

(2016) 04 GUJ CK 0098
In the Gujarat High Court

Case No : Appeal From Order No. 10 of 2010 with Civil Application No. 11306 of 2015

Kapilbhai Ishwarbhai Patel

APPELLANT

Vs

Dineshbhai Manibhai Patel

RESPONDENT

Date of Decision : 19-04-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 2, Order 41 Rule 23, Order 41 Rule 23A, Order 41 Rule 25, Order 41 Rule 28

Citation : (2017) 1 GCD 283 : (2016) 3 GLR 2491 : (2016) 3 GujLH 334

Hon'ble Judges : Mr. R.D. Kothari, J.

Bench : Single Bench

Advocate : Mr. D.D. Vyas, Senior Advocate with Mr. Dhaval D. Vyas, Advocate, for the Appellants No. 1; Deceased Litigant, for the Respondents No. 1; Mr. R.R. Marshall, Senior Advocate with Mr. Arpit A. Kapadia, Advocate, for the Respondents No. 2; Mr. Jayesh A. Dave

Final Decision : Allowed

Judgement

Mr. R.D. Kothari, J.—This is plaintiff's appeal. It is unusual in more than one sense. One reason for saying so is—the appeal which is admitted earlier is against the order of remand and yet it is likely to be allowed.

2. Few relevant facts are, thus; one Manilal had various parcels of land in Surat District. Couple of properties are residential houses and almost rest of all the properties are agricultural lands. The odd fact is that Manilal was residing separately from his wife and his three sons. He had instituted a suit from which the present appeal arises. The said suit is Special Civil Suit No.76 of 1982, it is for declaration and injunction, sought against his wife and sons. In substance, the relief prayed for is—declaration that properties mentioned in the plaint are his personal properties and he is in possession of the same. A declaration was also sought that defendants have no right, title and interest in the suit property. It also appears from the record that in respect of suit properties, a criminal complaint was also lodged. On apprehension of filing civil suit, caveat was also

filed. Manilal failed to get interim relief. Said Manilal died during the pendency of the suit. He had said to have executed a Will. It is stated to be a registered Will. On the strength of that Will, one of the defendants/son i.e. Ishwarbhai applied for transmitting him as plaintiff from the defendant. He had also applied for amendment in the plaint. It is apparent that said application of Ishwarbhai was allowed and Ishwarbhai had become the plaintiff in the suit and amended suit proceeded. The defendants contested the suit. Said suit came to be partly decreed. The trial court had held that plaintiff has 7th share in the suit property.

2.1 Aggrieved by the decree of the trial court, one of the defendants-brother, namely, Dineshbhai filed an appeal before the District Court i.e. Civil Appeal No.20 of 2006. The District Court was pleased to allow the appeal and remand the case to the trial court. In this Appeal from Order, the remand order is under challenge.

3. Heard learned advocates for the parties.

4. Shri D.D. Vyas, learned Senior Advocate for the appellant, after briefly referring the facts of the case, has drawn attention to relevant part of the impugned judgment. It was submitted that broadly saying, the appellate court has found that some material and relevant documents are not brought on record, hence, the remand found necessary by the appellate court. The procedure adopted by the appellate court is patently illegal. It was submitted that provision of Order 41, Rule 27, 28 and 29 are totally given go-bye. Attention was also drawn to other provisions of CPC. Not having on record the material and relevant documents mainly weighed with the appellate court, however, the procedure adopted by it is patently illegal, the appeal should be allowed on this ground alone. Shri D.D. Vyas has also drawn attention to a decision of this Court in case of Gamanbhai Purshottambhai Patel & Anr. v. Jivanbhai Purshottambhai Patel, reported in 1996 (1) GLR 771. Relying on the same, it was submitted that no case for remand is made out by the appellant. Attention was drawn to Para.11 to 19. Relying on the same, it was contended that remand order should be made only on rarest of rare case.

5. On the other hand, Shri R.R. Marshall, learned Senior Advocate with Mr. Arpit Kapadia, learned advocate for respondent No.2, supporting the order of remand, has pointed out that the appellate court has given reasons for remanding the matter and reasoning given by it, cannot be said to be bad or illegal. It was submitted that the appellate court has rightly found that defendants had no opportunity to lead the evidence. It was also pointed out that fact of passing of an award by the arbitrator qua the suit property is not disputed by the plaintiff and that being so, when this fact weighed with the appellate court, no fault can be found in course adopted by that court. The remand order, it was submitted, in a sense is an innocuous order. Referring Rule 23A Order 41 and relying on - ? considered necessary?, it was submitted that the view taken by the appellate court is not so erroneous which calls for interference in appeal. Shri R.R. Marshall has drawn attention to decisions of the Supreme Court in case of Jegannathan v.

Raju Sigamani & Anr., reported in (2012) 5 SCC 540, in case of C.N. Ramappa Gowda v. C.C. Chandre Gowda (Dead by LRs) & Anr., reported in (2012) 5 SCC 265, in case of Narayanan v. Kumaran & Ors., reported in (2004) 4 SCC 26, in case of Divya Exports v. Shalimar Video Company & Ors., reported in (2014) 16 SCC 194 and in case of Remco Industrial Workers House Building Cooperative Society v. Lakshmeesha M. & Ors., reported in (2003) 11 SCC 666 (Para.15 and 18).

6. Shri R.D. Dave, learned advocate appeared for other brother i.e. heirs of Dineshbhai. The principal grievance of Shri Dave and reason for supporting the order of remand was-the personal property of Dineshbhai and Naranbhai which they have purchased by executing the sale deed are erroneously included as a suit property. The LRs of deceased Dineshbhai are aggrieved because the personal property of Dineshbhai are included in the decree passed by the trial court. Shri Dave has drawn attention to a decision of the Supreme Court in case of Ishwar Das Jain (dead) through LRs v. Sohan Lal (dead) by LRs, reported in AIR 2000 SC 426.

7. Shri D.D.Vyas, in reply, besides drawing attention to a decision of this Court in case of Ravjibhai Mathurbhai Solanki v. Bijalbhai Devjibhai Prajapati, reported in AIR 2004 (GUJ.) 102 (Para.13 and 1.31) and AIR 1976 SC 866 (Para.9), has pointed out that appellate court has seriously erred in holding that defendants have no opportunity to lead the evidence. It was pointed out that case was adjourned from time to time and after lapse of more than one year after closing of evidence of the plaintiff, defendants? right to lead evidence was closed. It was also pointed out that much after the closure of defendants? evidence, Muljibhai had moved an application to reopen the right. Said application was rejected and that order was not carried any further. Except Muljibhai, other brothers have not applied to reopen the right. It was also pointed out that appellate court proceeded to frame the issues for consideration of trial court wherein, couple of issues framed without any pleading in that regard by the defendants.

8. The reasons given by the Appellate Court for remanding the case are as under :

(I) There is substance in say of defendants that distribution of properties has taken place earlier and in this regard, arbitrator has also given an award. Passing of an award is not disputed by the plaintiff. In view of plaintiff not controverting this fact and in view of production of copy of award on record, it can be said that plaintiff has not come with clean hands. As the copy of award is now placed on record, it requires to be proved as per the provisions of the Evidence Act, hence, remand.

(II) Under the Hindu Law, execution of a writing is not necessary for effecting the partition. Along with this, if we consider AIR 1995 SC 1728, entry in revenue record can be considered as relevant evidence for considering partition. In the present case, Entry No.1665 in revenue record is not proved in accordance with

law. It is so because defendants? have no opportunity to lead the evidence. Hence, the remand is necessary.

(III) The original defendants-Dineshbhai and Naranbhai have purchased Survey No.283 by executing registered sale deed dated 4.1.1977. The trial court has seriously erred in believing Survey No.283 as a joint Hindu Family Property. The sale deed dated 4.1.1977 could not be brought on record as the defendants have no opportunity to lead the evidence. Hence, the remand is necessary.

(IV) One release deed said to have been executed by Muljibhai is produced and against that, Muljibhai has filed an affidavit that no such release deed executed by him. In view of said material produced before the appellate court, remand is found necessary by the appellate court.

9. The appellate court has also observed that Manilal had daughters and in this suit, which in substance is suit for partition, daughters are not made party. As otherwise also, the matter is remanded to the trial court, plaintiff would take care of non-joinder of necessary parties.

10. Now, I may consider the rival submissions of the parties.

11. At the outset, I may state that while supporting the order of the District Court, the respondent No.1, who was the sole appellant before the District Court, has restricted his main attack to the inclusion of his properties, which, according to him, is his personal property by the trial court with other joint properties i.e. the suit property. But real and general-so to say-opposition against the present appeal came from respondent No.2, who has not preferred appeal before the District Court. Shri Vyas, learned Senior Advocate for the appellant has pointed out this fact and has opposed the strong opposition of appeal by respondent No.2. In reply to this, Shri Marshall, learned Senior Advocate has submitted that in a suit for partition, virtually all parties are in position of the plaintiff and status and position of respondent is equivalent to the appellant and therefore, this objection is in nature of technical objection. In a sense, Shri Marshall is right. But the point is somewhat different. It is important to note that before the District Court, Muljibhai i.e. respondent No.2 had not challenged the decree of the trial court and in fact, in his written submissions before the District Court, he has contended that decree of trial court be confirmed. He assertively supports the decree of the trial-court. This aspect to be borne in mind while proceeding to consider the rival submissions.

12. The main reasons weighed with the appellate court are two, namely, (i) relevant documents were not produced before the trial court and those relevant documents are required to be proved as per the law of evidence and (ii) the defendants have no opportunity to lead the evidence. As to the second reason, Shri D.D. Vyas, learned Senior Advocate had argued with vehemence that in the facts of the present case, this ground/reason is difficult to support. In view of final order I propose to pass and upon hearing the learned advocates for the parties, I may not dwell in detail on this second reason. As to the first reason for

remanding the case, the appellate court has considered that some of the material and relevant documents, namely sale deed dated 4.1.1977, relevant revenue entry, release deed, affidavit of Muljibhai and award etc. were produced before the appellate court. All these documents, though relevant and material, same were not produced before the trial court. These documents are produced only before the appellate court, hence, remand is found necessary. If said documents are not produced before the trial court and party considers that those documents are relevant and material for arriving at a decision on merits, the party can produce those documents at appellate stage by invoking and following the procedure laid down for production etc. of additional evidence. Order 41, Rule 27 reads as under :

"R.27-Production of additional evidence in Appellate Court.- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence such evidence was not within the knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

13. Order 41, Rule 27 has come up for consideration before the Supreme Court in various cases. Perhaps, the earliest case is Arjun Singh's case, AIR 1951 SC 193. Therein, the Supreme Court has laid down that true test is, whether it is possible to pronounce the judgment by appellate court on the basis of material before it or not, and without taking into consideration the additional evidence which is sought to be produced. I may briefly refer Rule 27 as it now stands.

14. As a rule, additional evidence cannot be produced in appeal. Sub-rule (1) specifically bars it. At the same time, it carves out exception in the form of clauses (a) and (b). By 1976 amendment in CPC, clause (aa) is introduced. It is clear from sub-rule (1) that party cannot claim production of additional evidence as a matter of right. The party has to make out a case either under clause (a) or under clause (aa). The third clause, namely, clause (b) takes care of different situation, to which I may refer to it in a moment. So far as the parties are concerned, they may invoke either clause (a) or clause (aa). For this, party has

to make out a case, namely,

- (i) the trial court has incorrectly or illegally refused to admit the evidence or
- (ii) despite his due diligence, such additional evidence did not come to his knowledge, or
- (iii) such additional evidence was, though within his knowledge, he cannot produce it before the trial court despite his due diligence.

14.1. Comparatively, majority of cases would be governed under clause (aa). If party invokes clause (aa), his due diligence would be on test. "Due diligence" has often come up for consideration before the Court. Much depends on facts and circumstances of the case. When a party invokes clause (a) or clause (aa), the party has to file an application seeking permission to produce the additional evidence. In the case on hand, it appears that no such application is filed by the party before the District Court. Besides that, it is advisable that application be accompanied by an affidavit. Upon filing of such application by party, the other side would have right to reply. The order passed by the court in such application would be subject to challenge before the higher forum. Sub-rule (2) deals with recording of reasons. Before referring it, I may refer to clause (b) since the cases under clause (b) would also govern by sub-rule (2).

15. The additional evidence may come on record via clause (b) also. That clause gives discretion to the court-as distinct to right to party under clause(a) or clause (aa)—to allow to produce additional evidence. Under this clause, the court may allow production of documents and may even permit examination of witness. The only condition is, it should appear to the appellate court that, "... doing so is required to pronounce the judgment in that case." In addition to this, clause (b) also provides that the court may allow production of additional evidence, "for any other substantial cause." On bare reading of provision, it would appear that fairly wide discretion conferred upon the appellate court. In the facts of present case, it is not necessary to elaborate this clause.

16. Now about clause (2). The Supreme Court in case of K. Venkataramiah v. A. Seetharama Reddy and Others, reported in 1963 SC 1526 has occasion to consider clause (2). It has held that if otherwise it is possible to ascertain from the record that appellate court has properly exercised its power to allow additional evidence then, such exercise of power cannot be set at naught only on the ground that reasons are not stated. Use of word "shall" in sub-rule-it was held-by itself does not make it mandatory. Relevant Para.13 of the aforesaid judgment reads, thus;

"13. It is very much to be desired that the courts of appeal should not overlook the provisions of clause (2) of the Rule and should record their reasons for admitting additional evidence. We are not prepared, however, to accept the contention of the appellant that the omission to record the reason vitiates the admission of the evidence. Clearly, the object of the provision is to keep a clear

record of what weighed with the appellate court in allowing the additional evidence to be produced-whether this was done on the ground (i) that the court appealed from had refused to admit evidence which ought to have been admitted, or (ii) it allowed it because it required it to enable it to pronounce judgment in the appeal or (iii) it allowed this for any other substantial cause. Where a further appeal lies from the decision of the appellate court such recording of the reasons is necessary and useful also to the court of further appeal for deciding whether the discretion under the rule has been judicially exercised by the court below. The omission to record the reason must therefore be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory. For, it does not seem reasonable to think that the legislature intended that even though in the circumstances of a particular case it could be definitely ascertained from the record why the appellate court allowed additional evidence and it is clear that the power was properly exercised within the limitation imposed by the first clause of the Rule all that should be set at naught merely because the provision in the second clause was not complied with. It may be mentioned that as early as 1885 when considering a similar provision in the corresponding section of the Code of 1882, viz., section 586, the High Court of Calcutta held that this provision for recording reasons is merely directory and not imperative vide *Gopal Singh v. Jhakri Rai*, ILR 12 Cal. 37. We are aware of no case in which the correctness of this view has been doubted. It is worth noticing that when the 1908 Code was framed and Or. 41 r. 27 took the place of the old section 586, the legislature was content to leave the provision as it was and did not think it necessary to say anything to make the requirement of recording reasons imperative. It is true that the word "shall" is used in R. 27 (2); but that by itself does not make it mandatory. We are therefore of opinion that the omission of the High Court to record reasons for allowing additional evidence does not vitiate such admission."

(emphasis supplied)

17. In the present case, without any application seeking permission to produce additional evidence-not to speak of any affidavit-and without any separate order dealing with production of additional evidence, the appellate court proceeded to refer the same and thought it fit to remand the case. When production of additional evidence is allowed, what would be the next step ?

18. If production is allowed, next step to follow is provided in Rule 28. Shri Vyas, learned Senior Advocate, has also drawn attention to Rule 28 which reads as under :

"Rule 28 - Mode of taking additional evidence.- Wherever additional evidence is allowed to be produced, the appellate court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the appellate court."

19. Rule 28 provides for mode of taking additional evidence. On allowing the production of additional evidence by the appellate court, the said court has three options; (I) it can record the evidence itself (ii) it can direct the court from which appeal is preferred to record the evidence or (iii) it can direct any subordinate court to take such evidence. See : H.P. Vedavyaschar v. Shivshankara and Anr., (2009) 8 SCC 231

19.1. As a consequence of allowing production of evidence either of above three alternatives follow. First task of the court at that time would be to record or to take the additional evidence. It is erroneous to believe that remand automatically flows from allowing production of additional evidence in appeal. Exercise of power of remand is quite distinct and different matter. It may be noted that in all cases where production of additional evidence is allowed, the remand of case need not necessarily take place. The order of remand can be passed under Rule 23 or 23 (a) or 25. In the present case, reading of judgment as a whole and reading its concluding paragraph, it certainly gives impression that production of additional evidence before it, itself has led the court to remand the case. The belief that, matter can be remanded only on that ground, if held by any court, it is misconception.

