

Court No. - 33**Reserved
A.F.R.****Case :- FIRST APPEAL FROM ORDER No. - 1455 of 2008****Appellant :- Mohd. Raseed Khan****Respondent :- Nagar Palika Parsiahd Jhansi And Another****Counsel for Appellant :- B.N. Agrawal, Sanjay Agrawal****Counsel for Respondent :- Pankaj Srivastava****Hon'ble J.J. Munir, J.**

1. This is a plaintiff's appeal arising out of an order of remand passed by the Lower Appellate Court setting aside the decree made in the suit and ordering a fresh trial, upon Issue No.1.

2. Original Suit No.194 of 2001 was instituted by Mohd. Raseed Khan against the Nagar Palika Parishad and the Executive Engineer of the said Nagar Palika, arrayed as the two defendants, claiming a permanent prohibitory injunction to the effect that the defendants be restrained from taking possession of and demolishing the existing constructions or otherwise interfering in the plaintiff's peaceful possession of Plot No.1897 (*minjumla*), the boundaries whereof are set out at the foot of the plaint and situate in *Mauza* Dadiapura, Andar Sagar Khidki, Jhansi.

3. The facts in brief leading to the action are:

The plaintiff claims to be the *zamindar*-owner in possession of *Arazi* No.187, admeasuring 0.202 hectares, boundaries whereof are set forth at the foot of the plaint and bearing *Khata Khewat* No.1/2, Mohal Shamlaat, *Mauza* Dadiapura, Andar Sagar Khidki, Jhansi, which is popularly known as 'Jogiana'. The said property shall hereinafter be referred to as 'the suit property'. According to the plaintiff, the

suit property houses a shop vending grit, stones etc., described as *Patthar Ki Taal Dukaan*, a thatched roofed structure described as a '*tapra*' and a house etc. The suit property is located in the midst of a populated area. A part of the suit property was encroached upon by one Ghanshyam unlawfully, who raised some construction thereon. The plaintiff instituted O.S. No.572 of 1995 against Ghanshyam for the relief of mandatory injunction, ordering the encroacher to remove his wall and tin-shed/ encroachments, and upon failure to do so, cause its removal through the process of Court. The suit aforesaid came to be decreed *vide* judgment and decree dated 06.03.1999 passed by the Civil Judge (Jr. Div.), Jhansi. Some local mafiosi then attempted to grab the suit property that led the plaintiff to institute O.S. No.59 of 2001 in the Court of the Civil Judge (Sr. Div.), Jhansi against Vishnu Garg, seeking a permanent injunction restraining the defendant of that suit and his associates from forcibly occupying the suit property, carving plots out of it, raising constructions thereon or selling it out to third parties. The learned Civil Judge *vide* his order dated 22.01.2001 passed an order of ad interim injunction directing parties to maintain *status quo*. This led persons, whose designs had been thwarted to forcibly occupy the suit property, to cause the employees of the Nagar Palika *mala fide* and the elected representatives there, by offering them the allurements of political support, to join them in the enterprise of dispossessing the plaintiff from the suit property and demolishing his construction.

4. It is the plaintiff's case that the defendants, that is to say, the Nagar Palika Parishad are neither the owner nor in possession of the suit property. However, defendant No.2, acting in concert with the private encroachers, caused a notice

to be issued under the Uttar Pradesh Municipalities Act, 1916 (for short, 'the Act of 1916') requiring the plaintiff to remove his constructions within three days and further saying that in the event of default, it would be demolished by force. It is pleaded by the plaintiff that the notice is absolutely bad, illegal and without jurisdiction, which does not oblige the plaintiff. But, if acting on the notice, the constructions standing on the suit property were demolished and construction of a park etc. done, the plaintiff would suffer irreparable loss and injury. Accordingly, the plaintiff instituted the present suit claiming exemption from the requirement of serving a notice under Section 326 of the Act of 1916.

