

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

+ **RSA No.395/2015**

% **18th July, 2016**

SMT. SUMAN LATA Appellant

Through: Mr. Amarjit Singh, Advocate.

versus

SH. AMIT KUMAR AND ANR. Respondents

Through: Mr. Paritosh, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellant/plaintiff against the Judgment of the First Appellate Court dated 13.10.2015 which reversed the Judgment of the Trial Court dated 27.3.2015 whereby the trial court had decreed the suit of the appellant/plaintiff for permanent and mandatory injunctions and mesne profits with respect to the suit property no.C-169, Pandav Nagar, Delhi-92. The effect of the judgment of the first appellate court is that the suit of the appellant/plaintiff has been dismissed both for mandatory and permanent injunctions as also for mesne profits. I may note that appellant/plaintiff by claiming mandatory injunction, was effectively claiming possession of the suit property.

2. The sole issue to be decided in the present case is interpretation of the admitted Will dated 5.5.1992 left behind by late Sh. Sant Ram Sachdev who is the father-in-law of the appellant/plaintiff i.e the father of Sh. Raj Kumar, the husband of the appellant/plaintiff. Two issues arise as regards the interpretation of this Will. The first issue is as to whether the appellant/plaintiff became an absolute owner of the suit property or only received a life interest under the Will whereby there remained a right of remainder interest in the respondent no.1/defendant no.1 and his brother Sh. Krishan Kumar as per the Will dated 5.5.1992 of late Sh. Sant Ram Sachdev. The second issue is that even if the Will dated 5.5.1992 does not give a remainder interest to the respondent no.1/defendant no.1 and his brother Sh. Krishan Kumar, even then can it be said that the appellant/plaintiff is not entitled to the reliefs effectively of possession and mesne profits qua the suit property inasmuch as appellant/plaintiff was only one of the absolute co-owner, with her husband and the father of the respondent no.1/defendant no.1 and Sh. Krishan Kumar, being the other absolute co-owner, who has died intestate, and hence the respondent no.1 as the son inherited his share in the suit property out of the share of his father/Sh. Raj Kumar. The first appellate court has dismissed the suit by observing that interpretation of the Will even if the same shows that the appellant/plaintiff did not receive only life interest but was the absolute co-owner of the suit property, she was only one co-owner with the other co-owner being her husband Sh. Raj Kumar, and since her husband Sh. Raj Kumar (and the father of the respondent no.1) has died intestate, the respondent no.1/defendant no.1 would

become one of the co-owners of the suit property by inheriting 1/3rd share out of the half share of his father Sh. Raj Kumar in the suit property, and that therefore he could not be evicted from the same. The relevant paras of the judgment of the first appellate court are paras 37 to 42 and these paras read as under:-

“37. Looking the facts of the case from the other angle as well, assuming that the intention of the testator is to make the respondent Smt. Suman Lata and her husband Lt. Sh. Raj Kumar absolute owner of the suit property by the testator as per his Will dated 05.05.1992, still the respondent cannot be termed as the absolute owner of the suit property as per the Will dt. 05.05.1992, the relevant portion of Will Ex.PW1/A is as under:

"I, the testator am the absolute owner uptill as I am alive, and after my death the said testimony my son and daughter-in-law (Sh. Raj Kumar S/o Sh. Sant Ram Sachdev and Smt. Suman Lata w/o Sh. Raj Kumar) shall before the absolute owner of the abovesaid property, who will be free to use, enjoy, sell, mortgage gift or transfer the same to any other person as they like without any interference or disturbance from other legal heirs, and he will also become the holder of my bank account or other movable and immovable property which have not been mentioned in this deed and after the death of the said testimonies Sh. Raj Kumar and Smt. Suman Lata W/o Sh. Raj Kumar Sachdev, the abovesaid property no. C-169, my bank account or other movable and immovable properties shall be automatically transferred in the name of my grandsons 'Kishan Kumar and Amit Kumar' sons of Sh. Raj Kumar Sachdeva, who will become the sole and absolute owner of the abovesaid property and holder of bank accounts, who will be free to enjoy, hold, sell, mortgage, gift or transfer the same to any other person they like without any interference or disturbance from other legal heirs such as sons (except the testimony Raj Kumar and daughter in law Smt. Suman Lata). If anyone raises any objection against the said property, that will be considered as null and void."

According to the same after demise of Sh. Sant Ram Sachdev, the property shall devolve upon his son Raj Kumar and daughter-in-law Suman Lata.

38. In the present case, son of testator namely Sh. Raj Kumar Sachdev expired on 24.05.1993 leaving behind the respondent Smt. Suman Lata and two sons namely Amit Kumar (appellant herein) and Sh. Krishan Kumar. If property is bequeathed to two persons, would this mean on the demise of one person the other person shall become the absolute owner of the property. With respect the answer is 'No'.

39. Had the recital of the Will were, in case son of the testator pre deceased his daughter in law Suman Lata, the respondent herein, she shall become absolute owner of the suit property then thing would have been different, but it is not the case here.

40. If a person dies, the right of succession opens and his right shall be devolved upon his legal heirs in accordance with the same. In the present case Sh. Raj Kumar father of appellant and husband of respondent died on 24.05.1993 and the rights of Sh. Raj Kumar in case of his dying intestate would devolve upon his legal heirs by way of succession who here in the present case are appellant no.1, respondent and Sh. Krishan Kumar. Respondent in any circumstances, cannot be said to be the absolute owner of the suit property and if, she is not the absolute owner of the suit property then she has no right to file the suit for possession against the appellants qua the suit property. For the same, respondent has first to get her share determined, which is devolved upon her by way of succession on account of death of her husband and father of the appellant i.e. Sh. Raj Kumar by filing a suit for partition and thereafter, suit for possession could be maintained to that extent of the portion which falls to the respondent and not in any circumstances to the whole of the suit property.

41. It seems that Ld. Trial Court went on the footing that the respondent/plaintiff is the owner of the suit property by virtue of Will dt. 05.05.1992 and that the appellant no.1/defendant have admitted in his cross examination that respondent is the owner of the suit property. At the outset, I may say that the courts ought to have to go by what the law is and not by the submission of the parties and in particular when the appellant has stated a absolute different averment in its pleadings viz. that they are also the co-owner and has equal right in the suit property on the basis of the Will executed by their grandfather Lt. Sh. Sant Ram Sachdev. In such circumstances, the Trial court have to carefully analyze the facts and law and should not base his finding on the one or two statement of the appellant.

42. Before holding respondent as absolute owner of the property on the basis of the Will it is the duty of the court to go through the Will and thereafter, the court should pass any order as it thinks fit. In the opinion of the court, the trial court has misread the recitals of the Will and misinterpreted the evidence on record.”

(underlining added)

3. I completely agree with the aforesaid conclusions of the first appellate court inasmuch as the relevant paras of the Will executed by late Sh. Sant Ram Sachdev clearly show that both the appellant/plaintiff and her husband Sh. Raj Kumar became joint absolute co-owners of the suit property. Of course, in my opinion, even this finding of the first appellate court requires some modification as stated hereinafter though confirming the conclusion of the first appellate court that appellant/plaintiff and her husband Sh. Raj Kumar became the absolute co-owners

of the suit property. I do not find any perversity or illegality whatsoever in the aforesaid conclusions of the first appellate court inasmuch as the husband of the appellant/plaintiff and the father of the respondent no.1/defendant no.1 has died intestate and therefore once Sh. Raj Kumar was one co-owner of the suit property, and who has died intestate, respondent no.1/defendant no.1 will hence be one of the co-owners of the suit property inheriting as son 1/3rd out of the half share of his father late Sh. Raj Kumar in the suit property.

