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

+ **CM(M) 901/2022 and CM 38478/2022**

KAILASH DEVI

..... Petitioner

Through: Mr. Shekhar Dasi, Adv.

versus

TEJ PAL & ORS.

..... Respondents

Through: Mr. Tanmaya Mehta and Mr.

Manish Gandhi, Advs. for R-1

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

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10.11.2022

1. This petition under Article 227 of the Constitution of India assails order dated 9th March 2022 passed by the learned Civil Judge in CS SCJ 94770/2016 (*Kailash Devi v. Tej Pal & Ors.*)¹, as well as a subsequent order dated 18th July 2022, whereby the application of the petitioner seeking review of the order dated 9th March 2022 was dismissed.

Facts

2. Babu Lal married twice. The petitioner Kailash Devi was his second wife. Tej Pal, Respondent 1 and Defendant 1 before the learned Civil Judge, was the son of his first wife and, therefore, the

stepson of Kailash Devi.

3. Kailash Devi claimed to be the sole and exclusive owner of the property situated at D-70, Laxmi Nagar, Delhi 110092, (the suit property), having been bequeathed the said property by Babu Lal under a Will dated 27th August 1986. Babu Lal, in turn, had, according to the plaint instituted by Kailash Devi, purchased the suit property from Rameshwari Prasad and Bachhi Ram under two sale deeds dated 19th February 1971.

4. Though, consequent on the demise of Babu Lal on 27th September 1986, the petitioner claimed to have come into sole and exclusive ownership of the suit property by virtue of Babu Lal's Will dated 27th August, 1986, she alleged, in the plaint, that Respondent 1 Tej Pal was seeking to oust her from the suit property and had, in fact, started recovering rent from tenants who were residing therein. She, therefore, instituted Civil Suit 769/87 seeking permanent injunction against creation, by Respondent 1 Tej Pal, of any third party interest in the suit property.

5. Tej Pal, in his written statement filed by way of response to the said suit, denied the Will dated 27th August 1986, asserted by the petitioner and set up, per contra, another Will stated to have been executed by Babu Lal on 1st September 1986 bequeathing the suit property to Tej Pal.

6. Civil Suit 769/87 was dismissed by the learned Sub Judge on 15th December 1990 under Section 41 of the Specific Relief Act.

7. Kailash Devi, thereafter, instituted Civil Suit 315/1995, seeking eviction, from the suit property, of Tej Pal and delivery of possession of the suit property to her, apart from damages and *mesne* profits. An alternate relief of partition was also incorporated in the suit.

8. In his written statement filed by way of response to CS 315/95, Respondent 1 Tej Pal disputed the petitioner's contention that she was the legally wedded wife of Babu Lal. In this regard, it was sought to be contended, by Respondent 1, that the petitioner was already married to Duli Chand and was not, therefore, competent to enter into a matrimonial alliance with Babu Lal. The Will dated 27th August 1986, asserted by the petitioner Kailash Devi was also disputed and the Will dated 1st September 1986 was, on the contrary, asserted by Respondent 1 Tej Pal. Respondent 1 also claimed to have been in continuous possession of the suit property.

9. Predicated on the aforesaid pleadings, the learned Civil Judge framed, on 14th August 1996, the following issues:

“(i) Whether the plaint has not been duly presented as alleged by the defendant? If so its effect? OPD

(ii) Whether the plaintiff Smt. Kailash *Devi* was married with Duli Chand as alleged by the defendant? OPD

(iii) Whether the plaintiff was not legally wedded wife of Late Sh. Babu Lal, as alleged by the defendant? OPD

(iv) Whether Late Sh. Babu Lal executed the Will dated 27/08/96 as alleged by the plaintiff? OPP

(v) Whether Late Sh. Babu Lal executed the Will dated 01/09/86 as alleged by the defendant? OPD

(vi) Whether the plaintiff became the exclusive owner of suit property under the Will dated 27/08/86? OPP

- (vii) Whether the suit is barred by order 2 Rule CPC? OPD
- (viii) Whether the suit is not maintainable for want of probate of the Will dated 27/08/86? OPD
- (ix) Whether the suit is undervalued and court fee paid is insufficient? OPD
- (ix)(A) Whether plaintiff is entitled to alternative plea of partition and separate possession of 1/8th share in the suit property in suit? OPP (this additional issue was framed on 28/10/1998).
- (x) Relief.”

Judgment dated 26th November 2012 of the learned Civil Judge

10. The learned Civil Judge decided Suit 315/1995 (renumbered 984/10/1995) *vide* judgment dated 26th November 2012. On the issues framed by her, the learned Civil Judge held thus:

Re. Issue (i) – Whether the plaint had been duly presented and the effect thereof

10.1 Holding that Respondent 1, as the defendant, had not elaborated as to how the plaint filed by the petitioner was not duly presented, this issue was decided in favour of the petitioner and against Respondent 1.

Re. Issues (ii) and (iii) – Whether Kailash Devi was married to Duli Chand, and was not the legally wedded wife of Babu Lal

10.2 The learned Civil Judge held that these issues were relevant only in matrimonial proceedings and not in a suit for possession. As such, as they were irrelevant, no findings were returned on these issues.

Re. Issues (iv) and (vi) – Whether Babu Lal had executed the Will dated 27th August 1986, asserted by the petitioner, and whether, therefore, the petitioner became the sole and exclusive owner of the suit property under the said Will?

10.3 These issues were decided by the learned Civil Judge against the petitioner and in favour of the respondent.

Re. Issue (viii) – Whether the suit was not maintainable as the Will dated 27th August 1986 was not probated?

10.4 In view of her finding that the Will dated 27th August 1986 was not a valid Will, the learned Civil Judge held that the issue of probate thereof did not arise for consideration.

Re. Issue (ix)(A) – Whether the petitioner was entitled to the alternative plea of partition and separate possession of 1/8th share in the suit property?

10.5 The learned Civil Judge held that it was not open to the petitioner to convert a suit for possession into a suit for partition by way of seeking additional relief. The issue was, therefore, decided in favour of the respondent and against the petitioner.

Re. Issue (v) – Whether Babu Lal executed the Will dated 1st September 1986, asserted by the respondent?

10.6 The learned Civil Judge held that there was **not** sufficient evidence to prove the Will dated 1st September 1986 as executed by Babu Lal. Hence, this issue was decided against the respondent.

Re. Issue (vii) – Whether the suit was barred by Order II Rule 2 of the CPC?

10.7 The learned Civil Judge held that, as the petitioner had, in CS 769/1987, earlier instituted by her, which was dismissed by a speaking order, sought the relief of possession, a fresh suit for possession could not be filed by her, in view of the bar of Order II Rule 2 of the CPC. Hence, this issue was decided in favour of the respondent and against the petitioner.

Re-Issue (ix) – Whether the suit was undervalued and insufficient court fee had been paid thereon?

10.8 As this was an objection raised by the respondent regarding which the respondent led no evidence, the issue was decided in favour of the petitioner.

11. In view of her decision on the afore-noted issues framed by her, the learned Civil Judge, *vide* the judgment dated 26th November 2012, held the petitioner to be not entitled to any relief and accordingly, dismissed the suit.

12. The petitioner appealed, against the aforesaid judgment dated 26th November 2012, of the learned Civil Judge, to the learned ADJ, *vide* RCA 35/2012.

13. RCA 35/2012 was disposed of, by the learned ADJ, *vide* judgment dated 9th October 2013 which forms the fulcrum of controversy in the present case. It becomes necessary, therefore, to refer to the said judgment in some detail.

Judgment dated 9th October 2013 of the learned ADJ in RCA 35/2012

14. Paras 1 to 4 of the judgment dated 9th October 2013, of the learned ADJ, set out the facts of the case in brief. Thereafter, in para 5, the learned ADJ has reproduced the issues, as framed by the learned Civil Judge on 14th August 1996. Para 6 of the judgment proceeds to note the findings of the learned Civil Judge in her judgment dated 26th November 2012. Para 7 notes the fact that the petitioner was in appeal against the said decision.

