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Court : Mumbai

Decided On : Nov-16-1934

Reported in : 156Ind.Cas.381

Judge : Broomfield, J.

Appellant : Purshottam Dattaraya Shetye

Respondent : Yeshvadabai Jayadeo Shetye

Judgement :

ORDER

Broomfield, J.

1. This is an application for revision of an order of remand made by the District Judge of Ratnagiri on appeal from the Subordinate Judge of Malvan in certain execution proceedings. There had been a suit in which the opponent obtained a decree for possession of certain land, Survey No. 11, Pot No. 4, against the present applicant and his brother. When the decree was sought to be executed, it was found that there was a shed on the land which had been constructed by the judgment-debtors. On behalf of the decree-holder it was alleged that the shed had been erected since the decree. A Commissioner was appointed to draw a map and to ascertain the age of the building. He submitted a report to the effect that the building was ten or eleven years old. The Subordinate Judge then disposed of the darkhast by directing that the decree-holder was to be given possession of the land with the exception of the shed and the land beneath it. He also directed that the judgment-debtor, were to have a right of way to the shed from their adjoining land pot No. 5.

2. The decree-holder appealed to the District Court. The learned District Judge was of opinion that the trial Court had gone beyond the decree in allowing the judgment-debtors a right of way and he further held that the darkhast could not be properly disposed of without a determination of the question whether the shed had been erected before or after the decree was passed. As regards the right of way, it is not clear that the learned District Judge had observed that the judgment-debtors are the owners of pot No. 5. So that all that they have been allowed is a right of way through a small portion of pot No. 4 to get to the shed. If they are entitled to retain possession of the shed and its site, it would seem prima facie that the right of way to it would be an easement of necessity. But, of course, it is necessary to determine whether the shed was erected before or after the decree, since in the latter case the judgment-debtors would not be entitled to retain it. The learned District Judge may have been perfectly right in thinking that this was an issue necessary for the determination of the case which the lower Court had omitted to determine. On that view he would have been justified in sending down an issue under Rule 25, Order XLI. What he did however was to set aside the order of the lower Court and remand the darkhast for re-trial in the light of his observations. Such an order could in the normal way only be passed under Rule 23, Order XLI, where the case has been decided by the original Court on a preliminary point. That was not so in the present case.

3. The questions before me in this revision application are whether the District Judge's order of remand was a

legal order and whether, if not, this Court can or should interfere. It is conceded and it is obvious that Rule 23, Order XLI, does not apply. However wide the interpretation one may put upon the words 'preliminary point', it cannot be held that the Subordinate Judge, here disposed of the case on a preliminary point so as to bring the matter within the ambit of the rule. It is also conceded that the District Judge might have made an order under Rule 25 sending down an issue while retaining the appeal for disposal on his own file, and further that that would have been a satisfactory procedure which would have met the case perfectly well. The argument on behalf of the opponent is that Rules 23 and 25, Order XLI are not exhaustive, that the Court has an inherent power to remand in other cases under Section 151, and that as it cannot be said that the District Judge acted without jurisdiction this Court cannot interfere in revision under Section 115. In any case it was urged that there has been no prejudice to the other side. Interference in revision is discretionary, and in the circumstances of the present case, this Court ought not to interfere.

4. Now it is true the Court has an inherent power to remand a case even where Rule 23 does not apply, provided that the interests of justice require it. A number of cases on this point have been quoted in Mulla's Civil Procedure Code, at pp. 1099 and 1100. But the authorities show, and I think it is also clearly in accordance with common sense, that the Court has no inherent power to disregard a method of procedure enjoined or provided by the Code and adopt different one unless it really is necessary in the interests of justice. Here it cannot be said that it was necessary to remand the whole case as the District Judge has done when it is admitted that an ordinary order sending down an issue under Rule 25 would have been sufficient. The position is therefore that the District Judge has made an order of remand which is not justified by the provisions of Rule 23, and if he was acting in his inherent power, he has invoked that power in a case in which he had no right to do so.

