed.