

Neutral Citation No. - 2024:AHC-LKO:22243
AFR
Reserved

Court No. - 4

Case :- FIRST APPEAL FROM ORDER No. - 811 of 2015

Appellant :- Smt. Renu Singh

Respondent :- Shubhang Chauhan And Another

Counsel for Appellant :- Mohd.Aslam Khan

Counsel for Respondent :- Ankit Srivastava

Hon'ble Rajnish Kumar,J.

1. Heard Mohd. Arif Khan, learned Senior Advocate assisted by Shri Akbar Ali Khan and Mohd. Shadab Khan, Advocates, holding brief of Mohd. Aslam Khan, learned counsel for the appellant and Shri Ankit Srivastava, learned counsel for the respondents.

2. This appeal under Order-XLIII, Rule-1(u) of the Civil Procedure Code, 1908 (here-in-after referred as C.P.C.) has been preferred by the plaintiff-appellant assailing the judgment and order dated 12.08.2015 passed by the Additional District Judge, Court No.11, Sitapur in Civil Appeal No.105 of 2014; Subhang Chauhan and Others Vs. Smt. Renu Singh, by means of which the appeal preferred by the defendant-respondents has been allowed and the judgment and order dated 17.11.2014 passed in Regular Suit No.491 of 2002; Smt. Renu Singh Vs. Bhagwan Bux Singh and Others has been set-aside and the matter has been remanded to the Trial Court to pass a fresh order in the light of the observations made in the judgment of the Appellate Court after affording sufficient opportunity of filing written statement to the defendants and framing the required issues and affording opportunity of evidence to the parties on the same and hearing.

3. Learned counsel for the appellant submitted that the Trial Court had decided the suit in accordance with law after framing the issues

and affording sufficient opportunity to the parties. Even then, if the learned Appellate Court was of the view that certain issues have not been framed and decided by the Trial Court, the Appellate Court, instead of remanding the whole case for a fresh trial, could have framed the additional issues and referred to the Trial Court and directed to take the additional evidence and called the same with its findings and decided the appeal after considering the same in accordance with law. Thus the submission is that the judgment and order passed by the first Appellate Court is not sustainable in the eyes of law and liable to be set-aside. He relied on **Syeda Rahimunnisa Vs. Malan BI (Dead) by L.Rs. and Another; 2016 (119) ALR 485, Sree Panimoola Devi Temple and Others Vs. Bhuvanachandran Pillai and Others; (2015) 12 SCC 698, Jagannathan Vs. Raju Sigamani and Another; (2012) 5 SCC 540, P. Purushottam Reddy and Another Vs. Pratap Steels Ltd.; (2002) 2 SCC 686, Narendra Vs. K. Meena; 2016 (119) ALR 494.**

4. Per contra, learned counsel for the respondents submitted that there is no error or illegality in the impugned judgment and order dated 12.08.2015 passed by the Appellate Court because the learned Trial Court had decided the suit committing several irregularities. He further submitted that after exchange of pleadings, the issues are required to be framed and the opportunity afforded to the parties to adduce the evidence on the said issues but in the present case the issues were framed in the judgment and order dated 17.11.2014 passed by the Trial Court itself and without affording any opportunity to adduce evidence on the said issues, the suit was dismissed, which could not have been done. Since the issues were not framed after exchange of pleadings, therefore the parties could not know as to what evidence is to be adduced, therefore the judgment, order and decree passed by the Trial Court has been rightly and in accordance with law set aside by the Appellate Court and the Appellate Court remanded the

case to decide a fresh as per the observations and directions issued by the First Appellate Court. Thus the submission is that the instant appeal has been filed on misconceived and baseless grounds and it is liable to be dismissed.

5. He further submitted that the first appeal under Order-XLIII, Rule-1 (u) is in the nature of appeal under Section 100, therefore it could be decided only on the legal issues. He relied on **Narayanan Vs. Kumaran and Others; (2004) 4 SCC 26** and **J. Balaji Singh Vs. Diwakar Cole and Others; (2017) 14 SCC 207**.