4. The other issue which calls for determination is with respect to interpretation of the Will whose relevant portion is reproduced by the first appellate court in para 37 of the judgment as reproduced above. The issue is that whether such Will gives only life interest to the appellant/plaintiff alongwith her husband Sh. Raj Kumar or does the same give absolute ownership interest to the appellant/plaintiff and her husband Sh. Raj Kumar in the suit property, and, even if absolute interest is created by the Will of late Sh. Sant Ram Sachdev in favour of the appellant/plaintiff and her husband Sh. Raj Kumar whether still there is scope for giving effect to the later part of the Will which states that ‘after the death’ of the appellant/plaintiff and her husband Sh. Raj Kumar, the suit property and all other properties of late Sh. Sant Ram Sachdev will be owned by respondent no.1 and his brother Sh. Krishan Kumar.

5. On behalf of the respondent no.1/defendant no.1 it was sought to be argued that the subject Will created only a life interest in favour of the

appellant/plaintiff and not absolute ownership. It is argued that in any case as per Section 88 of the Indian Succession Act, 1925 since the later part of the Will gives absolute interest in the suit property to the respondent no.1/defendant no.1 and his brother Sh. Krishan Kumar, this clause is inconsistent/repugnant with the earlier part of the Will giving absolute interest to the appellant/plaintiff and her husband Sh. Raj Kumar and therefore the later clause giving absolute ownership of the suit property to the respondent no.1/defendant no.1 and Sh. Krishan Lal will prevail as per Section 88 of the Indian Succession Act, 1925 which reads as under:-

“Section 88. The last of two inconsistent clauses prevails.-Where two clauses of gifts in a Will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.”

6. The law with respect to interpretation of the Will has been referred to by the first appellate court in its judgment by referring to the judgment of the Supreme Court in the case of *Navneet Lal @ Rangi Vs. Gokul & Ors. (1976) 1 SCC 630*. The relevant paras of the first appellate court dealing with what is the law on the subject interpretation of the Will as also the observations of the Supreme Court in the case of *Navneet Lal @ Rangi (supra)* are contained in para 19 to 22 of the judgment of the first appellate court and which paras read as under:-

“19. The general rule of construction in interpreting a 'Will', is first to ascertain by an examination of the entire Will what is the nature and the grammatical meaning of the language used by the testator. The entire instrument and all its parts are to be construed in relation to each other and so as, if possible, to form one consistent whole.

20. The fundamental and foremost rule while reading and interpreting the Will, is that the intention of the testator should be found from the recitals/clauses mentioned by him in his Will and the effect should be given to it as far as possible for the construction of the Will. Every case in hand should be looked into

independently and that the other cases will be of little assistance because the different clauses in different Wills will always differ from case to case.

21. In **Navneet Lal @ Rangī Vs. Gokul & Ors. 1976(1)SCC630**, The Hon'ble Supreme Court Of India in para 8 has laid down five rules while construing/interpreting a Will and observed as under:-

(1) In construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered; but that is only for the purpose of finding out the intended meaning of the words which have actually been employed.

(2) In construing the language of the will the court is entitled to put itself into the testator's armchair (Venkata Narasimha v. Parthasarathy) (1913) 41 Ind App 51 at p.73 (PC) and is bound to bear in mind also other matters than merely the words used. It must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense.... But all this is solely as an aid to arriving at a right construction of the Will, and to ascertain the meaning of its language when used by that particular testator in that document. [Venkata Narasimha's case (supra) and Ganambal Ammal v. T. Raju Ayyar: (AIR 1951 SC 103)]

(3) The true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory (Raj Bajrang Bahadur Singh v. Bakhtraj Kuer): (AIR 1953 SC 7)

(4) The court must accept, if possible, such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative. The court will look at the circumstances under which the testator made his will, such as the state of his property, of his family and the like. Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further, where one of the two reasonable constructions would lead to intestacy, that should be discarded in favour of a construction which does not create any such hiatus. (Pearey Lal vs. Rameshwar Das): (AIR 1983 SC 1703).

