

Neutral Citation:2024:AHC-LKO:66912

A.F.R.

Court No. - 6

Case :- FIRST APPEAL FROM ORDER No. - 244 of 2022

Appellant :- Jamuna Prasad @ Yamuna Prasad

Respondent :- Harilal

Counsel for Appellant :- Rajesh Kumar

Counsel for Respondent :- Kaushal Tiwari

Hon'ble Rajnish Kumar,J.

1. Heard Shri Rajesh Kumar, learned counsel for the defendant/appellant and Shri Kaushal Tiwari, learned counsel for the plaintiff/respondent.

2. This first appeal from order has been preferred under Order XLI Rule 1(u) of Civil Procedure Code, 1908 (hereinafter referred to as "C.P.C.") against the judgment and order dated 10.02.2022 passed in Civil Appeal No. 11 of 2021; Harilal vs. Jamuna Prasad by District Judge, Ambedkar Nagar, by means of which the appeal filed by the plaintiff/respondent has been allowed and judgment and order dated 05.12.2019 passed in Regular Suit No. 476 of 1997; Harilal vs. Jamuna Prasad by Civil Judge, Junior Division, Ambedkar Nagar has been set aside and the case has been remanded to the trial court to decide afresh in accordance with law and the observations made in the same.

3. Learned counsel for the appellant submits that the first appellate court has wrongly and illegally allowed and remanded the matter for deciding afresh, whereas all the pleadings, evidence and material on record were before the first appellate court and the first appellate court has recorded findings on the

basis of material on record and remanded the matter only on the ground that the evidence has properly not been appreciated, while the first appellate court has to decide the appeal considering the pleadings, evidence and material on record as trial court and it could have decided the case finally instead of reminding the matter. Thus, Learned counsel for the appellant submits that the impugned judgment and order is not sustainable in the eyes of law and is liable to be set aside and the matter may be remanded to the first appellate court to decide the appeal on merit in accordance with law. He relies on **Shivakumar and others vs. Sharanbasappa and others; 2020 AIR(SC) 3102/2020 LawSuit(SC) 345.**

4. Per contra, learned counsel for the respondent submits that learned first appellate court has rightly remanded the case in accordance with law to decide the suit afresh because the learned trial court has failed to properly appreciate the pleadings, evidence and material on record and the law laid down by the Hon'ble Apex Court and this Court. He further submits that the learned trial court has also failed to consider the report of the commissioner and the site plan prepared, which were on record, therefore, there is no error or illegality in the impugned judgment and order. However, he could not dispute that all the pleadings, evidence and commission report etc. were on record and the first appellate court could have passed the final order after considering the same.

5. I have considered the submissions of learned counsel for the parties and perused the records.

6. The plaintiff/respondent filed suit for permanent injunction on the ground that the land in dispute shown in the site plan annexed with the plaint is old abadi and sehan land

and his house is adjacent to the land in dispute on the western side. The sehan darwaja opens in the land in dispute, which is being used by his family members for sitting, sukhvan and for other agricultural and household purposes since prior to abolition of zamindari. There are two thala Kothi Bans, one tree of Gular, hand pipe, haudi and khoota in the land in dispute, as such, he is owner of the land in dispute under Section 9 of U.P. Zamindari Abolition and Land Reforms Act. The defendant/appellant has no concern with the land in dispute. The defendant/appellant is a muscle man and on the basis of his muscle power, he is threatening to open door in the land in dispute on the instigation of local police and administration since the last week of June, 1997. The sehan of the defendant/appellant is on the east side of his house. The defendant/appellant, after hearing about the suit, with the help of the local police and some enemies of the plaintiff/respondent has constructed a wall of bricks forcefully before commission, which has been shown in the site plan. Thus, the suit for permanent injunction and for demolition of wall constructed by the defendant/appellant and handing over possession back to the plaintiff/respondent.

7. The defendant/appellant contested the suit by filing written statements denying the averments made in the plaint and alleging that the wrong site plan has been filed alongwith the suit. It has further been stated that the wall existing on the western *hata* of his house on the western side, which was of mud had shortened, therefore, he had planned to construct a wall of bricks, which was opposed by the plaintiff/respondent, therefore, he gave an application to the Pargana Adhikari, Jalalpur for protection from the plaintiff/respondent for

reconstruction of the wall. It was further alleged that after inquiry in the complaint made by the defendant/appellant and with the intervention of the previous and the present *Gram Pradhan*, it was decided, on the basis of compromise, that a wall will be constructed leaving four hand land. Accordingly, the wall of 22 *Radda* was constructed. It was further alleged that in the east side of the boundary, his two thatches and the trees of Mango, *Badhal*, *Goolar*, *Lahchaura* and *Kothi bans* planted by his father are existing. The plaintiff/respondent has wrongly shown his pipe in the land in dispute, whereas the same is existing beyond his boundary wall at a distance on the western side and on the southern side of the house of the plaintiff/respondent and the main *sehan* of the plaintiff/respondent is also situated on the eastern side, accordingly, his *sariya* is also adjacent to his house. The house of the plaintiff/respondent had never been on the eastern side of the A.C. Line and he has no right to use the said land. The possession of the plaintiff/respondent had never been on the land in dispute, therefore, the suit may be dismissed. An additional written statement was also filed, before the trial court, denying the averments made in the plaint.