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

7. The appellant filed a suit for permanent injunction against late Bhagwan Bux Singh, who was her father-in-law, for restraining him from alienating movable and immovable properties on the ground that the husband of the appellant late Rajesh Kumar Singh died on 27.04.2002 on account of ailment of brain cancer. Due to death of husband of the appellant, the late father-in-law of the appellant became mentally derailed. The husband of the appellant had earned money from agricultural land/ crops etc. and raised constructions in the year 1995 and shifted alongwith his family to Ganeshpur. She further alleged that the father in law of the appellant was intending to transfer / alienate the property in dispute under the influence of some relatives and in case he is not restrained from doing so, the appellant will suffer irreparable loss and injury as she has no other source of her livelihood and the property in suit is Joint Hindu Family property and the appellant has got right and title in the same. During pendency of the suit, late Bhagwan Bux Singh died, therefore the respondent no.1 i.e. Subhang Chauhan, minor son of Raj Kamal Singh Chauhan and Smt. Usha Chauhan; mother of the respondent no.1 was substituted. Smt. Usha Chauhan also died during pendency of the suit, therefore

the respondent no.2 was substituted. The suit was amended and sale deeds dated 29.08.2002, 18.09.2002 and will dated 09.04.2008 were challenged with prayer for their cancellation.

8. Late Bhagwan Bux Singh filed the written statement. After his death, the substituted parties had not appeared, therefore the case had proceeded ex-party.

9. It appears that during pendency of the suit, the respondent no.1 had become major. The suit was decided by framing the issues in the judgment and order dated 21.11.2014 itself. The judgment and order dated 21.11.2014 was assailed by the respondents by filing the first appeal under Section 96 of C.P.C. The First Appellate Court after considering the grounds raised in the appeal and the record of the Trial Court and after affording opportunity to the parties passed the impugned judgment and order dated 12.08.2015 setting aside the judgment and order dated 17.11.2014 passed by the Trial Court and remanded the matter to the Trial Court with a direction to decide the suit a fresh after sufficient opportunity of written statement to the defendants and framing the required issues and affording opportunity of evidence to the parties on the same and hearing. Being aggrieved the instant appeal has been filed under Order-XLIII, Rule-1 (u) of C.P.C assailing the judgment and order passed by the Appellate court. The ground taken and pressed before this Court is that there was no illegality or error in the order passed by the Trial Court, even then if the first Appellate court was of the view that some issues were not framed and adjudicated by the Trial Court, the Appellate Court could have decided the appeal after framing the additional issues and calling evidence and findings on the same from the Trial Court, instead of remanding the case for a fresh decision.

10. In view of above, the issue to be decided in this case is as to whether the Trial Court had decided the suit by passing an order in

accordance with law, which does not suffer from any illegality or error, if not as to whether First Appellate Court has set-aside the judgment and order of the Trial Court and remanded the matter to decide a fresh right and in accordance with law or the first Appellate Court could have decided the appeal, after framing the issues and referring to the Trial Court with a direction to take additional evidence on the said issues and after trying the said issues send to the Appellate Court with its finding thereon and considering the same.

11. To consider the aforesaid issue involved in this case, this Court will first consider as to whether the judgment and order passed by the Trial Court is in accordance with law and it does not suffer from any illegality or error.

12. The rule Rule-1 of Order-XIV of C.P.C provides about framing of issues. Sub-rule (1) provides that issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. Sub-rule (5) provides that at the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend, therefore the issues are required to be framed at the first hearing of the suit on the basis of the pleadings made in the plaint and the written statement on which right decision of the case appears to depend. Rule 2 (1) of Order-XIV provides that notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues. Sub rule (2) of Rule 2 provides the order in which the issues may be decided. Rule 3 of order XIV provides as to from what material, the issues may be framed. Rule 4 order XIV provides that the court may examine witnesses or documents before framing issues.

Rule-5 of Order-XIV provides that the Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed. Sub rule (2) of Rules 5 of the Order XIV provides that the Court may also, at any time before passing a decree, strike out any issues which may be wrongly framed or introduced.

