

RAJASTHAN HIGH COURT

Prahlad Rai Dhand

Vs.

Savitri Devi

Civil Revn. Petn. No. 215 of 1999

(Harbans Lal, J.)

04.04.2003

JUDGEMENT

Harbans Lal, J.

1. This civil misc. appeal under Order 43, Rule 1(u) of the Civil Procedure Code, 1908 is directed against the order dated 10-12-1998 of the learned Addl. District and Sessions Judge No. 1, Sikar whereby the Civil Regular Appeal No. 25/95 filed by defendants was allowed and after setting aside the judgment and decree dated 14-9-1995 passed by learned Civil Judge (SD) Dataramgarh in Civil Original Suit No.63/84 (129/93), the case was remanded back to the trial Court for fresh decision.

2. Briefly stated, the relevant facts necessary for its disposal are that the plaintiff, appellant herein, instituted a civil suit in the trial Court for cancellation of sale-deed dated 24-1-1980 with the averments that the suit property described in para 2 of the plaint was in the ownership and possession of his father since Fagun Sudi 4 Sanwat 1990 and thereafter in his ownership and possession. Mst. Dhapu Devi wife of Late Sri Chandra Bhan Dhand who had no concern with the suit property sold it to her daughters Mst. Manohari Devi and Mst. Savitri Devi through a registered sale-deed dated 29-1-1980 without any consideration and knowing fully well that the same was surrendered by Late Sri Chandra Bhan Dhand in favour of father of the plaintiff through surrender-deed Ex. 2A and after his death plaintiffs have been in adverse possession thereof. The sale-deed was, therefore, void *ab initio* which be cancelled. The defendants denied averments in their written statement pleading further that through a family settlement arrived at on 30-12-1943 between two sons of Late Sri Kanhaiya Lal Dhand namely Late Sri Deen Dayal and Late Sri Chandra Bhan, the suit property came in the share of Late Sri Chandra Bhan and after his death Mst. Dhapu

Devi, his wife, became its owner. The trial Court after framing six issues stemming from the pleadings of the parties, taking oral and documentary evidence of the parties and affording an opportunity of hearing to the parties, decreed the suit on 14-9-1995 with costs. During the pendency of the appeal preferred from the aforesaid judgment and decree by the defendants, the defendants moved an application under Order 14, Rule 5 read with Section 107, C.P.C. for framing of issue as under:-

(Vernacular matter omitted)

3. The plaintiff opposed the aforesaid application by filing its reply. The learned first appellate Court allowed the application, framed the aforesaid additional issue and remanded the case to the trial Court with the direction to decide the suit afresh after taking evidence of the parties.

4. Learned counsel for the appellant has argued that there was no need to frame additional issue. Both the parties had gone to trial fully knowing the rival cases and had led all evidence in support of their case and in refutation of the case of the opposite side. No request for framing additional issue was made in the trial Court where the suit remained pending for over 11 years. Rather, full fledged, thorough and detailed cross-examination was made in this regard from Prahlad Rai PW-1. It was also contended that the settled law is that the appellate Court will not interfere in the judgment of the Court below unless there are compelling reasons. There is a presumption under Section 90 of the Evidence Act about the genuineness of a document produced from proper custody. According to him, where the parties were alive to real controversy and had led evidence in support of their respective contentions, non-framing of issue would not preclude the Court from deciding the point without formally framing the additional issue. Even if the additional issue was found necessary, the Court could not have quashed the entire judgment and decree. It could have, at best, either recorded additional evidence on the issue so framed or could have remitted the issue for recording of evidence and finding on such issue. So the order of the Court below is unwarranted and unsustainable.

5. Learned counsel for respondent has supported the order of the learned first appellate Court.

6. I have perused the impugned order and the record.

7. Rules 23, 23-A, 24, 25 and 26 of Order 41, C.P.C. deal with the remand of cases by the appellate Court. Rule 23 deals with a case of remand where the suit has been

disposed of on a preliminary point and Rule 23-A which was inserted by C.P.C. Amendment Act of 1976 deals with the powers of the appellate Court with regard to remand in cases disposed of otherwise on a preliminary point and provides that the appellate Court shall have the same powers of remand as under Rule 23. Rule 24 enables and empowers the appellate Court if the evidence on record is sufficient to pronounce judgment even after resettling the issue, if necessary. Rule 25 deals with the cases where it appears to the appellate Court that the trial Court has omitted to frame or try an issue or to determine any question of fact which is essential to the right decision of the suit on merits, the appellate Court may, if necessary, frame such an issue and refer the same for trial to the Court below and in such case it shall direct such Court to try such issue and to return the evidence together with its findings thereon and reasons there for within the time fixed by it or extended by it.

