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ALLAHABAD HIGH COURT

SINGLE BENCH

SMT. KEWLA DEVI AND OTHERS — Appellant

Vs.

ADDITIONAL JUDGE FAIZABAD AND OTHERS — Respondent

(Before : Narayan Shukla, J)

Misc. Single No. 2818 of 2010

Decided on : 09-07-2010

- Civil Procedure Code, 1908 (CPC) - Order 20 Rule 3, Order 41 Rule 31
- Evidence Act, 1872 - Section 74

A. Civil Procedure Code, 1908 — Order 41 Rule 25 — Remand — Power of Appellate Court — Appellate court has power to frame additional issues and refer them to the trial court for findings where the lower court omitted to frame or try an essential issue, or failed to determine a crucial question of fact — It is mandatory for the trial court to take additional evidence if required and return findings to the appellate court — The appellate court can direct the trial court to consider specific evidence for new issues. (Paras 10, 11, 13)

B. Civil Procedure Code, 1908 — Order 41 Rule 27 — Additional Evidence at Appellate Stage — Conditions for admission — Additional evidence can be produced if the trial court refused admissible evidence, or if diligence could not produce it earlier, or if the appellate court requires it to pronounce judgment or for substantial cause — Mere assertion of non-availability of a document by one party while another states it is in their possession and relevant for the case requires the appellate court to consider its production. (Paras 3, 4, 7)

C. Civil Procedure Code, 1908 — Order 41 Rule 23, 23A, 25 — Remand of

Case — Distinction and Limitations — Wholesale remands are generally covered by Rules 23 and 23A; inherent powers should not be used when express provisions exist — Remand should be avoided if the case is not covered by Rule 23, 23A, or 25, as it prolongs litigation unnecessarily — However, a remand is justified when the appellate court frames additional issues requiring determination of facts based on new evidence, such as a "proceeding register" of a trust, which impacts the validity of a sale agreement. (Paras 6, 9)

D. Evidence Act, 1872 — Sections 61, 74 — Private Documents — Admissibility and Proof — A private document, such as a trust's proceeding book, is not a public document under Section 74 — Its mere production does not make it admissible evidence; its entries must be supported by oral evidence from the maker and be subject to cross-examination to be accepted — Thus, a remand for the trial court to examine such a document with supporting oral evidence is a correct procedure for proper adjudication. (Paras 7, 9)

Cases Referred

- [P. Purushottam Reddy and Another Vs. Pratap Steels Ltd.](#), AIR 2002 SC 771 : (2002) 5 JT 5 : (2002) 1 SCALE 447 : (2002) 2 SCC 686 : (2002) 1 SCR 586 : (2002) AIRSCW 417 : (2002) 1 Supreme 357

Final Result : Dismissed

JUDGMENT

Narayan Shukla, J.—Heard Mr. D.C. Mukherji, learned Counsel for the Petitioners and Mr. S.K. Mehrotra, learned Counsel for the opposite parties 2 to 7. The Petitioners have challenged the order dated 30.1.2010 passed by the Additional District Judge, Court No. 4, Faizabad in Civil Appeal No. 4 of 2010 along with other connected Civil Appeal No. 61 of 2009.

2. By means of order impugned the learned Additional District Judge, court No. 4, Faizabad has remitted the matter to the court below to give findings on the issue framed by appellate court after providing opportunity to the parties to adduce evidence and after summoning the proceedings register as prayed in application 45 Ga filed at the appellate stage moved by the Plaintiff/Appellant. The issues framed by the appellate court are reproduced hereinunder:

1. Whether the said agreement to sale is against the provisions of the Trust-deed of Manohar Trust?
2. Whether the permission for sale of the property in question was not obtained from the

management committee prior to post alienation the same to the Defendant Nos. 2 to 6 and registration of the agreement to sale?

3. The learned Counsel for the Petitioners submits that opposite parties 2 to 7 did not make any application for summoning the proceeding register before the trial court. He pointed out that the provisions of production of additional evidence before the appellate court are provided u/s 41 Rule 27 CPC, which are reproduced hereinunder:

(i) 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 his 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 for any other substantial clause.

The appellate court may allow such evidence or document to be produced or witnesses 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.