13. In view of above, after filing of plaint and written statement, the Court has to frame the issues on which the parties are at variance in their pleadings, as per the procedure provided in Order-XIV of C.P.C. which are required to be decided.

14. In the instant case, the Trial Court had passed the judgement and order without framing the issues and affording opportunity to adduce the evidence on the same and framing the issues in the judgment and order itself and considering the evidence taken prior to that, which may be for the purpose of framing issues. It is to be noticed here that it is not a case in which the parties were not at issue, therefore it could have been decided under some provision of Order-XV of C.P.C. because the issues were framed in the judgment itself by the trial court.

15. Rule -1 of Order XVI provides that on or before such date as the Court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summonses to such persons for their attendance in Court. Therefore it is apparent that after framing of the issues, the evidence is required to be adduced on the said issues.

16. Rule 1 of Order XVIII C.P.C. provides about right to begin by the plaintiff unless there is any preliminary objection. Rule 2 of

Order-XVIII C.P.C. provides the statement and production of evidence. High Court amendment of Allahabad has substituted the Rule 2 w.e.f. 24.07.1926. Substituted sub rule (1) of Rule 2 provides that on the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case indicating the relevancy of documents produced by him and the nature of oral evidence which he proposes to adduce and call his witnesses in support of the issues which he is bound to prove. Sub-rule (2) provides that the other party shall then state his case and produce his evidence (if any). Substituted Rule 2 of Order XVIII is extracted here-in-below:-

""2. (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned the party having the right to begin shall state his case, indicating the relevancy of each of the documents produced by him, and the nature of the oral evidence which he proposes to adduce and shall then call his witnesses in support of the issues which he is bound to prove.

(2) The other party shall then state his case in the manner aforesaid and produce his evidence (if any)." (w.e.f. 24-7-1926)"

17. In view of above on the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and call his witnesses to adduce evidence in support of the issues which he is bound to prove. Thereafter the other party shall do the same. Thus it is crystal clear that after exchange of pleadings the issues are required to be framed first by the court so that the parties may know the issues on which they are at variance and they have to adduce the evidence in support of which issue. Then the party who has to prove any issue framed by the court, can adduce the evidence in support of that issue. Whereas in present case the issues have been framed by the Trial Court in the judgment itself and the suit has been decided without affording opportunity to the parties to adduce evidence on the said issues and on the basis of the evidence taken otherwise, which has not been adduced on the said issues and may be for framing of issues, therefore the Trial

Court has decided the suit without following the due procedure of law, which is a gross illegality in the eyes of law and the judgment and order passed accordingly is not sustainable at all in the eyes of law. The said judgment and order passed by the Trial Court was challenged in the first appeal accordingly.

18. Now the question arises as to whether in view of the aforesaid gross illegality and procedural lapse in the judgement and order passed by the Trial Court, the first Appellate Court has rightly and in accordance with law has set-aside the judgment and order of the Trial Court and remanded the matter for decision afresh in accordance with the directions and observations or the Appellate Court could have framed the issues and referred the matter to the Trial Court for taking evidence on them and after trying called with its findings and decided the appeal.

19. The provision of remand made in Rule-23, 23-A and 25 of Order XLI of C.P.C. are relevant for considering the above issue, which are extracted here-in-below:-

"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.*

The Following Allahabad High Court Amendment has been made in aforesaid Rule 23:

a. (i) Insert the following after the words 'and the decree is reversed in appeal', namely:

"or where the Appellate Court while reversing or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case, it"; and

(ii) delete the words "the Appellate Court" occurring thereafter and delete also the words

"if it thinks fit", occurring after the words "may".

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 reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.*

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.*

20. In view of above, Rule 23 as amended by the Allahabad High Court is '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 or where the Appellate Court while reversing or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case, it may 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.' The aforesaid Rule 23(A) provides in regard to the appeal, which has been preferred against the decree which has been made 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. In both the aforesaid rules, the power of First Appellate Court is one and the same as given in Rule 23 according to which, in case of reversal of a decree in appeal the Appellate Court may remand the case for re-trial. Rule 25 provides the contingencies in which the Appellate Court can frame the issues and refer the matter to the Trial

Court for taking evidence on them and trying the said issues, who shall send then to the same with it's findings thereon to the Appellate Court and the Appellate Court can decide the appeal accordingly.

21. Rule 25 of Order XLI C.P.C. provides that 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 is essential to the right decision of the suit upon merits, the Appellate Court may frame the said issues and refer to the concerned court for trial of same after taking evidence and referring to the Appellate Court with it's findings and reasons thereon and then the Appellate Court may decide the appeal. Thus this procedure can be followed only if the Trial Court has omitted to frame or try any issue or determine any question of fact whereas in the present case the Trial Court has failed to follow the due procedure of law in deciding the suit as indicated above, therefore, this Court is of the view that this procedure could not have been followed by the Trial Court and it has rightly in accordance with law has set-aside the judgment and order passed by the Trial Court and remanded the matter for a fresh decision.

22. The Hon'ble Supreme Court, in the case of **Syeda Rahimunnisa Vs. Malan BI (Dead) by L.Rs. and Another (supra)**, has held that the power of the Appellate Court to remand the case to subordinate court is contained in order XLI Rule 23, 23-A and 25 of C.P.C. It is, therefore, obligatory upon the appellant to bring the case under any of these provisions before claiming a remand and the Appellate Court is required to record reasons as to why it has taken recourse to any one out of three Rules of Order XLI of C.P.C. for remanding the case to the Trial Court. Relevant paragraph 35 is extracted here-in-below:-

"35. It is a settled principle of law that in order to claim remand of the case to the Trial Court, it is necessary for the appellant to first raise such plea and then make out a case of remand on facts. The power of the Appellate Court to remand the case to subordinate court is

contained in order XLI Rule 23, 23-A and 25 of CPC. It is, therefore, obligatory upon the appellant to bring the case under any of these provisions before claiming a remand. The Appellate Court is required to record reasons as to why it has taken recourse to any one out of the three Rules of Order XLI of CPC for remanding the case to the Trial Court. In the absence of any ground taken by the respondents (appellants before the First Appellate Court and High Court) before the First Appellate Court and the High Court as to why the remand order in these cases is called for and if so under which Rule of Order XLI of CPC and further in the absence of any finding, there was no justification on the part of the High Court to remand the case to the Trial Court. The High Court instead should have decided the appeals on merits. We, however, do not consider proper to remand the case to High Court for deciding the appeals on merits and instead examine the merits of the case in these appeals."

23. The Hon'ble Supreme Court, in the case of **Sree Panimoola Devi Temple and Others Vs. Bhuvanachandran Pillai and Others (Supra)**, has held that if the plaintiffs had not led sufficient evidence to establish their case, as held by the High Court, ordinarily, that should have been the end of the matter and in such circumstances, remand of the suit for de-novo consideration virtually gives to the plaintiffs a second opportunity to establish their case. This Court is of the view that this judgment relied by the learned counsel for the appellant is not applicable on the facts and circumstances of the present case because in the present case the learned Trial Court has failed to follow the due procedure of law and afford opportunity in accordance with law.

24. The Hon'ble Supreme Court, in the case of **Jagannathan Vs. Raju Sigamani and Another (Supra)**, has held that where the Trial Court has disposed of the Suit on merits and the decree is reversed in appeal and the Appellate Court considered that retrial is necessary, the Appellate Court may remand the suit to the Trial Court. The relevant paragraph-7 is extracted here-in-below:-

"(7) Order 41 Rule 23A has been inserted in the Code by Act No. 104 of 1976 w.e.f. February 1, 1977. According to Order 41 Rule 23A of the Code, the Appellate Court may remand the suit to the Trial Court even though such suit has been disposed of on merits. It provides that where the Trial Court has disposed of the Suit on merits and the decree is reversed in appeal and the Appellate Court considers that retrial is necessary, the Appellate Court may remand the suit to the Trial Court."

