

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Miscellaneous Appeal No.916 of 2010**

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Late Diljann Miyan through his L.Rs.

... .. Appellant/s

Versus

Sakina Banoo and Ors.

... .. Respondent/s

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**Appearance :**

|                      |   |                            |
|----------------------|---|----------------------------|
| For the Appellant/s  | : | Mr.Radha Mohan Pandey, Adv |
| For the Respondent/s | : | Mr.Raghiv Hassan, Sr.Adv.  |
|                      | : | Mr. Atul Kumar Pandey, Adv |
|                      | : | Md. Shahab Khalia, Adv     |

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**CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR**  
**ORAL JUDGMENT**

**Date : 31-01-2019**

Heard learned counsel for the parties.

2. This miscellaneous appeal has been filed against the judgment and decree dated 08.09.2010 passed by learned Additional District Judge-cum-F.T.C.-V, Buxar passed in T.A.No.09 of 2008.

3. The plaintiff-Sakina Banoo (respondent No.1 herein) had filed T.S.No.175 of 2000 for a decree of declaration that three deeds of gift dated 10.06.1985, executed by Mostt. Jainab Khatoon in favour of defendant 2<sup>nd</sup> set and defendant 3<sup>rd</sup> set of the suit, were fictitious, inoperative and invalid documents.

4. The suit was dismissed by the learned trial court by judgment and decree dated 24.12.2007. The dismissal was challenged in T.A.No.09 of 2008 which was heard by learned Additional District Judge of Fast Track Court, Buxar and the



learned Judge set aside the dismissal of the suit and allowed the appeal. Simultaneously, the learned lower appellate court remitted back the matter to the learned trial court for fresh judgment and decree. The order of remand has been challenged herein by the defendants of the suit under Order 43 Rule 1 (U) of the Code of Civil Procedure. Before considering the merit of the order of remand, it would be apt to reproduce the finding of the learned lower appellate court which is contained in last two paragraphs of the judgment only.

*“ The provision laid down in Muslim law Section 301 provides the right of a widow to retain possession of her husband property under a claim for her dower without the right to alienate the property by sale, mortgage, gift or otherwise if she alienates the property the alienation is valid to the extent of her dower..... it does not effect the share of other heirs of her husband. So in such circumstances whatever Jainab Khatoon has executed deed of gift for her own share in favour of appellant family is correct and valid and she has no right to execute her three deed of gift in favour of defendants. She has no valid*



*right to execute the alleged three deed of gift so the alleged three deed of gift is void document having no rightful at all and the learned lower court has wrongly decided the issue No.VI, VII and VIII against the plaintiff/appellant.*

*Thus considered the oral evidence as well as documentary evidence of both parties and also considered the document of both parties. I come to conclusion that argument of appellant has much force so the appeal is fit to be allowed and hence it is allowed and judgment and decree dated 24.12.2007 and 12.01.2008 is set aside and the case is remanded back to the learned lower court to pass fresh judgment and decree in favour of plaintiff/appellant and take necessary action for cancellation of three deed of gift as alleged by contesting defendants.”*

5. Rule 23 and Rule 23A of Order 41 C.P.C. deals with the cases wherein the learned appellate court can remand as follows:

**“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 readmit 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.*

**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.”



6. This matter is not directly covered by Rule 23 for the reason that the suit was not decided on any preliminary point and the decree of reversal is on whole issues decided by the learned trial court. Therefore, this matter is covered by Rule 23A.

7. The perusal of the conclusion of the learned lower appellate court does not reveal that the learned lower appellate court was of the view that retrial of the case is necessary. For coming to the conclusion that retrial is necessary, the learned lower appellate court must have recorded that what infirmity was left by the learned trial court which caused miscarriage of justice. In other words, the learned court below should have specifically stated whether any important issue was left to be decided by the learned court below or evidence could not be collected on any issue though framed and not decided by the learned trial court and other circumstances justifying remand of the case should have specifically been pointed out. In absence of any material to suggest that retrial of the case was considered necessary by the learned court below, the order of remand is not sustainable in law.

8. Learned counsel for the respondents submits that since the learned lower appellate court has set aside the finding of the learned trial court on its own merit, the remedy to the appellant was to file a second appeal and not an appeal under Order 43 Rule



1 (u) of the Code of Civil Procedure. Learned counsel has placed reliance on case of *Mostt. Sudama Devi and Ors Vs. Himanshu Shekhar Jha and Ors*, reported in **2002 (1) PLJR 361**.

9. In Sudama Devi's case, the learned appellate court had remanded to the learned trial court to examine the genuineness of the thumb impression of late Ram Gulam Mahto on memo of partition deed vide Ext.6. This Court has clearly discussed in paragraph-7 of the judgment regarding non-applicability of Rule 23 or Rule 23A of Order XXXXI C.P.C. and stated as follows:

“...Rule 23A, in my opinion, has no application to the facts and circumstances of the present case, as it is not a case where the learned lower appellate court has considered the necessity of retrial”.

In the present case, the learned lower appellate court has remanded back the matter to the trial court to pass fresh judgment and decree without pointing out the points on which fresh judgment and decree is required. The learned lower appellate court ignored that Rule 24 and Rule 25 of Order 41 C.P.C. empowers the learned appellate court to pronounce judgment when the evidence upon the record is sufficient or to frame and try any issue or to determine any question of fact. In the circumstances, enumerated in Rule 25.



10. Therefore, in my view, the aforesaid referred case law is not applicable in the present facts and circumstances of this case.

11. Accordingly, the impugned order to the extent of remand is set aside with direction to the learned court below to decided afresh whether this is fit for remand with specific reason for remand of the case.

12. This appeal stands allowed. However, without cost in the present facts and circumstances of the case.

**(Birendra Kumar, J)**

Nitesh/-

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| AFR/NAFR          | NAFR       |
| CAV DATE          | NA         |
| Uploading Date    | 04.02.2019 |
| Transmission Date | NA         |

