

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.710 of 2008

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Ambika Yadav son of Hiralal Yadav, resident of village-Phulkia, present Mauza-Mungraure Maruflal Kothi, Daulatpur, Jamalpur, Pergana-Sakoharpali, PS-Jamalpur, District-Munger.

.... Appellant/s

Versus

1. Ganesh Prasad Mishra son of Chhedi Mishra, resident of village-Kamdevapura, PS-Amarpur, District-Bhagalpur, presently residing in Mohalla-Sadar Bazar Jamalpur, PS-Jamalpur, District-Munger.

Plaintiff..Appellant---Respondent 1st party

2. (a) Kapil Sharma and (b) Vipin Sharma son of late Gopal Pd. Sharma.

3. Mostt. Ansuia Devi W/o Late Naresh Sharma

4. Chhotu Sharma (Major) son of late Naresh Sharma

5. Ganga Sharma (Major) son of late Naresh Sharma

6. Munna Sharma (Minor son of late Naresh Sharma

7. Sri Govind Prasad Sharma son of Sri Bhagwat Prasad Sharma.

All residents of G.T. Road, in the town of Aasansol, PO and PS-Aasansol, district-Bardwan(WB).

.... Defendant 2nd party ...Respondent/s

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Appearance :

For the Appellant/s : Mr. Pramod Kumar Sinha
Mr. Arvind Kumar Sharma
Mr. Chetan Kumar
Mr. Bijay Kr. Sinha

For the Respondent/s : Mr. Yogendra Mishra
Mr. Raghunath Kumar
Mr. Kaushal Kr. Singh
Mr. Ashok Kumar

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 01-12-2015

In the present case, the appellant is challenging the order dated 27th September 2008 passed by Chandrama Singh, Additional District Judge, Fast Track Court-VI, Munger in Munsifi Title Appeal No. 36 of 2003 whereby and whereunder the judgment dated 17th September 2003 as well as decree dated 24th September 2003 arising out of Title Suit No. 96 of 1989 has

been set aside and the matter has been remanded back for fresh decision.

The issues were framed by Additional District Judge, Fast Track Court, Munger and in the said judgment, the Court directed that the court below to obtain an expert opinion in respect of signature of Ambika Yadav as well as Bhagwat Prasad Sharma bearing on Ext.-2 (Bajidawa) and Ext.-A is the sale deed dated 27.4.1988 executed in favour of the present appellant including the signature of Bhagwat Sharma in his written statement. It has further been directed that the court below will take all steps to examine the said Bhagwat Prasad Sharma, even as court witness to arrive at a right conclusion.

It is undisputed fact that the evidence of Bhagwat Prasad Sharma cannot be recorded on account of his death. Only the issue left for getting the documents examined by the Government expert with regard to the signatures appearing in Ext.-2 and Ext.-A i.e. Bajidawa and sale deed respectively.

The present appellant is the defendant first party in the title suit as well as he was the first respondent before the Appellate Court. The present subject of the dispute is the land appertaining to Area 1 Kattha and 2½ dhurki, 1369 Sq. ft.

Bhagwat Prasad Sharma acquired the land which is subject matter of this case, in a partition suit, vide Title Suit No. 52 of 1958/51 of 1956 and in that title suit, he and his branch



acquired to 2.59 ¼ acres of land and the present disputed land is a part of the aforesaid land. Out of 2.59¼ acres of land, Bhagwat Prasad Sharma (Defendant no. 2) sold the aforesaid disputed land, vide sale deed dated 27/4/1988 (Ext-A) and later on, the plaintiff, Ganesh Prasad Mishra also purchased the same land, vide registered sale deed dated 12.6.1989 (Ext-1) through Shiv Shankar Prasad Sharma and Gopal Prasad Sharma, both are sons of Bhagwat Prasad Sharma. Bhagwat Prasad Sharma and others executed the power of Attorney in favour of Gopal Sharma for himself and for other members of the family, defendant nos. 2, 5 and 6.