25. The Hon'ble Supreme Court, in the case of **P. Purushottam Reddy and Another Vs. Pratap Steels Ltd. (Supra)**, has held that the Appellate Court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23-A or Rule 25 C.P.C. and an unwarranted order of remand gives the litigation an undeserved lease of life and, therefore must be avoided. This case is not applicable in the facts and circumstances of the present case because in the present case as discussed above and also as per the findings recorded by the First Appellate Court, the First Appellate Court has rightly and in accordance with law has remanded the case.

26. The Hon'ble Supreme Court, in the case of **Maya Devi (Dead) through LRs Vs. Raj Kumari Batra (Dead) (Supra)**, has held that whether or not the Appellate Court should remit the matter is discretionary with the Appellate Court and would largely depend upon the nature of the dispute, the nature and the extent of evidence that may have to be appreciated, the complexity of the issues that arise for determination and whether remand is going to result in avoidable prolongation of the litigation between the parties. The relevant paragraph- 17 is extracted here-in-below:-

"(17). Recording of reasons in cases where the order is subject to further appeal is very important from yet another angle. An Appellate Court or the authority ought to have the advantage of examining the reasons that prevailed with the Court or the authority making the order. Conversely, absence of reasons in an appealable order deprives the Appellate Court or the authority of that advantage and casts an onerous responsibility upon it to examine and determine the question on its own. An Appellate Court or authority may in a given case decline to undertake any such exercise and remit the matter back to the lower Court or authority for a fresh and reasoned order. That, however, is not an inflexible rule, for an Appellate Court may notwithstanding the absence of reasons in support of the order under appeal before it examine the matter on merits and finally decide the same at the appellate stage. Whether or not the Appellate Court should remit the matter is discretionary with the Appellate Court and would largely depend upon the nature of the dispute, the nature and the extent of evidence that may have to be appreciated, the complexity of the issues that arise for determination and whether remand is going to result in avoidable prolongation of the litigation between the parties. Remands are usually avoided if the Appellate Court is of the view that it will prolong the litigation."

27. The Hon'ble Supreme Court, in the case of **Narayanan Vs. Kumaran and Others (Supra)**, has held that it is quite safe to adopt that appeal under order 43 Rule (1) clause (u) should be heard only on the ground enumerated in Section 100. The relevant paragraph-17 of the judgment is extracted here-in-below:-

"17. It is obvious from the above rule that an appeal will lie from an order of remand only in those cases in which an appeal would lie against the decree if the Appellate Court instead of making an order of remand had passed a decree on the strength of the adjudication on which the order of remand was passed. The test is whether in the circumstances an appeal would lie if the order of remand were it is to be treated as a decree and not a mere order. In these circumstances, it is quite safe to adopt that appeal under order 43 Rule (1) clause (u) should be heard only on the ground enumerated in Section 100. We, therefore, accept the contention of Mr. T.L.V.Iyer and hold that the appellant under an appeal under order 43 Rule (1) clause (u) is not entitled to agitate questions of facts. We, therefore, hold that in an appeal against an order of remand under this clause, the High Court can and should confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and cannot canvass all the findings of facts arrived at by the Lower Appellate Court."

28. The Hon'ble Supreme Court, in the case of **J. Balaji Singh Vs. Diwakar Cole and Others (Supra)**, has considered the provisions of Order- XLIII, Rule-23, 23(A) and 25 of C.P.C. and under what circumstances remand could have been made and the power of this court under Order- XLIII, Rule-1 (u) of C.P.C., on being challenged an order of remand. The relevant paragraphs 13 to 21 are extracted here-in-below:-

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.

15. Now coming to the facts of the case, we are of the considered opinion that once the first Appellate Court allowed the application under Order 41 Rule 27 of Code and took on record the additional evidence, it rightly set aside the judgment/decree of the Trial Court giving liberty to the parties to lead additional evidence in support of their case which, in turn, enabled the Trial Court to decide the civil suit afresh on merits in the light of entire evidence. The first Appellate Court was, therefore, justified in taking recourse to powers conferred on the Appellate Court under Order 41 Rule 23-A for remanding the case to the Trial Court. We find no fault in exercise of such power by the first Appellate Court.

