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**(2013) 09 RAJ CK 0074**

**In the Rajasthan High Court**

**Case No :** Civil Miscellaneous Appeal No. 1679 of 2004

M/s. Ganpati Construction Company

APPELLANT

Vs

Shri Dilmohan Raj Mathur and Others

RESPONDENT

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**Date of Decision :** 11-09-2013

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 3, Order 41 Rule 23, Order 41 Rule 23A, Order 41 Rule 25, Order 41 Rule 28

**Citation :** (2013) 09 RAJ CK 0074

**Hon'ble Judges :** Bela M. Trivedi, J

**Bench :** Single Bench

**Advocate :** R.K. Goyal, for the Appellant; R.N. Mathur and Mr. G.P. Kaushik, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Bela M. Trivedi, J.—With the consent of the learned counsels for the parties the appeal is decided finally at the admission stage. The present appeal arises out of the order dated 04.06.2004 passed by the Additional District Judge, Court No. 2, Ajmer (hereinafter referred to as "the appellate court") in Civil Appeal No. 54/2000, whereby the appellate court has allowed the appeal filed by the respondent No. 1 by setting-aside the judgment and decree dated 28.07.2000 passed by the Civil Judge (Junior Division) (North) Ajmer, (hereinafter referred to as "the trial court") in Civil Suit No. 15/1996, and has remanded the case to the trial court for deciding the suit afresh after taking on record certain documents filed by the respondent No. 1 and after recording the additional evidence thereon.

2. In the instant case, it appears that the appellant-plaintiff had filed the suit against the respondents No. 2 & 3 (original-defendants) seeking permanent injunction for restraining them from enforcing the conditions of the agreement dated 02.01.1995 executed between the parties in respect of the contract of construction work awarded to the plaintiff. During the pendency of the said suit, certain documents produced by the appellant-plaintiff, were admitted by the

respondent No. 1, who was at the relevant time the officer In-charge of the work in question. The trial court while decreeing the suit as per the decree dated 28.07.2000, passed certain strictures against the respondent No. 1, who was not the party-defendant in the suit, and directed the respondent Nos. 2 & 3 to initiate departmental enquiry against the respondent No. 1. It appears that being aggrieved by the said judgment & decree passed by the trial court, the respondent No. 2 i.e. State of Rajasthan had preferred an appeal before the appellate court, however subsequently had withdrawn the same, and the respondent No. 1 in his personal capacity also had preferred the appeal being No. 54/2000. The appellate court while allowing the said appeal passed the impugned order as stated hereinabove. Being aggrieved by the same, the present appeal has been filed.

3. It has been submitted by the learned counsel Mr. R.K. Goyal, for the appellant that the appeal at the instance of the respondent No. 1, who was not the party-defendant in the suit, was not maintainable before the appellate court and the appellate court should not have allowed the same and remanded the case to the trial court. He also submitted that the respondent No. 2 State having withdrawn the appeal filed by it against the judgment & decree passed by the trial court, the appeal at the instance of the respondent No. 1 before the appellate court was not maintainable. He further submitted that appellate court had exceeded its jurisdiction by remanding the case dehorse the provisions contained in Order XLI of CPC. However, the learned Senior Counsel Mr. R.N. Mathur, for the respondent No. 1, has submitted that the trial court having fixed the responsibility on the respondent No. 1 and having directed the respondent No. 2 to initiate departmental enquiry against the respondent No. 1, such order was required to be challenged before the appellate court by the respondent No. 1. He further submitted that the respondent No. 1 having filed the additional documents before the appellate court, the matter was rightly remanded to the trial court for deciding afresh in the light of the said documents.

4. After having heard the learned counsels for the parties and after perusing the orders passed by the appellate court as well as by the trial court, it transpires that the appeal was filed by the respondent No. 1, who was not the party-defendant in the suit as the trial court while decreeing the suit of the appellant-plaintiff had passed certain strictures against the respondent No. 1. It further transpires that the appellate court vide the impugned order has remanded the case to the trial court under the provisions contained under Order XLI Rule 28 for deciding the suit afresh after permitting the respondent No. 1 to produce the additional evidence. In the opinion of this Court, the impugned order passed by the appellate court ex-facie appears to be bad and illegal.

5. At this juncture, it would be necessary to reproduce the scope of remand of the case by the appellate court, as laid down by the Apex Court in case of P. Purushottam Reddy and Another Vs. Pratap Steels Ltd., It has been 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 23-A in Order 41 of the CPC by the 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 inasmuch 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 therefor of the trial court, are required to be returned to the appellate court. However, still it was a settled position of law before the 1976 Amendment that the court, in an appropriate case could exercise its inherent jurisdiction u/s 151 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 41 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 23-A 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 23-A. 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 Manilal Nanavati v. Sushila Mahendra Nanavati* (AIR 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 Rule 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 41 Rule 31 CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for rewriting 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 CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore must be avoided.

6. Thus, as per the above stated legal position settled by the Apex Court, the

powers of remand could be exercised by the appellate court either under Rule 23 or under Rule 23-A of Order XLI. While Rule 23 could be exercised when the suit is disposed of by the trial court on a preliminary issue, Rule 23-A could be invoked when the suit is disposed of otherwise than on preliminary point and when the decree is reversed in appeal, and the retrial is found necessary by the appellate court. The remand contemplated in Rule 25 is limited remand, as in such case the trial court can try only such issues as are framed by the appellate court and referred to it for trial, and the trial court after recording the evidence thereon, is required to return the same to the appellate court alongwith its findings and reasons.

7. So far as the facts of the present case are concerned, as stated hereinabove, the appellate court has neither exercised its powers under Rule 23-A or Rule 25 of Order XLI of CPC. Rule 27 empowers the appellate court to permit the party to produce additional evidence before it and Rule 28 pertains to the mode of taking additional evidence. Neither Rule 27 nor Rule 28 empowers the appellate court to remand the case to the trial court for taking additional evidence and deciding the suit afresh. In that view of the matter, the impugned order passed by the appellate court suffers from gross illegality and infirmity which deserves to be set-aside. The appellate court is required to be directed to decide the appeal afresh and in accordance with law. It is needless to say that both the parties shall be at liberty to raise all possible contentions before the appellate court and the appellate court shall decide the same in accordance with law while deciding the appeal. In that view of the matter, the impugned order dated 04.06.2004 passed by the appellate court is set-aside. The appellate court is directed to decide the appeal on merits and in accordance with law. The appeal stands allowed accordingly.