As per the claim of the appellant, only a Jhopra was standing on the disputed plot, but wrongly a complaint was filed by the plaintiff that a Jhopra was illegally constructed over the land on 30.06.1989, for that, a proceeding under section 144 Cr.PC was initiated, vide Case No. 1406 M/1989, and that proceeding ended in favour of the present appellant and against that Criminal Revision No. 455 of 1989 was filed before the Sessions Judge, Munger which was dismissed, vide order dated 18.9.1989, holding that the proceeding of Section 144 Cr.PC lost its force. During 144 proceeding, Ganesh Prasad Mishra could know about execution of sale deed by Bhagwat Prasad Sharma in favour of the appellant, later on, he contacted Bhagwat Prasad Sharma who informed him, the relinquishment had been

made by executing a registered Bajidawa, vide order dated 6th August 1988 which led to filing of the suit.

In the suit, Ganesh Prasad Mishra has taken plea of the execution of sale deed by Bhagwat Prasad Sharma and on whose strength, the appellant is claiming the right over the property is not a genuine document, as the same has not been executed by real Bhagwat Prasad Sharma. It has further been stated that after purchasing the land by the present appellant-defendant, he executed the Bajidawa (deed of relinquishment) in favour of Bhagwat Prasad Sharma thereby he relinquished his right over the suit property and as such, after his relinquishment, Bhagwat Prasad Sharma executed the sale deed in his favour thereby validly transferred the right title of the disputed property whereas the relinquishment document itself shows that the defendant-appellant lost his right and title over the property in dispute.

The defendant-appellant appeared and filed his written statement there the plea has been taken that the sale deed was executed in his favour on 27.4.1988 by Bhagwat Prasad Sharma, as in the partition suit, the land in question was allotted to him. It has been claimed that after execution of the sale deed, Bhagwat Prasad Sharma lost his right to further transfer the same piece of land to the plaintiff, as after sale of land in his favour, he did not have a right and jurisdiction to



execute another sale deed in favour of the plaintiff, vide Registered sale deed dated 12.6.89. It has further been claimed that the sale deed dated 12.6.1989 is a forged document and does not confer any right title to the plaintiff. It has further been submitted that when he could know about the deed of Bajidawa being claimed to have been executed by him is a forged document, he without wasting any time, filed Sanha No. 1184 J/1989. So in the present case, the very important fact is the claim of the plaintiff that after Bajidawa, the sale deed was executed in their favour.

During the trial, the parties have led their oral and documentary evidences.

The Trial Court has framed altogether 7 issues, out of which, following issues were framed, whether the Bajidawa dated 6/8/1988 was executed by defendant first party or not and whether the sale deed dated 27.4.1988 was executed by Bhagwat Prasad Sharma or not.

Before the Trial Court, altogether 7 witnesses were examined by the plaintiff. Documentary evidences were produced marked as exhibits, namely, Ext. 1 is the sale deed dated 12.6.1989, Ext.2 is the Bajidawa, Ext. 3 is power of Attorney and Ext. 4 is the report of the expert.

Altogether 16 witnesses were examined from the side of the defendant. He has also produced the sale deed dated



27.4.1988 (which was marked as Ext.-A) to substantiate his claim that he purchased the land earlier than the plaintiff and subsequent sale deed does not confer any right title over the property in dispute. Other documents which were also filed by the defendant, are not very important for the purposes of disposal of this case.

The sale deed dated 27th April 1988, marked as Ext.-A, was executed in favour of the appellant and Bajidawa dated 6/8/1988 executed by appellant, was marked as Ext.2 whereas Ext.-1 is the sale deed dated 12.6.1989 executed in favour of the Respondent no. 1. Ext.-4 is report of Handwriting expert.

The counsel for the appellant has submitted that the Appellate Court has committed serious illegality in remanding the matter to the Trial Court for retrial when the Trial Court after examining the material available on record arrived to a conclusion that the plaintiff could not prove the signature of the defendant-appellant on the Bajidawa (Ext.-2). When he failed to prove that the Bajidawa has been executed by the appellant, no right and title would accrue to the respondent (Ganesh Pd. Mishra).

