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

% Judgment delivered on: 21.07.2015

+ **FAO (OS) 386/2015**

VISHVA MITRA (DECEASED) THR HIS LRS Appellant

versus

A R NIM (DECEASED) THR HIS LRS Respondent

Advocates who appeared in this case:

For the Appellant : Mr Gaurav Mitra with Mr Rishab Maheshwari and Ms Deepali Dwivedi, Advocates.

For the Respondent : None.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CM No.12653/2015 (exemption)

Exemption is allowed subject to all just exceptions.

CM Nos.12652/2015 (for condonation of delay in re-filing the appeal)

The delay in re-filing the appeal is condoned.

The appeal stands disposed of.

FAO (OS) 386/2015

1. This appeal is directed against the order dated 26.02.2015 passed by the learned Single Judge in CS(OS) 748/2010. The case was listed for final arguments before the learned Single Judge. This case has a

chequered history. The suit was initially filed in the year 1972, although it bears the number and year of 2010. That was because the Division Bench by virtue of its order dated 11.02.2010, while remanding the matter to the Single Judge, had directed that it be numbered contemporaneously.

2. The entire controversy before us is with regard to the interpretation of paragraph 10 of the Division Bench's order dated 11.02.2010 passed in RFA (OS) 27/1980. The learned counsel for the appellant submits that the directions given by the Division Bench in paragraph 10 of the said order dated 11.02.2010 ought to be read in the context and in the backdrop of what is to be found in paragraphs 7 and 8 of the said order. It is for this reason that paragraph Nos.7, 8 and 10 are extracted herein below:-

“7. In the course of the hearings before us, it has been contended by Mr. Harish Malhotra, learned Senior Counsel for the Appellant, that consequent upon an amendment to the plaint having been permitted, the *lis* should be remanded to the learned Single Judge on the Original Side of this Court for Framing of Issues and for leading additional evidence. Mr. Amit Sibal, learned counsel for the Respondent, does not argue to the contrary except for making the minor but

significant clarification that the Remand Order should not have the effect of setting at naught (i) the Issues predicated on the existing pleadings; (ii) the evidence of the parties recorded pursuant thereto and (iii) the Judgment.

8. The controversy before us, therefore, is within a short compass. The contention is that the Appellate Court is competent to frame additional Issues, as also record the evidence thereon. His submission is that so far as the Plaintiff is concerned, no further evidence needs to be led. The fact remains that if yet another additional Issue is necessitated, it would be improper not to allow the Defendant an opportunity to cross-examine the Plaintiff's witnesses with regard to this issue and also to lead its own evidence.

9. xxxx xxxx xxxx xxxx

10. It will be justified to reiterate that the need to frame additional Issues and lead evidence thereon has arisen because of the amendment to the plaint allowed in these appellate proceedings. Having considered all the complexities of the case, we are of the opinion that the proper course to adopt is to remand the matter to the Original Side of this Court, with a direction that the appropriate Court should frame fresh/ additional Issues and record evidence thereon. We clarify that the evidence already recorded in the backdrop of the existing issues will remain efficacious and relevant. The learned Single Judge shall thereafter reappraise the evidence, if found necessary

by him, and pass a fresh judgment or affirm the impugned judgment with additions, as may be found relevant. It is again clarified that this Remand shall not have the effect of setting aside the impugned judgment.”

(underlining added)

3. The controversy which was raised before the learned Single Judge was whether the original judgment and decree dated 24.04.1980 in the said suit (earlier numbered as Suit No.29/1972) continued to hold the field and as to whether the remand was only limited to the framing of additional issues and evidence being considered on those issues and conclusions being arrived on those issues alone. The learned counsel for the appellant/plaintiff submitted that the meaning and purport of the Division Bench's order dated 11.02.2010 was that the earlier judgment and decree was to remain intact and that the learned Single Judge was to only consider the additional evidence on the additional issues which were to be framed by the learned Single Judge. We may point out that the additional issues were framed by the learned Single Judge subsequently on 13.08.2010 and those additional issues are as under:-

"1. Whether the plaintiff has valued the suit property correctly in accordance with the law in the amended suit? OPP

2. Whether this Court possesses pecuniary jurisdiction to entertain and try the Claim in the amended suit? OPP

3 Relief. "

We may also point out that the evidence has been led by the respective parties on the additional issues also.

