

Chatar Lal Vs. Ramdas

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Court : Rajasthan

Decided On : Jan-12-1979

Reported in : AIR1979Raj87; 1979()WLN37

Judge : D.P. Gupta,; S.K. Mal Lodha and; M.C. Jain, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100, 101, 103 and 107(1) - Order 41, Rules 25 and 26 - Order 42, Rule 1; Rajasthan Premises (Control of Rent and Eviction) Act, 1950 - Sections 14(2); Rajasthan Premises (Control of Rent and Eviction) Act, 1976

Appeal No. : Second Appeal No. 416 of 1968

Appellant : Chatar Lal

Respondent : Ramdas

Advocate for Def. : L.R. Mehta, Adv.

Advocate for Pet/Ap. : N.P. Gupta, Adv.

Judgement :

M.C. Jain, J.

1. The following question of law was referred by one of us (M. C. Jain, J.) to be answered by the Full Bench vide order of reference dated 2-9-1978:--

'Whether the finding recorded by the first appellate court on the issue relating to comparative hardship remitted by this Court, being a finding of fact, is not open to challenge in the second appeal?'

2. The material facts leading to the present reference may be briefly stated as follows:--

3. Mahant Ramdas, plaintiff-respondent, instituted a suit for arrears of rent and ejectment from the disputed premises on the ground of personal necessity and default in the Court of Munsif, Udaipur, who by his judgment dated 30-11-1966 decreed the suit for eviction having found issue No. 2 regarding personal necessity in favour of the plaintiff. The defendant went in appeal, but his appeal was dismissed by the learned Additional District Judge, vide his judgment dated 10th of July, 1968. The defendant then preferred the second appeal. During the pendency of the second appeal the Rajasthan Premises (Control of Rent and Eviction) (Amendment) Act, 1976, came into force and in view of the amended Section 14(2) the following issue of comparative hardship was remitted for trial by this Court to the first Appellate Court vide order dated 31-3-1976:--

'Whether having regard to all the circumstances of the case including the question whether any other reasonable accommodation is available to the landlord or the tenant, greater hardship would be caused by passing a decree than by refusing to pass it?'

4. It was further directed that the lower appellate court shall record additional evidence of the parties and shall return the same to this Court together with its finding thereon. The first appellate court, after recording the evidence of both the parties and after hearing them, gave its finding on the aforesaid issue to this effect that greater hardship would be caused to the defendant Chatarlal by passing ^ decree than by refusing to pass it. Thus the remitted issue was decided in favour of the defendant and against the plaintiff. In the second appeal, an objection was raised on behalf of the defendant-appellant that the finding on the issue remitted by this Court, is a finding of fact and is not open to challenge in the second appeal. The finding of fact is binding on this Court. This preliminary objection was heard by one of us sitting in single Bench and divergence of judicial opinion was noticed, so

the above question was referred to be answered by the larger Bench.

5. We have heard Shri N. P. Gupta, learned counsel for the defendant-appellant and Shri L. R. Mehta, learned counsel for the plaintiff-respondent.

6. The learned counsel for the defendant-appellant submitted that the issue was remitted to the lower appellate court under Order 41, Rule 25, C.P.C. and the lower appellate court after recording the evidence of the parties, has returned the record together with its finding on the remitted issue. The finding so received forms part of the record in the suit under Order 41, Rule 26, C.P.C., and the plaintiff-respondent has submitted memorandum of objection against the finding. He urged that the finding arrived at by the first appellate court, being a finding of fact, is not open to attack in second appeal in view of Sections 100 and 101 of the Code of Civil Procedure. The provisions of Order 41, C.P.C., have not been made applicable to the second appeal in their entirety by the provisions contained in Order 42, Rule 1, C.P.C., but the provisions of O, 41 have been made applicable 'so far as may be' to appeals from appellate decrees. He urged that despite the fact that the finding has been given only by one court, that is, the first appellate court on the remitted issue, that finding cannot be scrutinised and gone into by this Court in view of the bar of Section 101, C.P.C., and this appeal cannot be treated as a first appeal so far as the finding on the remitted issue is concerned. He contended that against any finding returned by the first appellate court, no doubt, the parties have a right to submit their objections, but the grounds of objections have to conform to Section 100, C.P.C., and such objections are not open to be raised which may require appreciation of evidence afresh or weighing of the evidence recorded by the first appellate court. The provision of Order 41 Rule 26, C.P.C., no doubt, does not lay down the nature of objection which can be raised/ against the finding, but this provision has to be read along with the provision of Order 42, Rule 1, C.P.C., and the provisions of Sections 100, 101 and 103, C.P.C. He also urged that if the scheme of Sections 100, 101, 103 and 107, Order 41, Rules 22, 23, 24, 25, 26, 27 and 28 and Order 42, Rule 1, C.P.C., is examined, it would be clear that the provisions of Sections 100 and 101, C.P.C., would govern the contents of objections that can be raised under Order 41, Rule 26, C.P.C. and only each objections can be taken against the finding of fact recorded by the first