(5) It is one of the cardinal principles of construction of Wills that to the extent that it is legally possible effect should be given to every disposition contained in the Will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the Will. (Ramachandra Shenoy v. Mr. Hilda Brite: (AIR 1964 SC 1323))

22. While interpreting a 'Will', it is the primary duty of a court is to read the Will as a whole and ascertain from the language of the recitals therein as to what was the intention of the testator, that is to construe the Will. In interpreting the 'Will' the regard must have to be, not merely to the words used but to the evident intention of the testator. However, those intentions must be ascertained by the proper construction of the words he uses, and once ascertained, they must not be departed from." (underlining added)

7. Learned counsel for the respondent no.1/defendant no.1 has also placed reliance upon the judgment of the Supreme Court in the case of ***Kamla Devi Vs. Prabhawatti Devi (Smt.) and Others (2001) 10 SCC 602*** to argue that a Will which contains clauses such as found in the facts of the present case, it should be held that there is no repugnancy and what subsists on the death of the persons to whom absolute ownership is bequeathed in the first instance would be available to those later persons in the eventuality of death of first beneficiaries as stated in the Will. The relevant paras of this judgment are para 7 and 8 which read as under:-

"7. The other part of the submission is in respect of the interpretation of the will. We find para 3 of the will itself is very relevant for the purpose of interpretation of the will, which is quoted hereunder:-

"3. That subsequent to Smt. Kamla's death the persons enumerated thereafter shall be the owners of the property *that subsists*."

8. We find the Will in its earlier part recites that on his death his wife, Smt. Kamla Devi (the appellant), shall become the owner of the property which survives. Use of the word 'survives' here means what remains after the testator death. If the testator is still living, he may dispose of some and thus she will become the owner of what survives. Similarly, we do not find any rider is placed in this Will, after vesting of this property unto her or in any way limiting her right of transfer or disposal. Finally, the aforesaid quoted portion makes it absolutely clear that this property given to her under the Will was not limited but made her absolute owner. The significant words in paragraph 3 quoted above records clearly, subsequent to the death of the appellant, the persons enumerated in the Will shall be the owner of the property of what subsists. This means, whatever remains, or the residual property at the time of her death. So the High Court misconstrued the Will. It clearly confers on the appellant absolute ownership and not limited ownership. We may record here that trial court declined to grant decree of

possession to the appellant against which the appellant has not preferred any appeal which has become final.”

8. In my opinion, the issue with regard to the interpretation of the Will in question is in fact squarely covered by the judgment of the Supreme Court in the case of *Sadaram Suryanarayana and Another Vs. Kalla Surya Kantham and Another (2010) 13 SCC 147* wherein the Supreme Court in similar factual situation has held that there is no inconsistency or repugnancy because in case the person to whom property is absolutely bequeathed in the first instance does not dispose of the same in his lifetime, then, whatever is available at the time of death of the first beneficiary will devolve upon the remainder man. The relevant paras of the judgment of the Supreme Court in the case of *Sadaram Suryanarayana and Another (supra)* are paras 8 to 10, 15, 19 and 22 to 26 and which paras read as under:-

“8. The English rendition of Clause 6 of the Will executed by Smt. Kalla Jaggayamma is as under:

“(6) 2nd item tiled house situated in New colony out of which Eastern wing 2 rooms shall devolves to my 2nd daughter Chandaram Appalanarasamma and the Western wing rooms shall devolve upon my elder daughter Chandram Ramanamma with absolute rights of Sale, Gift, Mortgage etc., and this will come into force after my demise. After demise of my daughters the retained and remaining property shall devolve upon their female children only.”

9. It is evident from a plain reading of the above that the testatrix had bequeathed in absolute terms the property mentioned in Clause 6 in favour of her daughters Chandaram Appalanarasamma and Chandaram Ramanamma with absolute rights of sale, gift, mortgage etc. That the bequest was in absolute terms was made abundantly clear by the use of the words "absolute rights of sale, gift, mortgage etc." appearing in Clause 6 above. To that extent there is no difficulty. What led to a forensic debate at the Bar was the latter part of bequest under which the testatrix has attempted to regulate the devolution of the property in question after the demise of her daughters. The testatrix has desired that after the demise of

her daughters the property vested in them would devolve upon their female heirs only.

10. The question is whether the Testatrix Smt. Kalla Jaggayamma, had made two bequests, one that vests the property absolutely in favour of her daughters and the other that purports to vest the very same property in their female offsprings. If so whether the two bequests can be reconciled and if they cannot be, which one ought to prevail.

