

## RAJASTHAN HIGH COURT

Niranjan Lal

Vs.

U.I.T

C.M.A. No. 1253 of 1998

(R.S. Chauhan, J.)

21.08.2006

### JUDGEMENT

**R. S. Chauhan, J.**

1. Running from Court to Court for almost thirty years, trying to save his four shops and two staircases, the appellant has challenged the order dated 18-9-1988 passed by the Additional District Judge, No. 2 Alwar whereby the learned Judge has accepted the appeal against the judgment and decree dated 30-9-1993 passed by the Additional Munsif and Judicial Magistrate No. 3 and has remanded the case back to the learned trial Court. The appellant as the plaintiff in the case is, hence, forced to face a de novo trial even after the lapse of almost thirty years. His ordeal is unending, his patience is frayed, his faith in the judiciary is shaken.

2. The brief facts of the case are that on 21-3-1977, the appellant-plaintiff, Niranjan Lal had filed a suit for declaration and perpetual injunction against the UIT. In the plaint, the appellant had pleaded that plot of land measuring 30 x 120 situated at Station Road, Mangal Marg, Alwar was originally owned by one Shiv Lal Singh, a "Jagirdar". On 8-2-1956 one Heera Lal Saini purchased the said plot from Shiv Lal Singh by a registered sale deed. Subsequently, on 4-1-1962 Heera Lal sold the said property, through a registered sale deed, to Smt. Vidhya Devi and Smt. Mishri Devi. Thereafter, on 23-9-1971 Smt. Vidhya Devi sold the property in question to the appellant by a registered sale deed after taking a consideration of Rs. 15,000/-. The Patta of the said property was also handed over to the appellant. Since Smt. Vidhya Devi had applied for permission for construction on the said plot from the U.I.T. and since the said permission was granted by the U.I.T. the permission was also handed over to the appellant. In accordance with the permission granted by the U.I.T. the

appellant constructed four shops and two staircases at the cost of Rs. 20,000/-. The plaintiff had also pleaded that on 8-2-1956 when Shiv Lal Singh sold the said plot to Heera Lal, the District Collector had filed a suit in the Civil Court. But, the suit was decreed in favour of Heera Lal. The appellant further pleaded in his plaint that Heera Lal had been issued a notice under Section 91 of the Land Revenue Act. But vide order dated 4-5- 1962, the Tehsildar has treated Heera Lal as the owner of the land and as such discharged the notice issued under Section 91 of the Land Revenue Act. He further contended that the U.I.T. was bent on demolishing the shops without issuing any notice to him. Therefore, a declaration should be made that the appellant is the owner and is in possession of the land in question. Moreover, the defendants should be restrained by way of perpetual injunction that they would not demolish the construction made by the appellant.

3. The defendants-respondents, the UIT and the others, filed their written statements before the learned Civil Court wherein they denied the knowledge of the sale deed dated 8-6-1956 in favor of Heera Lal and disputed his right to sell Nazul land to Smt. Vidhya Devi and Smt. Mishri Devi. The defendants further averred that the construction amounted to an encroachment of government land. Hence, they have a right to demolish the said construction.

4. On the basis of the pleadings the learned trial Court framed as many as ten issues. In order to prove his case, the appellant examined eleven witnesses. Despite several opportunities being given to the respondents-defendants, the U.I.T. did not produce any oral or documentary evidence to prove its contentions. Therefore, vide judgment dated 30-9-1993 the learned trial Court decreed the suit in favor of the appellant and declared him to be in possession of and to be the owner of the property in question and restrained the respondents from demolishing the property of the appellant. It further restrained the respondents from interfering in the use or construction on the land in question.

5. Since the defendants-respondents were aggrieved by the said judgment, they filed an appeal. Vide judgment dated 8-9-1998, the Appellate Court accepted the appeal of the defendants re-framed the issues and remanded the case back to the Civil Court to take fresh evidence on the newly framed issues and to decide the case. The appellant is aggrieved by the said judgment, hence this appeal before this Court.