appellate court on any remitted issue, which can be raised in second appeal, like the finding being perverse or the evidence had been misread or inadmissible evidence had been read or admissible evidence has been rejected or material evidence has been ignored etc. In support of his submissions, the learned counsel cited some decisions which we shall deal with after referring to the contentions of the other side.

7. The learned counsel for the plaintiff-respondent on the other hand urged that in view of the provisions contained in Order 41, Rule 26, C.P.C., the party against whom the finding has been given, on the remitted issue, is entitled to present a memorandum of objection against that finding. The appellate court then should proceed to determine the appeal. This implies that the finding can be assailed even on merits and in case the party, against whom the finding has been given, is not allowed to assail the finding on merits, the provision of submitting the memorandum of objections against the finding would be rendered nugatory and would be a superfluous provision. The provision of Order 41, Rule 26, C.P.C., does not lay down any limitations regarding the nature and scope of objections to be raised against any finding. Had such been the intention of the Legislature, the Legislature would have expressly provided that the scope of objections would be limited to those grounds, which are provided in Section 100, C.P.C., when an issue is remitted in appeal from the appellate decree to the first appellate court. He urged that such a construction of the provision of Order 41, Rule 26 would make the first appellate court as the first and the last court of fact. Such could not have been the intention of the Legislature. The learned counsel also supported his arguments by citing cases, which have been referred to in the order of reference.

8. We may now proceed to consider the arguments advanced and the case law cited before us by both the sides. But before dealing with the respective contentions and considering the case law, it would be proper that for facility of reference the relevant provisions may be reproduced:--

'100. Second appeal-- (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a

High Court, on any of the following grounds, namely:--

- (a) the decision being contrary to law or to some usage having the force of law;
- (b) the decision having failed to determine some material issue of law or usage having the force of law;
- (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed ex parte.'

'101. Second appeal on no other grounds.-- No second appeal shall lie except on the grounds mentioned in Section 100.'

'103. Power of High Court to determine issues of fact.-- In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal which has not been determined by the lower Appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as is referred to in Sub-section (1) of Section 100.'

'107. Powers of Appellate Court. -- (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power--

(a) to determine a case finally:

(b) to remand a case;

{c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.'

'Order XLI -- Appeals from Original Decrees

'25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from--Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.'

'26. Findings and evidence to be put on record. Objections to finding.-- (1) Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objection to any finding.

Determination of appeal.--(2) After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.'

'Order XLII-- Appeals from Appellate Decrees

1. Procedure.-- The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees.'

9. So far as the provisions of Order 41, Rules 22, 23, 24, 27 and 28 are concerned, they will be considered while examining the scheme, and their reproduction is not necessary.

10. It may be stated that under the Code of Civil Procedure the rules in the First Schedule have been enacted to give effect to the provisions contained in various sections and for that the procedure has been set out in the rules in the First Schedule and these rules have been placed on the same footing as if they are enacted in the body of the Code, as is laid down in Section 121, C.P.C., which

provides that the rules in the First Schedule shall have effect, as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part. Section 107, C.P.C., deals with the powers of Appellate Court. The Appellate Court is Conferred with the powers to remand a case; or to frame issues and refer them for trial; or to take additional evidence or to require such evidence to be taken, as mentioned in Clauses (b), (c) and (d) of Sub-section (1) of Section 107, C.P.C. For the power of remand the relevant rule is Order 41, Rule 23, C.P.C. With respect to the power to frame issues and refer them for trial to the Court from whose decree the appeal is preferred, the corresponding rules are Order 41, Rules 25 and 26, C.P.C., and with respect to the power to take additional evidence or to require such evidence to be taken, the relevant rules are Order 41, Rules 27 and 28, C.P.C. These powers can be exercised in second appeal by the second appellate court by virtue of the provisions contained in Section 107 read with Order 41, Rule 1, C.P.C. Order 41, Rule 22, C.P.C, makes a provision conferring a right on the respondent to take any cross-objection to the decree which he could have taken by way of appeal, within the time prescribed in Sub-rule (1) and Sub-rule (2) provides for the form of memorandum of cross-objection and further lays down that the provisions of Rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply to the memorandum of cross-objection. It would appear from the provisions of Order 41, Rule 22, C.P.C., that the memorandum of cross-objections would be in the nature of memorandum of appeal and needs to be heard accordingly. Under Order 41, Rule 23, C.P.C., the whole case is remanded by the Appellate Court with necessary directions when the suit has been disposed of upon a preliminary point and the decree is reversed in appeal and on remand the suit is re-admitted under its original number and is determined afresh. Order 41, Rule 24, C.P.C., provides for a situation 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. This provision has reference to Clause (a) of subsection (1) of Section 107, C.P.C.

