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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on: 20th August, 2019
Pronounced on: 26th August, 2019**

+ CM(M) 791/2019

NAV SHAKTI EDUCATIONAL SOCIETY Petitioner
Through : Mr.Sanjeev Sindhwani, Senior
Advocate with Ms.Vasundhra
Bhardwaj, Advocate.

versus

LAXMAN PUBLIC SCHOOL SOCIETY & ORS Respondents
Through : Mr.Rajinder Singh, Advocate for
R-1.
Mr.I.S.Alag, Senior Advocate with
Mr.Moinuddin Khan Advocate for
R-2.

**CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA**

YOGESH KHANNA, J.

1. The question involved in these proceedings is if the petition under Article 227 of the Constitution of India is maintainable or the petitioner ought to have filed a Second Appeal against the impugned order 22.03.2019 passed by the learned Additional District Judge – 09, Central District, Tis Hazari Courts, Delhi.

2. The brief facts which led to the filing of the petition are an application under Order IX Rule 13 CPC was filed by the respondent herein in a Civil Suit filed by the petitioner herein. On 20.10.2005 none appeared for the petitioner before the learned Trial Court though the

counsel for legal heirs of the defendant No.6 appeared and matter was adjourned to 08.02.2006. On 08.02.2006 none of the parties were present in the Court and the learned counsel for the respondent told the respondent since the matter has been transferred on 08.02.2006 to some other Court, hence court notice shall be served upon them by the concerned Court and they need not appear till such court notice is served. However, no court notice was ever served and the respondents were proceeded ex parte vide order dated 18.10.2011, hence, an application under Order IX Rule 13 CPC was moved.

3. The said application under Order IX Rule 13 CPC was though dismissed by the learned Trial Court, but the first appellate Court in appeal set aside the order of the learned Trial Court on the basis *Reena Sadh vs Anjana Enterprises* AIR 2008 SC 2054 and remanded the matter to the learned Trial Court.

4. The reasoning given in the impugned order read as under:-

"11. I have carefully gone through the impugned order dt.04.12.2018 passed by Ld. Senior Civil Judge wherein the series of events and the conduct of the parties have been discussed, however, Ld. Trial court has not appreciated the contention raised by Ld. counsel for petitioners qua Rule 6 of Chapter 13 of Delhi High Court rules and has also not considered the judgments of Hon'ble Supreme Courts in "Reena Sadh Vs. Anjana Enterprises - Manu/SC/7464/2008" and "Ramgulam Vs. Bhagat Prasad Patel, Manu/SC/1182/2010. In the facts and circumstances of the case since the impugned order was made without appreciating Rule 6 of Chapter 13 of Delhi High Court rules and judgment relied upon by Ld. Counsel for petitioners, I deem it fit to remand back the matter for fresh disposal of the matter. Consequently, the impugned order dated 04.12.2018 is set aside and the matter is remanded back to the Ld. Trial court for passing a fresh order in accordance with law as well as considering Rule 6 of Chapter 13 of Delhi High Court Rules and the judgments of Hon'ble Supreme Court delivered in "Reena Sadh Vs. Anjana Enterprises - Manu/SC/7464/2008" and "Ramgulam Vs. Bhagat Prasad Patel, Manu/SC/1182/2010. Since the matter is quite old one, it is directed that Ld. Trial court shall pass a fresh order after hearing both the parties within three months. As such, the present appeal stands disposed off. TCR be sent back to

the Ld. Trial court alongwith the copy of the order immediately. Parties are directed to appear before the Ld. Trial court on 29.03.2019. Appeal file be consigned to R/R."

5. In this petition, I need to answer two questions:— *a)* is the petition under Section 227 of the Constitution of India maintainable; and *b)* was the power of remand properly exercised.

6. Qua *a)* above, the learned senior counsel for the respondent has vehemently argued a petition under Article 227 of the Constitution of India is not maintainable and in fact a second appeal ought to have been filed. It is urged Order *XLIII Rule (1) (u)* CPC covers an order under Rule 23 or 23A or Order *XLI* remanding a case *where an appeal would lie from the decree* of the appellate Court. He also referred to Section 105(2) CPC which read:-

"105 Other orders

(1)xxx

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

7. The learned senior counsel for the respondent then referred to *Sita Ram Goel vs Sukhnandi Dayal & Others* AIR 1972 SC 1612 where on a decision on an application under Order *XXI Rule 2* CPC, an appeal was filed before the learned Additional District Judge and the matter was remanded; no appeal was filed by the decree holder against the order of remand passed by the learned District Judge and when the matter was taken to High Court, the High Court passed the following order:-

"24. Even otherwise, as we have already pointed out, the proceedings have been treated 'as one under s. 47 C.P.C. in which the Misc. Civil Appeal No. 688 of 1960 was perfectly competent. Under Order 41 Rule 23, an appellant court has got power to remand the proceedings when a suit has been disposed of on a preliminary point. We have already pointed out that the District Munsif dismissed the application filed by

the appellant on the preliminary ground that it is barred by limitation. We have already further pointed out that it must be considered to be a proceeding under s. 47 as it was really in opposition to the execution proceedings filed by the respondent. The appellate court, under those circumstances, when it disagreed with the trial court on the question of limitation was perfectly competent to remand the proceedings. Under Order 43 Rule 1 Cl.(u) C.P.C. an appeal lies against an order remanding a case where an appeal would lie from the decree of the appellate court. From the fact that the respondent has filed Second Appeal, which is the subject of attack before us against the decision in an appeal of the District Court in the same proceedings, it is clear that the respondent should have filed an appeal against the order of remand.

25. *The consequence of an omission to file an appeal against the order of remand, under such circumstances, is indicated in s. 105, Sub-s. (2) C.P.C. which is as follows:*

"Sec. 105(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

26. *We have already pointed out that the respondent had a right of appeal against the judgment and order passed in Misc. Civil Appeal No. 688 of 1960. The respondent admittedly did not file an appeal against the said order of remand."*

8. Further, the learned senior counsel for the respondent referred to decision of this Court in *Rajinder Singh vs Pushpa Devi Bhagat & Another* AIR 2004 Delhi 228 wherein the Court held:-

"51.....the impugned order passed by the learned Additional District Judge is an order remanding the case to the learned Civil Judge for a decision on merits in accordance with law. An appeal from this order falls within the category of an appeal from an order as described in Order XLIII Rule 1(u) of the CPC. There was no dispute that had the learned Additional District Judge confirmed the decree, a second appeal could have been filed to this Court. Since the decree passed by the learned Civil Judge was not confirmed but was in fact set aside and the matter remanded for a decision in accordance with law, it would squarely be covered by the aforesaid provision of Order XLIII of the CPC. Reference in this context may also be made to Section 104(1)(i) of the CPC whereby an appeal is provided from any order made under the rules from which an appeal is expressly allowed....."

9. Thus, it was argued by the learned senior counsel for the respondent since the time period for filing an appeal had expired, so a petition under Article 227 of the Constitution was filed, hence it be not entertained.

10. The learned senior counsel for the petitioner, however, submits no Second Appeal can be filed against the First Appeal from Order unless and until it is statutorily provided for. He argued the Delhi High Court Rules debars carrying such orders in second appeal.

11. It is the contention of the learned senior counsel for petitioner that second appeal would not lie from the impugned order as the second appeal lies under Section 100 CPC which deal with the appeals from the appellate *decrees*.