15. Thereafter, paras 9 to 12 of the judgment of the learned ADJ read thus:

“9. The plaintiff/appellant by way of the suit claimed ownership on the basis of will dated 27.08.1986 and in the alternative claimed 1/8th share in the property of her husband late Sh. Babu Lal on the basis of inheritance. *The basis of claim of the plaintiff has been that she was legally wedded to late Sh. Babu Lal and respondents no. 2 to 7 were born from this wedlock. The defendant, on the other hand, disputed the marital status of the plaintiff and stated that there was no valid marriage between plaintiff and Late Sh. Babu Lal. In the circumstances, it was necessary and important to decide the marital status of the plaintiff before coming to the conclusion about her rights to the property in question either on the basis of will or on the basis of inheritance. The Ld. Civil Judge has not given any findings with respect to the issues no. 2 and 3. The Ld. Judge went wrong in holding that issues would be relevant only in matrimonial proceedings. The right to property is linked and dependent upon the marital status of the parties and otherwise also Ld. Civil Judge was required to give findings on each and every issue framed on the basis of the pleadings of the parties. The provision u/o 14 Rule 2 CPC in this regard is very clear as under:-*

“Court to pronounce judgment on all issues. –

(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2) pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the

case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to –

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any Jaw for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.”

10. It is further important to note that Ld. Civil Judge did not upon the Will of the plaintiff or that of the defendant and in that event the law of inheritance would come into play. While disposing of issue no. 9A, Ld. Civil Judge observed that plaintiff has been claiming exclusive ownership of the property and not to be the co-owner and therefore suit for possession cannot be converted into the suit for partition. The Ld. Civil Judge fell in error in making such observations as the alternative relief has been specifically claimed by the plaintiff in the suit and there was no question of converting the suit for possession into the suit for partition. The Ld. Civil Judge was required to appreciate the evidence and to consider the law of inheritance and then should have come to the conclusion about the share of the plaintiff in the suit property.

11. On examining the findings of the trial court, *I find that judgment is not sustainable in law. The impugned judgment is accordingly set aside and matter is remanded back to the trial court for hearing the parties afresh and to give judgment on all the issues.* The appeal is accordingly disposed of and parties are directed to appear before the trial court on 22.10.2013.”

(Italics and underscoring supplied)

16. The matter was thus remanded to the learned Civil Judge.

17. Before the learned Civil Judge, the parties joined issue on whether the remand, by the learned ADJ, *vide* her judgment dated 9th October 2013 was a wholesale remand covering all issues or was only for *de novo* consideration of certain limited issues. The impugned order dated 9th March 2022 proceeds to address the said controversy.

18. In para 7 of the impugned order, the learned Civil Judge has traced the sequence of proceedings culminating in the passing of the judgement dated 9th October 2013 by the learned ADJ and has recorded the rival contentions of the parties regarding the exact scope and ambit of the remand directed by the said judgement. Thereafter, in para 7, the learned Civil Judge has reproduced paras 9, 10 and 11 of the judgement dated 9th October 2013 of the learned ADJ. She, thereafter, proceeds to decide the question of the scope of remand, by the learned ADJ in para 8 of the impugned order dated 9th March 2022, thus:

“8. On close perusal of the judgement of the Ld. Appellate Court, it transpires that the court has to give findings only on the issues left out to be decided in the judgment of the Trial Court i.e., on issues no. 2, 3 and 9A. This conclusion has been arrived at after taking into account the following points:

- a. The Ld. Appellate Court has not reversed or disturbed the findings issues already decided by the Ld. Predecessor of this Court, however, has merely remanded back the matter to give findings on all the issues i.e., the issues left/undecided by the Trial Court.
- b. Though the plaintiff has challenged findings on issue no. 4 and 7 before the Ld. Appellate Court, however, the Ld. Appellate Court did not discuss the findings of fact arrived at by the Ld. Predecessor of this Court on issue no. 4 and 7.
- c. The Ld. Appellate Court while taking into account the provisions of Order 14 Rule 2 CPC clearly observed that the Trial Court is required to give finding on all the issues. This, if taken holistically, evidently implies that now this Court has to decide the remaining issues only, thereby passing a fresh judgment after giving finding on issues no. 2,3 and 9A.

Had the Ld. Appellate Court reversed the finding of the Ld. Predecessor of this Court on issues no. 1, 4, 5, 6, 7 and 8, this observation would have been there in the judgment of the Ld. Appellate Court. It is clear the present

matter has been remanded back invoking the provisions of Order 41 Rule 25 CPC.

Accordingly, final arguments on issue no. 2, 3 and 9A shall be heard from both the sides on NDOH. Let final arguments be addressed accordingly.”

