

25.04.2022
SL No.5
Court No.8
(gc)

**FMA 1243 of 2021
With
CAN 1 of 2018
(Old No: CAN 5721 of 2018)**

**Sk. Kamaluddin
Vs.
Rowsonara @ Rouson Ara Khatun**

Mr. Avishek Prasad,
Ms. Sreetama Neogi,
....for the Appellant.

In spite of service, the respondent is not represented nor any accommodation is prayed for. In view of the earlier order, we proposed to hear out the appeal at the admission stage.

The appeal is arising out of judgment and decree dated 31st August, 2017 passed by the learned Additional District Judge, 1st Court, Suri, Birbhum in Money Appeal No.6 of 2014. The learned First Appellate Court allowed the appeal by remanding the same to the learned Civil Judge (Senior Division), Suri, Birbhum with a direction to write a fresh judgment after giving opportunity to both sides to make their submissions. The learned Trial Judge was directed to decide the matter afresh after taking into consideration the observation made by the Appellate Court but not to be influenced at the time of writing the judgment.

The appeal was arising out of a money decree. The reason for the remand in the words of the learned First Appellate Court for the “restricted remand” appears to

be that the Trial Court could not reconcile the two alleged promissory notes dated 24th October, 1997 and 3rd December, 1999 and there has been a misappreciation of evidence and misreading of certain documents. The learned First Appellate Court was of the view that the learned Trial Court did not take into consideration the Exhibit-1 in its proper perspective and unusual gap between the execution of the alleged document and the evidence by Rausonara Khatun. The First Appellate Court was of the view that the Trial Court fails to appreciate those relevant factors in proper perspective for ascertaining validity and genuineness of those two documents, which are the principal documents for the money suit. The learned First Appellate Court referred to Section 2(5) of the Stamp Act and a Full Bench decision of Madras High Court in ILR 13, Mad. 147(FB) where observations have been made that an instrument which contains a promise to pay on demand a certain sum of money with interest and which bears the signature of the writer and of some other witnesses, is a bond and should be stamped as such.

The learned Counsel appearing on behalf of the appellant has submitted that the Appellate Court had exceeded its jurisdiction in remanding the matter to the Trial Court as all the evidences were available with the Appellate Court and there is no issue which is required to be considered by the Trial Court on the basis of

which the final decision is required to be taken in the instant case.

The matter before us is not covered by Order 41 Rule 23 of the Code of Civil Procedure. The learned Trial Court did not dispose of the suit on a preliminary point. The Trial Court disposed of the suit on merits. All points were taken into consideration by the Trial Court in deciding the lis between the parties. The Trial Court may have decided the matter rightly or wrongly, it is the duty of the Appellate Court to decide the matter on merits. The order of remand cannot be passed mechanically, more so, when all the facts and findings are available before the Appellate Court on the basis of which the Appellate Court is capable of deciding the lis between the parties. The Appellate Court may remand the matter where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of suit upon the merits. It was on such consideration, the Appellate Court may, if necessary, frame issues and refer the same for trial to the Court from whose decree the appeal is preferred and in such case the Trial Court may be allowed to take additional evidence, if required. In the instant case, the First Appellate Court did not frame any issue for remand by the Trial Court. Moreover, having regard to the fact that all the issues have been decided by the Trial Court to

the best of the ability of the Trial Court, we do not find any issue or any question of fact which are required to be decided by the Trial Court on remand. The Appellate Court also did not frame any issue and refer such issues for Trial to the Court from whose decree the appeal was carried to the First Appellate Court. The order of remand has to be carefully worded so that the Trial Court precisely knows the issues, the Trial Court would be required to re-adjudicate or adjudicate.

In a recent judgment, the Hon'ble Supreme Court in ***Nadakerappa Since Deceased by LRS. & Ors. Vs. Pillamma Since Deceased by LRS. & Ors. decided on 31st March, 2022 (Civil Appeal Nos.7657-7658 of 2017)*** has clearly stated that an order of remand cannot be passed as a matter of course. An order of remand cannot also be passed for the mere purpose of remanding a proceeding to the lower court. An endeavour has to be made by the Appellate Court to dispose of the case on merits and more so, when both the sides have led oral and documentary evidence, the Appellate Court has to decide the appeal on merits instead of remanding the case to the lower court. The relevant observations are in Paragraph 25, which state:-

“25. The Division Bench, without assigning any cogent reasons, has set aside the order of the learned Single Judge and has remanded the matter to the Land Tribunal. It is settled law that the order of remand cannot be passed as a matter of course. An order of remand cannot also be passed for the

mere purpose of remanding a proceeding to the lower court or the Tribunal. An endeavour has to be made by the Appellate Court to dispose of the case on merits. Where both the sides have led oral and documentary evidence, the Appellate Court has to decide the appeal on merits instead of remanding the case to the lower court or the Tribunal. We are of the view that, in the instant case, the Division Bench has remanded the matter without any justification.”

On such consideration, we do not find any reason for the learned First Appellate Court for “restricted remand” to the learned Trial Court for writing a fresh judgment. On the basis of evidence, it was open for the Appellate Court to form its own opinion.

On such consideration, we allow this appeal.

The order of remand is set aside.

The Appellate Court is directed to rehear the appeal and write a fresh judgment on the basis of the materials on record.

Accordingly, the appeal being FMA 1243 of 2021 and the application being CAN 1 of 2018 (Old No: CAN 5721 of 2018) stand disposed of.

However, there shall be no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

(Ajoy Kumar Mukherjee, J.)

(Soumen Sen, J.)