

AD-2
Ct No.01
Jalpaiguri
22.09.2023
B.Pal

**Calcutta High Court
In The Circuit Bench at Jalpaiguri
Appellate Side**

CO 106 of 2023

**KHOKA BARMAN
VS
DIN MOHAN BARMAN AND ANR**

Ms. Suman Sehanabis (Mandal)
Mr. Salok Sah

.....for the petitioner

1. Despite service, none appears for the opposite party.
2. The affidavit of service filed today be kept on record.
3. Learned counsel for the petitioner argues that the learned Trial Judge acted palpably without jurisdiction in observing that the evidence and record of the previous trial is completely wiped out.
4. The short facts of the case are that a pre-emption application was filed by the opposite party no.1 against the petitioner. The said application was dismissed, upon which an appeal was preferred by the opposite party

no.1. In the said appeal, vide judgment and order dated August 12, 2022, the appellate Judge disposed of the appeal bearing Misc. Appeal No. 04 of 2017, sending the matter to the Trial Court on remand.

5. Subsequently, evidence was adduced in connection with the remanded matter. However, thereafter, at the stage of passing order, the learned Civil Judge (Junior Division), Additional Court at Cooch Behar observed, on the premise of certain judgments cited before him, that the effect of the remand order completely wiped out the previous trial and the evidence already on record.
6. A scrutiny of the appellate order shows that the Appellate considered the evidence *in extenso*.
7. Thereafter, the Appellate Court went on to observe that for proper adjudication of the matter and to avoid any prejudice being caused to anyone, *“it is better to send record for retrial so that parties may adduce evidence regarding the total land contained in corresponding R.S. Plot No.1318 and land contained in different plots curved from the said R.S. Plot No.1318 during L.R. operation for*

ascertaining total land contained in L.R. Plot No.1392. Apart from that parties may adduce evidence on other points during retrial.”

8. The expression “retrial” is ambiguous and may be construed to mean either that the trial was to start from the inception or from the stage where it had ended last.
9. To attribute the former interpretation, we have to hold that the Appellate Court had expunged the entire findings of the Trial Court and the entire evidence on record adduced on the earlier occasion. However, we find from the records that the Appellate Judge had considered the documents which are already on record and had not set aside the observations of the trial Judge on merits. The doubt of the appellate court was on the limited question as to the total land contained in corresponding R.S. Plot No. 1318 and land contained in different plots curved from the said R.S. Plot during L.R. operation for ascertaining total land contained in L.R. Plot No. 1392.
10. The parties were also given opportunity to adduce evidence on other points during retrial.

11. First, the other issues dealt with by the Trial Court previously were not set aside as such. Secondly, the Appellate Court gave further liberty to the parties to adduce evidence on the other points, which itself shows that there was necessity to give such liberty, as the evidence already on record was not set aside by the Appellate Court. If the trial was intended to start from scratch, no liberty would be necessary to lead further evidence, since the parties would, in any event, have to lead evidence *de novo*.
12. Since a complete perusal of the Appellate Court's order indicates that the remand was on a limited context regarding the total land contained in corresponding R.S. Plot No. 1318 and the land contained in plots curved out from the same during L.R. operation, a construction to the contrary, by expunging the entire evidence already on record, would not be proper in the context of the case.
13. The learned Trial Judge, while passing the impugned order considered two judgments, which are apparently contrary to each other on proposition of law. However, the said

judgments were rendered in their respective factual contexts and neither of them can be taken to be sacrosanct insofar as the instant case is concerned.

14. In view of the above observations, the finding of the learned Trial Judge in the impugned order, that the evidence and the records of the previous trial Judge were completely wiped out, was erroneous in law and passed without jurisdiction.
15. Accordingly, CO No. 106 of 2023 is allowed, thereby setting aside Order No. 86 dated May 16, 2023 passed by the Civil Judge (Junior Division), Additional Court at Cooch Behar (Sadar) and directing the Trial Judge to proceed with the retrial on the basis of the evidence which was already on record before the remand order and to decide the pre-emption case on the basis of evidence already on record as well as the further evidence subsequently adduced, as expeditiously as possible, preferably within six months from the date of communication of this order to the Trial Court.
16. There will be no order as to costs.

17. Urgent certified website copy of this order, if applied for, be made available to the parties subject to compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)