6. Mr. Ashok Gaur, the learned counsel for the appellant, has raised a number of contentions before us firstly the scope of remanding a case by the Appellate Court to the Trial Court is covered under Section 107 of the Civil Procedure Code (henceforth to be referred to as 'the Code', for short) and by Order 41, Rules 23 to 26A of the Code. According to the learned counsel, sufficient evidence had been produced before the trial Court for the Appellate Court to re-settle the issues and finally determine the suit, itself. Thus, there was no necessity for the learned Judge to remand the case. In fact, he should have invoked his power under Order 41, Rule 24 of the Code and should have finally determined the suit.

7. Secondly, in the alternative, in case the learned Judge came to the conclusion that the trial Court had omitted to frame or try any issue or to determine a question of fact, which appears to the Appellate Court to be essential for the right decision of the suit, then the Appellate Court should have framed the issues, referred them for trial to the Trial Court and directed the Court to take additional evidence as required. After recording the evidence the trial Court should have returned the evidence to the Appellate Court, which would then proceed to determine the appeal. But according to the learned counsel the learned Judge has not exercised the powers given to him under Order 41, Rules 25 and 26 of the Code. Instead, the case has been remanded back in toto for a de novo trial. Hence, the Learned Judge has failed to exercise a power vested in him.

8. Thirdly, the trial Court had framed the proper issues. Thus, there was no necessity for the Appellate Court to reframe the issues and to direct the trial Court to re-try the case.

9. Fourthly, according to the learned counsel, the original owner of the land was one Shiv Lal Singh, who was a "Jagirdar". According to him, Shiv Lal Singh had sold a parcel of the land, in which the present land in dispute is located, to Bhagwan Sahai. Subsequently Bhagwan Sahai had sold the said land to one Chandra Mohan. The U.I.T. has tried to dispossess Chandra Mohan from the said land on the ground that the said land was not Shiv Lal Singh's personal property. According to the U.I.T. the land was Government land. Therefore, he could not have sold it to Bhagwan Sahai. Chandra Mohan, filed a civil suit against the U.I.T. The dispute between Chandra Mohan and U.I.T. travelled all the way to this Court where two issues were argued before this Court whether the parcel of the land (in which the present land in dispute is

located) was the personal land of Shiv Lal Singh or not? and whether Shiv Lal Singh had the right to sell the said property or not? Vide judgment dated 3-10-1991, this Court had given a categorical finding that the Jagir Commissioner, vide his order dated 17-12-1962, had concluded that the property situated in Alwar, is the personal property of the Jagirdar although this property is not situated within the Jagir itself. Thus, Shiv Lal Singh was competent to sell the property in dispute on 17-8-1956. Thus, this Court had clearly held that Shiv Lal Singh had the right to sell the parcel of the land. According to the learned counsel, the U.I.T. was well aware of this judgment. The U.I.T. has never challenged the said judgment. Hence the said judgment has achieved finality. Therefore, the U.I.T. cannot reopen the issue in the present case, as there is now an issue estoppel against the U.I.T.

10. Lastly, the learned counsel has contended that the case has been pending between the U.I.T. and the appellant since 1977 i.e. for almost thirty years. By remanding the case back to the learned trial Court, the litigation between the parties would continue ad infinitum. There has to be an end to litigation. In case, the learned Judge had properly exercised his power under Order 41, Rule 24 of the Code, there was no necessity for remanding the case back to the learned trial Court.

11. On the other hand, Mr. S. N. Gupta, Deputy Government Advocate has stressed the fact that the learned trial Court did not frame the correct issues. Therefore, the learned Judge was justified in re-framing the issues and sending them for further trial to the learned trial Court. However, when the Deputy Government Advocate was confronted with the judgment dated 3-10- 1991 passed by this Court, he failed to address the contention about the issue estoppel.

12. We have heard both the learned counsel for the parties and have perused the impugned order.

13. Repeatedly, it has come to the notice of this Court that more often than not, the District Judges are remanding the cases back to the trial Court in a routine manner. Since invariably the appeals are being filed against such remand orders before this Court, this Court is unnecessarily being flooded by such litigations. Hence, it is imperative to understand the scope and ambit of the power to remand a case to the trial Court.