5. A written statement was filed on behalf of the defendants on 02.04.2002, where Paragraph No.1 of the plaint was not denied. In the additional pleas, it is averred that in the survey plan of the Nagar Palika Parishad, the suit property appears as Nagar Palika property and no one has a right to be in its possession or exercise any right in relation to it. The plaintiff's so called possession and constructions are absolutely illegal, which the Nagar Palika have every right to remove. It is also averred that the demolition notice has been lawfully served, which the Nagar Palika have a right under the law to do. It is also pleaded that before action to remove encroachment is taken, the Nagar Palika always issue notice to the encroacher. The next plea that is urged is that against the notice an appeal lies under Section 318 of the Act of 1916. The present suit is not maintainable.

6. On the pleadings of parties, the Trial Court framed the followings issues (translated into English from Hindi):

"1. Whether the constructions are an encroachment on the Nagar Palika land?

2. Whether the Court has jurisdiction to try the suit?

3. To what relief is the plaintiff entitled?"

7. The plaintiff in support of his case examined three witnesses, to wit, PW-1 Mohd. Raseed Khan, Ram Swaroop Gupta, PW-2 and Khaliluddin, PW-3. In his documentary evidence, the plaintiff produced Paper No.10-Ga, copy of the *Khewat Chausala* relating to *Mohala Shamlaat* for the *Fasli* Year 1405-1408. There is further on record an extract of the non-Z.A. Khatauni for the *Fasli* Year 1408, paper No.12-Ga, copy of a registration certificate for the plaintiff's shop dated 05.03.1994 issued by the Chief Inspector, Shops and Commercial Establishment, paper No.13-Ga, a copy of the judgment passed in O.S. No.572 of 1999, Paper No.14-Ga, a copy of the order passed in O.S. No.59 of 2001, paper No.15-Ga being copy of a notice sent to the defendants under Section 326 of the Act of 1916, Paper No.16-Ga, copy of the registered postal receipt relative to the dispatch of the said notice, Paper No.17-Ga, copy of the demolition notice served by the defendant Nagar Palika under Section 211 of the Act of 1916. Through another list Paper No.33-Ga, four documents were filed, to wit, a map bearing Paper No.34-Ga, *Khasra Bandobast* for the year 1346F bearing Paper No.36-Ga, and a copy of the judgment and order dated 20.07.1993 passed by the Ex-Court of *Munsif*, Jhansi in O.S. No.43 of 1989.

8. The defendants produced a solitary witness in support their case, Dharamjeet Singh, former Draftsman in the employ of the Nagar Palika Parishad, Jhansi. No documentary evidence was produced on behalf of the defendants.

9. The Trial Court while deciding Issue No.1 did say in the opening remark that the burden to prove it lay upon the

defendants, but as the findings proceed, it is apparent that both parties went to trial on the issue conscious of each other's case where the plaintiff's evidence comprising the *Khewat* and the non-Z.A. *Khatauni*, the other documentary evidence and the oral testimony, was considered to return a finding that the plaintiff is the owner in possession of the suit property. The testimony of DW-1 was considered by the Trial Court to note that the witness has acknowledged the fact that the plaintiff was in possession of the suit property and has his constructions there, including his shop. The Trial Court has remarked that the witness has never said that the Nagar Palika has not given permission to raise the constructions.

10. In his cross-examination, DW-1, the witness has admitted the fact that the plaintiff has not constructed any projection etc. on the suit property. It has, particularly, been recorded by the learned Trial Judge that the witnesses has admitted that the plot housing the suit property is not entered in the Nagar Pakika Property Register. The Trial Judge has also noted that DW-1 has said that he has not brought the survey plan to Court. Considering that the entire case of the defendant is based on the fact that the property is their's, because it is included in the survey plan, the survey plan, which ought to have been, has not been produced or proved in Court. DW-1 has also been noticed to have said that he did not have with him the Register to show that the plot comprising the suit property is public property. All that he could rely upon was the survey plan. The Court has remarked that the defendants witness is considering the property to be the public property on the basis of the survey plan. A finding has been returned by the Trial Judge that from the aforesaid testimony of defendant's witness, it appears that the suit property is entered in the defendant's survey plan, but