20. Now, brief reference may be made to remand provision.

Case laws relied on by parties mainly revolve around power and scope of remand.

21. Rule 23 reads, thus :

"Rule 23. - Remand of case by Appellate Court - Where the Court from whose decree an appeal is preferred has disposed of the suit on a preliminary point and the decree is reversed in appeal, or where the Appellate Court, while reversing or setting aside the decree under appeal, considers it necessary in the interests of justice to remand the case, it may by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with direction to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit, and the evidence, if any, recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand."

21.1. Rule 23 can be invoked only when suit is disposed of on preliminary issue. In practise, comparatively such cases would be few. In those cases where the suit is disposed of on preliminary issue and the Court is of the view that matter is required to be remanded, there should also be disagreement of appellate court with the finding of the trial court and it shall reverse that finding. Consequence of reversal of finding and decree would be followed by remand. In the present case, the suit is not disposed of on preliminary issue. Hence, no question of exercise of power under Rule 23.

22. Limitation on power of appellate court to remand the case only wherein the

suit is disposed of on preliminary issue is lifted by introduction of Rule 23A. Rule 23A reads, thus;

"23A. - 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."

22.1. By virtue of 1976 Amendment, appeal can be remanded even in cases wherein case is disposed of otherwise than on preliminary point.

23. Shri Vyas, learned Senior Advocate for the appellant has drawn attention to Gamanbhai Patel's case (supra). Attention inter-alia was drawn to Para.19. It reads as under :

"19. It is undoubtedly true that Rule 23A which came to be introduced by Amendment Act, 1976 deals with residuary cases or other cases where the order of remand could be made by the appellate Court. The circumstances under which remand could be ordered in cases other than those covered by Rule 23 Order 41, it is provided that where re-trial is considered necessary, the appellate Court shall have some powers as it has under Rule 23 to direct as to what issue or issues shall be tried in the case so remanded. The learned Assistant Judge has not assigned any legal, proper, justifiable or cogent reason and has nowhere recorded his satisfaction that a retrial, in his opinion, was necessary. The power to remand under Rule 23A Order 41 of C.P. Code is not to be exercised rashly and without sufficient cause. Order of retrial in any case unless it is absolutely necessary, is to be avoided. It shall have to be kept in mind by the appellate Court that a remand of a case after quashing and setting aside the decree of the trial Court with direction to re-frame issues and to permit the parties to lead evidence once again is bound to add to miseries of the parties as ordinarily trial of a civil suit in the Courts in India consume minimum five to seven years time at the stage of trial and there are towns and cities where even suits are not tried in a period of a decade or more. The human patience of the litigating parties is by that time lost or exhausted and a feeling of dissatisfaction pervades the trial Court all throughout the country and order of remand, therefore, which is casually made without sufficient cause, without any justifiable reason and without stating as to why re-trial is necessary, is wholly unjustifiable both from the point of exercise of judicial discretion as well from the point of non-fulfilment of statutory provisions. In the opinion of this Court, Rule 23A Order 41 is only to be invoked in rarest of rare or most exceptional cases when the appellate Court is for very convincing and cogent reasons to be recorded in writing is satisfied that a re-trial is necessary, failing which substantial miscarriage of justice would result. In my opinion, in the present case, in view of the most unsatisfactory, vague, ambiguous and nebulous statements and totally unconvincing and unjustifiable reasons given by the learned Asst. Judge, there was no justification to quash and set aside the judgment and decree passed by the trial Court and to direct re-trial of the suit after framing proper issues and after recording evidence

afresh which may be led by the parties."

23.1. The Gamanbhai's case (supra) was rightly involved by Shri Vyas, learned Senior Advocate for the appellant. While one may agree with the view expressed therein, it may be stated that restricting the remand in rarest of rare case is too stringent test to apply in practise. It may be borne in mind that in that case, it was found that the learned Judge was used to dispose of most of the appeals by remanding the same and in that way, facts of that case was typical. Once the appellate court reverses the decree under appeal and in the process, it considers satisfactorily case on merits and further, retrial is considered necessary by it then, remand follows naturally. No further test then courts need to apply. It is enough that appellate court is conscious that remand should be in 'exceptional' or in 'rare' case only. In order to emphasise limited scope of remand and in order to give full and maximum weight-age to it, adding the superlative term to the expression of rare by saying that it should be in rarest of rare case, is not proper and it is perhaps not called for. Howsoever in simple terms and in clear words the proper and true scope of remand is laid down, ultimately there is no other way but, to leave it to the discretion of the appellate court.

24. Learned advocate for the respondent has drawn attention to C.N. Ramappa Gowda's case (supra), more particularly to the Head Note, which reads, thus;

"Suit for partition involving disputed questions of fact decreed by trial court merely on basis of plaint affidavit filed by plaintiff in view of non-filing of written statement and non-cross-examination of plaintiff by defendants despite issuance of summons and being represented by advocate-cryptic decree passed by trial court without assigning any reason as to how plaintiff succeeded in proving that suit property was joint family property-Although defendants had failed to file written statement in spite of numerous opportunities given for the same but once decree was passed, defendants promptly filed appeal before High Court-Held, High Court was justified in remanding matter to trial court for de novo trial by giving fresh opportunity to defendants to file written statement-However, cost of Rs.25,000 imposed on defendants as a precondition for retrial/de novo trial-Family and Personal Laws-Hindu Law-Joint Family property-proof of."