4. In the light of the aforesaid provisions as well as the facts of the present case he submits that opposite parties 2 to 7 failed to give explanation before the appellate court as to why the registers were not summoned during the course of trial. He further submits that against the application for summoning the register, the opposite party No. 8 has specifically denied the availability of said register with him, as such there was no occasion for the learned appellate court for remanding the case for summoning the registers to take decision on the basis of additional evidence; whereas in the first issue framed by the appellate court no additional evidence is required to decide the same as the same has to be determined in the light of the Bye-laws of the Trust. So far as second issue is concerned, that can also be determined by the appellate court itself.

5. He further invited the attention of this Court towards the observations made by the appellate court, whereby the appellate court has shown necessity for summoning the proceeding register. The observation of the appellate court is that the proceeding register is required for two purposes. Firstly, to prove actual receiving of consideration, if any, because if the consideration is received, it would have been certainly deposited in Debutter Account and would have been mentioned in that register. Secondly, to prove the permission

of the management committee in respect of the sale of the property. Thus he submits that in the operative part of the judgment the learned appellate court has not shown any necessity for additional evidence to decide issue and it only requires to peruse the document, which can be perused by the appellate court itself.

6. In support of his contentions he cited a decisions of the Hon'ble Supreme Court rendered in the case of P. pursushotam [P. Purushottam Reddy and Another Vs. Pratap Steels Ltd.](#), in which the Hon'ble Supreme Court on the question of legality and propriety of the order of remand considered the provisions of Order 41 Rule 23A of the CPC and held that all the cases of wholesale remand are covered by Rules 23 and 23A. In view of the express provisions of these Rules, the High Court cannot have recourse to its inherent powers to make remand, 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 dehors 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 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.

7. Through the counter affidavit filed on behalf of opposite parties 2 to 7 it has been submitted that in paragraph 4 of the plaint it was categorically stated that the Defendant No. 1 is a trust which maintains its proceeding book in which all the proceedings held by it are recorded. In the above proceedings book of the trust full details of the agreement for sale in question relating to the Plaintiffs as well as the amount paid by them are recorded. The above proceeding book of the trust in the form of a register are with Defendant No. 1., therefore, it was imperative on the part of Defendant No. 1 to produce it for the examination of the court which was not done although in his statement in the above suit before the trial court it was specifically mentioned by the D.W.-1 the present Mahanth viz; Mahanth Devendra Prasadacharya that such proceeding register is in his possession. He categorically stated before the trial court that the above referred proceeding book and the trust deed are maintained upto date at the Asthan and the same is in his possession. He further stated that under the provision contained in Order 41 Rule 27 (b) CPC the appellate court is empowered to allow the evidence or to produce the document if it requires document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause.

8. It has further been stated that the appellate court was fully entitled to require the production of the proceeding book and examination of the additional evidence by itself as directed in its judgment under challenge in the writ petition.

9. It has further been submitted that appellate court has given the finding that the plea of the Plaintiffs/answering opposite parties that they gave Rs. 67,000/- in four instalments cannot be held reliable in absence of any other corroborative evidence. Therefore, the matter has rightly been remanded to the trial court to decide the issue on the basis of the additional evidence adduced by the parties. It has also been submitted that since the proceeding book, the examination of which was required by the appellate court is a private record maintained for the purpose of the trust in question and not being a public document as defined in Section 74 of the Evidence Act, 1872, it has to be supported by oral evidence of the maker of the entries. Therefore, mere production of the above register before the court below would not make it acceptable as an admissible evidence. It requires an oral evidence to support it and be subjected to cross examination by the Defendants without which the above document cannot be admitted in evidence, therefore the appellate court has adopted a correct procedure in remitting the issue relating to the trial court for recording finding on the basis of the evidence. So far as second issue framed by the appellate court is concerned, para 14 A of the plaint at page 45 of the paper book contains the specific pleading that any agreement of the debuttar property in question is violative of the rules of the trust deed in question. Therefore, the said issue requires consideration by the trial court for proper decision.

10. In support of his submissions Mr. S.K. Mehrotra, learned Counsel for the opposite parties 2 to 7 has cited the following decisions:

Bachahan Devi and Anr. v. Nagar Nigam, Gorakhpur and Anr. (2008) 12 SCC 372. In the said case the trial court granted relief of permanent injunction, which was appealed. During the pendency of the appeal an application to amend the written statement was allowed by the appellate court.

Thereafter certain additional issues were framed. The appellate court was of the view that since the written statement had been amended during the pendency of the appeal, the matter should be remanded to the trial court for fresh decision. Challenging the order passed, an appeal was filed by Respondent No. 1 before the High Court. Stand of Plaintiff No. 1 before the High Court was that the appellate court committed an illegality in remanding the matter for fresh consideration. It was submitted that the appellate court could have exercised its discretion under Order 41 Rule 25 of the Code of Civil Procedure, 1908 and it could have recorded evidence itself.

The High Court was of the view that the order of remand should be passed rarely and in the instant case that was not the case. That being so, the High Court set aside the order of the first appellate court and the matter was remanded to it for decision of the appeal on merit. The order of the High Court was challenged before Hon'ble the Supreme Court. The Hon'ble Supreme Court upheld the order of High Court and dismissed the appeal.

11. The relevant para 11 of the said case is reproduced hereinunder:

11- A bare reading of the provision makes it clear that the same comes into operation when the court, from whose decree the appeal is preferred, has omitted to frame or try an issue, or to determine any question of fact which appears to the appellate court essential for the right decision of the suit upon the merits. In order to bring in application of Order 41 Rule 25 the appellate court must come to a conclusion that the lower court has omitted to frame issues and/or has failed to determine any question of fact which in the opinion of the appellate court are essential for the right decision of the suit on merits. Once the appellate court comes to such a conclusion it may, if necessary, frame the issues and refer the same to the trial court. In other words there is no compulsion on the part of the appellate court to do so. This is clear from the use of the expression "may". But the further question that arises is whether in such a case the appellate court is bound to direct the trial court to take additional evidence required. This is a mandatory requirement as is evident from the provision itself because it provides that the lower court shall proceed to try such case and shall return the evidence to the appellate court together with the findings therein and the reasons therefor. As noted above, the provision becomes operative when the appellate court comes to the conclusion about the omission on the part of the lower court to frame or try any issue. Once the appellate court directs the lower court to do so it is incumbent upon the trial court to take additional evidence required. As has been rightly contended by learned Counsel for the Appellant, there may be cases where additional evidence may not be required. But where the additional evidence is required, then the lower court has to return the evidence so recorded to the appellate court together with the findings thereon and the reasons therefor.

12. He cited following other decisions also:

Moel Joshwa v. The State of U.P. and Ors. 2003 (21) LCD 468, Dukh Haran Verma v. The State of U.P. and Ors. 2004 (22) LCD 540, Lachhman Singh (dead) through L Rs. and Ors. v. Hazara Singh (dead) through LRs and Ors. 2009 (27) LCD 422 and Km. Mithlesh Sharma v. State of U.P. and Ors. 2006 (24) LCD 1013.

However, upon perusal of the record on the point involved for consideration in the present case I find the case i.e Bachahan Devi (supra) is only relevant to consider, therefore, I do not discuss the other cases.

13. The court below has framed additional issues by forming the opinion that for determination of question whether the permission for sale of such property was given by the Trust or not? it is necessary to examine the daily work register. It has also been observed that for determination of transfer of consideration money the discussion is required on these issues as there is statement of P.W. 2 that he had given Rs. 6700/- in four instalments on different occasions, but he could not receive the receipt from Mahanth Ram Kripal Prasadacharya. Thus bona fide of transaction has to be examined in the light of the additional issues, therefore, the court below has remanded the matter to the trial court for determination of issues with the evidences adduced therein, in which in the light of the

judgment of Hon'ble Supreme Court rendered in the case of Bachahan Devi (Supra), I do not find error.

14. However, keeping in view the objection of the learned Counsel for the Petitioners that the opposite parties are in intention to linger on the matter, I hereby provide that the trial court shall examine these issues with the evidences adduced therein within three months from the date of placement of record before him and immediately thereafter shall place the same to the learned appellate court for decision in the matter.

15. In the result, the writ Petitioner is dismissed.