

(1922) 04 MAD CK 0011
In the Madras High Court

Malayath Veetil Raman and Others

APPELLANT

Vs

C. Krishnan Nambudripad (dead) and Krishnan Nambudripad,
legal representative of the deceased

RESPONDENT

Date of Decision : 18-04-1922

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 104

Citation : AIR 1922 Mad 505 : (1922) 43 MLJ 354

Hon'ble Judges : Walter Salis Schwabe, J;Oldfield, J;Courtts Trotter, J

Bench : Full Bench

Judgement

Walter Salis Schwabe Kt., K.C., C.J.—The District Munsif held in this suit that the true construction of a service grant was clear and that

evidence of the consideration for that grant and of whether services were in fact rendered or not was irrelevant. On appeal, the Subordinate judge

took a different view of the construction of the grant and held that such evidence was relevant. He accordingly remanded the case with that

direction to be determined according to law. On appeal to the High Court from that order of remand a preliminary objection is taken that no

appeal lies, and it was also contended that the Subordinate Judge had no power to remand the case. The High Court has referred those matters for

determination to a Full Bench. The questions are of general interest as they raise points of procedure which have frequently arisen and have

resulted in a conflict of judicial decision.

2. The right, of appeal is by Section 104 of the Civil Procedure Code, 1908 expressly limited to cases enunciated in that section or expressly

provided for by the rules.

3. The rule giving a right of appeal is Order 43 which includes as appealable an order under Order 41 Rule 23 remanding a case.

4. The power to remand is given by Section 107 which gives power to Appellate Courts to remand a case subject to such conditions and

limitations as may be prescribed. That no doubt can be prescribed by rules. The only rule dealing with remand is Order 41 Rule 23 which is in the

following terms - where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is

reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case.

5. It has been held in several cases and most recently by a majority of a Full Bench in Calcutta, *Ghuznavi v. The Allahabad Bank Ltd.* ILR (1917)

C. 929 that this rule is a limitation on the exercise of the powers of remand u/s 107. I venture to doubt if this is correct, but in the view I take of this

case, it is not necessary for the decision, nor do I think it was necessary for the proper decision of any of those cases. Feeling apparently that in a

case like the present which it was supposed was not covered by Rule 23 that there ought to be a power to remand, the Full Bench in the Calcutta

case referred to above, and Judges in various cases here and elsewhere have held that there is an inherent power in the Court u/s 151 to remand,

and in other cases it has been held that there is power u/s 99. Further as no appeal is provided for from orders made under the inherent power of

the Court, resort has been had to the powers of the High Court in revision.

6. In my view, Section 99 has no application and if I agreed that rule 23 limited the power to remand to cases within its terms, I should not readily

accede to the proposition that where the Code expressly limits the power of a Court, there can co-exist an inherent power in that Court to

disregard that limitation.

7. The remanding of cases or, as it is there called, the granting of a new trial, is of every day occurrence in England in any case where, by reason of

the Appellate Court reversing the decision of the trial Court, there remain matters still to be decided in the suit and it would be remarkable if the

Code and rules here did not give similar powers, for absence of such powers would involve the result that in such cases it would be necessary for

the Appellate Court to retain the suit before it and remit issues to be determined

by the trial Court and so take away from the trial Court its proper function of giving judgment in the first instance. Further if there was no appeal, the whole of the time and money spent on the proceedings on remission would be wasted, if it ultimately turned out that the trial Court had been right in the first instance, But in my judgment none of these results follow because on the true construction of Rule 23 all Appellate Courts have power to remand in almost every case where such a power is required. The question turns on the meaning of the words ""preliminary point"" in that rule. In my judgment the only meaning that can be properly given to these words in this context is any point the decision of which avoids the necessity for the full hearing of the suit. There are many instances of such points such as, that a suit is barred by limitation; that the Court has no jurisdiction, e.g., under the Estates Land Act; that evidence tendered was not admissible; that on the plaintiff's evidence there is no case for the defendant to answer; in a libel suit, that there is no proof of publication. In all these cases, if the decision is held to be wrong, the case remains to be decided on what is sometimes referred to as the merits of the case. The points are preliminary to the final disposal of the case. In my judgment the two cases reported in A.T.S.P. Anthappa Chetty Vs. Ramanathan Chetty, were wrongly decided, for the points were preliminary points. In one it was held that a settlement with an agent bound his principal, and so the rights as between the two principals, if this decision was wrong, were left undecided; in the other, evidence was improperly excluded, and so the case was disposed of without being fully heard.