14. Section 107 of the Code deals with the powers of the Appellate Court as under:

107. Powers of appellate Court - (1) Subject to such conditions and limitations as may be prescribed, as appellate Court shall have power.

(a) to determine case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

15. Order 41, Rules 23 to 26A of the Code deals with the power of remand. Order 41, Rule 23 reads as under:-

23. Remand of case by Appellate Court - Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reserved in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to readmit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

23-A. Remand in other cases - Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reserved in appeal and a retrial is considered necessary the Appellate Court shall have the same powers as it has under Rule 23.

24. Where evidence on record sufficient, Appellate Court may determine case finally - Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resetting the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

25. Where Appellate Court may frame issues and refer them for trial to Court

whose decree appealed from - Where the Court from whose decree the appeal is preferred has committed to frame or try any issue or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred and in such case shall direct such Court to take the additional evidence required, and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereupon and the reasons therefore (within such time as may be fixed by the Appellate Court or extended by it from time to time).

26. Findings and evidence to be put on record - Objections to finding - (1) Such evidence and findings shall form part of the record in the suit, and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to any finding.

(2) Determination of appeal - After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.

26-A. Order of remand to mention date of next hearing - Where the Appellate Court remands a case under Rule 23 or Rule 23-A, or frames issues and refers them for trial under Rule 25, it shall fix a date for the appearance of the parties before the Court from whose decree the appeal was preferred for the purpose of receiving the directions of that Court as to further proceedings in the suit.

16. A conjoint reading of these provisions would clearly reveal that under Section 107(2) of the Code, the appellate Court has the same power as the Court of original jurisdiction. Moreover, according to Section 107(1) of the Code, the appellate Court has the power to frame the issues, to take additional evidence and to determine the suit.

17. Order 41, Rules 23 to 29 of the Code merely elaborate the power prescribed by Section 107 of the Code. Order 41, Rule 23 of the Code deals with a case where the trial Court has disposed of a 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, and may further direct the issues, which shall be tried in the case so remanded. The appellate Court may further direct the trial Court to readmit the suit under its original number in the register of civil suits. It may also direct the trial Court to determine the suit and

also declare that the evidence, if any, recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

18. Order 41, Rule 23-A of the Code grants the same power as under Order 41, Rule 23 of the Code, when the case is finally disposed of and the decree is reversed in appeal and a retrial is considered necessary. Considering the fact that the power under Order 41, Rules 23 and 23-A of the Code is vast in nature, the power should be exercised sparingly and in the rarest of the rare case. For a de novo trial especially under Order 41, Rule 23-A of the Code would imply the trial to commence all over again from the initial stage. Since the civil trials are time consuming, since a de novo trial would again take the parties through the rigors of a civil trial, therefore, such a power should be resorted to in the rarest of the rare case.

19. Once, the case has come up to the appellate stage, according to Rule 24 of the Code, if the evidence upon the record is sufficient to enable the appellate Court to pronounce judgment, the appellate Court may, after resettling the issues, if necessary, finally determine the suit. Hence, under Rule 24 of the Code, there is no necessity for the Court to remand the case back to the trial Court, it can exercise the power, take additional evidence under Rule 27 of the Code for these resettled issues and decide the case finally itself.

20. According to Rule 25 of the Code, the appellate Court may frame certain issues and refer them for trial to the trial Court in case the trial Court has omitted to frame or try any issue or to determine any question of fact, which appears to the appellate Court to be essential for just decision of the suit. The appellate Court shall direct the trial Court to take additional evidence as required and to return the evidence so recorded back to the trial Court within the time-frame fixed by the appellate Court. Upon receiving such evidence under Rule 26(2) of the Code, the appellate Court shall proceed to determine the appeal.

21. A bare perusal of Rules 24 and 25 of the Code clearly reveals that the appellate Court should endeavor to decide the case at the appellate stage itself. However, in rare cases for just decision of the case, it may remand the case back to the trial Court for recording of evidence on particular issue framed by it. But such recording should be done within the time-frame fixed by the appellate Court. Moreover, the evidence so recorded should be sent back to the appellate Court for the final decision of the appeal.