16. In our considered view, the only error which the first Appellate Court committed was that it went on to record the findings on merits. In our view, it was not necessary to do so while passing the order of remand. The reason is that once the first Appellate Court formed an opinion to remand the case, it was required to give reasons in support of the remand order as to why the remand is called for in the case. Indeed, the remand was made only to enable the Trial Court to decide the case on merits. Therefore, there was no need to discuss much less record findings on several issues on merits. It was totally uncalled for.

17. So far as the impugned order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the judgment of the first Appellate Court and restored the judgment of the Trial Court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the remand order in an appeal filed under Order 43 Rule 1(u) of the Code. Indeed, once the High Court came to a conclusion that the remand order was bad in law then it could only remand the case to the first Appellate Court with a direction to decide the first appeal on merits.

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.

20. In the light of abovementioned discussion, we are of the opinion that the High Court had no jurisdiction to consider much less deciding the entire case of the parties on merits in such appeal.

21. We are also unable to agree with the High Court when it held that the first Appellate Court instead of remanding the case to the Trial Court should have heard the appeal on merits. This finding, in our view, is bad in law for the reason that firstly, it was not possible for the first Appellate Court to have recorded the evidence at the appellate stage.

29. In view of above, in the appeal under Order- XLIII, Rule-1 (u) C.P.C., the appellant is not entitled to agitate the questions of facts and this Court has to confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and the said rule 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. Therefore now the conclusions for remand by the first appellate court will be considered.

30. The first Appellate Court had made five points of determination, which are extracted here-in-below:-

- "1. क्या प्रतिवादिनी सं०-3 श्रीमती उषा चौहान की मृत्यु के बाद उनके पति राज कमल सिंह को वाद में प्रतिस्थापित न किये जाने से मूल वाद की कार्यवाही दूषित है?*
- 2. क्या प्रतिवादी सं०-2 शुभांग चौहान को किसी संरक्षक के जरिये पक्षकार न बनाने से मूल वाद की कार्यवाही दूषित है ?*
- 3. क्या प्रतिवादी सं०-3/1 असित चौहान को प्रतिस्थापित किये जाने के वाद उसे जबाबदेही के लिए सम्मन न भेजे जाने के कारण मूल वाद की कार्यवाही दूषित हुई है?*
- 4. क्या वाद प्रस्तुत करने की वादिनी की अधिकारिता के संबंध में व वाद सुनवाई की दीवानी न्यायालय की अधिकारिता के संबंध में व याचित अनुतोष के कालवाधित होने के संबंध में विशिष्ट वाद बिन्दु विरचित न किये जाने से अवर न्यायालय की वाद कार्यवाही दूषित हुई ?*
- 5. क्या निर्णय के पूर्व दीवानी प्रकिया संहिता के आदेश 14 नियम 5 के तहत अवर न्यायालय द्वारा वाद बिन्दु विरचित न किये जाने से और निर्णय में ही वाद बिन्दु विरचित कर उस पर पक्षकारों को साक्ष्य का अवसर न दिये जाने से अवर न्यायालय की वाद दूषित हुई है ?"*

31. While considering the 1st point of determination, learned First Appellate Court found that after death of Smt. Usha Chauhan, the defendant no.3 in the suit, her husband Ram Kamal Singh Chauhan

was also required to be substituted in view Section 15 of the Hindu Succession Act and afforded opportunity to defend, according to which in pursuance of the will in favour of Smt. Usha Chauhan, after her death, her husband had also right in the said property. The will was not set-aside till the time of death of Smt. Usha Chauhan, therefore the Trial Court had passed the judgment and order without affording opportunity to Raj Kamal Singh Chauhan, who had right and title in the property in dispute after death of Smt. Usha Chauhan and before setting aside the will and the same could not have been set aside without affording the opportunity to him.

32. Section 15 of the Hindu Succession Act- 1956 provides general rules of succession in the case of female Hindus. Sub section (1) (a) of Section 15 provides that the property of a female Hindu dying intestate shall devolve upon the sons and daughters and the husband, which is extracted here-in-below:-

"15. General rules of succession in the case of female Hindus.—(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,—

(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

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33. In view of above, the suit could not have been decided without impleadment of husband of Smt. Usha Chauhan, the defendant no.3 and affording opportunity to him. This Court is of the view that the finding recorded by the first Appellate Court does not suffer from any illegality or error.