not in their property register, and the survey plan has not been proved in Court. It has been observed that while the plaintiff has produced documentary evidence supported by oral testimony to show that he is in possession of the suit property, the defendants have not produced any evidence about their ownership or possession. The plaintiff has been held by his evidence to have proved both his title and possession to the suit property, whereas by acknowledging the fact that the suit property is not entered in their property register, the defendants have failed to establish that the plaintiff has encroached upon Nagar Palika Property, to wit, the suit property. The issue was, accordingly, decided in terms that the plaintiff is the owner in possession of the suit property, not the defendants, and further that the plaintiff has not encroached upon the defendants property.

11. Issue No.2 has been decided against the defendants and in favour of the plaintiff holding that the notice of demolition issued under Section 211 of the Act of 1916 is without jurisdiction, because it is a notice issued completely beyond the provisions of Section 211, which envisage the Municipality's power by notice to require the owner or occupier of a building to remove or alter a projection or structure overhanging or projecting into or encroaching a street, drain, sewer or aqueduct. The Nagar Palika have no power to direct demolition of construction, claiming it to be the Nagar Palika land under Section 211. It is for the said reason that the remedy of appeal under Section 318 of the Act of 1916 would not at all be available to the plaintiff.

12. The third issue has also been answered in favour of the plaintiff and the suit decreed in terms that the defendants have

been restrained from interfering in the plaintiff's peaceful possession over the suit property or his constructions perpetually.

13. Aggrieved by the judgment and decree dated 22.08.2003 passed by the Trial Judge, an appeal was carried by the defendants to the District Judge of Jhansi, that was numbered on the file of the learned Judge as Civil Appeal No.67 of 2006. The appeal upon assignment, came up for determination before the Additional District Judge, Court No.3, Jhansi on 19.02.2008. The Lower Appellate Court has allowed the appeal holding the finding of the Trial Court to be vitiated on Issue No.1 on ground that burden has wrongly been placed upon the defendant for reason that the issue has been wrongly framed. The suit has been remanded to the Trial Court for trial afresh on Issue No.1 in accordance with law.

14. Aggrieved by the order of remand passed by the Lower Appellate Court, the plaintiff has preferred this appeal under Order XLIII Rule 1(u) of the Code of Civil Procedure, 1908 (for short, 'the Code').

15. Heard Mr. Sanjay Agrawal, learned Counsel for the plaintiff and Mr. Pankaj Srivastava, learned Counsel appearing on behalf of the respondents.

16. The Lower Appellate Court has opined that the plaintiff has brought this action on the basis of title and possession, and the cause of action shown is the statutory notice issued by the defendants calling upon him to remove the encroachment made on the Nagar Palika property, to wit, the suit property. In the written statement, the defendants have claimed the suit property to be in the Nagar Palika's ownership and said that the plaintiff's possession, as well as the standing constructions, are

illegal. In the opinion of the Lower Appellate Court, the plaintiff, therefore, had the burden of proving both title and possession. The Lower Appellate Court says that on the case of parties, the issue that ought to have been framed should be: *Whether the plaintiff is the owner in possession of the suit property?* It is then remarked by the Lower Appellate Court that the learned Trial Judge has committed an error in framing the relevant issue in the terms: *Whether the plaintiff's construction is an encroachment on Nagar Palika land?* In the opinion of the Lower Appellate Court, this wrong framing of the issue has thrown burden upon the defendants to prove that the plaintiff has not encroached upon their land. This is not in accordance with the parties' case, as held by the Judge in the Lower Appellate Court.