19. The petitioner filed an application under Order XLVII of the CPC, seeking a review of the order dated 9th March 2022. By order dated 18th July 2022, the said review application stands dismissed, basically reiterating the findings in the order dated 9th March 2022 and, thereafter, holding that no case for review as made out, within the limited scope of Order XLVII of the CPC.

20. Aggrieved thereby, the present petition under Article 227 of the Constitution of India has been instituted by the petitioner, challenging the orders dated 9th March 2022 and 18th July 2022.

Rival contentions

Petitioner's submissions

21. Mr. Shekhar Dasi, learned Counsel for the petitioner, submitted that the judgment dated 9th October 2013 of the learned ADJ was clear and categorical in directing reconsideration, by the learned Civil Judge and decision afresh, on all the issues. He submits that the learned ADJ has, in her judgment dated 9th October 2013, not upheld any of the findings in the judgment dated 26th November 2012 of learned Civil Judge in CS 984/10/95. That being so, he submits that the learned Civil Judge could not have, in the remand proceedings, *suo moto* held that the remand was restricted to certain specified issues.

Respondent's submissions

22. Mr. Tanmaya Mehta, learned Counsel for the respondents has, *per contra*, contended that, if the judgment dated 9th October 2013 of the learned ADJ is to be treated as an order of wholesale remand, directing reconsideration by the learned Civil Judge of all issues framed by her on 14th August 1996, rather than an order remanding, for consideration, only those issues which had remained undecided by the learned Civil Judge in her judgment dated 26th November 2012, it would render the order dated 9th October 2013 violative of Order XLI Rules 31 to 33² of the CPC and Order XLI Rule 23A³ of the CPC. He submits that the word “on all issues”, as contained in the concluding paragraph of the judgment dated 9th October 2013 of the learned Civil Judge would necessarily have to be read as “on all issues which have not been decided by the learned Civil Judge”. The issues on which the learned Civil Judge had already rendered an opinion in her judgment dated 26th November 2012, he submits, could not have conceivably formed part of the remand, by the learned ADJ, in her order dated 9th

² 31. **Contents, date and signature of judgment.** – The judgment of the Appellate Court shall be in writing and shall state –

- (a) the points for determination;
- (b) the decision thereon;
- (c) the reasons for the decision; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

32. **What judgment may direct.** – The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the Appellate Court may pass a decree or make an order accordingly.

33. **Power of Court of Appeal.** – The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or make and to pass or made such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under Section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has *omitted* or refused to make such order.

³ 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 retrial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23.

October 2013.

23. Mr. Mehta submits that, in her appeal against the order dated 26th November 2012 of the learned Civil Judge, the petitioner had sought setting aside of the said order in full. Order XLI Rule 31 of the CPC, submits Mr. Mehta, requires the first Appellate Court to return findings on all the issues which arise before it. To the extent, the first Appellate Court does not set aside the finding of the Trial Court on any issue, Mr. Mehta would submit that finding must be treated as having been upheld.

24. Mr. Mehta points out that the learned Civil Judge, in her judgment dated 26th November 2012, decided certain issues and left certain other issues undecided. The decision of the learned Civil Judge, on the issues with respect to which she had returned findings in her judgment dated 26th November 2012, he submits, had not been reversed or even disapproved by the learned ADJ in her judgment dated 9th October 2013. Without the earlier findings on the said issues, as contained in the order 26th November 2012 having been reversed by the learned ADJ, if the learned Civil Judge, in *de novo* proceedings, was to again reconsider the said issues, Mr. Mehta submits that the principle of *res judicata* would apply, for which purpose he presses into service Explanation V to Section 11⁴ of the CPC. This, he submits, would result in a piquant situation which could never have been within the contemplation of the learned ADJ

⁴ 11. **Res judicata.** – No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation V. – Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

while passing the judgment dated 9th October 2013.

25. In any event, submits Mr. Mehta, this Court is exercising jurisdiction under Article 227 of the Constitution of India. Article 227 of the Constitution of India, he submits, is restricted to cases in which the interpretation by the court below of the facts or the law is perverse. The learned Civil Judge has, in the impugned order, given clear and categorical reasons as to why she regards the order dated 9th October 2013 as an order of limited remand on issues which were yet undecided. These findings, he submits, cannot be regarded as perverse, so as to invite interference under Article 227 of the Constitution of India.

26. Resultantly, Mr. Mehta, therefore, exhorts this Court to dismiss the petitioner's petition.

Analysis

27. Having heard learned Counsel and perused the record, I am unable to subscribe the view expressed by Mr. Mehta.

28. The issue under consideration before the learned Civil Judge, while passing the impugned order, has neatly been framed, thus, in para 1 of the impugned order dated 9th March 2022:

“1. The limited question that falls for consideration before this Court is- whether the Ld. Appellate Court vide Judgment dated 09.10.2013 has remanded back the case to this Court for fresh reconsideration of all the issues or whether the suit has been remanded back for consideration on the issues which were left undecided by the Trial Court?”

29. The learned Civil Judge has decided the afore-noted issue by holding that the learned Appellate Court (i.e. Court of the learned Additional District Judge/ADJ) had, in its judgment dated 9th October 2013, remanded the matter back to her for consideration only with respect to Issues 2, 3 and 9A, as framed by the learned Civil Judge on 14th August 1996.

30. The decision of the learned Civil Judge is in the teeth of the concluding paragraph of the judgment dated 9th October 2013, passed by the learned ADJ, and, in fact, rewrites the said paragraph. The concluding paragraph of the judgement dated 9th October 2013 of the learned ADJ read thus:

“11. On examining the findings of the trial court, *I find that judgment is not sustainable in law*. The impugned judgment is accordingly *set aside* and *matter is remanded* back to the trial court *for hearing the parties afresh and to give judgment on all the issues*. The appeal is accordingly disposed of and parties are directed to appear before the trial court on 22.10.2013.”

(Emphasis supplied)

31. To my mind, there can be absolutely no doubt about the import of the order dated 9th October 2013 – which, I may note, was never challenged, and has, therefore, admittedly become final *inter partes*. Indeed I find it in surprising that, despite the concluding direction of the learned ADJ in the order dated 9th October 2013 being so clear and categorical, the learned Civil Judge arrived at a conclusion, in the impugned order dated 9th March 2022, that the order of remand by the learned Appellate Court was restricted to three of the issues as originally framed. *Ex facie*, the finding, as already noted, is in the teeth of the order passed by the learned Appellate Court, which was binding on her. The finding is not one at which any reasonable

person, tutored in the law and aware of the facts, could have arrived at and is, therefore, *ex facie* perverse.

32. The learned ADJ left no stone unturned in making the intent of the judgment being passed by her clear and unequivocal. Para 11 of the judgment dated 9th October 2013, as extracted hereinabove, clearly states that:

- (i) *the judgment* dated 26th November 2012, of the learned Civil Judge, which was under appeal before the learned ADJ, was not sustainable in law,
- (ii) *the judgment* was accordingly *set aside*,
- (iii) *the matter* was remanded to the learned Civil Judge,
- (iv) the remand was for hearing the parties *afresh* and
- (v) after hearing the parties, the learned Civil Judge was required to *render a judgment on all issues*.

33. I failed to understand how the learned ADJ could have been more unequivocal regarding the directions that she was issuing.

34. The view expressed by the learned Civil Judge in the impugned order does not commend itself to acceptance, for the following reasons:

- (i) The judgment dated 26th November 2012, under challenge before her, has been *set aside* by the learned ADJ, not *set aside in part*. It is clear that *where an Appellate Court sets aside the judgment, the entire judgment stands set aside, unless the order of the Appellate Court specifically limits setting aside*

of the impugned judgment to certain aspects or issues. What the learned Civil Judge has, in the impugned order, held is that the learned ADJ set aside the judgement dated 26th November 2012 of the learned Civil Judge only on Issues 2, 3 and 9A, and upheld the judgement on all other issues. The learned Civil Judge could not, thus, have rewritten the decision of the learned ADJ.

(ii) The learned ADJ, in her judgment dated 9th October 2013 clearly finds *the judgment* dated 26th November 2012 to be unsustainable in law. What has been found to be unsustainable in law, therefore, is the entire judgment dated 26th November 2012. The contention of the respondents, if accepted, would amount, again, to rewriting of the order dated 9th October 2013 of the learned ADJ to read that the judgment dated 26th November 2012 of the learned Civil Judge was unsustainable with respect to Issues 2, 3 and 9A and was sustained in respect of all others. This is completely impermissible.