8. On the basis of the pleadings of the parties, six issues were framed by the trial court. Thereafter, evidence of P.W. 1-Harilal, P.W. 2-Ambeylal and P.W. 3-Haridarshan was recorded, but no documentary evidence was filed on behalf of the plaintiff/respondent. On behalf of the defendant/appellant, the evidence of D.W. 1-Jamuna, D.W. 2-Ram Deen and D.W. 3-Hari Prasad was recorded. On his behalf, copy of the Nakal Report Chalani, Police Station Malipur dated 22.07.2010 and case State vs. Jamuna Prasad under Section 18/116 IPC, court of Up Zila

Magistrate, Jalalpur and Nakal Report Chalani, Police Station Malipur dated 10.07.2010, case State vs. Jamuna Prasad etc. Case No. 1490 of 2010, under Section 18/116 IPC court of Up Zila Magistrate Jalalpur were filed as Paper Nos. 41ga and 42ga alongwith the list 40ga in documentary evidence. The learned trial court, after considering the pleadings of the parties, evidence and material on record and hearing, dismissed the suit. Being aggrieved, the Civil Appeal was filed by the plaintiff/respondent before the court below.

9. The court below recorded that the main objection against the judgment and decree passed by the trial court is that the learned trial court has passed the impugned order without perusing appropriately pleadings of both the parties, facts and evidence available on record and circumstances of the case. The learned trial court has also ignored the guidelines determined by Hon'ble Supreme Court and this High Court while passing the impugned order. The learned trial court has also not considered the commission report and site plan, therefore, the impugned order is not sustainable, therefore, the appropriate order may be passed setting aside the impugned order. The relevant Paragraph 9 of the impugned order is extracted hereinbelow:-

"9. अपीलार्थी/वादी द्वारा विद्वान अवर न्यायालय द्वारा पारित आक्षेपित निर्णय एवं आदेश के विरुद्ध मुख्य रूप से यह आपत्ति की गयी है कि विद्वान अवर न्यायालय ने उभय पक्ष के अभिकथनों तथा पत्रावली पर उपलब्ध तथ्य साक्ष्य एवं परिस्थितियों का सम्यक् ढंग से परिशीलन किये बिना आक्षेपित आदेश पारित किया है। विद्वान अवर न्यायालय ने माननीय उच्च न्यायालय व माननीय उच्चतम न्यायालय द्वारा निर्धारित गाइड लाइन की अनदेखी करके आक्षेपित आदेश पारित किया है। विद्वान अवर न्यायालय ने अमीन आयुक्त द्वारा प्रस्तुत आख्या व मानचित्र को नजरन्दाज करते हुए आक्षेपित आदेश पारित किया है, जो अस्तित्व में रहने योग्य नहीं है। अतः उसे अपास्त करते हुए यथोचित आदेश पारित किया जाय।"

10. The defendant/appellant opposed the submissions of learned counsel for the plaintiff/respondent and stated that the

learned trial court has passed the judgment and decree after considering the facts and evidence available on record and circumstances of the case, in which there is no error, therefore, the appeal is liable to be dismissed. The relevant paragraph 10 of the impugned order is extracted hereinbelow:-

"प्रत्यर्थी / प्रतिवादी के विद्वान अधिवक्ता द्वारा अपीलार्थी के उपरोक्त तर्कों व तथ्यों का खण्डन किया गया और यह कथन किया गया कि विद्वान अवर न्यायालय ने पत्रावली पर उपलब्ध तथ्य, साक्ष्य एवं परिस्थितियों को दृष्टिगत रखते हुए आक्षेपित आदेश पारित किया है, जिसमें कोई त्रुटि नहीं है। अतः अपीलार्थी की अपील निरस्त किये जाने योग्य है।"

11. In view of above, it is apparent that the appeal was filed only on the ground that the trial court has passed the judgment and decree without considering pleadings, evidence, material on record, commission report and the facts and circumstances of the case, therefore, admittedly all the material for deciding the suit was before the trial court and no evidence or material was required to be placed on record for passing the judgment and decree in the suit.

12. The provision of remand has been made in Rule 23, 23A and 25 of Order XLI C.P.C. Rule 24 of Order XLI C.P.C. provides that where 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, may determine the suit finally, which is extracted hereinbelow"-

"24. Where 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, 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 Appellate Court proceeds."

13. In view of Rule 24, quoted above, the appellate court is to pronounce the judgment and determine the suit finally, where the evidence upon the record is sufficient to enable it to

pronounce the judgment, which may be pronounced after resettling the issues, if necessary, 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, therefore, even if the appellate court is of the view that the trial court has passed an erroneous and illegal order taking a view, which is not sustainable on the basis of material before the trial court, it can pass order taking a different view after considering the pleadings, evidence and material on record. Thus, if no issue arises, which is required to be framed or which is required to be considered on the basis of pleadings of the parties and if required to be framed but no additional evidence is required, the first appellate court may decide the appeal as a trial court after resettling issues and it cannot invoke provisions of Rule 23, 23-A or 25 of Order XLI C.P.C. for remanding the matter. Consequence thereof is that the first appellate court has to finally determine the suit after considering the pleadings, evidence and material on record as a trial court considers the same.

14. The aforesaid view taken by this court is covered by the judgment of Hon'ble Supreme Court, in the case of **Shivakumar and others vs. Sharanbasappa and others (Supra)**. The Hon'ble Supreme Court, in the said case, considered the procedure relating to appeals from original decrees provided under Order XLI C.P.C. and noted in para 25 (25.1 to 25.6). The Hon'ble Supreme Court held in para 25.3 and 25.4 that a comprehension of the scheme of the provisions for remand as contained in Rules 23 and 23A of Order XLI is not complete without reference to the provision contained in Rule 24 of

Order XLI . It has further held that a conjoint reading of the Rule 23, 23A and 24 of Order XLI brings forth the scope as also contours of the powers of the 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 XLI C.P.C. and to determine the suit finally and it is only in such cases where the decree in challenge is reversed in appeal and a re-trial is considered necessary, 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. The para 25 (25.1 to 25.6) is extracted herein below:-

"[25] Taking up the other point for determination the submission of learned counsel for the appellants that the High Court ought to have considered remanding the case by taking recourse to the provision contained in Order XLI Rule 23A CPC, in our view, remains totally bereft of substance this submission has only been noted to be rejected.

25.1. The procedure relating to appeals from original decrees (usually referred to as 'regular first appeal') is provided in Order XLI of the Code of Civil Procedure, 1908 and therein, various provisions relating to hearing of an appeal, remand of case, remitting of issues for trial, production of additional evidence in Appellate Court etc. are contained in Rules 16 to 29 under the sub-heading Procedure on hearing. For their relevance, we may take note of the provisions contained in Rules 23. 23A. 24 and 25 of Order XLI CPC as follows:-

"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, with 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 to all just exceptions, be evidence during the trial after remand.

23A. 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 reversed in appeal and a re-trial 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 resettling 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 omitted 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 thereon and the reasons therefor within such time as may be fixed by the Appellate Court or extended by it from time to time."

25.2. Rule 23A came to be inserted in Order XLI 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 23A in Order XLI 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 re-trial is considered necessary.

25.3. A comprehension of the scheme of the provisions for remand as contained in Rules 23 and 23A of Order XLI is not complete without reference to the provision contained in Rule 24 of Order XLI 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.

25.4. A conjoint reading of Rules 23, 23A and 24 of Order XLI 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 XLI CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a re-trial 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 mannefe be the litigationunwarranted order of remand merely elongates the life of the litigation without serving the cause of Justice. A mere order of remand only on the ground that the points touching An 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.

25.4.1. The decision cited by the learned Counsel for the appellants in the case of Mohan Kumar (supra) 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 the appeal so filed by the appellant but proceeded to dismiss the entire suit with the finding that the plaintiff-appellant 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 non-examination 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 re-trial 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 re-trial 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 fillup the lacuna in its case.

25.5. It gets perforce reiterated that the occasion for remand would arise only when the factual findings of Trial Court are reversed and a re-trial is considered necessary by the Appellate Court.

25.6. 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 plaintiff-appellants 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.

15. The Hon'ble Supreme Court had also considered the aforesaid issue in the case of **J. Balaji Singh vs. Diwakar Cole and others; (2017) 14 SCC 207** and under what circumstances, remand could have been made and the power of this Court under Order 43 Rule 1(u) C.P.C on being challenged in an order of remand. The relevant paragraphs 13, 14, 18 and 19 are extracted hereinbelow:-

"13) The main question, which fell for consideration before the High Court, was whether the first Appellate Court was right in remanding the case to the Trial Court for fresh trial on merits?

14) There are three provisions in the Code which deal with the power of the Appellate Court to remand the case to the Trial Court. These provisions are Order 41 Rules 23, 23-A, and 25.

14.1) So far as Order 41 Rule 23 is concerned, it enables the Appellate Court to remand the case to the Trial Court when it finds that the Trial Court has disposed of the suit upon a preliminary point. The Appellate Court in such cases is empowered to direct the Trial Court to decide all the issues on evidence on record.

14.2) So far as Rule 23-A is concerned, it enables the Appellate Court to remand the case to the Trial Court when it finds that though the Trial Court has disposed of the suit on all the issues but on reversal of the decree in appeal, a re-trial is considered necessary by the Appellate Court.

14.3) So far as Rule 25 is concerned, it enables the Appellate Court to frame or try the issue if it finds that it is essential to the right decision of the suit and was not framed by the Trial Court. The Appellate Court in such case may, accordingly, frame the issues and refer the same to the Trial Court to take the evidence and record the findings on such issues and return to the Appellate Court for deciding the appeal. In such cases, the Appellate Court retains the appeal to itself.

18) The High Court failed to see that when the first Appellate Court itself did not decide the appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the appeal on merits. Moreover, Order 43 Rule 1(u) confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43 Rule 1(u) gives a limited power to examine the issue relating to legality of remand order, as is clear from Order 43 Rule 1(u) which reads thus:-

“1(u) an order under rule 23 or rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court”

19) It is well settled law that the jurisdiction to decide the appeal on merits can be exercised by the Appellate Court only when the appeal is filed under Section 96 or 100 of the Code against the decree. Such was not the case here.”

16. In view of above, this Court in an appeal under Order 43 Rule 1(u) has to confine itself on such facts, conclusions and decisions, which have a bearing on the order of remand and the aforesaid rule confers limited power on the High Court to examine only the legality and correctness of the remand order of the first appellate court and not beyond that.

17. Adverting to the facts of the present case, the first appellate court framed three points for determination on the basis of pleadings of the parties and the grounds of challenge, which are extracted hereinbelow:

- “1. क्या अपीलार्थी/वादी प्रश्नगत भूमि का स्वामी है और स्वामी स्वरूप उस पर अध्यासित है?*
- 2. क्या प्रतिवादी द्वारा दौरान वाद विवादित स्थल पर निर्माण किया गया है, यदि हाँ तो प्रभाव?*
- 3. क्या अपीलार्थी/वादी याचित अनुतोष को प्राप्त करने का हकदार है?”*

18. The first and second point of determination have been considered and decided together. After considering the pleadings of the parties, evidence and material on record, the first appellate court came to the conclusion that the learned trial court should have passed the required order after considering deeply the points discussed by the first appellate court but the learned trial court has not done so and passed impugned order in a cursory manner. Thus, the view expressed by the learned trial court on the said points does not seem, *prima facie*, in accordance with law. In such situation, the first appellate court came to the conclusion that the case is liable to be remanded to

the learned trial court for passing fresh legal order in view of observations made by the first appellate court after hearing.

19. While considering the third point of determination, the first appellate court came to the conclusion that the appellant/plaintiff has succeeded in proving from his all facts and evidence that the land in dispute is his *sehan* land of which he is the owner and in possession since the time of his ancestors and since prior to the abolition of zamindari. His trees and tap are situated on the said land. In such situation, the appellant/plaintiff is entitled for the relief of permanent injunction.

20. In view of above, the first appellate court on the basis of pleadings, evidence and material on record has recorded findings in regard to the first, second and third point of determination. The first appellate court has not found that evidence on record is not sufficient to dispose of the case finally. The first appellate court has also not recorded any finding that any issue has not been framed, which is required to be framed and evidence on the same is required to be adduced by the parties. In such circumstances, the appellate court itself should have determined the suit finally instead of remanding the matter as it could have been done in such circumstances.

21. In view of above and considering the overall facts and circumstances of the case, this Court is of the view that the first appellate court has passed the impugned judgment and order and remanded the case to the learned trial court for deciding afresh in violation of law as discussed above because the appeal could have been decided finally by the appellate court, therefore, it is not sustainable in the eyes of law and liable to

be set aside by this Court with a direction to the first appellate court to decide the appeal in accordance with law.

22. The appeal is, accordingly, **allowed**. The judgment and order dated 10.02.2022 passed in Civil Appeal No. 11 of 2021; Harilal vs. Jamuna Prasad by District Judge, Ambedkar Nagar is hereby set aside. The matter is remitted back to the first appellate court with a direction to the first appellate court to reconsider and pass a fresh order, after affording opportunity of hearing to the parties, in accordance with law and observations made hereinabove in this order expeditiously and preferably within a period of three months, from the date of production of certified copy of this order, without granting unnecessary adjournment to either of the parties as the proceedings are pending since filing of the regular suit in the year 1997. No order as to costs.

(Rajnish Kumar,J.)

Order Date :- 24.9.2024/Raj