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15. To the same effect is the decision of this Court in *Mauleshwar Mani's case* where the question once again was whether an absolute interest created in the property by the Testatrix in the earlier part of the Will can be taken away or rendered ineffective by the subsequent bequest which is repugnant to the first bequest. Answering the question in the negative, this Court held that once the testator has given an absolute right and interest in his entire property to a devisee it is not open to him to further bequeath the very same property in favour of the second set of persons. The following passage from the decision in this regard is apposite: (SCC pp.473-74, para 12)

“12. In view of the aforesaid principles that once the testator has given an absolute right and interest in his entire property to a devisee it is not open to the testator to further bequeath the same property in favour of the second set of persons in the same will, a testator cannot create successive legatees in his will. The object behind is that once an absolute right is vested in the first devisee the testator cannot change the line of succession of the first devisee. Where a testator having conferred an absolute right on anyone, the subsequent bequest for the same property in favour of other persons would be repugnant to the first bequest in the will and has to be held invalid.....We are, therefore, of the view that once the testator has given an absolute estate in favour of the first devisee it is not open to him to further bequeath the very same property in favour of the second set of persons.”

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19. In *Kaivelikkal Ambunhi's case* (SCC p.445, para 4), the Court applied the maximum *cum duo inter se pignantia reperiuntur in testamento ultimum ratum est* which means that in a will if there are two inconsistent provisions the latter shall prevail over the earlier.

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22. It is evident from a careful reading of the provisions referred to above that while interpreting a Will, the Courts would as far as possible place an interpretation that would avoid any part of a testament becoming redundant. So also the Courts will interpret a Will to give effect to the intention of the Testator as far as the same is possible. Having said so, we must hasten to add that the decisions

rendered by Courts touching interpretation of the Wills are seldom helpful except to the extent the same recognize or lay down a proposition of law of general application. That is so because each document has to be interpreted in the peculiar circumstances in which the same has been executed and keeping in view the language employed by the Testator. That indeed is the requirement of Section 82 of the Succession Act also inasmuch it provides that meaning of any clause in a Will must be collected from the entire instrument and all parts shall be construed with reference to each other.

23. Coming then to the facts of the case at hand it is evident from a careful reading of clause 6 of the Will extracted above that the same makes an unequivocal and absolute bequest in favour of daughters of Testatrix. The use of words like "absolute rights of sale, gift, mortgage etc." employed by the Testatrix make the intention of the Testatrix abundantly clear. Learned Counsel for the plaintiff-respondents herein also did not have any quarrel with the proposition that the Testatrix had in no uncertain terms made an absolute bequest in favour of her daughters. What was argued by him was that the bequest so made could be treated as a life estate not because the testament stated so but because unless it is so construed the second part of clause 6 by which the female offspring of the legatees would get the property cannot take effect. It was on that premise contended that the absolute estate of Smt. Sadaram Appalanarasamma ought to be treated only as a life estate. The contention though attractive on first blush, does not stand closer scrutiny. We say so because the ultimate purpose of interpretation of any document is to discover and give effect to the true intention of the executor, in the present case the testatrix.

24. We are not here dealing with a case where the Testatrix has in one part of the Will bequeathed the property to 'A' while the same property has been bequeathed to 'B' in another part. Had there been such a conflict, it may have been possible for the plaintiff-respondent to argue that the latter bequest ought to take effect in preference to the former. We are on the contrary dealing with a case where the intention of the Testatrix to make an absolute bequest in favour of her daughters is unequivocal. Secondly, the expression "after demise of my daughters the *retained and remaining properties* shall devolve on their females children only" does not stricto sensu amount to a bequest contrary to the one made earlier in favour of the daughters of the testatrix.

25. The expression extracted above does not detract from the absolute nature of the bequest in favour of the daughters. All that the Testatrix intended to achieve by the latter part of Clause 6 was the devolution upon their female offspring all such property as remained available in the hands of the legatees at the time of their demise. There would obviously be no devolution of any such property upon the female offspring in terms of the said clause if the legatees decided to sell or gift the property bequeathed to them as indeed they had every right to do under the terms of the bequest. Seen thus, there is no real conflict between the absolute bequest which the first part of Clause 6 of the Will makes and the second part of the said clause which deals with devolution of what and if at all anything that remains in the hands of the legatees.