(iii) What was remanded by the learned ADJ was *the matter*. The word “matter” clearly refers to the entire case and not to certain issues which were framed by the learned Civil Judge.

(iv) The learned ADJ has directed the learned Civil Judge to hear the parties *afresh* and give judgment *on all the issues*. It is impossible to read down this direction, which is omnibus in character, by reference to any other part of the judgment dated 9th October 2013. The clear and categorical directive to the learned Civil Judge was to hear the parties afresh and to give

judgment not with respect to certain issues, which have been framed by the learned Civil Judge, but *with respect to all issues*.

(v) In fact, the submission of Mr Mehta is, to an extent, self-defeating. Mr Mehta would contend that the words “on all issues”, as employed by the learned ADJ in the concluding paragraph of her judgement dated 9th October 2013, should be read as “on all issues not decided by the learned Civil Judge” or, alternatively, “on all undecided issues”. The judgement dated 9th October 2013, was never challenged. No clarification was ever sought thereof. It has, therefore, become final. It has to be read as it stands. Mr Mehta’s submission, if accepted, would result in this Court lending its imprimatur to the proposition that the learned Civil Judge could have added words to those employed by the learned ADJ while remanding the matter. The argument, as noted, turns upon itself.

35. Inasmuch as, despite such categorical directions having been given by the learned ADJ in her order dated 9th October 2013, the learned Civil Judge has, nonetheless, treated the remand proceedings as restricted to Issues 2, 3 and 9A, the impugned order cannot sustain either on facts or in law and is, *ex facie*, perverse in law.

36. Mr Mehta is not correct in his contention that the learned ADJ did not address the issues which the learned Civil Judge had, in her order dated 26th November 2012 decided, and that, therefore, the findings with respect to the said issues must be deemed to have been upheld, applying Explanation V to Section 11 of the CPC. The reason for the learned ADJ remanding all issues for *de novo* consideration is

to be found in the judgement dated 9th October 2013 itself. Paras 6 and 9 of the judgment dated 9th October 2013, passed by the learned ADJ, to the extent they are relevant read, thus:

“6. The trial court did not give any findings on issues no. 2 and 3 stating that marital status of plaintiff is not relevant in the matter in controversy and therefore no findings are required to be given. While disposing of issues no. 4 and 6, the Ld. Civil Judge came to the conclusion that plaintiff has failed to prove will dated 27.08.1986 EX PW-2/1 being genuine and valid and therefore issues have been decided against the plaintiff. The Ld. Civil Judge also disbelieved the will dated 01.09.1986 set up by the defendant and observed that evidence is not sufficient to prove the said will and accordingly decided against the defendant while disposing of issue no. 5. It has also been held that suit is barred u/o 2 Rule 2 CPC in view of earlier suit having been dismissed.

9. The plaintiff/appellant by way or the suit claimed ownership on the basis of will dated 27.08.1986 and in the alternative claimed 1/8th share in the property of her husband late Sh. Babu Lal on the basis of inheritance. The basis of claim of the plaintiff has been that she was legally wedded to late Sh. Babu Lal and respondents no. 2 to 7 were born from this wedlock. The defendant, on the other hand, disputed the marital status of the plaintiff and stated that there was no valid marriage between the plaintiff and Late Sh. Babu Lal. In the circumstances, *it was necessary and important to decide the marital status of the plaintiff before coming to the conclusion about her rights to the property in question either on the basis of will or on the basis of inheritance. The Ld. Civil Judge has not given any findings with respect to the issues no. 2 and 3. The Ld. Judge went wrong in holding that issues would be relevant only in matrimonial proceedings. The right to property is linked and dependent upon the marital status of the parties and otherwise also Ld. Civil Judge was required to give findings on each and every issue framed on the basis of pleadings of the parties.*”

(Emphasis supplied)

37. The learned ADJ, therefore, was of the view that the learned Civil Judge was in error in treating the marital status of the petitioner-plaintiff to be irrelevant. According to the learned ADJ, “*before coming to the conclusion about her rights to the property in question either on the basis of the Will or on the basis of the inheritance*”, it

was necessary and important for the learned Civil Judge to decide the marital status of the petitioner-plaintiff. Clearly, therefore, the learned ADJ was of the view that, before proceeding with other issues framed by her, the learned Civil Judge had to decide, initially, the marital status of the petitioner-plaintiff. It is apparently for this reason that the learned ADJ did not restrict the remand to any selected issues but has directed all issues to be considered *de novo* and decided afresh.