12. Heard.

13. Admittedly, an appeal against an order of dismissal of an application under Order IX Rule 13 CPC is not an appeal against a decree. Order XLIII Rule (1) (u) CPC notes:-

“Order XLII Appeals from orders

1. An appeal shall be from the following orders under the provisions of section 104, namely:-

(a) to (t) xxx

(u) an order under Rule 23 or Rule 23A of Order XLI remanding a case where an appeal would lie from the decree of the Appellate Court; Xxxx”

A bare perusal of the above provision would show an appeal would lie from an order under Rule 23, Rule 23A CPC of Order XLI CPC remanding a case only where an appeal would lie from the *decree* of the learned Appellate Court. This provision is though different from the other provisions of Order XLI Rule 1 CPC but is in sync with Section 100 CPC dealing with Second Appeal.

14. *Rajinder Singh (supra)* so relied upon by the respondent is a case where an appeal was filed against the *decree*, hence the Court held in an order of remand by the Appellate Court, only an appeal would lie which

infact is the correct position. Moreso, Section 115(2) CPC says notwithstanding anything contained in sub-section (1) wherein any party is aggrieved by an order of remand from which an appeal lies, does not appeal, he shall be precluded from disputing its correctness.

15. The case of *Sita Ram Goel* (supra) can also be distinguished as in the said decision, an execution was filed by the landlord wherein an objection under Section 47(2) CPC were filed by the tenant / appellant. It is noted in the decision itself that under Section 47(2) CPC, the Court has power to treat such proceedings as a suit. Now, if that is so, then the judgment passed in dismissing the objections under Section 47(2) CPC would *per se* be treated as a *decree*, hence, Order XLIII Rule (1) (u) CPC would apply and an appeal would only lie against such an order of remand of proceedings under Section 47(2) CPC.

16. However, the proceedings before this Court culminated on an application under Order IX Rule 13 CPC which when decided would not finally adjudicate the rights and liabilities of the parties and hence such order cannot be termed as a *decree*. It thus distinguishes an order of the Appellate Court while dismissing an application under Order IX Rule 13 CPC from an order dismissing the objections under Section 47(2) CPC. Since the impugned order passed by learned First Appellate Court *per se* is not a decree; therefore the order passed by the learned Appellate Court cannot be termed as a decree and hence, such an order would not be an appealable order.

17. It is also important to note under Section 104(2) CPC, “*no appeal shall lie from any order passed in appeal under this section*”.

In other words, the CPC itself applies an embargo against filing an appeal against an *order* passed by the Appellate Court under S. 104 and by extension Order 43 CPC. As such, an appeal under Order 43 Rule 1(u) CPC cannot be maintained against an order passed in an appeal filed under Order 43 Rule 1(d) CPC, pursuant to the bar contained in Section 104 (2) CPC. Thus, the ingredients of Order 43 Rule 1(u) CPC having not been fulfilled, no appeal is maintainable under the said provision.

18. Further, the said argument of respondent can also not be sustained for other reasons, namely:-

(i) *It is only against an order of remand passed by an Appellate Court sitting in appeal against a decree passed by the Trial Court i.e. in an appeal filed under provisions of S. 96 of the CPC, would provisions of Order 43 Rule 1(u) of the CPC be applicable. This is apparent from the plain reading of this provision. The provisions of Order 43 Rule 1(u) of the CPC would not apply in case of a remand made by the Appellate Court dealing with an appeal against an order passed by the Ld. Trial Court, which is not a decree;*

(ii) *The statute provides for an appeal only in case of an order passed under provisions of Order 41 Rule 23 or 23-A CPC and not generally; and Order 41 Rule 23 or 23-A CPC contemplates remand by the Appellate Court adjudicating an appeal filed under S. 96 of CPC against a decree passed by the Ld. Trial Court; and*

(iii) *The use of the phrase 'decree of the Appellate Court' signifies that the judgment of the Appellate Court is a final judgment determining rights of parties, as would be the case only in case of a judgment deciding an appeal filed under S. 96 of the CPC against the decree of the Trial Court. The statutory requirement that an appeal should be available in law against the decree of the Appellate Court, further signifies that the judgment of the Trial Court should be a decree, since it is only in such a case, that the aggrieved party has a right of further appeal (under provisions of S. 100 of CPC). CPC does not otherwise provide for a second appeal against general orders.*

19. The respondent has further sought to argue that the provisions of Order 41 CPC are applicable to appeals filed under Order 43 by virtue of provisions of Order 43 Rule 2 CPC and therefore, reference to an order of remand under Order 41 Rule 23 or 23-A CPC in provisions of Order 43

Rule 1(u) CPC may be read to include an order of remand made in an appeal under Order 43 CPC, such as in case of the impugned order.