34. In regard to the 2nd point of determination, learned Appellate Court has found that while amending the suit for claiming the relief of cancellation of sale deed, the respondent no.1 was impleaded as defendant no.2. At the time of his impleadment he was minor, therefore he should have been impleaded through guardian. If he was not impleaded through guardian then court should have appointed

some guardian but it was not done. Even after his attaining the age of majority during pendency of the suit he was not afforded opportunity to file the written statement and evidence, therefore the judgment and decree passed by the Trial Court against him is void.

35. The appellant before this Court, in the synopsis of this appeal, has stated that the respondent no.1 was substituted through his father as his guardian because he was minor, therefore, admittedly the respondent no.1 was minor at the time of his impleadment but he was not impleaded through guardian, which is apparent from the categorical finding recorded by the First Appellate Court which has not been assailed by the appellant, therefore by mentioning the aforesaid facts in the synopsis of this appeal the appellant has given the wrong fact before this Court and tried to mislead the court. This Court does not find any illegality or error in the findings recorded by the First Appellate Court in regard to 2nd point of determination because the guardian of a minor defendant is required to be appointed under Rule 3 of Order XXXII on an application moved on behalf of minor or plaintiff.

36. In regard to 3rd point of determination, learned First Appellate Court found that the respondent no.2 i.e. the defendant no.3/1 was substituted after death of Smt. Usha Chauhan and the substitution was allowed on 16.04.2014 holding the notice sufficient on the ground of passing of 30 days after sending of notice but after his substitution no notice was sent for filing the written statement and the case had proceeded ex-parte against him on 26.05.2014, which could not have been done.

37. In regard to the 4th point of determination, learned First Appellate Court found that the appellant had filed a suit for permanent injunction and amended the relief by adding a prayer for cancellation of sale deed and also the will deed after the death of defendant but no

issue was framed in regard to the suit being time barred for the reliefs claimed, whereas the sale deed could not have been set aside without framing issue in this regard and deciding the same.

38. In regard to the 5th point of determination, the First Appellate Court has found that the Trial Court has decided the suit without framing the issues in accordance with Order-XIV, Rule-5 before the judgement and affording the opportunity to the parties, and the Trial Court had framed the issues while deciding the suit in the judgment itself. This issue has been discussed in detail by this Court above in this judgement and it has rightly and in accordance with law has been decided by the First Appellate Court.

39. The First Appellate Court has also held that the Trial Court has failed to record any finding while setting aside the sale deed as to whether it could have been set-aside or not, if the ex-parte injunction dated 13.09.2002 was not served on late Bhagwan Bux Singh before execution of sale deed on 18.09.2002 because it was served on 14.08.2003. It has further recorded that no finding has been recorded in regard to the mental condition of late Bhagwan Bux Singh, without which the suit could not have been decided.

40. In view of the aforesaid discussion and considering the over all facts and circumstances of the case, this Court is of the view that there is no illegality or error in the impugned judgement and order dated 12.08.2015 passed by the First Appellate Court in Civil Appeal No.105 of 2014; Subhang Chauhan and Others Vs. Smt. Renu Singh, which has been passed after considering the pleadings, hearing and recording findings and reasons for remand which does not suffer from any illegality or error and call for any interference by this Court. The grounds taken in this appeal are misconceived and not sustainable in the eyes of law. The appeal is misconceived and liable to be dismissed.

41. The appeal is, accordingly **dismissed**. No order as to costs.

42. Before parting with the case, this Court deems it appropriate, since the matter is old one, to provide that the Trial Court shall make it's earnest endeavour to decide the suit expeditiously and preferably within a period of one year in accordance with law and as observed and directed by the First Appellate Court and the observations made in this order. The parties shall appear before the Trial Court on 04th April, 2024.

(Rajnish Kumar, J.)

Order Date :- 14.03.2024
Haseen U.