24.1. Attention was also drawn to Para 28. In that case, order of remand by the High Court was challenged before the Supreme Court. The Supreme Court had dismissed the appeal. As it would appear from Para.28 and 29, the trial court in its 'cryptic decree' has given no reason for passing the decree and it had taken the view that since defendants have not filed any written statement nor rebuttal evidence of denial came from the defendant, it accepted the case and passed a decree. No such case herein. In the present case, defendants did appear, had filed reply and has cross-examined plaintiff and witness. Further, the trial court had discussed the evidence led before it.

25. Then, attention was also drawn to Jegannathan's case (supra) wherein, the Supreme Court has held that appeal is maintainable against the order of remand.

However, relying on Narayan's case, (2004) 4 SCC 26, it was held that such appeal is to be heard only on the grounds on which second appeal under section 100 is to be heard. This is altogether on different point.

26. In Ishwar Das Jain (dead) through Lrs's case (supra) on which learned advocate, Mr.R.D.Dave has placed reliance, the Court has considered that when finding of fact can be interfered with while considering the second appeal. It was held that interference is permissible when material or relevant evidence is not considered by the Court or where finding has been arrived at by the appellate court by placing reliance on inadmissible evidence. Either of these two situations would give rise to substantial question of law. Reliance on this placed in support of submission that power of this Court while hearing appeal against remand is as circumscribed as Court hearing second appeal and therefore, this Court should not interfere in this appeal. As a principle O.K. but, when order under challenge is passed outside Rule- 23, 23A and 25, this authority can not help Shri Dave.

27. In Divya Exports's case (supra), the High Court was pleased to allow the appeal and decree the suit. It is the case under Rule 24. In the suit, declaration was claimed that plaintiff has exclusive worldwide video right of VCD/DVD and all other formats of video rights in respect of 15 Telugu films for which agreement was entered into. There were some other developments also prior to filing of the suit. Learned Single Judge of the High Court proceeded to decide the question for which no issue was framed by the trial court and this exercise was followed by drawing inferences from the statement made by the witness in evidence and on that basis, it recorded negative finding on the validity of the agreement. The Supreme Court found that there was no issue before the trial court about the validity of the agreement and as there was no issue, party could not produce the evidence on it. Accordingly, the Supreme Court was pleased to allow the appeal. In short, the court proceeded to deal with the issue which was not framed and had also decided it by drawing inferences from oral evidence that has led the Supreme Court to allow the appeal. It appears that in that case, the High Court had invoked Rule 24. The Supreme Court in the facts of that case found it to be erroneous. No such case herein. Rule 24 is not in issue.

28. In P. Purushottam Reddy And Anr. v. Pratap Steels Ltd., reported in AIR 2002 SC 771, the plaintiff instituted a suit for specific performance on the basis of agreement to sell. The trial court decided that suit on all issues. In an appeal against that decree, the High Court recorded its finding on some of the issues and then, framed three additional issues and remanded the case to the trial court. In appeal against the said order of remand, the Supreme Court held that order of remand is neither under Rule 23 nor 23A nor 25. Therein, it was held as under;

"...In the instant case the trial court did not dispose of the suit for specific performance of agreement to sell upon a preliminary point. The suit was decided by recording findings on all the issues. By its appellate judgment the High Court has recorded its finding on some of the issues, not preliminary and then, framed

three additional issues leaving them to be tried and decided by the trial court. It is not a case where a retrial is considered necessary. Neither R.23 nor R.23 or O.41 applies. None of the conditions contemplated by R.27 exists so as to justify production of additional evidence by either party under that Rule."

28.1. The Supreme Court has further held in Para.10 as under :

"10. The next question to be examined is the legality and propriety of the order of remand made by the High Court. Prior to the insertion of Rule 23A in Order 41 of the Code of Civil Procedure by CPC Amendment Act 1976, there were only two provisions contemplating remand by a court of appeal in Order 41 of CPC. Rule 23 applies when the trial court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in appeal. Rule 25 applies when the appellate court notices an omission on the part of the trial court to frame or try any issue or to determine any question of fact which in the opinion of the appellate court was essential to the right decision of the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand in as much as the subordinate court can try only such issues as are referred to it for trial and having done so the evidence recorded together with findings and reasons therefore of the trial court, are required to be returned to the appellate court. However, still it was a settled position of law before 1976 Amendment that the court, in an appropriate case could exercise its inherent jurisdiction under Section 151 of the CPC to order a remand if such a remand was considered pre-eminently necessary *ex debito justitiae*, though not covered by any specific provision of Order 11 of the CPC. In cases where additional evidence is required to be taken in the event of any one of the clause of Sub-rule (1) of Rule 27 being attracted such additional evidence oral or documentary, is allowed to be produced either before the appellate court itself or by directing any court subordinate to the appellate court to receive such evidence and send it to the appellate court. In 1976, Rule 23A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23A as it is under Rule 23. After the amendment all the cases of wholesale remand are covered by Rule 23 and 23A. In view of the express provisions of these rules, the High Court cannot have recourse to its inherent powers to make a remand because as held in *Mahendra v. Sushila*, AIR 1965 SC 365 at p. 399, it is well settled that inherent powers can be availed of *ex debito justitiae* only in the absence of express provisions in the Code. It is only in exceptional cases where the court may now exercise the power of remand *de hors* the Rules 23 and 23A. To wit the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20, Rule 3 or Order 11, Rule 31 of the CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for re-writing the judgment so as to protect valuable rights of the

parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 of the CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore must be avoided."

(Emphasis supplied : Herein O.11 appears to be misprinted. It should be O.41)

28.2. The Supreme Court allowed the appeal and remanded back the case to the High Court.

29. Under Rule 23A, the appellate court has power to remand the case to the trial court. However, for that it has to reverse the decree and it has to come to the conclusion that re-trial is necessary.

