

(1922) 02 CAL CK 0031
In the Calcutta High Court

Radha Krishna Saha and Others

APPELLANT

Vs

Kamal Kamini Debya and Others

RESPONDENT

Date of Decision : 15-02-1922

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 23

Citation : AIR 1922 Cal 456 : 70 Ind. Cas. 547

Hon'ble Judges : Greaves, J;B.B. Ghose, J

Bench : Division Bench

Judgement

1. The plaintiffs are the appellants in this appeal and are also the petitioners in the Rule. The plaintiffs sued to establish their title to and for recovery of a certain fishery. The First Court decreed the suit. The Second Court held that the case had not been properly dealt with and modified one of the issues that had been settled by the learned Judge in the First Court and directed that the case should be tried de novo on the modified issue. The order of the lower Court is this: "The appeal is allowed and the decree of the lower Court is reversed. The suit is remanded for a de novo trial of the suit on amendment of Issue No. 6 as mentioned above. The lower-Court is directed to, readmit the suit under its original number in the register of civil suits and to proceed to determine the suit, the evidence recorded during the original trial to be evidenced during the trial after remand. The parties to be at liberty to adduce new evidence in support of their respective cases."

2. A preliminary objection was taken on behalf of the respondents that this was a remand not under the provisions of Order XLI, Rule 23, of the Code, but that it was a remand under the inherent jurisdiction of the Court under the provisions of Section 151 of the CPC and that no appeal lies. Order. XLI, Rule 23, provides that 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 appeals the Appellate Court may, if it thinks fit, by order remand the case and may further direct what issue or issues shall be tried. It was urged before us on behalf of the respondents

that, notwithstanding the terms of the order of the lower Court, this was not an order under the provisions of Order XLI, Rule 23, as the First Court has not disposed of the case upon a preliminary point. Both the learned Vakils for the appellants and respondents agree that the provisions of Order XLI, Rule 25, do not apply as, clearly, the order was not made under the provisions of Order XLI, Rule 25, and on behalf of the respondents it is said that as the remand was not made under Order XLI, Rule 23, which is an appealable order it must, as I have already said, have been made under the provisions of Section 151, and we were referred to the Full Bench decision in the case of Abdul Karim Abu Ahmed Khan Ghaznavi v. Allahabad Bank, Ltd. 41 Ind. Cas. 598 : 44 C. 929 : 26 C.L.J. 49 : 21 C.W.N. 877 it being suggested that the decisions in both the cases of Baseemati Debi v. Taritbasani Dassi 44 Ind. Cas. 416 : 31 C.L.J. 314 and Prosunna Chandra v. Boidya Nath Mistry 56 Ind. Cas. 516 : 31 C.L.J. 360 : 24 C.W.N. 708 must be taken to be in conflict with the Full Bench case, and it is said, that in both those cases the attention of the Court was not drawn, to the Full Bench decision. It is further urged that the decision in the case of Manx Mohan Mandal v. Ramtaran Mandal 33 Ind. Cas. 329 : 43 C. 148 must be taken to have been overruled by the Full Bench decision, although it does appear that that decision was expressly referred to in the Full Bench case and is not stated to have been overruled. We think the learned Vakil for the respondents has read into the Full Bench case something more than it intended to decide and we think that all that it decides is that the power of remand is not limited to the cases described in Order XLI, Rule 23 or Rule 25, but that the Court has an inherent power to remand u/s 151, if it is necessary for the ends of justice. We think that the learned Judge intended to make his order under the provisions of Order XLI, Rule 23 of the Code although we agree that he had no jurisdiction under the circumstances to make an order thereunder and consequently we think that we must reverse his decision as was done in the case of Mani Mohan Mandal v. Ramtaran Mandal 33 Ind. Cas. 329 : 43 C. 148. We accordingly set aside the Judge's decision and direct that the case be restored to his file and that he should proceed with the hearing of the appeal according to law. We desire to add that if it becomes necessary for him to exercise the powers vested in him under the CPC it will be open to him to proceed as he thinks fit under those powers but we think that he was wrong in making the order which he did and that, as Sir Lawrence Jenkins in the case of Mani Mohan Mandal v. Ramtaran Mandal 33 Ind. Cas. 329 : 43 C. 148 has said, the Judge had no authority both to reverse the decision of the Court below and to remand the case as he has done.

3. The result is that this appeal succeeds and the order of remand by the learned District Judge is set aside; but we do not reverse the decision of the lower Appellate Court on the merits of the case nor do we express any opinion with regard to that decision. It will be open to the Judge to re-consider the decision at which he has arrived if he thinks fit so to do costs of this appeal will abide the result.

4. We make no order on the Rule as it is not necessary.

5. Let the record be sent down as soon as the decree is drawn up.