

**(2017) 03 GUJ CK 0168**  
**In the Gujarat High Court**

**Case No : 139 of 2013 With CIVIL APPLICATION NO 6996 of 2013**

JADEJA TAPUBHA HARISING(DECD) & ANR.

APPELLANT

Vs

JADEJA VAJUBHA VAGHJI & ANR.

RESPONDENT

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**Date of Decision : 24-03-2017**

**Acts Referred:**

[Code of Civil Procedure, 1908](#), [Section 100](#), [Order 6 Rule 17](#), [Order 41 Rule 27](#), [Order 41 Rule 23](#), [Order 41 Rule 28](#), [Order 41 Rule 27\(1\)\(b\)](#) - Second appeal

**Citation : (2017) 03 GUJ CK 0168**

**Hon'ble Judges :** Rajesh H.Shukla

**Bench :** Single Bench

**Advocate :** BIPIN I MEHTA, NIRAV SANGHVI, ASHISH M DAGLI

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## Judgement

1. The present Second Appeal has been filed by the Appellants / Original Plaintiffs under Section 100 of the Code of Civil Procedure being aggrieved with the impugned judgment and order in Regular Civil Appeal No. 1 of 2001 by the learned Additional District Judge, Kachchh at Bhuj dated 17.4.2013 remanding the matter back to the trial court for deciding afresh Civil Suit No. 39 of 1993, posing the substantial questions of law as stated in the Appeal.

2. Heard learned Advocate Shri Bipin I. Mehta for the Appellants and learned Advocate Shri Nirav Sanghvi for learned Advocate Shri Ashish M. Dagli for the Respondents.

3. Learned Advocate Shri Mehta referred to the background of the facts and the judgment of the trial court as well as the appellate court and submitted that the first appellate court has committed an error in remanding back the suit for trial afresh after the fresh evidence. He submitted that this is not permissible in view of the provisions of Order 41 Rule 27 and Rule 28 of the Code. He pointedly referred to Order 41 Rule 27(1)(B). He therefore submitted that the entire suit

should not have been remanded for trial afresh. In support of his contention he has referred to and relied upon the judgment of the Hon"ble Apex Court in case of *The Municipal Corporation of Greater Bombay v. Lala Pancham and ors.* reported in AIR 1965 SC 1008 and referred to the observations made in paragraph 9: "This clearly shows that what the High Court has in substance done is to order a fresh trial. Such a course is not permissible under O. XLI R.27, Code of Civil Procedure. The High Court has quite clearly not proceeded under O.XLI R. 25 because it has not come to the conclusion that the City Civil Court had omitted to frame or try an issue or to determine the question of fact which was essential to the right decision of a suit." Learned Advocate Shri Mehta therefore submitted that the powers under Order 41 Rule 27 cannot be resorted to in such a fashion, and therefore, the present Second Appeal may be allowed.

4. Learned Advocate Shri Sanghvi for learned Advocate Shri Ashish M. Dagli for the Respondent however referred to the background of the facts and submitted that as observed in the judgment of the appellate court as well as the trial court that the issue is with regard to redemption of mortgage while appreciating the issue, the first appellate court has made an observation that the first appellate court is not in a position to come to any decision in the absence of any relevant material and evidence, and therefore, it thought it desirable to remand the matter back to the trial court for deciding afresh. It has also been observed that the matter is remanded back for deciding afresh on the basis of material and evidence that may be placed before the court. He submitted that the mortgage deed and other relevant documents have not been placed on record. He submitted that it has been observed that sufficient material and evidence is not placed before the trial court and therefore the findings and conclusion may not be consistent and therefore in the absence of record and relevant evidence the matter is required to be remanded back.

5. Learned Advocate Shri Sanghvi referred to Order 41 Rule 23 and Rule 23(A) and submitted that the case would be governed by Order 41 Rule 23(A) which provide: "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."

6. Learned Advocate Shri Sanghvi submitted that after the amendment in the Code of Civil Procedure in 1976, it has been clearly provided that where an appeal is preferred from the decree of the court, which has disposed of the case otherwise than on preliminary point, the appellate court may have the same power as under Rule 23 and it may pass the order for retrial. In other words, if it is considered necessary, retrial could be ordered. Therefore, when the court below has thought it just and proper to have the decision after the proper material and evidence is placed before the court, it cannot be said to be erroneous.

7. In view of these rival submissions, it is required to be considered whether the

present Second Appeal deserve consideration.

8. As could be seen from the background of the facts, the relevant documentary evidence have not been placed on record which the first appellate court has observed would be relevant for the purpose of deciding the Appeal either way, and therefore, it though it desirable to remand the matter back for deciding it afresh on the basis of material and evidence that may be placed on record.

9. Therefore, the moot question is whether the judgment of the appellate court could be said to be contrary to the provisions of Order 41 Rule 28 as sought to be canvassed by learned Advocate Shri Bipin I. Mehta for the Appellant.

10. The provisions of Order 41 Rule 27 has a reference to production of additional evidence in the appellate court, meaning thereby whether the appellate court could permit additional evidence at the appellate stage. In other words, it is an enabling provision of the appellate court to permit additional evidence and Rule 28 refers to mode of taking additional evidence. The issue involved in the present case is however regarding exercise of discretion to remand the matter back for deciding afresh, which has a reference to the exercise of power to remand the case by the appellate court. For that, Rule 23(A) as quoted above would be relevant. It clearly provides that where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, meaning thereby on other relevant issues and it is reversed and "retrial is considered necessary", the appellate court shall have the powers as it is under Rule 23. Thus, if the appellate court feels that it is desirable in the interest of justice that the matter be remanded back for decision afresh on the basis of material and evidence after giving an opportunity to the parties, it may pass such an order, which can neither be said to be erroneous nor it can be said to be contrary to any statutory provision as posed in the question of law by the Appellant specifically referring to Order 41 Rule 27 and Rule 28.

11. Similarly, the reliance placed by learned Advocate Shri Bipin I. Mehta for the Appellant referring to the judgment in case of *The Municipal Corporation of Greater Bombay v. Lala Pancham and ors.* (supra) would not have any application to the facts of the case. As could be seen, it has a reference to the aspect of amendment and the plaint introducing a new case and the entire discussion is with reference to the scope of amendment in exercise of power under Order 6 Rule 17 of the Code. It is in this background, the observations which have been emphasized in paragraph 9 have to be read. In the same paragraph, it has also been observed that if the appellate court comes to a conclusion that the court below has omitted to frame or try an issue or determine a question of fact which was essential to the right decision of the suit, it could exercise such power though it has also been observed to frame the necessary issue. In the facts of the case, it is not the issue but it is the material and evidence for the purpose of deciding the issues, for which the matter is remanded back, which cannot be said to be erroneous or contrary to the provision of law in light of Order 41 Rule 23(A) of the Code. Therefore, the

present Second Appeal along with Civil Application deserve to be dismissed and accordingly stands dismissed.