22. The purpose behind the Rules is not to initiate de novo trial. The purpose is also not to prolong the dispute between the parties. Since the judiciary must endeavor to decide the dispute as soon as possible, the appellate Court is expected to decide the case at the appellate stage itself. Therefore, the tendency to remand the case in to after setting aside the judgment of the trial Court and the tendency to direct a de novo trial is against the tenor of law. The appellate Court is expected to exercise its power within the confines to Rules 23 to 26-A of the Code. Ample powers have been given to the appellate Court under Rules, 27, 28 and 29 of the Code to take additional evidence and to decide the issues re-framed by it. Since the trial Courts are the most overburdened Courts in the judicial hierarchy, the appellate Court, should refrain from remanding the case in to in a routine manner. What can be done at the appellate stage, need not be remanded back to the trial Courts. After all, the buck has to stop somewhere.

23. The poor litigant cannot be treated as a shuttlecock and forced to run from pillar to post, from Court to Court. The litigant expects the judiciary to decide its case at the earliest. The litigant neither has the financial means, nor the energy to go on a roller-coaster ride of litigations. The judiciary has to be sensitive to the financial condition and to the expectation of the litigant. To prolong a dispute endlessly is not only a disservice to the litigant, but it is an injustice to him. Therefore, this trend of remanding the case back to the trial Court in a mechanical and routine manner has to stop. The learned District Judges, who are experienced and knowledgeable, are expected to do their duty by the litigant.

24. In the case of *Bechan Pandey v. Dulhin Janki Devi*, <sup>1</sup> the Hon'ble Supreme Court had held as under :

To remand a suit to the trial Court would necessarily have the effect of keeping alive the strife between the parties and prolonging this long drawn litigation by another round of legal battle in the trial Court and thereafter in appeal. It is time, that the final curtain is drawn and the long meandering course of litigation between the parties is put an end to. The Courts should be loath to entertain a plea, which would have the effect of condemning succeeding generation of families to spend major part of their lives in the protracted litigation.

25. Similarly, in the case of *P. Purushottam Reddy v. Pratap Steels Ltd.* <sup>2</sup> the Apex Court cautioned and said, "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, Civil Procedure Code. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided". Although in his case the Apex Court was dealing with the power of the High Court to remand a case back to the trial Court after the Amendment of 1976 in the Code, the caution quoted above equally applies to the District Court.

26. In the case of *Prahlad Rai Dhand v. Smt. Savitri Devi* <sup>3</sup> this Court has held as under:

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.

27. In the present case, the learned Judge should have kept in mind that the U.I.T. had failed to produce any oral and documentary evidence in order to substantiate its stand. The power to remand a case should not be used to permit the U.I.T. to fill the lacuna left by it during the trial. Since the U.I.T. had participated in the trial, in case it were aggrieved by the issues framed by the trial Court at the initial stage, it was free to challenge the said issues at that time. The U.I.T. cannot be permitted, after the decision of the case, to indirectly challenge the issues framed by the trial Court. For, what should be done directly, cannot be permitted to be done indirectly. Moreover, the issue whether the land in dispute belonged to the Government or was the personal property of Shiv Lal Singh was long settled by the decision of this Court dated 3-10-

1991. Therefore, no fruitful purpose would be served in reopening the said issue. The learned Judge should also have been alive to the conduct of the U.I.T. The suit was filed on 21-3-1977 and the trial Court decided the case on 30-9-1993. During this period of over sixteen years, the U.I.T. decided not to contest the case. A litigant, who sleeps over his rights for sixteen years, cannot be permitted to re-open the Pandora's Box after a lapse of almost two decades. To do so is to inflict grave injustice on the appellant.

28. For these reasons, this appeal is allowed and the judgment dated 18-9-1998 is quashed and set aside and the judgment dated 30-9-1993 is confirmed. No orders as to cost.

Appeal allowed.

Cases Referred.

1. (AIR 1976 SC 866)
2. (2002) 2 SCC 686: (AIR 2002 SC 771)
3. (2003 (3) WLC (Raj) 575: (AIR 2004 Raj 63)