8. In *Purushottam Reddy v. Pratap Steels Ltd.*,¹ their Lordships of the Honble Apex Court have considered these rules and have held as under:

"Prior to the insertion of Rule 23-A in Order 41 of the Civil Procedure Code by the C.P.C. Amendment Act, 1976, there were only two provisions contemplating remand by a Court of appeal in Order 41, C.P.C. Rule 23 applies when the trial Court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in appeal. Rule 25 applies when the appellate Court notices an omission on the part of the trial Court to frame or try any issue or to determine any question of fact which in the opinion of the appellate Court was essential to the right decision of the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand inasmuch as the subordinate Court can try only such issues as are referred to it for trial and having done so, the evidence recorded, together with findings and reasons there for of the trial Court, are required to be returned to the appellate Court. However, still it was a settled position of law before the 1976 Amendment that the Court, in an appropriate case could exercise its inherent jurisdiction under Section 151, C.P.C. to order a remand if such a remand was considered pre-eminently necessary *ex debito* justitiae, though not covered by any specific provision of Order 41, C.P.C. In cases where additional evidence is required to be taken in the event of any one of the clauses of sub-rule (1) of Rule 27 being attracted, such additional evidence, oral or documentary is allowed to be produced either before the appellate Court itself or by directing any Court subordinate to the

appellate Court to receive such evidence and send it to the appellate Court. In 1976, Rule 23-A has been inserted in Order 41 which provides for a remand by an appellate Court hearing an appeal against a decree if (i) the trial Court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate Court can exercise the same power of remand under Rule 23-A as it is under Rule 23. After the amendment, all the cases of wholesale remand are covered by Rules 23 and 23-A. In view of the express provisions of these Rules, the High Court cannot have recourse to its inherent powers to make a remand because, as held in *Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati*,² it is well settled that inherent powers can be availed of *ex debito justitia* only in the absence of express provisions in the Code. It is only in exceptional cases where the Court may now exercise the power of remand *dehors* Rules 23 and 23-A. To wit, the superior Court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20, Rule 3 or Order 41, Rule 31, C.P.C. and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for rewriting the judgment so as to protect valuable rights of the parties. An appellate Court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23-A or Rule 25, C.P.C. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided."

9. Thus, it is apparent and well settled that where the evidence on record is sufficient to decide the matter and controversy in between the parties, the appellate Court should not remit the case to the trial Court. It should itself decide the matter, if it is necessary to frame additional issue, the appellate Court can very well frame issues which appear to it necessary and then decide the matter on the evidence on record if there is sufficient evidence. But even where it comes to the conclusion that some important issue has been left out or omitted by the trial Court and it is essential to frame such an issue and the evidence on, such an issue has not been led by the parties or is insufficient, then it can very well frame additional issue and remit the additional issue/issues for taking evidence on the additional issue/issues with the direction to send back evidence along with findings on such issue but it does not empower the appellate Court to set aside the entire judgment and decree passed by the trial Court and the procedure for decision on the additional issue has also been given in Rule 26 of Order 41, C.P.C.

10. In the instant case, learned first appellate Court has completely ignored and given a go-bye to the aforesaid provisions of law. It has set aside the entire judgment and decree passed by the trial Court which, it was not competent to do as per the aforesaid provisions and the law laid down in this behalf by the Hon'ble Apex Court.

11. In the instant case, the parties appear to have led evidence knowing fully well the case of each other. All the documents have also come on record including surrender-deed Ex. 2-A in respect of which additional issue has been framed by the Court below. As a matter of fact, the controversy covering the additional issue could be decided under Issues Nos. 1, 2 and 3 which deal with the exclusive ownership and possession of the plaintiff on the suit property since Falgun Sud 4, Samvat 1990 as also with regard to family settlement arrived at between the parties on 30-12-1943. The effect of the surrender-deed Ex. 2-A may be considered while deciding these issues. The first appellate Court appears to have not kept in view the relevant provisions under which it could remand the case and has quashed the entire judgment and decree passed by the trial Court and has after framing the additional issue remitted the case for deciding it afresh which is neither justified and warranted nor sustainable in the face of law laid down by the Hon'ble Apex Court as indicated above.

12. This appeal, therefore, deserves to be and is hereby allowed. The impugned order passed by the first appellate Court quashing the entire judgment and decree and remitting the case to the trial Court with the direction to take additional evidence and to decide the suit afresh, is hereby set aside. The appeal shall be restored to its original number in the Court below and shall be disposed of in accordance with law in the light of the observations made hereinabove.

Appeal allowed.

Cases Referred.

1. (2002) 2 SCC 686: (AIR 2002 SC 771)
2. AIR 1965 SC 364