It has further been said that the issues framed by the Appellate Court for the purposes of decision of the Trial Court is nothing, but a paraphrase of the same issues prepared



by the Trial Court, he did not frame a new issue which was not framed by the Trial Court and in all the issues, the Trial Court has given positive finding and as such, there was no occasion for the Appellate Court to rephrase the same issues. He has further submitted that the Appellate Court should not have remanded back the matter in order to fill up the lacuna left by the plaintiff. It was not the duty of the court to act either in assistance of the plaintiff or the defendant by passing an order of remand but to act as independent arbiter.

In the present case, the Appellate Court remanded the case without sufficient reason, but acted as helping hand to the plaintiff which is not permissible in law. It has further been argued that the Appellate Court on the basis of material available on record, did not frame any issue which was omitted by the Trial Court rather in the guise of framing the issue, remanded and rephrased the same issue with some addition and deletion of the word. He has further submitted that it is duty of respective parties to lead the evidence in support of their respective cases. He has further said the Appellate Court acted in such a manner what the plaintiff was to do, directed for examination of Bhagwat Prasad Sharma especially in view of fact that the plaintiff himself had refused to examine him during trial and secondly giving a direction to get the Bajidawa (Ext.-2) to be examined by the Government handwriting expert. It is not



a finding of appellate court that there is no evidence available with regard to prove the genuineness of Bajidawa when the executant itself comes forward and says that it is not his signature, but it is a forged and fabricated signature, so much so, Satya Narayan Yadav (DW-12), witness to wazidawa has refused to recognise his signature on the wazidaba. He has further submitted sufficient evidences are very much there and the Trial Court on scrutiny of the evidence, disbelieved the genuineness of the same and later on, when the appellant refused to recognise the signature, the onus lies on the plaintiff to prove that Ext. 2 bears his signature. When the plaintiff failed to discharge his onus, properly and satisfactorily, the Appellate Court should not have remanded the case to fill up the lacuna that has been left by the plaintiff, is an illegal order and not sustainable in law.

The counsel for the respondent appeared and submitted that the appeal itself is not maintainable, as has submitted the order has been passed in exercise of power under Order 41, Rule 25 and it will not be treated that the order has been passed either in terms of Order 41 Rule 23 or Rule 23A of the CPC.

In such view of the matter, the Order 43, does not prescribe the forum of appeal against the order passed under Order 41, Rule 25 as the appeal lies against the order passed

under Order 41, Rule 23 and Order 41 Rule 23A not against the order passed under Order 41, Rule 25.

The counsel for the respondent has relied upon the judgment reported in 1977 SC 2047 para 9, 2011 SC 1492 para 18 and 2013 SC 2239 para 19.

The counsel for the appellant, in contra, submitted judgement reported in 1977 SC 2047, 2011 SC 1492, 2013 SC 2239 do not apply but placed reliance on 1959 Pat. 335 para 2, 1957 Madras 403 para 3, 2002 SC 771 para 10, 1999 SC 1125, AIR 2009 SC 1998 para 5 and 6, (2007) 15 SCC 155 paras 9 and 10, AIR 2014 (NOC) 445 Patna and AIR 2009 (NOC) 506 Kerala D. He has submitted that the Judgment and order has been passed in exercise of power under Order 41 Rule 23A.

The counsel for the respondent has submitted that the court below has rightly remanded back the matter, as in the present case, the sheet anchor is the Bajidawa if it is found to be genuine then in that circumstance, no right and title continued in favour of the defendant-appellant, but when the Bajidawa is found to be not sustainable having no valid signature of appellant, in that circumstance, right and title of Bhagwat Prasad Sharma, treated to have been extinguished, did not have right to re-execute the sale deed in favour of the plaintiff Respondent no.1.

The counsel for the respondent has further



submitted that the court below has done nothing wrong in remanding back the matter, but he had done it for the ends of justice. He has further submitted that there was no sufficient materials available before the Trial Court as well as the Appellate Court to arrive at a right finding, as the Trial Court rejected the expert report i.e. Ext-4 on the ground that the expert has not examined the disputed signature properly, in that circumstance, only course left out to the Appellate Court to remand back the case with direction to arrive at a right conclusion with regard to genuineness of signature to get the signature over the documents examined by a Government expert.

Before entering into the merit of the case, it will be proper to deal with the preliminary objection raised by the respondent submitting that the present appeal is not maintainable, as it does not fall under the category of Order XLIII, Rule 1(u).

As it is clear that the nature of the order that has been passed by Trial Court is not based on preliminary issue. Before dealing with this issue, it will be proper to examine contour of Order 41, Rule 23, 23-A and 25 of the Code of Civil Procedure.

Order 41 Rule 23 deals with the power of the appellate Court to remand the matter where the Court from

whose decree an appeal is preferred has disposed the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court in a proper case, will direct to re-admit the suit and proceed to determine the same.

Order 41 Rule 23-A deals with the 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.

Order 41 Rule 25 deals with the cases 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 in such circumstance, Appellate Court 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.

As in the present case, the appellate court has set



aside the entire judgment and decree framed its own issues and remitted back the matter with the direction to the court below to take evidence on particular issues and decide the case afresh, so this Court is of the view that the objection raised by the respondent is not sustainable in view of fact that order has not been passed under Order 41 Rule-25 as the appellate court has not kept the matter pending with himself and as such the order has been passed under Order 41 Rule-23-A which is covered under the provision of Order XLIII, Rule 1 (u) and as such, there is no substance in the objection, accordingly the same is rejected.

In the present case while deciding the issue of remand, some essential fact to be looked into is that Bhagwat Prasad Sharma executed the sale deed in favour of Ambika Yadav, defendant no. 1-appellant on 27.4.1988 (Exhibit-A) and later on, sons of Bhagwat Prasad Sharma after obtaining the power of Attorney from Bhagwat Prasad Sharma executed another sale deed dated 12.6.1989 (Ext.-A), on the strength of Bajidawa (Ext.-2)(deed of relinquishment dated 6.8.1988). First, the case of the plaintiff is that the sale deed has been executed in favour of Ambika Yadav by another Bhagwat Prasad Sharma impersonating him to be real one.

Another plea has been taken that in view of Bajidawa (Ext.-2) registered deed, Ambika Yadav lost his right and

interest over the property in question. Bhagwat Prasad Sharma executed another sale deed.

It is well known principle of law that the plaintiff has to prove his case on his own strength, not on the weakness of the defendant and as such has to prove the right title over the property by the valid evidence.

The Bajidawa bears the signature of Ambika Yadav who denied his signature on Ext.-2, i.e. Bajidawa and that has been supported by Satya Narayan Yadav, D.W. 12 has also deposed that it is not his signature.

The report submitted by the handwriting expert which is Ext.-4 has been found by the Trial Court to have not been done in accordance with law and refused to place reliance on Ext.-4.

Sita Ram Mandal is another witness of Bajidawa, was not brought by the plaintiff to show that the document bears the signature of Ambika Yadav, so much so, the plaintiff has clearly stated during his deposition that he would not bring the members of defendant 2nd party i.e. Bhagwat Prasad Sharma and his family members, so much so, Bhagwat Prasad Sharma who executed the sale deed in favour of Ambika Yadav has already died.

Let us examine whether lower appellate court correctly exercised his power to remand the case on the issues

framed by him and directed to examine Bhagwat Prasad Sharma including verify the signature of appellant on two documents mentioned above.

The principle for remand came for consideration on number of occasion before this Court as well as before Hon'ble Supreme Court.