8. In Kuppelan v. Kunjuvalli (1911) 1 M.W.N. 199 in an action on a will it was held that the will was a forgery and therefore the questions in the case assuming the will to be genuine were not decided. In Jambukiyya v. Rajamma (1912) 36 Mad. 492 the trial Judge held a receipt was a settlement of a suit out of Court, and therefore did not hear tire suit on its merits at all. These are all in my judgment instances of decisions of preliminary points and in none of those cases was it necessary to resort to the inherent powers of the Court.

9. The words ""preliminary point"" occur in Section 562 of the C.P. Code of 1882 which corresponded to the present Order 41 Rule 23, and are interpreted in the same manner as I interpret them above by Mahmood J. in Rain

Narain v. Bhawanidin ILR (1884) All. 29 at page 32 where he lays down that the words are not confined to such legal points only as may be pleaded in bar of suit but comprehend all such points as may have prevented the Court disposing of the case on the merits, whether such points are pure questions of law or pure questions of fact; and he gives as an instance a mortgage suit in which it is held that the plaintiff is not a son and heir of the mortgagor and therefore the suit is dismissed without entering into the merits of the various pleas relating to the mortgage. The same view is expressed in Muhammad Allahdad Khan v. Muhammad Ismail Khan I.L.R.(1885) All. 289 by Edge C.J. and on page 343 by Mahmood J. The same view is expressed in different words in Ramachandra Joishi v. Hazi Kassim by Muthusami Ayyar and Best JJ. and also by Seshagiri Aiyar and Odgers JJ. in Anthappa Chetty v. Ramanathan Chetty (1919) 37 M.L.J. 538 though as I have stated in my view they misunderstood or misapplied the principle enunciated.

10. It was in my judgment wrongly admitted before the referring Bench that the point was not a preliminary one. My answer to the first question is that the Lower Appellate Court was competent to pass the order u/s 107 and Order 41, Rule 23. There is a right of appeal from that order under Order 43 and therefore the second question does not arise.

Oldfield, J.

11. The first of the questions referred was framed, as the order of reference shows, to obtain a decision as to the existence and extent of the alleged inherent power of the Appellate Courts to remand and in particular as to the correctness of the unrestricted recognition of that power in Ghuznavi v. The Allahabad Bank Ltd. ILR (1917) Cal. 929 and Anthappa Chetty v. Ramanathan Chetty (1919) 37 M.L.J. 538.

12. With all respect I am not prepared to assume that Appellate Courts in India have inherently or in virtue of Section 107 C.P. Code any such general power to order a new trial as is conferred in Order XXXIX under the English Judicature Act. For here there is never any question of the parties' right to the finding of a jury on issues of fact, which can be obtained only in the Court of first instance; and there is reason, when the litigant has once reached the Appellate Court and the stage of a general consideration of the evidence, against authorizing that Court to abandon control

over the case and leave it to take its chance of an early trial in competition with others of later institution. It is however unnecessary to pursue this

assumption further or to consider whether it is reconcileable with the provisions of Section 107 and Order XLI under the Code, because I agree

that Rule 23 of that Order covers the case before us, if the word ""preliminary"" in it receives its proper interpretation.

13. It was alleged and not disputed before the referring Judges that the point, on which the case had been decided by the Court of first instance,

was a preliminary one. But it was then, it is not disputed, supposed that a preliminary point must be one independent of the merits. That supposition

might have been consistent in some degree with the reference to remand in Section 562 in the Code of 1882, as for the purpose of ""investigating

and in the amended Code of 1888 as for the purpose of ""determining"" the suit on its merits; and there was also the omission from the section in the

latter of the description contained in the former of the disposal on a preliminary point, as excluding ""any evidence of fact which appears to the

appellate Court essential to the determination of the rights of the parties"" - But, whatever the implication of this wording, there is nothing

corresponding with it in the present Code or the order under it; and there is therefore no reason for treating only those points as ""preliminary"",

which, like pleas of res judicata or jurisdiction, are strictly independent of the merits. The decisions in Ram Narain v. Bhawanidin I.L.R.(1882) All.

29 and Muhamad Allahdad Khan v. Muhammad Ismail Khan ILR (1888) All. 289 were given on the Code of 1882 and before the omission

abovementioned. But I respectfully follow my Lord in adopting at least the portion of them referred to by him, as a correct statement of the law as

it now stands, and concur in the opinion he proposes.

Coutts Trotter, J.

14. I agree with my Lord that this is a preliminary point, which I take to mean a point which when decided in the way in which it is in fact decided

determines the result of the suit, and discharges the Court ;from the duty of trying all or some of the other issues in the case. If this conclusion be

correct, it renders it unnecessary to go into the wider questions raised in argument. I concur in the answers propounded.