17. Upon a close scrutiny of the records, the judgment impugned, including that passed by the Trial Court and hearing learned Counsel for the parties, what we find is that the Lower Appellate Court may be right in saying that the issue ought to have been framed in terms suggested by the Judge in appeal, and if it were done, certainly the burden and onus both would be differently placed. Both would fall upon the plaintiff in case this issue were framed, as it ought to have been. But, this error in framing the issue and casting the onus and burden upon the defendants, does not make any material difference. This is so for that reason that where parties go to trial conscious of the real issue that arises between them and lead all evidence that they can, it matters little that the issue has been incorrectly framed or the onus and burden placed on the wrong shoulders.

18. It may, in certain cases, make a difference of some consequence to the outcome, if the finding rendered is founded

entirely on who had the burden, but could not discharge it. This could be more true of cases that are disposed of conducting a proper trial, where the relevant issues are decided on the point of onus under Section 102 of the Evidence rather than burden of proof under Section 101. Where, however, all evidence has been led by parties, with no case that one party or the other could not produce evidence that he wished to do, a mere ill-framing of issue and the consequent incorrect placing of burden, would not vitiate the result. It would all the more not vitiate the result where both parties have led all evidence that they desired, and, the Court has rendered a wholesome judgment, considering the entire evidence; not merely disposing of issues in the suit, in the rather out of vogue manner on the point of evidential burden alone, and passing judgment on that basis.

19. What we have said above endorses the principle that once both parties have led evidence, fully conscious of the other's case, the mere non-framing of the relevant issue or a wrong framing of it, would not affect the validity of the finding returned. In this connection, reference may be made to the decision of the Supreme Court in **Bhairab Chandra Nandan v. Ranadhir Chandra Dutta, (1988) 1 SCC 383**, where it was held:

"6. Learned Counsel for the respondent submitted that the appellant has another house situate in Ismail Madan Lane and, therefore, the appellant was not left without alternate accommodation and, as such, the appellant has not satisfied the requirements of Section 13(ff) for seeking possession of the leased portion for his own occupation. The house situate in Ismail Madan Lane is said to be more than three miles away from the suit house as per statement of counsel made at the bar. Moreover, the house is not lying vacant. The appellant's witness Mukhtar Ahmed examined as PW 2 has deposed that he is a tenant

in the house in Ismail Madan Lane and that the entire house is in the occupation of tenants and no portion is lying vacant. Apart from this, it has also to be pointed out that this is a case where the appellant's (*sic* family) is occupying a portion of the house and wants possession of the leased portion only by way of additional accommodation. To such a case the condition imposed by Section 13 that "a landlord should not be in possession of any reasonably suitable accommodation" may not be strictly attracted. Otherwise, it would lead to a landlord being asked to disrupt the family and providing accommodation for the members of his family at different places. The respondent's counsel submitted that since no issue has been raised on the question of alternative accommodation being available, the appeal may be remanded to the appellate court for evidence being taken and a finding rendered on the question whether the house in Ismail Madan Lane would meet the requirement of the appellant. We do not find any merit in this submission. Though formally no issue was framed, the parties went to trial and adduced evidence with this issue in mind and have drawn the attention of the court to the existence of another house belonging to the appellant in Ismail Madan Lane and the said house being not vacant. There is, therefore no need for the appeal being remanded for a finding on the question whether alternate suitable accommodation is available for the appellant."

(emphasis by Court)

20. To the same effect is the holding of the Supreme Court in **P. Purushottam Reddy and another v. Pratap Steels Ltd., (2002) 2 SCC 686**, where it was observed:

"12. Assuming that there was any deficiency in the pleadings and also an omission on the part of the trial court to frame a specific issue, the present one is a case where the applicability of the law laid down by this Court in *Nagubai Ammal v. R. Shama Rao* [AIR 1956 SC 593] was squarely attracted. In *Nagubai* case [AIR 1956 SC 593] this Court was called upon to examine if the plea of *lis pendens* was not open to the plaintiff on the ground that it had not been raised in the pleadings. Neither the plaint nor the reply statement of the plaintiff contained any averment that the sale was affected by the rule of *lis pendens*. There was no specific issue directed to