The issue of remand came for consideration before Madras High Court in Mohamed Zackria v. V. Srinivas and Co. and another, reported in AIR 1957 Madras 403 and in paragraph 3 of the said judgment, the Court has said which is as follows:-

"A remand is not intended for the purposes of adding thus to unambiguous evidence and changing the meaning."

In case of Smt. Kartar Devi vs. Smt. Pramila Das, reported in 1993 (1) PLJR 576, considered different facts of Order 41 Rule 23, 23-A and Order 41 Rule 25. This Court has said that on a bare perusal of the aforementioned provision, it is evident that in order to invoke the jurisdiction by the appellate court; in terms thereof a decree passed by the learned trial court has to be reversed in the appeal and a re-trial must be considered necessary and only upon fulfillment of the aforementioned conditions, the court would exercise its power of remand which is vested in its under Order 41 Rule 23-A of the Code of Civil Procedure and Order 41 Rule 25 has been

discussed in paragraph 20 of the judgment which is as follows:-

"In this view of the matter, evidently Order 41 Rule 23A of the Code of Civil Procedure will also have no application. In terms of Order 41 Rule of the C.P.C., the court of appeal below has jurisdiction to remand a case only where it is held that the trial court has omitted to frame or try any issue, or to determine any question of fact, which according to the appellate court was essential for the right decision of the suit. In such an event, the appellate court may frame issues, and refer the same for trial to the court from whose decree the appeal is preferred. In a case where appellate court exercises its power under Order 41 Rule 25 of the C.P.C. it should remand the suit for determination of such issues only which have been framed by the appellate court and thereupon the trial court is required to return the evidence to the appellate court together with its findings thereon and the reasons therefor. The appellate court on receipt of the evidences recorded by the trial court and the reasons recorded by him is required to proceed with the appeal and pass a judgment in accordance with law."



The Hon'ble Supreme Court in *Ashwinkumar K. Patel v. Upendra J. Patel and others*, reported in **AIR 1999 SC 1125** in paragraph 7, has considered, in what situation the Court should remand the case. The Court has opined that the higher Court should not remand the case to the lower Court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead to unnecessary delay and cause prejudice to the parties to the case. When the material was available before the appellate Court, it should have itself decided the appeal one way or other. The appellate court could consider the various aspects of the case mentioned in the order of trial Court, either would confirm or reverse or modify. It will be relevant to quote paragraph 7 which is as follows:-

"In our view, the High Court should not ordinarily remand a case under Order 41, Rule 23, C.P.C. to the lower Court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case



mentioned in the order of the trial Court and considered whether the order of the trial Court ought to be confirmed or reversed or modified. It could have easily considered the documents and affidavits and decided about the prima-facie case on the material available. In matters Involving agreements of 1980 (and 1996) on the one hand and an agreement of 1991 on the other, as in this case, such remand orders would lead to further delay and uncertainty. We are, therefore, of the view that the remand by the High Court was not necessary.”

Again the issue of remand came for consideration in P. Purushottam Reddy and another v. M/s. Pratap Steels Ltd., reported in **AIR 2002 SC 771**, there the question again came for consideration dealing with the issue of remand taking into consideration the provision of Order 41 Rule 23A and Order 41 Rule 25. It will be better to quote paragraph 10 of the said judgment which is as follows:-

“The next question to be examined is the legality and propriety of the order of remand made by the High Court. Prior to the insertion of Rule 23A in Order 41 of the Code of Civil Procedure by CPC Amendment Act, 1976, there were only two



provisions contemplating remand by a Court of appeal in Order 41 of CPC. Rule 23 applies when the trial Court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in appeal. Rule 25 applies when the appellate Court notices an omission on the part of the trial Court to frame or try any issue or to determine any question of fact which in the opinion of the appellate Court was essential to the right decision of the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand inasmuch as the subordinate Court can try only such issues as are referred to it for trial and having done so, the evidence recorded, together with findings and reasons therefor of the trial Court, are required to be returned to the appellate Court. However, still it was a settled position of law before 1976 Amendment that the Court, in an appropriate case could exercise its inherent jurisdiction under Section 151 of the CPC to order a remand if such a remand was considered pre-eminently necessary ex debito justitiae, though not covered by any specific provision of Order 41 of the CPC. In cases where