20. Order 43 Rule 2 reads as follows: “*Procedure – the Rules of Order XLI shall apply, so far as may be, to the appeals from orders*”. Clearly, the provisions of Order 41 CPC are made applicable only as regards the procedure to be followed while dealing with an appeal under Order 43 CPC; and does not give substantive rights to parties, including the right of appeal.

21. The right of appeal against an order passed under Order 41 Rule 23 or 23-A CPC is granted under Order 43 CPC and not under Order 41 CPC. Therefore, even if provisions of Order 41 CPC are made applicable to appeals under Order 43 CPC, merely the power to remand the matter (akin to Order 41 Rule 23 CPC) gets extended to the Appellate Court but in the absence of a specific provision, the right of an aggrieved party to file an appeal against such an order is not extended by the Statute. Provisions of Order 43 Rule 1(u) CPC are clear and do not allow for an expanded reading. It is settled law that a right of appeal is a statutory right and does not exist as a general common law right, unless specifically provided. Therefore, in the absence of a specific statutory provision, the right to appeal, as claimed by the Respondent cannot be allowed to an aggrieved party.

22. Now, the second limb of argument is if *CM (M)* can be filed or a Civil Revision Petition should have been filed under Section 115 CPC. *Prima facie* the remedy under Section 115 CPC or Civil Revision would not be available as Section 115 can be invoked only in respect of those

cases which have been *decided*. The case is decided only when there is adjudication on the rights and liabilities of the parties. Since in the present case, there was no such adjudication as the learned First Appellate Court has merely remanded the matter thus the matter would not fall within the expression *cases which has been decided*. Hence this petition would only lie.

23. Nevertheless, the learned senior counsel for the petitioner has quoted various decisions to show where this Court may also convert a petition under Article 227 of the Constitution of India to revision/writ/appeal etc. In *Shaqafath Ali Khan and Others vs Imdad Jah Bhahadur and Others* JT2009 (3) SC 652 the Supreme Court held:-

"56. If the High Court had the jurisdiction to entertain either an appeal or a revision application or a writ petition under Articles 226 and 227 of the Constitution of India, in a given case it, subject to fulfillment of other conditions, could even convert a revision application or a writ petition into an appeal or vice- versa in exercise of its inherent power. Indisputably, however, for the said purpose, an appropriate case for exercise of such jurisdiction must be made out."

24. Further in *Sanjay Mehra vs Sunil Malhotra* 2010 (170) DLT 797 this Court held:-

"28. In the above view of the matter, this Court could well entertain the present petition under Article 227 of the Constitution as a revision petition under the proviso to Section 25 B (8) of the DRCA. Consequently, there is no merit in the preliminary objection as to the maintainability of the petition. It is accordingly overruled. Submissions of the Petitioners/landlords on merits. It is accordingly overruled."

25. In *Tara Devi vs Prahlad Rai* 2014(7) AD (Delhi) 323 again this Court noted:-

"2. Certain facts are required to be stated and understood before dealing with this petition, and which are stated hereinafter, but at the outset, at the request of the counsel for the petitioner, this petition under Section 115 CPC is converted into a petition under Article 227 of the Constitution of India, and which I am entitled to do so because heading of the petition is immaterial and substance has to be seen vide

judgment of the Supreme Court in the case of Municipal Corporation of Delhi Vs. R.P.Khaitan & Anr. 79 (1999) DLT 555 (SC)."

