

HIGH COURT OF RAJASTHAN AT JODHPUR

Bench: Hon'ble Mr. Justice Madan Gopal Vyas

Date of Decision: 29th May 2024

Case No. :

S.B. CIVIL MISC. APPEAL NO. 449/2024

APPELLANT(S): MUNICIPAL COUNCIL NAGPURAppellant

VERSUS

RESPONDENT(S): 1. BABULAL, 2. MITHU RAMRespondents

Legislation:

Order 43 Rule 1(u) of the CPC

Section 107 of the CPC

Subject: Appeal challenging the remand order by the appellate court which quashed and set aside the trial court's judgment and remanded the case for fresh consideration of oral and documentary evidence.

Headnotes:

Civil Procedure – Remand Order – Appellate court quashed trial court's judgment and remanded case for fresh consideration – Appellant contended appellate court failed to specify new issues or necessity for additional evidence – High Court finds remand order lacks justification, sets it aside, and directs appellate court to decide appeal on merits [Paras 1-13].

Order 41 CPC – Powers of Appellate Court – Remand under Rules 23, 23A, 24 – Appellate court must specify issues or necessity for remand – Evidence on record sufficient for adjudication mandates final decision without remand – High Court emphasizes appellate court's obligation to decide appeal on merits unless retrial is essential [Paras 7-10].

Judicial Precedents – High Court refers to Kerala and Allahabad High Courts' rulings, emphasizing minimal use of remand powers and appellate court's duty to decide on merits when evidence suffices – References: Gopalkrishnan v. V. Ponnappan, Prem Raj v. Nagar Palika, RSRTC v. Haridwarilal Sharma [Para 10].

Decision – Civil Miscellaneous Appeal Allowed – Remand order quashed – Appellate court directed to hear and decide appeal on merits – Parties to appear before appellate court on specified date [Paras 11-13].

Referred Cases:

Gopalkrishnan &Anr. v. V. Ponnappan &Ors., 2022(1) Civil Court Cases 741 (Kerala)

Prem Raj & Ors. v. Nagar Palika Thr. Prabhari Adhikari Nagar Palika &Ors., 2022(4) Civil Court Cases 033 (Allahabad)

RSRTC &Anr. v. Haridwarilal Sharma, 2014(1) Civil Court Cases 802 (Rajasthan)

Representing Advocates:

For Appellant(s): Mr. Rajesh Parihar

For Respondent(s): Mr. Harish Purohit

JUDGMENT

This civil misc. appeal under Order 43 Rule 1(u) read with Section 107 CPC has been preferred by the appellant-defendant against the impugned judgment dated 18.09.2023 passed by learned Additional District Judge No.1, Nagaur (for short, learned 'appellate Court') in regular appeal No.148/2013(14/2013), whereby learned appellate Court, while partly allowing the appeal, quashed and set aside the judgment and decree dated 23.09.2013 passed by learned Civil Judge (Jr. Division), Nagaur, (for short, 'learned trial Court'), in civil original suit No.68/2008, remanded the matter back to learned trial Court for deciding the suit afresh after considering the oral and documentary evidence.

2. The facts in nutshell are that the respondents-plaintiffs herein preferred a suit seeking decree of declaration and permanent

injunction before the learned trial Court. In the suit, it was averred that the then Chairman of Municipal Board was trying to sell the *pattasudaland* of the plaintiffs to other persons and he wanted to dispossess the plaintiffs. Therefore, suit was preferred by the respondents-plaintiffs herein seeking the aforesaid reliefs. Thereafter, the appellant-defendant submitted written statement to the said suit denying the averments made therein and stated that the appellant-defendant is the sole owner of the disputed land and after procuring the required reports, removed the encrochees over the land of Khasra No.53.

