

(2013) 07 RAJ CK 0203

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 629 of 2013

Kanhaiyalal and Another

APPELLANT

Vs

Smt. Kamla and Others

RESPONDENT

Date of Decision : 05-07-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 41 Rule 23A, Order 41 Rule 27, Order 43 Rule 1, Order 43 Rule 1(a)

Citation : (2013) 4 WLN 274

Hon'ble Judges : Arun Bhansali, J

Bench : Single Bench

Advocate : Tribhuvan Gupta, for the Appellant;

Final Decision : Dismissed

Judgement

Arun Bhansali, J.—These appeals under Order XLIII, Rule 1(u) CPC arise out of the order dated 21.2.2013 passed by the Additional District Judge No. 2, Bhilwara, whereby the appeal filed by the plaintiff-respondents has been allowed and the order dated 20.3.2012 passed by the trial court has been set-aside; the application filed by the plaintiff under Order XLI, Rule 27 CPC has been allowed and the matter has been remanded back to the trial court for further proceedings. The facts in brief are that the plaintiff filed a suit for permanent injunction regarding land comprised in Arajai No. 3806 ad-measuring 1 Bigha 13 Biswa. The appellants herein filed application under Order VII, Rule 11 CPC inter-alia with the averments that the suit related to agriculture land and therefore, the same was not maintainable before the Civil Court.

2. The trial court after hearing the parties allowed the application filed by the appellants and exercising powers under Order VII, Rule 10 CPC ordered return of the plaint for being presented before the court of competent jurisdiction.

3. Feeling aggrieved, the plaintiff filed an appeal under Order XLIII, Rule 1(a) CPC against the order passed by the trial court under Order VII, Rule 10 CPC.

The learned Appellate Court vide impugned order dated 21.2.2013 allowed the appeal and passed the order as indicated here-in-before.

4. While hearing on admission, a query was put to learned counsel for the appellants about maintainability of the present appeals under the provisions of Order XLIII, Rule 1(u) CPC in view of the express language of the said Rule read with Section 104(2) CPC.

5. It is submitted by learned counsel for the appellants that the appeal would be maintainable and the same has rightly been filed under the said provisions and a combined reading of the said provisions does not bar the present appeal.

6. I have considered the submissions made by learned counsel for the appellants.

7. It would be relevant to quote provisions of Section 104 and Order XLIII, Rule 1(u), which reads as under:-

Section 104. Orders from which appeal lies.-

(1)- An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:-

[***]

[(ff) an order u/s 35A;]

[(ffa) and order u/s 91 or section 92 refusing leave to institute a suit of the nature referred to in section 91 or section 92, as the case may be;]

(g) an order u/s 95;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;

(i) any order made under rules from which an appeal is expressly allowed by rules;

[Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.]

(2)- No appeal shall lie from any order passed in appeal under this section.

ORDER XLIII

1. Appeal from orders.- An appeal shall lie from the following orders under the provisions of section 104, namely:-

(u)- an order under rule 23 [or rule 23A] or Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;

8. A bare reading of the above provisions clearly brings out that the appeal under Order XLIII, Rule 1(u) CPC is maintainable against an order under Rule 23 or 23A of Order XLI remanding a case, where an appeal would lie from the decree of the appellate court. It is a pre-requisite for maintainability of appeal under the said sub-rule that the appeal from the order/decreed impugned should lie from the order/decreed of the appellate court else, the appeal under the said provision would not be maintainable.

9. It would be seen that the trial court exercised powers under Order VII, Rule 10 CPC and ordered return of plaint, against which the appeal is provided and was apparently filed under the provisions of Order XLIII, Rule 1(a) CPC, which for ready reference reads as under:-

Appeal from orders.- An appeal shall lie from the following orders under the provisions of section 104, namely:-

(a)- an order under rule 10 of Order VII returning a plaint to be presented to the proper Court [except where the procedure specified in rule 10A of Order VII has been followed];

10. Section 104(2) CPC (supra) clearly bars appeal from any order passed in appeal under the provisions of Section 104 under which Order XLIII, Rule 1 CPC has been framed. Therefore, no second appeal would lie from order passed by the appellate court under Order XLIII, Rule 1(a) of the CPC and consequently, as the power of remand has been exercised while exercising powers under Order XLIII, Rule 1(a) CPC, the appeal under Order XLIII, Rule 1(u) CPC would not be maintainable.

11. The sum and substance of the above discussion is that from an order of remand passed under Order XLI, Rule 23 or 23A, in an appeal u/s 104 CPC, would not be appealable, as from that order, no appeal would lie because the same is not permitted against the appellate order passed in appeal under Order XLIII vis-a-vis Section 104(2) CPC.

12. In view of the above discussion, these appeals are not maintainable and the same are, therefore, dismissed. However, it will be open for the appellants to take appropriate proceedings, if so advised, against the impugned order and the dismissal of the present appeals shall not effect the said proceedings. The stay application also stands dismissed.