

(1884) 11 AHC CK 0004

Allahabad High Court

Case No: None

Sohan Lal

APPELLANT

Vs

Aziz-Un-Nissa Begam and Others

RESPONDENT

Date of Decision: Nov. 4, 1884

Citation: (1885) ILR (All) 136

Hon'ble Judges: Mahmood, J; Duthoit, J

Bench: Division Bench

Final Decision: Disposed Of

Judgement

Mahmood, J.

This is a first appeal from an order of the Lower Appellate Court, remanding the case to the Court of First Instance u/s 562 of the CPC for trial de novo.

2. Having considered the judgment of the Lower Appellate Court, we have no doubt that the order contravenes the express provisions of Section 562 and Section 564 of the Civil Procedure Code. Under the former of these sections, the only ground for setting aside the decree of the Court of First Instance can be that the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point, so as to exclude any evidence of fact which appears to the Appellate Court essential to the determination of the rights of the parties, and the decree upon such preliminary point is reversed in appeal." Section 564 expressly prohibits the remand of a case for a second decision except as provided in Section 562.

3. In the present case, the judgment of the Court of First Instance did not proceed upon any preliminary point, nor did that Court exclude any evidence of fact within the meaning of Section 562. The Lower Appellate Court's judgment is obviously framed in language adapted to an order of remand u/s 566 of the Civil Procedure Code, and the reasons given by that Court could not necessitate a remand u/s 562. The lower Court's order cannot stand; but the learned pleader for the appellant asks us to dispose of the case finally, without sending it back to the Lower Appellate

Court. He contends on the authority of the Full Bench ruling of this Court in *Badam v. Imrat* ILR All. 675 that we are bound, even at this stage, to enter into the merits of the whole case, and to dispose of it finally.

4. We are of opinion that this contention is not sound. The Full Bench ruling upon which the learned pleader relies does not go to the extent of supporting his contention. All that was ruled in that case was, that an appeal from an order remanding a suit for re-trial is not to be confined to the question whether the remand has been made contrary to the provisions of Section 562 of the Civil Procedure Code; but that the question whether the decision of the Appellate Court on the preliminary point is correct or not, may also be raised and determined in such an appeal. In the case before us the judgment of the Lower Appellate Court does not, as we have already said, proceed upon any preliminary point which we can determine at this stage. The judgment professes to deal with the merits of the case, though the result of the reasons would be a remand u/s 566, and not u/s 562.

5. It is to be observed that the case from which this appeal has arisen is one which can come up before us only in second appeal, and we are of opinion that the circumstance that this appeal is a first appeal from order under the provisions of Clause (28), Section 588 of the Civil Procedure Code, would not alter the nature of the powers to be exercised by us in second appeals u/s 584 of the Civil Procedure Code. In other words, we cannot deal with the case as if it were a first appeal from a decree. In the case of *Bam Narain v. Bhawanidin* Weekly Notes 1882 p. 104 and in *Sheoambar Singh v. Lallu Singh* Weekly Notes 1882 p. 158 to both of which one of us was a party, the powers of this Court in its jurisdiction as the Second Appellate Court were discussed. The observations made in those cases appear to us to be applicable in principle to the present case. Section 590 of the CPC renders Chapter XLI of the Code applicable to such appeals as the present only *mutatis mutandis*; and we cannot regard that section as binding us to enter into the merits of the whole case simply because the Lower Appellate Court, instead of remanding the case u/s 566, has erroneously remanded it for new trial u/s 562. In our opinion the functions of this Court in appeals under Clause (28), Section 588, are limited to disposing of such points as properly fall within the scope of Section 562. No such point exists in this case, and all that we are called upon to do is to rectify the procedure adopted by the Lower Appellate Court in the matter of the remand, and to direct that Court to decide the case itself on the merits. The questions raised before us in the memorandum of appeal may be proper questions for disposal after the Lower Appellate Court has pronounced its final judgment and decree; but they cannot be disposed of at this stage. The logical consequence of the contrary view would be, that in every case in which the Lower Appellate Court passes an erroneous order of remand for re-trial u/s 562, and an appeal is preferred to this Court under Clause (28), of Section 588, the functions of this Court, in cases like the present, instead of being confined to matters described in Section 584 of the Code, would be converted into those of the first Appellate Court; in other words, an erroneous order of remand

by the Lower Appellate Court would have the effect of converting into a first appeal a case which could only be the subject of second appeal.

6. For these reasons we decree this appeal, and setting aside the order of the Lower Appellate Court, remand the case to that Court, with directions to restore the case to its own file, and to dispose of it according to law. The costs of this appeal will be costs in the cause.