26. The two parts of Clause 6 operate in different spheres, namely, one vesting absolute title upon the legatees with rights to sell, gift, mortgage etc. and the other regulating devolution of what may escape such sale, gift or transfer by them. The latter part is redundant by reason of the fact that the same was repugnant to the clear intention of the testatrix in making an absolute bequest in favour of her daughters. It could be redundant also because the legatees exercised their rights of absolute ownership and sale thereby leaving nothing that could fall to the lot of the next generation females or otherwise. All told the stipulation made in the second part of clause 6 did not in the least affect the legatees being the absolute owners of the property bequeathed to them. The corollary would be that upon their demise the estate owned by them would devolve by the ordinary law of succession on their heirs and not in terms of the Will executed by the testatrix.” (underlining added)

9. A reading of the aforesaid paras shows that the Supreme Court has held in similar facts that there is no inconsistency because what will remain of the property, to the extent the same survives on the death of the first beneficiary, will devolve upon the subsequent beneficiaries. The Supreme Court has also held that the language of the Will in facts such as the present would give not a life estate but absolute ownership to the first beneficiary in view of the categorical language in the Will entitling the first beneficiary to sell, mortgage etc the suit property. Therefore, in view of the ratio of the judgment of the Supreme Court in the case of *Sadaram Suryanarayana and Another (supra)* I hold that the Will in question does not give only a life interest to the appellant/plaintiff but gives absolute ownership of the suit property to the appellant/plaintiff and her husband late Sh. Raj Kumar, of course with the condition that whatever will remain and subsist out of the suit property as on the date of the death of the appellant/plaintiff and Sh. Raj Kumar, the same would vest with the respondent no.1/defendant no.1 and his brother Sh. Krishan Kumar. Of course, I must hasten to add that the same would not in any manner take away the fact that the suit for possession of

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appellant/plaintiff has to be dismissed even if there is absolute ownership of the suit property of the appellant/plaintiff and her husband Sh. Raj Kumar, since Sh. Raj Kumar has died intestate, the defendant no.1/respondent no.1 becomes a co-owner of the suit property as a legal heir/son of Sh. Raj Kumar inheriting 1/3rd share out of the half share of late Sh. Raj Kumar. Also, in case the suit property or whatever of it survives on the death of the first other beneficiary of the Will namely the appellant/plaintiff, at that stage of death of the appellant/plaintiff then it will be seen as to whether respondent no.1/defendant no.1 alongwith Sh. Krishan Kumar becomes owner inasmuch as it is pre-mature at this stage to make any observations in this regard during the lifetime of the appellant/plaintiff.

10. In view of the above, while holding that the appellant/plaintiff is one absolute co-owner of the suit property alongwith other equal co-owner being her husband Sh. Raj Kumar, yet the respondent no.1/defendant no.1 is one of the co-owners of the suit property, having inherited at this stage from the share of the father Sh. Raj Kumar dying intestate i.e defendant no.1/respondent no.1 as a son inheriting 1/3rd share out of the 50% share of late Sh. Raj Kumar. Consequently, the first appellate court has rightly allowed the appeal and dismissed the suit which was decreed by the Judgment of the Trial Court dated 27.3.2015.

11. I may note that I have given additional reasoning with respect to the interpretation of the Will instead of remanding the matter inasmuch as this is a requirement of Order XLI Rule 24 CPC and so held by the Supreme Court recently

in the judgment in the case of *Lisamma Antony and Another Vs. Karthiyayani and Another (2015) 11 SCC 782* and the relevant paras of this judgment 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.”

12. In view of the above, I do not find any merit in the appeal or that any substantial question of law under Section 100 CPC arises. Consequently, this Regular Second Appeal is dismissed, leaving the parties to bear their own costs.

JULY 18, 2016
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VALMIKI J. MEHTA, J