11. Now if we look to the provisions of Order 41, Rule 25, C.P.C., it would appear that under this provision the Appellate Court may after framing necessary issues, refer the same for trial to the court from whose decree the appeal is preferred, where that court has omitted to frame any issue or has omitted to try any issue or has omitted to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits. When such issue is remitted for trial to the court from whose decree the appeal is preferred, the Appellate Court shall direct such Court to take the additional evidence required and such Court is required to try such issues and shall return the evidence to the appellate Court together with its findings thereon and the reasons therefor. It would appear from this provision that the issues are to be remitted to the Court from whose decree the appeal is preferred, in three situations, namely, when that Court has (1) either omitted to frame the issue, or (2) omitted to try any issue, or (3) omitted to determine any question of fact. Rule 26 provides that the evidence recorded and findings given by such court shall form part of the record in the suit and it would be open to either party to present a memorandum of objection to such a finding, within a time to be fixed by the Appellate Court and after the expiration of the period so fixed for presentation of the memorandum of objection, the Appellate Court shall proceed to determine the appeal. It may be mentioned that Order 41, C.P.C., deals with provisions in respect of appeals from original decrees. That being so the memorandum of objection under Order 41, Rule 26, C.P.C., is in no way limited or confined to questions of law only, but objections concerning facts, can also be taken. Order 41, Rule 27, C.P.C., provides for production of additional evidence in Appellate Court in certain contingencies enumerated in that provision and Rule 28 lays down the mode of taking additional evidence. It provides that 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 the same when taken, to the Appellate Court. The Appellate Court under Order 41, Rule 25, C.P.C., as well as under Order 41, Rule 27, C.P.C., has the seisin of the case, whereas if the case is remitted under O, 41, Rule. 23, C.P.C, the Appellate Court does not have any seisin of the case. Under Rule 27, C.P.C., only additional evidence is taken by, the Appellate Court and if it considers proper, it can get the additional evidence recorded, either from the court

from whose decree the appeal is preferred, or from any other subordinate court. No issue is remitted to such court and such court is not required to give any finding; whereas under Rule 25, issue is remitted for trial to the court from whose decree the appeal is preferred and such court is required to take additional evidence, try that issue or issues and is further required to record its findings and reasons for those findings. Under Rule 24, the Appellate Court itself can determine the case finally after resettling the issues in case it finds that the evidence upon the record is sufficient to enable the appellate Court to pronounce judgment and when it feels that no issue needs to be remitted for trial. It would appear from the provisions of Order 41, Rules 22 to 28 that they deal with different situations in which the Appellate Court may act. Elaborate and detailed provisions for the procedure to be followed in appeals from appellate decrees in situations dealt with under Order 41, Rules 22 to 28, C.P.C., have not been enacted and even the other procedural provisions embodied in Order 41, C.P.C., have not been enacted with regard to the procedure to be followed in appeals from appellate decrees. Order 42, Rule 1, C.P.C., lays down that the Rules of Order 41 shall apply so far as may be to appeals from appellate decrees. From the words 'so far as may be' it would appear that the Rules of Order 41 would not apply to appeals from appellate decrees, as they are applicable to original decrees, but they shall be applicable to such an extent only so that they may not be inconsistent with any provisions relating to second appeals. Instead of reproducing the whole body of rules contained in Order 41, C.P.C., with necessary changes and modifications, the Legislature in its wisdom made the rules of Order 41, applicable to appeals from appellate decrees to a limited extent only by using the expression 'so far as may be'. The expression 'so far as may be' had been the subject of interpretation in the decided cases, which we shall presently refer.

12. As regards second appeals, Sections 100 and 101, C.P.C. are the specific provisions which lay down when and on what grounds second appeal will lie and when it will not lie. