(1922) 08 CAL CK 0046

Calcutta High Court

Case No: S.A. No. 2026 of 1920

Bisai Nath		APPELLANT
	Vs	
Tara Nath Deb and others		RESPONDENT

Date of Decision: Aug. 22, 1922

Final Decision: Dismissed

Judgement

1. This is an appeal by the defendant in a suit for recovery of possession of land on establishment of title. The Court of first instance decreed the suit. Upon appeal that decree was reversed and the suit dismissed. The plaintiffs thereupon appealed to this Court, and on the 19th February 1919, Chatterjee and Panton, JJ. set aside the decree of dismissal made by the Lower Appellate Court and remanded the case for decision of the question of limitation. That question has now been decided in favour of the plaintiffs and the decree made by the primary Court in the first instance has been restored. On the present appeal, the defendant has attacked the order of remand, and has invited us to hold that the ease should never have been remanded; that not only the order of remand but whatever has followed therein should be treated as null and void and that the question in controversy should be heard in the present appeal as if there had been no order of remand. We are of opinion that this contention, cannot possibly be upheld.

2. There were two questions involved in the suit, namely, (1) the question of title, and (2) the question of limitation. The trial Court found in favour of the plaintiffs upon both the questions. The lower Appellate Court found in their favour upon the question of title but dismissed the suit on the ground that it was barred by limitation. Upon second appeal to this Court, Chatterjee and Panton, JJ. were of opinion that the finding upon the question of title could not be successfully impeached in second appeal, and they accordingly affirmed the decision of the District Judge thereon. The question of limitation stood on a different footing. The Court was of opinion that the findings were not sufficient and consistent, and accordingly allowed the appeal. The decree of the lower Appellate Court which

proceeded on the assumption that the claim was barred by limitation was necessarily reversed and the case was remanded for investigation of the question of limitation. We are now asked to hold that this order was without jurisdiction and that it is open to us to ignore it. In support of this position, reference has been made to the cases of Tarini Kant v. Kunjo Behari 12 W.R. 112 and Gada Dhar v. Sosi Moni 21 W.R. 7, which are of no real assistance to the appellant, because they merely lay down that when a case is remanded for retrial, all the questions in controversy are open for consideration. In the present case, there is no dispute possible as to the scope of the remand order. The Court expressly stated that the question of title would not he open for consideration and the only question for decision would be that of limitation. Reference has been made to the character of the order of remand and we have been urged to hold that the order was in contravention of O. 23 of R. 41 of the Code in as much as the decision appealed against had not been pronounced on a preliminary point. It may be conceded that the decision was not upon a preliminary point; but it was ruled by a Full Bench of this Court in Ghuznavi v. Allahabad Bank (1917) 44 Cal. 929 that the power of the Appellate Court to direct a remand is wider than that indicated in O. 41, R. 23. The Appellate Court has inherent power to direct a remand where such remand is needed in the ends of justice. The same view was indicated by the Judicial Committee in Brij Inder Singh v. Kashi Ram (1918) 45 Cal. 94 = 44 I.A. 218. There may, indeed, be a controversy, notwithstanding the rule in its wider form, whether in a concrete case an order of remand is or is not necessary in the interests of justice. As an illustration of this, reference may be made to the decision of the Judicial Committee in Radha Prosad v. Lal Sahab (1891) 13 All. 53 = 17 I.A. 150.

3. But this argument has been addressed to us on the assumption that the question of the validity or propriety of the order of remand is open for consideration. We are clearly of opinion that the question is not so open. It has been contended however that an order of remand not made in accordance with O. 41, R. 23 is null and void and may be ignored. But it is plain that an order of remand may be valid even though it is not covered by O. 41, R. 23. Assume for a moment that an order made in the exercise of the inherent powers of this Court has been improperly made; that is made under circumstances which do not justify it. Such an order is not without jurisdiction. It is an order made with jurisdiction, though the jurisdiction may have been erroneously exercised. This view is supported by the decisions in Mohes Chandra v. Samiraddin (1901) 28 Cal. 324; Durga Kinkar v. Konchai, (1907) 6 C.L.J. 71 and Nobin Chandra v. Pran Kissen (1914) 41 Cal. 108. There are instances to be found in the books where an attempt of this description had been made before, but failed. We need refer only to the decisions in Brojo v. Jaggat, 21 W.R. 199 Latchman v. Ganga, (1911) 31 Mad. 72 Ganga Ram v. Janmejay 1 C.L.R. 144 Suraj Din v. Chatter (1881) 3 All. 755, Ram Kuwar Bai v. Damodar 6 Bom. H.C.R. 146. In the case last mentioned, Sir Richard Couch, C.J. observed that a remand order made on second appeal is, unless a review of it be obtained within the prescribed time, a conclusive

determination of the points of law involved in it; and the correctness of the law laid down upon a remand cannot be questioned on a subsequent second appeal; nor is the fact of the Court''s adopting a different view of the law after an order has been made, in general a good ground for allowing a review of such order after the time for a review has elapsed. We may point out that the policy of the Legislature as indicated in the CPC of 1908 is in favour of finality of orders of remand. S. 105, Sub-S. (2) provides that notwithstanding the provision contained in Sub-S. (1) where any party aggrieved by an order of remand, made after the commencement of the Code, from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness. This provision was inserted to nullify the effect of the decision of a Full Bench of this Court in Khadem Hossein v. Emdad Mossain, ILR 29 Cal. 758 where it had been ruled by a majority that the validity of an order of remand or of a preliminary decree may be assailed either by a direct appeal or by way of an appeal against the final decree. That view was based on the opinion expressed by the Judicial Committee in the cases of Mohesshur Singh v. The Bengal Government 7 M.I.A. 283. Forbes v. Ammereonissa Begum, 10 M.I.A. 340 and Shah Makhun Lal v. Sree Kishen Singh 12. M.I.A. 157. Under the law as it now stands, the appellant, if he was dissatisfied with the order of remand should either have applied for a review of judgment or got the decision set aside by an appeal to a superior tribunal. He has not taken recourse to either of the possible methods for contesting the validity of that order. Consequently that order is binding on the appellant. If that order stands, it is indisputable that what has followed has been made with jurisdiction and the judgment of the District Judge pronounced after remand cannot be successfully attacked in second appeal.

4. The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.