30. One of the submissions of learned advocate for the respondent may be referred to. Shri R.R.Marshall, learned Senior Advocate has emphasised ? considered necessary? occurring in Rule 23A. It was submitted that provision itself confers wide discretion to the appellate court. The appellate court having exercised its discretion and in the circumstances of the case on hand, when it is ? considered necessary? to remand the case, this Court should not interfere with the exercise of discretion by the District Court. It is not possible to agree with this submission of learned advocate for the respondent. The reason is, order of the District Court travelled beyond Rule 23, 23A and Rule 25. It is only in cases wherein otherwise appellate court?s order is within the ambit of either of these provisions and yet other side challenges the order questioning the exercise of discretion by appellate court, the plea advanced by Shri R.R.Marshall, learned Senior Advocate can claim serious consideration. Staying outside the relevant provision and then, claiming protection of phrase ?considered necessary? - occurring in provision - is too strained effort to be acceptable.

31. Now I may consider whether case falls under Rule 25. In a moment it would be clear that why it is necessary to deal with this Rule. In the present case, the District Court has proceeded on the line that defendant has no opportunity to lead the evidence and secondly, the additional evidence produced before it, needs consideration. Hence, the remand. Having proceeded on this line, at the end it has formulated 4 issues and relying on Rule 23 and 23(a), it has remanded the case to the trial court with a direction to decide the suit on merits.

32. In this regard i.e. issues framed by the District Court, Shri Vyas, learned Senior Advocate has submitted that at least two of the issues framed are de-hors the written statement of opponent and in any case, they are contrary to reply filed by defendants. This question may not be examined as otherwise also framing of an issues and remanding whole case to trial court is bad.

33. Rule 25 provides for framing of issues by appellate court and for remanding the case on limited ground. In ever case where the Court proceeds to deal with appeal under Rule 25, the court would require to bear in mind the following aspects :

(1) An error in respect of issue/s. In other words, the trial court has (i) omitted to frame the issue or (ii) it has, though framed, omitted to try it, or;

(2) Even if the case does not fall under either of above two situations, still the appellate court has power to give direction to the trial court, when in the opinion of the appellate court determination of any fact is required.

(3) By providing for above two alternate situations, fairly wide discretion is given to the appellate court. However, there is a rider imposed for invoking either of these modes.

(4) The appellate court would require to form an opinion that such course is ? essential for right decision in the suit.?

(5) Having reached at that stage, the appellate court would issue direction to decide issue/s which is/are found necessary by it, or issue direction to determine the fact which found by it to be an essential.

(6) For trial court, it would be open to record additional evidence for determination of such issue/s or for determination of fact, as the case may be.

(7) The trial court would require to record the finding on such additional material.

(8) Such evidence and finding would be remitted back to appellate court,

(9) The appellate court then would decide the appeal in accordance with law, and

(10) Appeal, as a whole, need not go back to the trial court under this Rule.

34. It is material to note that in cases under Rule 25, appeal would remain pending before appellate court. The appellate court would proceed to decide it finally upon receiving report or finding of the trial court.

35. Strong reliance was also placed by learned advocate for the respondent on Remco Industrial Workers House Building Cooperative Society's case (supra) and attention was drawn to Head Note as well as Para.14 to 18. It reads, thus; First, I may quote Head Note;

"Civil Procedure Code, 1908-Or. 41 Rr.25 and 23-A-Appellate court's power to remit or remand the case to trial court-Non-consideration of basic issue-Remand-Dispute relating to title and possession of inam land-Under Karnataka (Personal and Miscellaneous) Inams Abolition Act,1954 inamdar could be granted occupancy right in respect of land in the inam for which no occupancy right had been granted to tenant-Occupancy right in respect of the suit land earlier granted to tenant but later granted to the inamdar-Suit land purchased by plaintiff from inamdar-Suit filed for title and possession of the land-Order granting occupancy right in favour of the tenant produced in trial court and marked and admitted as evidence without any objection by plaintiff though in written statement of defendant there was no specific reference to that order-Held, burdent o prove title and possession of the specific land was initially on the plaintiff - When the document, viz., order granting occupancy right to the tenant, was admitted,

basic issue of effect of that document on the subsequent grant in favour of the plaintiff and identity of land under the two grants did arise as a legal issue for consideration-But both the trial court and appellate court overlooked that document and neither considered nor rendered any decision on that issue which was vital to the just decision of the case-Powers of appellate court are not inhibited by the acts or omissions of the parties-This a fit case where Supreme Court should exercise powers of remand under Or.41 R.25 r/w R.23-A and remit the whole case to trial court for deciding that specific issue-Tenancy and Land Laws - Karnataka (Personal and Miscellaneous) Inams Abolition Act,1954 (1 of 1955)."

35.1. Relevant Para.14 to 18 read, thus;

"14. After hearing the learned counsel appearing for the parties, we have formed an opinion that the interest of justice demands remand of case to the trial court for framing and trial of specific issue on the grant of Occupancy Rights under order dated 28.5.1965 in favour of the tenant [Ex. D-3] and the order dated 09.12.1969 [Ex.P-1] in favour of erstwhile Inamdar. True it is that in the written statement of defendant no. 1, no clear and specific pleading to base their claim for title and possession of the suit land on grant dated 28.5.1965 [Ex.D-3] was raised. No specific prayer appears to have been made either in the trial court or in the High Court in appeals to consider issue of identity of the land on the basis of the grant dated 28.5.1965 [Ex. D-3].

15. It cannot, however, be lost sight of that the burden to prove title and claim for possession of specific land in Survey No. 132/2 was initially on the plaintiff. The defendant no. 1 in the written statement contested the claim of the plaintiff and claimed title in itself. The grant of Occupancy Rights in favour of tenant Muniyappa contained in the order dated 28.5.1965 [Ex. D-3] was produced in the trial court without objection from the plaintiff and allowed to be exhibited and marked as Ex. D-3. When such a document of grant of suit land to the extent of 1 acre 3 guntas in favour of defendant no. 1 was before the trial court, it was necessary for it to consider its effect on the subsequent grant dated 09.12.1969 [Ex. P-1] in favour of the erstwhile Inamdar. The legal position not in dispute is that if the suit land in Survey No. 132/2 area 1 acre 3 guntas had already been granted by order dated 28.5.1965 [Ex. D-3] to the tenant, Muniyappa, the same land could not have formed part of the grant to the extent of 1/7th share to erstwhile Inamdar in the order dated 09.12.1969 [Ex. P-1]. A clear legal issue, based on earlier grant dated 28.5.1965 [Ex. D-3] and the subsequent grant dated 09.12.1969 [Ex. P-1] with the identity of the land under the two grants did arise before the trial court as well as the appellate court. The said issue has not been answered by any of the two courts below. The plaintiff has to succeed on the strength of its own case and not on the weakness of the case of the defendant. In opposing the prayer for remand, learned counsel appearing for the plaintiff/respondent has placed strong reliance on the decision of Privy Council in Kanda & Ors v. Waghu, AIR (37) 1950 Privy Council 68. The contention advanced

is that since pleadings based on Ex. D-3 were not raised in the written statement of defendant no.1 and no issue on the basis of Ex. D-3 having been raised in the trial court, this Court should not remit the matter for retrial on the said issue.

16. As we have stated above, document [Ex. D-3] was admitted and marked as evidence before the trial court. When such document was admitted, naturally the question of effect of that document on the subsequent grant [Ex. P-1] in favour of plaintiff did arise for consideration of the trial court as well as appellate court. Surprisingly, the trial court while discussing the claim of title of the plaintiff to Survey No. 132/2 for area 1 acre 12 guntas did not make any mention of the document admitted and exhibited before it as Ex.D-3. The relevant part of the discussion in the judgment of trial court apparently shows that the document of earlier grant of Occupancy Rights to the tenant [Ex. D-3] had been overlooked. The said part of judgment reads thus :- "They also do not show what was the extent of land comprised in S.No. 132/2. The only material available on record to show the extent of land in S.No. 132/2 is Ex. P-12 the revised mutation order passed by the Deputy Tahsildar of Bangalore North Taluk dated 30.5.1972. According to para 2 of the said order the total extent of area comprised in S.No. 132/2 corresponding to S. Nos. 305 and 472 was 8 acre as and 12 guntas and if that is so than 1/7th of the total extent of land comprised in S.No. 132/2 would be 1 acre 7.4 guntas and not 1 acre and 12 guntas. No doubt the Deputy Tahsildar, North Taluk in Ex.P-12 has stated that Subbalakshamma's share was 1 acre 12 guntas as there was a balance of acres 29 guntas as remaining in S.No. 305 after the lands previously registered in the name of one Muniyappa, Sakamma and Lakshamma and therefore it was possible to allot 1 acre 12 guntas in S.No. 305 and he has therefore recognised the share of P.W. 2 Subbalakshamma in S.No. 305 and as 1 acre and 12 guntas. However, the question is not whether 1 acre and 12 guntas was available in S.No. 305 so that he could recognise P.W. 2 Subbalakshamma as the owner of the said 1 acre and 12 guntas in S.No. 305 which is now given S.No. 305/2 but as to whether Subbalakshamma was entitled to in pursuance to the order passed as per the original of Ex. P-1 to 1 acre and 12 guntas.

17. In the cross appeals before the High Court, document [Ex. D-3] had again been overlooked. See the following part of the judgment of the High Court in paragraph 18 :-

"At some stage it was canvassed by Sri N.S. Krishnan that the land in question and many other lands were purchased by the management of the REMCO factory for formation of a layout from the tenants in the occupation of the Inam land. Not a scrap of paper is produced in the suit to show that these tenants had claimed occupancy rights under any provisions of Inams Abolition Act before the Authority namely the Special Deputy Commissioner for Inams Abolition. But subsequent purchasers namely the management of the REMCO factory have also not made any claim before the authority for occupancy rights.

[Underlining to supply emphasis]

18. From the above resume of facts and the nature of orders of grants of Occupancy Rights to the contesting parties, we find that the basic issue of the effect of earlier grant dated 28.5.1965 [Ex. D-3] in favour of the tenant - Muniyappa on the subsequent grant dated 09.12.1969 [Ex. P-1] in favour of plaintiff/respondent was neither addressed to by any of the courts below nor a decision has been rendered on the same. The issue of effect of Ex. D-3 on Ex.P-1 and the identity of the land under the two grants is vital to the just decision of the case. The powers of the appellate court are not inhibited by the acts or omissions of the parties. Rule 25 Order 41 of Code of Civil Procedure empowers the appellate court to frame an issue and remit it for trial which has been omitted to be framed and tried by the trial court and which appears to the appellate court essential to the right decision of the case. Rule 23 A Order 41 introduced by CPC Amendment Act No. 104 of 1976 w.e.f. 1.2.1977 confers powers on the appellate court to remand whole suit for retrial. In our considered opinion, this is a fit case where this Court should exercise powers of remand under Order 41, Rule 25 read with Rule 23 A of CPC."