additional evidence is required to be taken in the event at any one of the clauses of sub-rule (1) of Rule 27 being attracted, such additional evidence, oral or documentary, is allowed to be produced either before the appellate Court itself or by directing any Court subordinate to the appellate Court to receive such evidence and send it to the appellate Court. In 1976, Rule 23A has been inserted in Order 41 which provides for a remand by an appellate Court hearing an appeal against a decree if (i) the trial Court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate Court can exercise the same power of remand under Rule 23A as it is under Rule 23. After the amendment all the cases of wholesale remand are covered by Rule 23 and 23A. In view of the express provisions of these rules, the High Court cannot have recourse to its inherent powers to make a remand because, as held in *Mahendra v. Sushila* (AIR 1965 SC 365, at p. 399), it is well settled that inherent powers can be availed of *ex debito justitiae* only in the absence of express provisions in the



Code. It is only in exceptional cases where the Court may now exercise the power of remand dehors the Rules 23 and 23A. To wit, the superior Court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20, Rule 3 or Order 11, Rule 31 of the CPC and hence it is no judgment in the eye of law it may set aside the same and send the matter back for re-writing the judgment so as to protect valuable rights of the parties. An appellate Court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 of the CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided.”

The Court in **AIR 2009 SC 1998** (Gowrammanni and Ors. vs. V. V. Patil (deceased by L. Rs.) and Ors.) has said that the High Court was not justified in remanding the matter to the trial court, but should have decided the appeal on merit after taking into consideration the evidence before the trial court.

In view of the aforesaid discussion it has to be examined whether the appellate court has rightly remanded back the case or should have himself entered into the merit and decided the cases.



It appears from the judgment that the appellate court has remanded back the matter giving direction to the court below to hold the examination of Bhagwat Prasad Sharma as a court witness and obtain the expert opinion of the Government handwriting expert in respect of signature of Bhagwat Prasad Sharma as well as Ambika Yadav.

So far examination of Bhagwat Prasad Sharma and taking opinion of expert of his signature, finger print cannot be materialised in view of the death of Bhagwat Prasad Sharma as well as in paragraph 10 of judgment under appeal where the counsel for Mr. Ganesh Prasad Mishra has specifically accepted no admitted or undisputed signature of Bhagwat Prasad Sharma is available on record, in such view of the matter, getting an examination of Bhagwat Prasad Sharma as well as opinion of expert on his signature does not arise on account of his demise. Now the question remains about the thumb impression of Ambika Yadav on Ext.-2 (deed of relinquishment) as apparent from the record that Ganesh Pd. Mishra, respondent no. 1 has stated that he will not examine as a witness any member of defendant 2nd party whereas the evidence of expert is available before the appellate court vide Ext.-4, evidence of Ambika Yadav is available on record, so much so, the evidence of Satya Narayan Yadav, D.W. 12 is available on record.

In such view of the matter, this Court is of the view

that there was no need for appellate court for remand of the matter. The appellate court has not recorded any where that evidence are not sufficient to decide the case on merit but only said that the evidence of Bhagwat Prasad Sharma was necessary and expert opinion of Government handwriting expert in respect of thumb impression of Bhagwat Pd. Sharma and Ambika Yadav, Ext.-A and Ext.-2 is necessary to arrive the truth. The court below has not recorded any finding on the merit of expert report, Ext.-4.

In such view of the matter, this Court finds that the appellate court has wrongly exercised the power and remanded back the matter. Accordingly, the order of appellate court is set aside and the court below is directed to decide the case on the basis of material available on record.

If the appellate court while disposing the appeal feels necessity of additional evidence, it can exercise the power as available in law.

With the above observation/direction, this appeal is allowed.

(Shivaji Pandey, J)

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