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

+ RSA 208/2016

HAWA SINGH

..... Appellant

Through: Mr. Arun Sharma and Mr. Sidharth
Sejwal, Advocates.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Dr. Ashwani Bhardwaj, Adv.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

ORDER

% **02.09.2016**

1. On 8.8.2016 when notice was issued in this second appeal the following order was passed:-

“C.M. Appl. No. 28319/2016 (for condonation of delay of 142 days in re-filing the appeal, under Section 151 CPC)”

This is an application seeking condonation of delay of 142 days in re-filing the appeal.

For the reasons stated in the application, the same is allowed and the delay is condoned.

The application stands disposed of.

C.M. Appl. No. 28318/2016 (Under Order 22 Rule 3 CPC, on behalf of LRs of deceased – Hawa Singh for taking them on record)

This application is actually unnecessary because applicants being the legal representatives of the original plaintiff can sue in their own right because the right to sue survives and the plaintiff did not die during the pendency of judicial proceedings but died after passing of the impugned judgment.

C.M. stands disposed of by observing that the applicants would be entitled to represent the erstwhile plaintiff.

RSA 208/2016

page 1 of 5

RSA 208/2016 and C.M. Appl. No. 28316/2016 (for stay, under Section 151 CPC)

1. Counsel for the appellants argues that in view of order 41 Rule 24 CPC the First Appellate Court could not have remanded the first appeal but ought to have decided the first appeal on merits as the record of the trial court was complete. It is also argued that there was no need for additional evidence to prove the orders of the departmental authorities because the said documents were admitted documents and could always be referred to by the first appellate court itself.
2. Let notice be issued to the respondents, on filing of process fee, both in the ordinary method as well as by registered post AD, returnable on 2nd September, 2016.
3. Trial court in the meanwhile will not proceed ahead with the disposal of the suit bearing No. 1338/06/93 titled as Hawa Singh Vs. Union of India and Ors. [New CS(OS) No. 25/2015].
4. A copy of this order be given *dasti*.”

2. I have pointed out to counsel for the respondents the recent judgment of the Supreme Court in the case of *Lisamma Antony and Another Vs. Karthiyayani and Another (2015) 11 SCC 782* which holds that appellate courts cannot remand the matters except under Order 41 Rule 23 CPC where suit is decided only on a preliminary issue ie all issues are not decided or under Order 43 Rule 23 A CPC when a re-trial/additional evidence is necessary, and, if record of the trial court is otherwise complete it is the appellate court which must decide the matters on merits and not remand the matters to the court below. The relevant paras of the judgment

of the Supreme Court in the case of *Lisamma Antony and Another (supra)*

read as under:-

“14. Rule 23 of Order 41 of Code of Civil Procedure, 1908, (for short "the Code") provides that 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, which 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 all just exceptions, be evidence during the trial after remand.

15. Rule 23A of Order 41 of the Code provides that 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.

16. Rule 24 of Order 41 of the Code further provides that where evidence on record is sufficient, appellate court may determine case finally, instead of remanding the same to the lower court.

17. Needless to say, in the present case, the suit was not disposed of on any preliminary issue by the trial court. The second appellate court should have restrained itself from remanding a case to the trial court. Remanding a case for re-appreciation of evidence and fresh decision in the matter like the present one is nothing but harassment of the litigant. The unnecessary delay in final disposal of a lis, shakes the faith of litigants in the court.”

3. It is seen that in the present case on behalf of the appellant challenge is laid to the impugned judgment of the first appellate court which remands the matter to the trial court for fresh decision although the trial

court did not by its judgment limit its decision in the suit only on preliminary issues and nor has the first appellate court required or directed leading of additional evidence. Therefore, in view of Order 41 Rule 24 CPC read with the ratio of the recent judgment of the Supreme Court in the case of *Lisamma Antony and Another (supra)*, it is the first appellate court which has to decide the appeal on merits as per record of the trial court.

4. It is the respondents herein who had filed the first appeal before the first appellate court, and therefore, it is this first appeal which will have to be decided now by the first appellate court after hearing arguments of both the parties and as per the record of the trial court. The judgment now be passed by the first appellate court will be uninfluenced by any of the observations made in the impugned judgment of the first appellate court dated 17.11.2015.

5. The appeal is accordingly disposed of by remanding the matter to the first appellate court to decide the same on merits. Parties to appear before the District and Sessions Judge, Central, Tis Hazari Courts, Delhi on

18.10.2016 and the District and Sessions Judge will mark the appeal for decision to a competent court in accordance with law.

VALMIKI J. MEHTA, J

SEPTEMBER 02, 2016
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