that question. However, evidence was adduced by the plaintiff on the plea of *lis pendens* and not objected to by the defendants. The question was argued and tested by taking into consideration the evidence that the proceedings were collusive in character with a view to avoid operation of Section 52 of the TP Act. This Court felt satisfied that the defendants went to trial with full knowledge that the question of *lis pendens* was in issue, had ample opportunity to adduce their evidence thereon and fully availed themselves of the opportunity. This Court formed the opinion that in the circumstances of the case, absence of a specific pleading on the question was a mere irregularity which resulted in no prejudice to the defendants. After having noticed the rule of pleadings as applicable to civil law that "no amount of evidence can be looked into upon a plea which was never put forward", this Court held: (AIR p. 598, para 12)

"The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present in the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto.""

21. In this case what is noteworthy is that there is no grievance made or one that can possibly be made that because of the incorrect framing of the issue, the parties were not conscious of the case, on which they went to trial. Also, there is no grievance that because of the manner in which Issue No.1 was framed by the Trial Court, the parties did not have opportunity to lead evidence. If one were to look at Issue No.1, bearing in mind the fact that this issue by its phrasing had incorrectly thrown burden upon the defendants, the logical consequence is that much more evidence on behalf of the defendants would be led than if the issue had been framed the way the Lower Appellate Court has suggested, and which, we

do not find to be faulty. The mistake that the Trial Court committed in framing the issue and *a fortiori* misorienting the burden ought to have led the defendants to produce the maximum of evidence that they could, to prove their case of title and possession. Unfortunately, that has not been done.

22. No evidence has been produced by the defendants on the issue, except for a solitary witness, DW-1. Therefore, this is not remotely a case where the defendants can be said to have been prejudiced in the matter of producing their evidence on the issue about title and possession to the suit property, on account of the way it was phrased. In the opinion of this Court, therefore, the Lower Appellate Court was wrong to think about a remand after appropriately framing Issue No.1 for the trial of that issue afresh. This brings the Court to the other question, which the learned Counsel Counsel for parties have mooted at great length. This relates to the matter of remand.

23. It is urged on behalf of the plaintiff that given the fact that the parties had adduced all evidence that they could on the first issue, the Lower Appellate Court ought not have remanded. Instead, on the available evidence, the Lower Appellate Court should have rendered judgment in the appeal on merits.

24. It is true that with the introduction of Rule 23-A in Order XLI of the Code, the scope of remand has been enlarged to cover even those cases where the Trial Court has rendered judgment on merits; not merely those covered by Rule 23, where the suit has been disposed of by the Trial Court on a preliminary issue. However, the way the exercise of power to remand has been guided by high authority, the unmistakable principle is that if there is sufficient evidence on record to dispose of the suit finally, there ought not to be a remand. This

is in keeping with the salutary principle that the policy of the law is to avoid protraction of litigation and uncertainties that come with it. The principle is a facet of speedy justice, where all courses that foment delays are to be eschewed.

25. Here, it must be remarked that what would be meant by evidence sufficient to dispose of the suit, or for that matter, a particular issue arising in the suit, means all evidence that has been led by parties conscious of each other's case, which they wish to do. It does not mean that if one party, despite being conscious of the other's case, has chosen to produce no evidence, or scanty, insufficient, unreliable and undependable evidence, a remand is to be ordered to assist that party to fill up the lacunae, it had opportunity at the trial to take care of.