4. The learned Single Judge has construed the Division Bench's order to mean that the learned Single Judge can examine the evidence recorded earlier as also the evidence recorded on the additional issues and come to an overall conclusion on all issues and deliver a judgment thereon. The learned counsel for the appellant "vehemently" argued before the learned Single Judge as also before us that the findings of the learned Single Judge on the earlier occasions were not to be touched upon by the learned Single Judge after the remand and that the remand was only limited to the additional issues which were directed to be framed and on which additional evidence had been led.

5. We do not agree with the submissions made by the learned counsel for the appellant and we fully endorse the views expressed by the learned Single Judge in the impugned order dated 26.02.2015. Paragraph 7 of the Division Bench's order, which we have extracted above, only records the

submissions of the counsel for the parties. It does not reflect the decision of the Division Bench or opinion of the Division Bench. Insofar as the paragraph 8 of the Division Bench's order is concerned, it only notes that contention that the Appellate Court is competent to frame additional issues, as also record evidence thereon. This, of course, is a course which the Division Bench did not adopt inasmuch as it remanded the matter to the learned Single Judge for framing of additional issues and also for recording of evidence. However, paragraph 8 of the Division Bench's order dated 11.02.2010 does record that if an additional issue is necessitated, it would be improper not to allow the defendant an opportunity to cross-examine the plaintiff's witnesses with regard to that issue and also to lead its own evidence.

6. It is in this backdrop that the Division Bench ultimately gave its opinion and conclusion in paragraph 10 of the said order. On going through the said paragraph 10 of the order, it is clear that the Division Bench, having considered all the complexities of the case, was of the opinion that the proper course to be adopted was to "remand the matter to the original side" of this Court with a direction that "the appropriate Court should frame fresh/additional issues and record evidence thereon".

While so remanding the matter, the Division Bench clarified that the evidence already recorded in the backdrop of the existing issues would remain efficacious and relevant. Importantly, the Division Bench clearly directed that the learned Single Judge would be entitled to “reappraise the evidence”, if found necessary by him, and pass a “fresh judgment” or “affirm the impugned judgment with additions”, as may be found relevant. The expressions which we have placed within quotes clarify the position that the remand entailed re-appreciation/reappraisal of the evidence already on record. It did not simply entail appreciation of the new evidence which was to be recorded. The expression “reappraisal” means to appraise something which has already been considered on an earlier round. The expression “fresh judgment” entails that a “new” judgment in entirety could be rendered by the learned Single Judge. The learned Single Judge also had the option of affirming the impugned judgment with additions. In other words, it was open to the learned Single Judge to render an entirely fresh judgment on all the issues or to accept the reasoning adopted in the earlier judgment with additions in respect of the additional issues. It was further clarified by the learned Division Bench that the remand would not have the effect of setting aside

the impugned judgment. Had this clarification not been given by the Division Bench, then it would not be open to the learned Single Judge to adopt the reasoning of the earlier impugned judgment. Since the Division Bench gave the option to the learned Single Judge to even affirm the earlier reasoning, it became necessary for the Division Bench to clarify that the remand would not have the effect of setting aside the impugned judgment. This is also because the Division Bench had not considered the matter on merits and, therefore, the remand ought not to be construed as negating the reasoning adopted by the learned Single Judge in the judgment which was impugned in the said RFA (OS) 27/1980.

7. It is for these reasons that we do not agree with the submissions made by the learned counsel for the appellant. We are in complete agreement with the view taken by the learned Single Judge in the impugned order dated 26.02.2015.

8. Consequently, the appeal is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

JULY 21, 2015/st