

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 27.7.2011*

+ **CM(M) No.302/2011 & CM No.5397/2011**

SHRI RAVI SETIA & ANR.

Through: Appellants
Mr.Sanjay Jain and
Mr.Pradeep Diwan, Sr.
Advocates with Mr.Alakh
Kumar and Ms.Namisha
Gupta, Advocates.

Versus

SHRI SOM NATH SETIA & ORS. Respondents

Through: Mr.Sanjeev Sindhwani,
Advocate for R-1 &2.
Ms.Sobha Takiar,
Advocate for R-3/DDA

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J. (Oral)

1 The order impugned before this Court is the order dated 07.2.2011 vide which the application filed by the plaintiffs under Section 151 of the Code of Civil Procedure (hereinafter referred to as 'the Code') seeking disposal of the suit i.e. suit No.257/2001 in terms of the order of the Apex Court dated 07.10.2009 had been

disposed of; the contention of the defendants no.1 to 3 that they should be permitted to file a written statement had been rejected; matter had been fixed for final arguments.

2 Record shows that the plaintiffs had filed the present suit for declaration and cancellation of certain documents as also with a prayer of permanent injunction against the defendants. This suit was dismissed on 18.5.2005 by the Civil Judge. The suit was dismissed on a preliminary issue; the court was of the view that the suit was barred under Order XXIII Rule 3A of the Code; the matter having been compromised between the parties before the court at Rajasthan the present suit was not maintainable. The appeal against this judgment was disposed of on 24.3.2006. The regular second appeal against the order of the Additional District Judge was also disposed of on 10.12.2008 endorsing the finding of the appellate court; whereby the suit stood dismissed.

3 On 07.10.2009 the Supreme Court set aside the order passed in the second appeal. The relevant extract of the order of the Apex Court is noted herein as under:

“In view of the position explained above, the impugned judgments of the High Court and courts below are set aside and the matter is remanded to the trial court which shall decide the suit in accordance with law expeditiously. All questions of law and facts are open to both the parties to be raised before the trial court except the plea of Order 23 Rule 3A,

CPC, since we have held that the bar under that provision does not apply in this case.”

4 Matter has been remanded back and the suit has to be decided in terms of the order of remand dated 07.10.2009. Since no date had been fixed by the Apex Court the plaintiff had moved an application under Section 151 of the Code seeking disposal of the suit in terms of this order of the Apex Court dated 07.10.2009.

5 Vehement contention of the counsel for the petitioners is that the impugned order dated 07.2.2011 has not considered the remand order in its true context; the order of remand specifies that all questions of law and fact are open to both the parties which may be raised in the trial court; questions of fact necessarily entail the filing of a written statement as without the written statement facts cannot be pleaded; the impugned order in not granting permission to the defendants to file their written statement has committed an illegality and it is opposed to the import of the order of the Apex Court.

6 Arguments have been refuted. It is pointed out that the order of remand passed by the Apex Court has to be construed strictly in view of the provisions of Order XLI Rule 23 of the Code and whatever was the facts and evidence already available with

the trial court, the trial court has to proceed on them. It is as if the clock has been set back.

7 Record shows that the plaintiffs had filed the present suit against the defendants. The petitioners before this Court was defendants no.1 to 3 in the trial court. The defendants no.1 to 3 had been proceeded ex parte in the trial court on 26.11.2001. Admittedly written statement had not been filed by the said defendants. On 03.9.2002 four issues had been framed by the trial court. Application under Order IX Rule 7 of the Code had been preferred by the defendants no.1 to 3 seeking setting aside of the ex parte order dated 26.11.2001 which application had been dismissed on 15.01.2004. This order was not challenged. Defendant no.4/DDA was being represented; DDA had also filed their written statement. In the course of the arguments which had ensued before the trial court, the trial court was of the view that the suit was not maintainable in view of the provision of Order XXIII Rule 3A of the Code; on this preliminary point the suit was dismissed. As noted supra this finding was up-held even in second appeal. Apex Court had, however, remanded the matter back to the trial judge and the order of remand has been reproduced and noted supra.

8 Learned counsel for the petitioner has pointed out that the
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order of remand is not a limited remand; it is unfettered; the trial court could not have refused permission to the defendant to file their written statement as no adjudication on facts could take place in the absence of the written statement.

9 At this stage relevant it would be to reproduce the provision of Order XLI Rule 23 of the Code. It inter-alia reads as:-

“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 reversed 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, which directions to re-admit 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 all just exceptions, be evidence during the trial after remand.”

10 Admittedly this provision would apply in the instant case as the suit had been disposed of on a preliminary issue. The terms of remand as contained in Order XLI Rule 23 have to be complied with. The language of this provision clearly stipulates and states that when a suit is remanded back it has to be re-admitted under its original number and the court to which the matter had been remanded will proceed to determine the suit and the evidence, if any, recorded during the original trial will be the evidence during the trial after remand. The language of this provision in fact encompasses a situation where there is no evidence recorded in a

particular case; even in that exigency the court shall proceeded to decide the suit. The direction contained in the order of remand of the Apex Court had clearly envisaged that this suit shall be decided in accordance with law; this would be as per the procedure as contained in the Order XLI Rule 23 of the Code. Questions of law and fact are the questions which were already on the court record; admittedly defendant no.4 had filed his written statement; he had also led evidence; the evidence of the plaintiffs was also on record; it was these facts and law (which were on the record of the trial court) which had to be proceeded and dealt with by the trial court; there was only one specific embargo on the defendants and that was that the plea of Order XXIII Rule 3A of the Code would not be taken up to the defendant as this provision did not apply to this case.

11 The impugned order on no count suffers from any infirmity. It had appreciated and construed the provision of law and the order of the Apex Court and it in its correct perspective. Petition is dismissed being without any merit.

INDERMEET KAUR, J.

JULY 27, 2011
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