26. Similarly in *Bimla vs Anil Kumar Arora* MANU/DE/1991/2014 it has been held as under:-

"1. This petition is filed under Article 227 of the Constitution of India, however, really the same had to be filed under Section 115 of the Code of Civil Procedure, 1908 (CPC). Since in law heading of the petition cannot make a difference, I am hence treating this petition filed under Article 227 of the Constitution of India as one under Section 115 CPC."

27. Admittedly the limitation to file Civil Revision is 90 days, whereas this petition was filed within 42 days. The stamping in CM(M) as also to Civil Revision is almost same. Further, in this case too the petitioner alleges the first Appellate Court had failed to exercise the jurisdiction so vested in it and have rather acted in the exercise of its jurisdiction illegally or with material irregularity, hence there can be no issues, if this petition may also be treated as Civil Revision.

28. Coming to question *(b) supra*, admittedly, power of remand cannot be exercised in a casual manner and it is only when twin conditions viz *a)* the Trial Court had disposed of matter on a preliminary issue; and *b)* where the decree is reversed in appeal and retrial is considered necessary; are satisfied, then the appellate Court should exercise the power of remand and that too in exceptional cases as was held in *P.Purshottam Reddy vs Pratap Steels Limited* 2002 AIR (SC) 771 wherein the Court categorically noted:-

"10. 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 in as much 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 therefore 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 11 of the CPC. In cases where additional evidence is required to be taken in the event of any one of the clause 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 *de hors* 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.”

29. Further even in *Municipal Corporation, Hyderabad vs Sunder Singh* 2008 AIR (SC) 2579 the Supreme Court held:-

“19. A distinction must be borne in mind between diverse powers of the appellate court to pass an order of remand. The scope of remand in terms of Order XLI Rule 23 is extremely limited. The suit was not decided on a preliminary issue. Order XLI Rule 23 was therefore not available. On what basis, the secondary evidence was allowed to be led is not clear. The High Court did not set aside the orders refusing to adduce secondary evidence.

20. Order XLI rule 23A of the Code of Civil Procedure is also not attracted. The High Court had not arrived at a finding that a re-trial was necessary. The High Court again has not arrived at a finding that the decree is liable to be reversed. No case has been made out for invoking the jurisdiction of the Court under Order XLI Rule 23 of the Code.

*An order of remand cannot be passed on ipse dixit of the court. The provisions of Order II Rule 2 of the Code of Civil Procedure as also Section 11 thereof could be invoked, provided of course the conditions precedent therefor were satisfied. We may not have to deal with the legal position obtaining in this behalf as the question has recently been dealt with by this Court in *Dadu Dayalu Mahasabha, Jaipur (Trust) v. Mahant Ram Niwas & Anr.* (Civil Appeal No. 3495 of 2008) disposed of on 12.5.2008.”*

30. Now coming to the facts, a bare perusal of the impugned order passed by the learned appellate Court do not show as to if the appellate court has even examined the facts to come to a conclusion that an order of the learned Trial court may not be reversed, but rather, it simply say since Rule 6 of Chapter 13 of the Delhi High Court Rules and judgments of the Supreme Court in *Reena Sadh* (supra) and *Ramgulam* (supra) were not considered; be now considered and a fresh order be passed. This is not the spirit of the power of remand as enumerated in CPC. The learned appellate Court ought to have applied its mind to the facts of the case to come to a *prima facie* conclusion that an order of the learned Trial Court should fail for non compliance of Rule 6 of Chapter 13 of the Delhi High Court Rules and/or both decisions of the Supreme Court referred to above. Even the operative part of the impugned judgment does not show any application of mind in this case and hence the order of remand passed by the learned appellate court is set aside. The learned appellate Court shall look into the matter afresh in the light of above. The petition is disposed of. No order as to costs.

31. Both the parties to appear before the learned First Appellate Court /Successor Court for directions on 05.09.2019.

32. Copy of this order be sent to the learned First Appellate Court / Successor Court forthwith.

YOGESH KHANNA, J.

AUGUST 26, 2018

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