

Plaintiff accordingly had defendant's third share in certain moveable property offered for sale, and as there was no purchaser for such share, plaintiff's present application has been made.

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The Court is of opinion that, as the defendant's family is undivided, it is not competent for it to order the sale of so much of the undivided family property as will satisfy the decree against a single co-parcener, and it accordingly disallows plaintiff's application contingent upon the opinion of the High Court respectfully solicited under Section I, Act X of 1867 whether it is right in so disallowing plaintiff's application.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—We are of opinion that the Court of Small Causes had not power to do more in execution of the decree than issue process for the attachment and sale of the defendant's undivided right, title and interest in the family moveable property. It would be for the purchaser at such a sale to obtain a partition of the share.

Appellate Jurisdiction. (a)

Referred Case No 28 of 1870.

G. MUNIAPPAH NAIDU *against* M. IYASAMY MUDELY.

An Appellate Court can remand a case a second time on account of error, defect or irregularity of procedure in passing a decree or order, provided the error, defect or irregularity be such as to affect the merits of the case or the jurisdiction of the Court.

When a suit has been regularly heard and determined, and on appeal the decree is reversed, the Appellate Court has the discretionary power to remand the case only if the decree should have been upon a preliminary point and have the effect of excluding the consideration of evidence essential to the rights of the parties.

THE following case was referred for the opinion of the High Court by H. P. Gordon, Acting Judge of the Court of Small Causes of Chittoor, in Suit No. 111 of 1868.

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This suit was brought by the transferee of in Abkarry lease (plaintiff and respondent) to recover from appellant (a sub-renter) the following sums, viz., Rupees 32-12-0,

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amount of rent due, Rupees 22-15-0 interest thereon, and Rupees 94 interest for sums paid when overdue. Total amount of claim Rupees 149-11-0. The suit was instituted previous to the establishment of the Court of Small Causes of Chittoor.

The defendant (appellant) denied his liability, pleading payments, and relying upon the plaintiff's vouchers and accounts for the proof of his defence.

The suit was heard before me on the 4th day of April 1870, and was adjourned for further hearing subject to the decision of the High Court upon the following case.

The suit when first heard by the District Munsiff was dismissed on the ground that it was barred by the Statute of Limitations. The plaintiff was examined as a witness by defendant to show that he (plaintiff) had on obtaining a transfer of the lease received a list of the debts then due to the lessees in which defendant's name was not included. This plaintiff denied. The District Munsif in his judgment expressed no opinion as to the truth of the plaintiff's evidence upon this point. On appeal this decision was overturned, and the suit was remanded for trial on the merits. When the suit thus came on for hearing again in the District Munsif's Court, the District Munsif who took the evidence of defendant's witnesses at the first hearing and who passed the original decree had been removed. His successor did not re-examine the witnesses, but passed judgment on a perusal of the records, and upon hearing the arguments of the vakils. The Sudder Court, in their proceedings of the 7th August 1849, ruled that under circumstances similar to the foregoing, suits should be re-investigated. Section 350 of the Civil Procedure Code appears to authorise the remand of a suit where there has been an irregularity in the decision affecting the merits of the case or the jurisdiction of the Court, but Section 352 declares that a suit shall not be remanded for a second decision except as provided in Section 351 which refers to the case of a suit having been disposed of upon a preliminary point so as to exclude evidence of material facts.

Upon the foregoing facts I was of opinion that, inas-

much as Section 351 did not apply to the case, I was unable to remand it to the Lower Court for re-investigation, and that the ruling of the Sudder Court above referred to was intended solely for the guidance of Judicial Officers and did not authorize the remand of a suit otherwise than as provided in the Civil Procedure Code. As, however, I ascertained that the same question would arise in several suits before me, and that, under similar circumstances, suits were elsewhere remanded, I deemed it right to refer the matter to the High Court. I was of opinion that the procedure followed by the District Munsif may have been prejudicial to the appellant.

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The questions for the decision of the High Court are—

1. Where the judgment of an Original Court is passed on a perusal of evidence taken by a predecessor of the decreeing Judge and an appeal is preferred therefrom, should the suit be remanded for re-investigation and a second decision if it appear that the procedure followed may have been prejudicial to the appellant ?

If it should be so remanded, under what section of the Civil Procedure Code should the remand be made ?

No counsel were instructed.

The Court delivered the following

JUDGMENT :—We are of opinion that an Appellate Court can remand a case on account of error, defect, or irregularity of procedure in passing a decree or order, provided the error, defect or irregularity be such as to affect the merits of the case or the jurisdiction of the Court. But when a suit has been regularly heard and determined, and on appeal the decree is reversed, the Appellate Court has the discretionary power to remand only if the decree should have been upon a preliminary point and have had the effect of excluding the consideration of evidence essential to the rights of the parties.

In no other case can a remand be ordered because of a wrong decision as to the right claimed in the suit after a

1870. hearing in the regular course. Section 353(a) makes it
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 of 1870. the evidence on the record is sufficient for a satisfactory decision, and when there has been an omission to raise or determine a question essential to the determination of the suit upon the merits and the evidence on the record is insufficient to admit of the question being decided by the Appellate Court, Section 354(b) requires recourse to be had to the reference of an issue for trial by the Lower Court.

In the present case the irregularity of procedure at the hearing of the case in the Original Court was such as to affect the merits of the case. Our opinion therefore is that the suit may be remanded under Section 350.(c)

(a) Section 353 is as follows :—

When the evidence upon the record of the Lower Court is sufficient to enable the Appellate Court to pronounce a satisfactory judgment, the Appellate Court shall finally determine the case, notwithstanding that the judgment of the Lower Court has proceeded wholly upon some other ground.

(b) Section 354 :—

If the Lower Court shall have omitted to raise or try any issue or to determine any question of fact which shall appear to the Appellate Court essential to the right determination of the suit upon the merits, and the evidence upon the record is not sufficient to enable the Appellate Court to determine such issue or question of fact, the Appellate Court may frame an issue or issues for trial by the Lower Court and may refer the same to the Lower Court for trial. Thereupon the Lower Court shall proceed to try such issue or issues and shall return to the Appellate Court its finding thereon together with the evidence. Such finding and evidence shall become part of the record in the suit ; and either party may, within a time to be fixed by the Appellate Court, file a memorandum of any objection to the finding ; and after the expiration of the period so fixed, the Appellate Court shall proceed to determine the appeal.

(c) Section 350 :—

The judgment may be for confirming or reversing or modifying the decree of the Lower Court. But no decree shall be reversed or modified, nor shall any case be remanded to the Lower Court on account of any error, defect or irregularity either in the decision or in any interlocutory order passed in the suit not affecting the merits of the case or the jurisdiction of the Court.