38. The order dated 9th October 2013 of the learned ADJ is, therefore, so clear and unequivocal that no further discussion on the point appears necessary. Nonetheless, I may advert to the provisions of the CPC, on which Mr. Mehta sought to place reliance.

39. Proceeding sequentially through the provisions in the CPC cited by Mr. Mehta, the first provision on which Mr. Mehta relies is Section 11, particularly Explanation V thereto.

40. The reliance, by Mr Mehta, on Explanation V to Section 11, as already noted, is clearly misplaced. There is no question of *res judicata*, as the judgment dated 26th November 2012 of the learned Civil Judge has been set aside as a whole and the matter has been remanded for a decision on all issues. In that view of the matter, no finding of the learned Civil Judge, as contained in the order dated 26th November 2012, survives the judgment dated 9th October 2013 of the learned ADJ, so as to operate as *res judicata* in the *de novo* proceedings.

41. The submission, of Mr. Mehta, that the learned ADJ has not, issue-by-issue, set aside the judgment dated 26th November 2012 of

the learned Civil Judge, fails to impress. There is no such requirement in the law. The learned ADJ has clearly set out, in her judgment dated 9th October 2013, the reasons for setting aside the judgment dated 26th November 2012, of the learned Civil Judge as a whole, and remanding all issues for decision afresh. There can, therefore, be no question of any application of Section 11 of the CPC or of Explanation V thereto.

42. The next provisions to which Mr. Mehta draws attention are Rules 21 to 23 of Order XLI. Order XLI of the CPC deals with appeals from original decrees and Rules 31 to 33 specify what the judgment of the first Appellate Court is required to contain. It is well settled that a decision of the first Appellate Court is required to conform to Order XLI Rule 31 of the CPC.⁵

43. However, Mr. Mehta is not correct in contending that the words “the points for determination”, as contained in Order XLI Rule 31 must be equated with the issues framed by the learned Trial Court. There is no mandate, in the law, for a judgment of a first Appellate Court exercising jurisdiction under Section 96 of the CPC read with Order XLI thereof, to pass the judgment issue-wise, on the basis of the issues framed by the learned Trial Court. What is required by the learned first Appellate Court, by Order XLI Rule 31 of the CPC, is framing of the “points for determination”. The expressions “points for determination” and “issues” are not synonymous. So long as the judgment of the first Appellate Court identifies the points for determination and gives a reasoned decision thereon, the judgment is necessarily to be regarded as conforming to Order XLI Rule 31 of the

⁵ Refer *Malluru Mallappa (D) through LRS. v. Kuruvathappa & Ors.*, (2020) 4 SCC 313; *Somakka (D) by LRS. v. K. P. Basavaraj (D) by LRS.*, (2022) 8 SCC 261; *K. Karuppuraj v. M. Ganesan*, (2021) 10 SCC 777.

CPC.

44. In this context, in my opinion, Order XLI Rule 31 of the CPC cannot be read in a formulaic fashion. The order of the learned first Appellate Court should adhere to the protocol of Order XLI Rule 31 of the CPC in substance, not necessarily in form.

45. Viewed thus, it is clear that the judgment dated 9th October 2013 of the learned ADJ has identified the points, which arose for consideration and has given reasons for deciding to set aside the judgment dated 26th November 2012 of the learned Civil Judge as a whole and remand all issues for *de novo* consideration. Having listed the issues drafted by the learned Civil Judge in the judgement dated 26th November 2012, the learned ADJ has proceeded on the premise that, before taking up other issues for consideration, the learned Civil Judge ought, at the first instance, to have decided the issues framed with respect to the marital status of the petitioner vis-a-vis Duli Chand and Babu Lal, which were dismissed by the learned Civil Judge as being immaterial to the controversy. Even for this reason, the judgment dated 9th October 2013 of the learned Civil Judge has given cogent justification for setting aside, as a whole, the judgment dated 26th November 2012 of the learned Civil Judge and remanding the matter afresh to be re-decided on all issues framed by the learned Civil Judge.