26. For these principles, endorsing a course that avoids remand, reference may be made to the decision of the Supreme Court in **Shivakumar v. Sharanabasappa, (2021) 11 SCC 277**, where it has been held:

"26.2. Rule 23-A came to be inserted in Order 41 CPC by way of the Code of Civil Procedure (Amendment) Act, 1976. Prior to this amendment, it was generally accepted by the Courts that although under Rule 23, an order of remand could be made only on reversal of a decree disposing of suit on a preliminary point but, the appellate court has the inherent power of remanding a case where it was considered necessary to do so in the interest of justice. Some of the High Courts had made similar provisions by way of their respective amendments. Insertion of Rule 23-A in Order 41 by the amending Act of 1976 makes it explicit that even when the suit has been disposed of otherwise than on a preliminary point and the decree is reversed in appeal, the appellate court shall have the power of remand, if a retrial is considered necessary. [Such powers of remand, as provided in Rules 23 and 23-A of Order 41, are different than the power of the appellate court to remit an issue for findings under Rule 25. The power of remitting is ordinarily to be resorted to when the trial court

has omitted to try any material issue or to determine any question of fact. In other words, the proper procedure in a case where the trial court, while disposing of the suit on merits, had failed to determine one or more of the material issues/questions, is to remit the issue/question(s) under Rule 25 and not to remand the whole case for retrial. Ordinarily, in the case of an order under Rule 25 of Order 41, the matter is retained on the file of the appellate court and only the issue/question(s) are remitted to the trial court for findings. On the other hand, when an order of remand is made under Rule 23 or Rule 23-A, the whole case goes back for decision to the trial court except on the point on which the appellate court has returned concluded finding, if any. While making a remand under Rule 23 or Rule 23-A, the judgment and decree of the trial court is required to be set aside but it is not necessary to set aside the impugned judgment and decree when taking recourse to Rule 25 of Order 41.]

26.3. A comprehension of the scheme of the provisions for remand as contained in Rules 23 and 23-A of Order 41 is not complete without reference to the provision contained in Rule 24 of Order 41 that enables the appellate court to dispose of a case finally without a remand if the evidence on record is sufficient; notwithstanding that the appellate court proceeds on a ground entirely different from that on which the trial court had proceeded.

26.4. A conjoint reading of Rules 23, 23-A and 24 of Order 41 brings forth the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an appellate court is to follow the mandate of Rule 24 of Order 41 CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a retrial is considered necessary that the appellate court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates the life of the litigation without serving the cause of justice. An order of remand only on the ground that the points touching the appreciation of evidence were not dealt with by the trial court may not be considered proper in a given case because the first appellate court itself is possessed of jurisdiction to enter into facts and appreciate the evidence. There could, of course, be several

eventualities which may justify an order of remand or where remand would be rather necessary depending on the facts and the given set of circumstances of a case.

26.4.1. The decision cited by the learned counsel for the appellants in *Mohan Kumar* [*Mohan Kumar v. State of M.P.*, (2017) 4 SCC 92 : (2017) 2 SCC (Civ) 368] is an apt illustration as to when the appellate court ought to exercise the power of remand. In the said case, the appellant and his mother had filed the civil suit against the Government and local body seeking declaration of title, perpetual injunction and for recovery of possession in respect of the land in question. The trial court partly decreed the suit while holding that the plaintiffs were the owners of the land in dispute on which trespass was committed by the respondents and they were entitled to get the encroachment removed; and it was also held that the Government should acquire the land and pay the market value of the land to the appellant. Such part of the decree of the trial court was not challenged by the defendants but as against the part of the decision of the trial court which resulted in rejection of the claim of the appellant for allotment of an alternative land, the appellant preferred an appeal before the High Court. The High Court not only dismissed [*Mohan Kumar v. State of M.P.*, FA No. 3 of 1998, order dated 24-1-2005 (MP)] the appeal so filed by the appellant but proceeded to dismiss the entire suit with the finding that the appellant-plaintiff had failed to prove his ownership over the suit land inasmuch as he did not examine the vendor of his sale deed. In the given circumstances, this Court observed that when the High Court held that the appellant was not able to prove his title to the suit land due to nonexamination of his vendor, the proper course for the High Court was to remand the case to the trial court by affording an opportunity to the appellant to prove his title by adducing proper evidence in addition to what had already been adduced. Obviously, this Court found that for the conclusion reached by the High Court, a case for retrial was made out particularly when the trial court had otherwise held that the appellant was owner of the land in dispute and was entitled to get the encroachment removed as also to get the market value of the land. Such cases where retrial is considered necessary because of any particular reason and more particularly for the reason that adequate opportunity of leading sufficient evidence to a party is requisite, stand at entirely different

footings than the cases where evidence has already been adduced and decision is to be rendered on appreciation of evidence. It also remains trite that an order of remand is not to be passed merely for the purpose of allowing a party to fill- up the lacuna in its case.