36. The Head Note itself is fairly clear to appreciate why the case was remanded in that case. It would appear that, therein, the plaintiff has instituted a suit for title and possession of the suit land. The plaintiff had purchased the suit land from Inamdar. The suit land was in possession of tenant. Earlier grant was issued in 1965 in favour of tenant. Thereafter, there was also grant of land in favour of Inamdar. Grant in his favour was averred by the defendant in written statement and he did produce it before the trial court. In spite of averments about grant in written statement and its production during trial, the plaintiff has not raised any objection on taking such grant on record and accordingly, it was admitted in evidence. In the facts of that case, said grant of 1965 was required to be considered, however, case came to be decided without considering the effect of that document. The Supreme Court found that question, namely, effect of issuance of two grant by the Authority and secondly, identity of the land in the background of two grants on record essentially arise and this aspect was completely missed by the courts below. Hence, the case was remanded. The circumstances of the present case are different. Unlike the present case, therein the document was not sought to be produced at appellate stage nor the case was remanded on that ground. Besides that, in view of final order I propose to pass, it would not be proper to offer further comment on applicability of above case to the present case.

37. It would be useful to refer the case of Shanti Devi v. Daropti Devi and Others, reported in (2006) 13 SCC 775. In that case, in Para.12, 13 and 14 it was held as under :

"12. A bare perusal of the plaint filed by Respondent No.1 herein would show that the validity and/or legality of the Will has been challenged on a number of grounds; one of them being suspicious circumstances surrounding the execution of the Will purported to have been executed by Smt. Budho Bai. There cannot be

any dispute with regard to the proposition of law that the onus of proof to establish that the Will was validly executed by the testator was on the person who was a beneficiary thereunder. Existence of suspicious circumstances may not lead to an inference that the Will was invalid in law, but would certainly be a relevant factor to arrive at a finding that the Will was not executed by the testator in a sound and disposing state of mind.

13. But the same by itself could not be a ground for remitting the entire suit to the learned Trial Judge upon setting aside the decree of the learned Trial Court. The power of remand vests in the Appellate Court either in terms of Order 41 Rules 23 & 23A or XLI Rule 25 of the Code of Civil Procedure. Issue No. 4 was held to have been wrongly framed. Onus of proof was also wrongly placed and only in that view of the matter the High Court thought it fit to remit it to the learned Trial Judge permitting the parties to adduce fresh evidence. It, therefore, required the learned Trial Judge to determine a question of fact, which according to it was essential, upon re-framing the issue.

14. Only, thus, additional evidences were required to be adduced upon reframing the issue and having regard to the fact that onus of proof was wrongly placed on the plaintiff."

37.1. The Supreme Court was pleased to allow the appeal against remand and set aside the order of remand.

38. In the end, I may mention that before delivering the judgment, I had asked the learned advocates for the parties to explore the possibility by which the appeal can be disposed of before this Court itself. It did not work. Therefore, consequential order upon above discussion is required to be passed. The appeal is required to be remanded to the District Court. Before that, with regard to remand, some observations on order of the District Court may be made. To be fair to the District Court, I may observe that it is not that the judgment under appeal is totally bald or learned District Court has ignored the judgment of the trial court or the evidence on record. The learned District Court did refer (only refer) the evidence of original plaintiff - Manilal in Paras.12, 14 and 15 (No other oral evidence referred). Then, while dealing with aspect of property of respondent-Dineshbhai, who was appellant before the District Court, it has concluded that how the trial court has held to have established that the suit property is ancestral property is not clear. In other words, the appellate court had held that the trial court ought not to have believed that it is ancestral property is established. These references to evidence of Manilal and comment on holding of trial court qua ancestral property are over shadowed by detailed discussion on production of additional evidence, on which District Court has focused along with other aspect which is referred herein-above. In this regard i.e. circumstances under which case came to be remanded, it is material to note that learned District Court initiated discussion on a wrong premise. It proceeds to consider the appeal on the premise that the question before the Court is, whether earlier there was partition of property or not or whether it was intention

of deceased original plaintiff to distribute the property among the sharers and that parties have acted as per the partition arrived at or not? Such was not the case of original plaintiff. On the contrary, the original plaintiff had instituted a suit for declaration and permanent injunction claiming that the suit property is his self-acquired property. After framing question on that line, in the discussion thereafter follows, it has referred additional evidence referred by the appellant/defendant. Erroneous approach has led to erroneous conclusion. In addition to this, mixing up Rule 23A and Rule 25 and remanding the case is also bad. As stated above, the court refers Rule 23 and 23A and proceeds to frame additional issues and remanded the case. Before the trial court, plaintiff has led the evidence and four witnesses examined by him-including himself - discussion qua oral evidence and various documentary evidence brought on record by the plaintiff should have been made. Such discussion may be brief. Reversal of decree of trial court ought to have been preceded by such discussion and thereupon, it may have recorded the conclusion that retrial is necessary. It did not do so. On framing of issues by it, in the end, (?on facts, couple of issues, urged by Shri Vyas, learned Senior Advocate as a bad-that apart?), it could have asked for finding of trial court on these issues and after receiving such finding from trial court, it could have disposed of the appeal. Neither it did so. In short, in view of above discussion, conclusion arrived by it is erroneous and bad.

39. In view of above, the Appeal from Order is allowed. The judgment and order of the District Court is hereby quashed and set aside. Upon hearing learned advocates for the parties, the appeal is remanded back to the District Court to decide it in accordance with law. It would be open for the parties to file an application for production of additional evidence, if so advised. If such application is made, the appellate court shall decide the same in accordance with law. I may also mention that I have tried to explain legal provision in brief and I have not considered merits of the case. It would also be open for the District Court to pass any order in appeal in accordance with law, after hearing the parties. Since the case is fairly old, appeal court shall decide the appeal as expeditiously as possible.

40. Consequently, Civil Application No. 11306 of 2015 stands disposed of.