46. Insofar as Order XLI Rule 23A of the CPC is concerned, it merely confers, on the first Appellate Court seized with an appeal against a decree passed on merits, by the learned Trial Court, the same powers as are vested by the learned first Appellate Court by Order

XLI Rule 23. The Order XLI Rule 23 empowers the first Appellate Court to remand the case and further empowers it to direct what issue or issues would be tried in the case so remanded. The Order dated 9th October 2013 cannot, in any manner, be said to deviate from the discipline of these provisions. It remands CS SCJ 94770/2016 for consideration afresh and also requires the *de novo* consideration to cover all issues framed by the learned Civil Judge on 14th August 1996.

47. In any event, the submissions advanced by Mr. Mehta really do not arise for consideration at this stage. They are, in a manner of speaking, essentially seeking to call into question the judgment dated 9th October 2013 passed by the learned ADJ. As I have already observed, there is no equivocation, whatsoever, about the fact in the decision of the learned ADJ to set aside the judgment dated 26th November 2012, as a whole, and remanded, for reconsideration, all issues afresh. If the respondents felt that the decision was not in conformity with any of the provisions of the CPC, he should have challenged the decision. The judgment dated 9th October 2013 has, however, not been challenged, and has attained finality. It has, therefore, to be taken for what it is. Plainly read, as already noted, the learned ADJ has, by the judgment dated 9th October 2013, directed all issues to be decided afresh by the learned Civil Judge.

48. In that view of the matter, I am of the opinion that the impugned order of the learned Civil Judge, which holds that the remand was restricted to Issues 2, 3 and 9A, amounts to rewriting of the judgment dated 9th October 2013 of the learned ADJ, which is completely impermissible in law. It, therefore, suffers from

perversity, both on facts as well as in law, and makes out a clear case for interference under Article 227 of the Constitution of India.

49. Before concluding, I deem it necessary to enter an observation with respect to the concept of “perversity”, as understood in law. “Perversity” is different from “perversion”. As such, a finding that a decision is perverse, in law, does not reflect any perversion on the part of the author of the decision. *Kilasho Devi Burman v. C.I.T.*⁶ deems a conclusion to be “perverse..... if it is such that no person, duly instructed, could upon the record before him have reasonably come to it”. Where perversity attaches to the manner in which evidence has been appreciated by the Court or authority below – though the present controversy does not involve this issue – the finding of the court below is said to be “perverse”, “if it not supported by evidence or contains inferences drawn in a stretch and unacceptable manner”, as held in *Vishwanath Agrawal v. Sarla Vishwanath Agrawal*⁷.

50. The first of these two definitions applies squarely in the present case. Given the unequivocal terms of remand in the judgment dated 9th October 2013 by the learned ADJ, any finding to the effect that the remand by the learned ADJ was not of all issues but was only of certain selected issues is one which, on the record before the Court, no reasonable person could have arrived at. Though the learned Civil Judge has, no doubt, given reasons for her finding, and this Court has no doubts about the *bonafides* of the impugned order, it does suffer from perversity as explained by the Supreme Court in *Kilasho Devi Burman*⁶ and, therefore, merits interference under Article 227 of the Constitution of India.

⁶ (1996) 7 SCC 613

⁷ (2012) 7 SCC 288

Conclusion

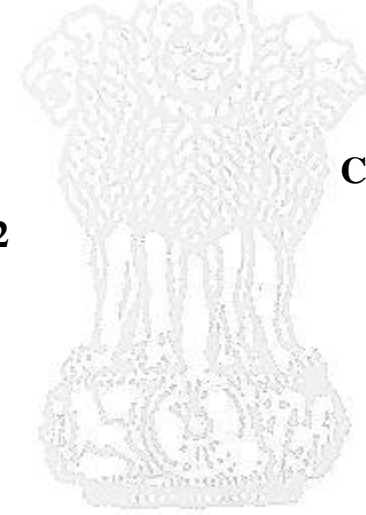
51. For the aforesaid reasons, the impugned judgments dated 9th March 2022 and 18th July 2022 of the learned Civil Judge are quashed and set aside. It is clarified that the judgment dated 9th October 2013 of the learned ADJ has remanded, for *de novo* consideration all issues framed on 14th August 1996, to the learned Civil Judge.

52. The petition is allowed accordingly with no order as to costs. Miscellaneous application is also disposed of.

C.HARI SHANKAR, J

NOVEMBER 10, 2022

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