5. I do not think it can be seriously contested that this Court has power to interfere. In *Kalu v. Narayan* 100 Ind. Cas. 578 : A.I.R. 1927 Bom. 111 : 29 Bom. L.R. 56, this Court interfered by way of appeal from the order of remand. In that case the District Judge had purported to act under Rule 23. This Court held that he was not at liberty to act under that rule but ought to have acted under Rule 25 that is to say, it was held that the order made by the District Judge was not one which could legally have been made under Rule 23. Under Order XLIII, Rule 1, Clause (w) however the only appeal provided is one from the order of remand under Rule 24. If the order is one which could not be made under that rule, it is difficult to see how there can legally be an appeal from it. But that this Court is entitled to interfere in revision is, I think, perfectly clear. It has been so held in *Banka Behari Deb v. Birendra Nath Dutt* : AIR1927Cal850 , where it was laid down that the Court ought not to make use of the inherent jurisdiction with which it is invested in circumstances to which the provisions of the Code are applicable, and if it does so, it acts without jurisdiction so that the order is open to revision by the High Court.

6. Mr. Adarkar who appears for the opponent, referred me to a Madras case, *Mallayya v. Veerayya* 100 Ind. Cas. 135 : A.I.R. 1927 Mad. 335 : 52 M.L.J. 90 : 25 L.W. 198 : 38 M.L.T. 15, where it was held that no appeal lies from an order of remand made in an improper use of the inherent power on the ground that no question of jurisdiction is involved. But there is a later case of the same High Court *Mullappa Chettiar v. Alagiri Naicker* 133 Ind. Cas. 205 : A.I.R. 1933 Mad. 791 : 60 M.L.J. 475 : (1931) M.W.N. 710 : Ind. Rul. (1931) Mad. 717, where a different view has been taken. In that case Jackson, J., held that where the lower Appellate Court purported to remand a case under its inherent power in a case covered by one of the rules of the Code, it is a material irregularity in the exercise of its jurisdiction by the lower Appellate Court which the High Court can cure by interfering in revision. That is the decision of a single Judge, but he refers to numerous cases of the Madras High Court, and in any case. I prefer the reasoning of the judgment of Calcutta High Court in *Banka Behari Deb v. Birendra Nath Dutt* : AIR1927Cal850 . Further, I am of opinion that not only has this Court power to interfere, but it ought to interfere in the circumstances of this case. I am by no means satisfied that the other party will not be prejudiced by leaving matters to take their course. The District Judge might have disposed of the matter finally himself, after sending down an issue to the lower Court if he thought it necessary, which should not have occasioned much delay. The remand of the whole darkhast may easily entail serious delay. In

that connection I may refer to the observations of Oldfield, J., in Raman Nayar v. Krishnan Nambudripad 69 Ind. Cas. 828 : A.I.R. 1922 Mad. 505 : 45 M. 900 : 31 M.L.T. 208 : 16 L.W. 405 : 45 M.L.J. 354 : (1922) M.W.N. 589. After expressing a doubt as to the existence of any general power to order a new trial the learned Judge says p. 911 Page of 45 M.--[Ed.].

There is a 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.

7. Moreover, I think, there is really a question of principle involved. District Judges have rather frequently misused their inherent powers in this way and remanded cases in circumstances not within the scope of Rule 23, and this practice leads not only to delay but to unnecessary appeals and applications to this Court. I think therefore that it is necessary to interfere. I set aside the order of the District Judge and send back the appeal to him for disposal according to law. If he considers it necessary to send down an issue under Rule 25, he can of course do so, and if does, he should give such directions as may be necessary as to the recording of further evidence. As was done in Annaji Ramchandra v. Thakubai Dattaraya 118 Ind. Cas. 790 : A.I.R. 1929 Bom. 175 : 53 B. 335 : 31 Bom. L.R. 208 : Ind. Rul. (1929) Bom. 486, I direct that parties bear their own costs in this application. Costs in the District Court will be dealt with by the District Judge in disposing of the appeal.

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