26.5. It gets perforce reiterated that the occasion for remand would arise only when the factual findings of the trial court are reversed and a retrial is considered necessary by the appellate court.

26.6. The present case had clearly been the one where the parties had adduced all their evidence, whatever they wished to; and it had not been the case of the appellant-plaintiffs that they were denied any opportunity to produce any particular evidence or if the trial was vitiated because of any alike reason. As noticed, there had been several suspicious circumstances surrounding the will in question, some of which were noticed by the trial court but were brushed aside by it on untenable reasons. The High Court has meticulously examined the same evidence and the same circumstances and has come to a different conclusion that appears to be sound and plausible, and does not appear suffering from any infirmity. There was no reason or occasion for the High Court to consider remanding the case to the trial court. The contention in this regard is required to be, and is, rejected."

(emphasis by Court)

27. Endorsing the same principle is Nadakerappa v. Pillamma, 2022 SCC OnLine SC 387, it was held by their Lordships of the Supreme Court:

"25. The Division Bench, without assigning any cogent reasons, has set aside the order of the learned Single Judge and has remanded the matter to the Land Tribunal. It is settled law that the order of remand cannot be passed as a matter of course. An order of remand cannot also be passed for the mere purpose of remanding a proceeding to the lower court or the Tribunal. An endeavour has to be made by the Appellate Court to dispose of the case on merits. Where both the sides have led oral and documentary evidence, the Appellate Court has to decide the appeal on merits instead of remanding the case to the lower court or the Tribunal. We are of the view that, in the instant

case, the Division Bench has remanded the matter without any justification.”

28. The principle finds echo in a more recent decision of the Supreme Court in **Arvind Kumar Jaiswal v. Devendra Prasad Jaiswal Varun, 2023 SCC OnLine SC 146**, where it has been observed:

“**3.** An order of remand prolongs and delays the litigation and hence, should not be passed unless the appellate court finds that a re-trial is required, or the evidence on record is not sufficient to dispose of the matter for reasons like lack of adequate opportunity of leading evidence to a party, where there had been no real trial of the dispute or there is no complete or effectual adjudication of the proceedings, and the party complaining has suffered material prejudice on that account.¹ Where evidence has already been adduced and a decision can be rendered on appreciation of such evidence, an order of remand should not be passed remitting the matter to the lower court, even if the lower court has omitted to frame issue(s) and/or has failed to determine any question of fact, which, in the opinion of the appellate court, is essential. The first appellate court, if required, can also direct the trial court to record evidence and finding on a particular aspect/issue in terms of Rule 25 to Order XLI, which then can be taken on record for deciding the case by the appellate court.”

29. In this case, as already said, there is all evidence led by parties, which they wished to lead and the matter was tried before the Court of first instance with parties conscious of each other's case. All evidence is there on record sufficient to dispose of the suit finally. In these circumstances, therefore, the course of action adopted by the Lower Appellate Court to remand on the point of burden of proof, which in this case is largely academic, cannot be countenanced.

30. In the result, this appeal succeeds and is **allowed**. The impugned order passed by the Lower Appellate Court is set aside and the appeal is restored to its original number on the

file of the Lower Appellate Court, which shall now proceed with the appeal on a day-to-day basis and decide the same in all eventualities within three months of the date of receipt of a copy of this judgment. Costs of this appeal shall abide the event before the Lower Appellate Court.

31. Let a copy of this judgment be communicated through the learned District Judge, Jhansi to the Court, that would now be *in seisen* of the appeal.

Order Date :- 28.11.2023

Anoop