

(2013) 11 RAJ CK 0184
In the Rajasthan High Court
Case No : Civil Misc. Appeal No. 1868/2013

R.S.R.T.C.

APPELLANT

Vs

Haridwarilal Sharma

RESPONDENT

Date of Decision : 11-11-2013

Acts Referred:

Citation : (2014) 3 WLN 52

Hon'ble Judges : Bela M. Trivedi, J

Bench : Single Bench

Final Decision : Allowed

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 has been filed by the appellants-defendants under Order XLIII Rule 1(u) of C.P.C. challenging the order dt. 22.04.2013 passed by the Addl. District Judge No. 3, Jaipur Metropolitan, Jaipur (hereinafter referred to as "the appellate Court") in Civil Regular Appeal No. 15/12, whereby the appellate Court has allowed the appeal filed by the respondent-plaintiff by setting aside the judgment and decree dt. 28.04.2012 passed by the Addl. Civil Judge (JD) No. 2, Jaipur Metropolitan, Jaipur (hereinafter referred to as "the trial Court") in Civil Suit No. 636/09 and remanded the case to the trial Court for deciding afresh in the light of the observations made in the impugned order.

2. It has been sought to be submitted by the learned counsel Mr. Alok Chaturvedi for the appellants that the appellate Court could not have remanded the case to the trial Court without reversing the decree passed by the trial Court and without finding the retrial necessary as contemplated in Rule 23A of Order XLI of C.P.C. According to him the appellate Court has acted beyond the scope of Order XLI, while remanding the case to the trial Court. The learned counsel for the appellants has relied upon the decision of this Court in the case of Khatoon Dukhtar (D) Through Lrs. vs. Smt. Naraini Devi & Ors., 2013 (3) WLC (Raj.) 616 and also the decision of the Apex Court in the case of P. Purushottam Reddy and

Another Vs. Pratap Steels Ltd., in support of his submissions.

3. However, the learned counsel Mr. M.C. Jain for the respondent has submitted that the impugned order passed by the appellate Court being just and proper this Court should not interfere with the same.

4. In the instant case, it appears that the respondent-plaintiff had filed the suit seeking declaration against the appellants-defendants, alleging inter alia that he was entitled for the pay-scale of Rs. 6500-200-10500 and also for the promotion on the post of Static Officer. The said suit was resisted by the appellants-defendants denying the allegations made in the plaint and also raising the objections as regards the jurisdiction of the Court to try the suit. The trial Court after considering the evidence on record dismissed the suit vide the judgment and decree dt. 28.04.2012, against which the respondent-plaintiff had preferred the appeal before the appellate Court. The appellate Court while partly allowing the said appeal set aside the judgment and decree passed by the trial Court and remanded the case to the trial Court for deciding afresh in the light of the observations made in the impugned order.

5. It is pertinent to note that power of remand under Rule 23A of Order XLI, could be exercised by the appellate Court when the trial Court had disposed of the case otherwise than on a preliminary point, and when the decree in appeal is reversed and, a retrial is found necessary. On these two conditions being satisfied, the appellate Court can exercise the same power under Rule 23-A as under Rule 23. Further, the validity of remand of the case has to be tested by reference to Rule 25 also. The appellate Court can not remand the case if the case is not covered either under Rule 23 or Rule 23-A or Rule 25. A beneficial reference of the decisions of the Apex Court in this regard be made in case of Municipal Corporation, Hyderabad Vs. Sunder Singh, and in case of Jegannathan Vs. Raju Sigamani and Another, With regard to scope of remand, a very pertinent observations have been made by the Apex Court in case of P. Purushottam Reddy and Another Vs. Pratap Steels Ltd., in which 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 C.P.C. Amendment Act, 1976, there were only two provisions contemplating remand by a Court of appeal in Order 41 of C.P.C. 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 therefore 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 under Sec. 151 C.P.C. 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 C.P.C. 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 23-A 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 vs. 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 Rules 23 and 23-A. 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 C.P.C. 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 23-A or Rule 25 C.P.C. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore must be avoided.

6. In view of the above stated legal position, 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. In the instant case, from the submissions made by the learned counsels for the parties, and to the impugned order passed by the appellate Court, it transpires that the appellate Court has remanded the case to the trial Court, without reversing the findings recorded by the trial Court on the issues framed by the trial Court and without finding the retrial necessary.

7. So far as the Rule 25 is concerned, it cannot be gainsaid that the appellate Court has power to refer the issues that may be framed by it, to the trial Court

for taking the additional evidence thereon and in such case, the trial Court has to proceed to try such issues and return the evidence to the appellate Court together with its findings thereon and the reasons therefore. However, in the instant case, the appellate Court has also failed to frame any issue which according to the appellate Court, the trial Court had failed to frame, nor has it called for the additional evidence from the trial Court on such issue, and hence Rule 25 also had no application.

8. It appears that the appellate Court has remanded the matter on the ground that the trial Court had relied upon certain documents which were not referred to by the appellants-defendants in the written statement and, therefore, the findings given by the trial Court on Issue Nos. 1 and 2 were wrongly recorded. As held by the Apex Court in the above referred decision, the unwarranted order of remand gives the litigation an undeserved lease of life and therefore must be avoided and that the order of remand cannot be passed on the ipse dixit of the Court. The appellate Court having remanded the matter without considering the provisions contained in Rule 23-A, Rule 25 and Rule 27 of Order XLI of C.P.C., the impugned order suffers from gross illegality and, therefore, it deserves to be set aside. In that view of the matter, the impugned order passed by the appellate Court is set aside. The appellate Court is directed to decide the appeal on merits. Let the parties remain present before the appellate Court on 02.12.2013. The appeal stands allowed accordingly.