

(1979) 04 PAT CK 0008
In the Patna High Court
Case No : Civil Revision No. 923 of 1973

Kailashpati Narain Singh and Others	Vs	APPELLANT
Bhola Sanani and Others		RESPONDENT

Date of Decision : 06-04-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 24, Order 41 Rule 25, Order 41 Rule 26, Order 41 Rule 27, 151

Citation : AIR 1980 Patna 111

Hon'ble Judges : B.P. Jha, J

Bench : Single Bench

Advocate : Lakshman Saran Sinha, for the Appellant; Aswini Kumar, for the Respondent

Final Decision : Allowed

Judgement

B.P. Jha, J.—The plaintiffs-petitioners have preferred this civil revision against the order of remand made by the Appellate Court.

2. A short point for consideration is: Whether a remand order u/s 151 of the Civil P. C. can be made in violation of the specific provisions contained in Order 41, Rules 24 to 27 of the Civil P. C. (hereinafter referred to as "the Code") ?

3. In the present case, the Appellate Court remanded the appeal for fresh consideration of issues 3 and 5 by the trial Court and for delivering a fresh judgment in the light of the observations made in the order. The Appellate Court was of opinion that no finding is possible in respect of issues 3 and 5 at this stage, and, as such, it directed the trial Court to give clear findings on both the issues in the light of the evidence on the record.

4. The short point is: whether this type of remand order can be passed u/s 151 of the Code or not? The Appellate Court remanded the matter for delivering a fresh judgment on the basis of the existing evidence on the record. In my opinion, the order of remand u/s 151 of the Code should not be passed where an

appeal can be disposed of under Order 41, Rule 24, 25 and 27 of the Code. Under Order 41, Rule 24 of the Code, if the evidence on the record is sufficient, the Appellate Court shall pronounce the judgment on the basis of the evidence on the record. In the present case, the evidence was sufficient on the record to decide issues 3 and 5. Issues 3 and 5 were as follows:

"3. Whether the suit is bad for nonjoinder of parties ?

5. Whether the suit is barred by law of limitation and adverse possession ?"

In respect of issue No. 3, the trial Court held that it was not pressed before it. The trial Court discussed issue No. 5 on the basis of the materials on the record. The Appellate Court remanded issue No. 5 mainly on the ground that the trial Court did not consider the evidence of the witnesses in cross-examination. The Appellate Court could have decided issue No. 5 on the evidence on the record. Ordinarily, the Court should not invoke the aid of Section 151 of the Code when an appeal can be decided under Order 41, Rules 24, 25 and 27 of the Code. If the Appellate Court is of opinion that the trial Court omitted to frame or try any issue, or to determine any question of fact, the Appellate Court may frame the issue and refer the case to the trial Court and direct the trial Court to take additional evidence required. After trying the issue and recording such evidence, the trial Court shall return the file to the Appellate Court who will decide the matter raised in the appeal. Under Order 41, Rule 27 of the Code, the Appellate Court can admit additional evidence in accordance with law and decide the appeal on merit. If under these provisions, the Appellate Court can determine the dispute, then in that case the Appellate Court should not invoke the aid of Section 151 of the Code. The Appellate Court can invoke the aid of Section 151 of the Code for remanding the case where the Appellate Court cannot determine the issues under Order 41, Rules 24, 25 and 27 of the Code. In other words, if the Appellate Court thinks that retrial is needed, then in that case only the Appellate Court can take the aid of Section 151 of the Code.

5. In this connection, a Full Bench decision of the Calcutta High Court in *Ghuznavi v. The Allahabad Bank Ltd.*, ILR 1917 Cal 929 was referred to. In that case, the majority of the Judges were of the view which will appear from the judgment of Mookerjee, J. wherein he held as follows:

".....where it is clearly apparent that the Appellate Court cannot itself satisfactorily dispose of the suit on the merits by the adoption of the specific procedure mentioned in Rules 24-29, a remand for retrial is not only permissible but obviously incumbent on the Court."

Their Lordships of the Calcutta High Court have held that if the Appellate Court cannot dispose of the appeal under Order 41, Rules 24-29, a remand for retrial can be made u/s 151 of the Code. Hence, I hold that u/s 151 of the Code, a remand for retrial can be made in exceptional cases and not in any other case. In the present case, the appeal could have been disposed of under Order 41, Rule 24 of the Code as there was sufficient evidence to decide the appeal on merits. It

was none of the business of the Appellate Court to remand an appeal simply for writing a fresh judgment. In my opinion, such an order is an abuse of the process of the Court. Section 151 of the Code can be used for the ends of justice or to prevent abuse of the process of the Court or in cases where there is no specific provision in the Code. In my opinion, the Appellate Court erred in law in remanding the matter u/s 151 of the Code when the appeal itself could have been disposed of by the Appellate Court under Order 41, Rule 24 of the Code. A remand u/s 151 of the Code should not be made by the Appellate Court when the appeal could be disposed of under I Order 41, Rules 24 to 29 of the Code. In my opinion, Section 151 of the Code should be used where the Appellate Court is of opinion that the whole issue should be retried, otherwise not. In this connection, a decision of the Supreme Court in Mahendra Manilal Nanavati Vs. Sushila Mahendra Nanavati, was referred to. In that decision, it has been held that it is well settled that the inherent powers can be availed of only in the absence of express provisions in the Code.

6. In these circumstances, I hold that the order of remand passed by the Appellate Court is not in accordance with law, and it failed to exercise the jurisdiction which was vested in it by law. Hence I remand the matter to the Appellate Court for fresh decision in accordance with law after hearing both the parties.

7. The principle of law raised in this case may be summarised thus:--

The inherent powers u/s 151 of the Code can be exercised for remanding a case only for a retrial and not otherwise. The Appellate Court should not invoke the aid of Section 151 of the Code when an appeal can be disposed of under Order 41, Rules 24 to 27 of the Code. It is a settled law that the inherent powers can be exercised only in absence of express provisions in the Code. If an appeal can be disposed of under Order 41, Rules 24 to 27 of the Code, then in that case Section 151 of the Code shall not be invoked for directing a retrial and writing a fresh judgment on the existing materials on the record. In other words, if an appeal can be disposed of under Order 41, Rule 24 of the Code on the basis of evidence on record, the Appellate Court shall not invoke Section 151 of the Code for remanding a case to the trial Court.

8. In the result, the petition is allowed and the Appellate Court is directed to rehear the appeal and decide the appeal on merits after hearing both the parties in accordance with law as well as on the basis of the observations made above. The parties will bear their own costs.