3. On the basis of the pleadings of the parties, learned trial Court framed four issues for determination. The plaintiff examined as many as six witnesses and exhibited six documents and defendant examined three witnesses and exhibited nineteen documents. Thereafter, vide judgment and decree dated 23.09.2013, learned trial Court rejected the suit preferred by the plaintiffs. Thereafter, the respondents-plaintiffs herein preferred an appeal before the learned appellate Court. Learned appellate Court, vide judgment dated 18.09.2023, while partly allowing the appeal of the respondents-plaintiffs, quashed and set aside the judgment and decree dated 23.09.2013 and directed the learned trial Court to decide the suit afresh after taking into consideration the documentary and oral evidence with regard to disputed land. Aggrieved by the judgment and decree dated 18.09.2023 passed by learned appellate Court, the appellant-defendant has preferred the present civil misc appeal.

4. Arguing on the present appeal, learned counsel appearing for the appellant-defendant submits that the learned appellate Court has committed grave illegality while quashing and setting aside the judgment and decree of learned trial Court without reversing the

findings recorded by it. It is further submitted that as per Order 41 Rule 23 CPC, a remand order requires that the appellate Court directs the learned trial Court specifically as to what issue or issues shall be tried in the case so remanded but in the present case, learned appellate Court without assigning any reason, straightway remanded the matter. It is further submitted that all the material was available with the learned appellate Court and the learned appellate Court could pass the order on merits. It is further submitted that a bare perusal of Rules 23, 23A and 24 of Order 41 CPC would make it clear that non-consideration, failure or mis-appreciation of an issue may not be a ground to order remand of the case, when the evidence on record is sufficient for determination of the issue by the appellate Court. Thus, it is submitted that it was within the permissibility of the learned appellate Court to take up and consider every issue and to determine the same when the evidence was available on record for its adjudication. However, learned appellate Court has wrongly remanded the matter back to learned trial Court. It is further submitted that learned appellate Court was under an obligation to decide the lis between the parties unless it came to a definite finding that the matter required leading of evidence once again by learned trial Court. It is further submitted that the power of remand could be exercised by learned appellate Court either under Rule 23 or Rule 23A of Order 41 CPC. In the instant case, learned trial court has not specifically directed the learned trial Court to frame any new issue or to decide any specific issue which has not been decided by learned trial Court without considering the documentary as well as oral evidence. Thus, it is submitted that the present civil misc. appeal may be allowed the impugned judgment dated 18.09.2023 passed by learned appellate Court may be quashed and set aside. In support of his contentions, learned counsel for the appellant has placed reliance upon the following judgments:-

1. Prem Raj & Ors. Vs. Nagar Palika Thr. PrabhariAdhikariNagar Palika &Ors. reported in 2022(4) Civil Court Cases 033 (Allahabad)
2. Gopalakrishnan &Anr. Vs. V. Ponnappan &Ors.reported in 2022(1) Civil Court Cases 741 (Kerala) 3. R.S.R.T.C. &Anr. Vs. Haridwarilal Sharma reported in 2014(1) Civil Court Cases 802 (Rajasthan)
5. Per contra, learned counsel for the respondents-plaintiffs, submits that learned appellate Court has not committed any illegality while passing the order impugned and, therefore, it is prayed that the present appeal may be rejected.
6. Heard learned counsel for the parties and perused the material available on record.
7. Rules 23, 23A & 24 of Order 41 CPC are relevant to decide the present controversy. The same are being reproduced here as under for ready reference:-

"23. Remand of case by Appellate Court -

Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, 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 directions 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.

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 re-trial is considered necessary,*

the Appellate Court shall have the same powers as it has under rule 23

3. Apart from Rule 23 and 23 A, Rule 24 is also incorporated in [Order XLI C.P.C.](#), mandating the appellate court to exercise its jurisdiction to determine the issue, when the parties have adduced evidence sufficient to determine the issue, without a remand of the case, which is extracted below for reference:

24. Where evidence on record sufficient, Appellate Court may determine case finally

-Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds."

Rule 23 of Order 41 CPC provides that appellate Court may, if it thinks fit, remand the case, and may further direct what issue or issues shall be tried in the case so remanded. Rule 23A of Order 41 CPC provides that an appellate Court may remand the suit to the trial Court even though such suit has been disposed of on merits where re-trial is considered necessary. Rule 24 of Order 41 provides that whether the evidence on record is sufficient to enable the appellate Court to pronounce judgment, it can even resettle issue and, thereafter, finally determine the case.

8. Before proceeding further, it would be apt to quote para 21 of the impugned judgment passed by the learned appellate Court.

Para 21 is reproduced as under:-

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9. A bare perusal of para No.21 of the impugned judgment passed by learned appellate Court makes it clear that neither the learned appellate Court has directed the learned trial Court to frame new issue nor has directed for re-trial on any particular issue or to take on record any other evidence and additional evidence and then pass a fresh order. Not only this, it is also not clear on what specific point or question, the matter was remanded back to learned trial Court. Further, in the present case, ample evidence was available before the learned appellate Court. However, the reason as to why the learned appellate Court has remanded the matter back to learned trial Court to

decide it afresh after considering documentary and oral evidence, is conspicuously missing in the impugned judgment.

10. In case of **Gopalkrishnan (supra)**, the Kerala High Court in para No.4 had held as under :-

"4. A conjoint reading of Rule 23, 23A and 24 of [Order XLI C.P.C.](#) would make it clear that non-consideration, failure or mis-appreciation of an issue may not be a ground to order remand of the case, when the evidence on record is sufficient for determination of the issue by the appellate court. It is within the permissibility of the first appellate court to take up and consider every issue in dispute and to determine the same when evidence on record is sufficient for its adjudication, irrespective of whether it was taken up or answered by the trial court. In short, a remand of the case to the trial court is not permissible, when the evidence on record covers the material for adjudication of every issues involved in the suit. It is also within the jurisdiction of the appellate court to settle and decide any issue, which is essential for fair determination of the dispute involved, when evidence on record is sufficient. The expression "evidence upon the record is sufficient" incorporated in Rule 24 shall not be understood to cover any failure upon the party to tender any evidence, insufficiency of evidence or any laches thereof so as to bring the matter within the purview of that Rule, when the party is aware of the dispute involved and the nature of issues to be adjudged. Hence, a remand of the case, either to fill up the lacuna in the evidence or in the case set up or failure to adduce evidence cannot be a ground of remand, when the dispute was within the knowledge of the parties and proceeded or defended with the suit with that knowledge. But, when there is denial of sufficient opportunity to adduce evidence

resulting in grave injustice to the party, it is permissible to order remand of the case. "

In case of **Premraj (supra)**, Allahabad High Court in para No.6 has held as under:-

"6. The appellate court is under obligation to decide by itself the lis between the parties unless it comes to the definite finding that the matter requires leading of evidence once again by the Court below. The remand of matter which has been decided by and between the parties has to be in rarest of the rare cases. The appellate Court is under obligation to dispose of the case finally vide [Order 41 Rule 24 of the Code of Civil Procedure, 1908](#). Record is sufficient to enable the appellate Court to pronounce judgement and, therefore, it will have to decide the matter finally. This is the mandate of the Apex Court spelled out as early as 1969 in the case of [Sunder Singh v. Narain Singh, 1969 SCD 900](#), reiterated in [Bhairab Chandra Nandan v. Ranadhir Chandra Dutta, \(1988\) 1 SCC 383](#). The Appellate Court no doubt has power to remand the matter under Order 41 Rule 23 and 23 A [of C.P.C.](#) but it has to follow certain conditions which are not satisfied in the case in hand."

In case of **RSRTC (supra)**, the co-ordinate Bench of this Court has held as under :-

"7. 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. "

11. In view of the above, the present appeal is allowed. The impugned judgment dated 18.09.2023 passed by learned Additional District Judge No.1, Nagaur in regular appeal No.148/2013(14/2013) is quashed and set aside. The learned appellate Court is directed to decide the appeal on merits after providing opportunity of hearing to the parties in accordance with law.

12. The parties are directed to remain present before the learned appellate Court on 02.07.2024.

13. A copy of this order be sent to learned appellate Court through Email/Fax.

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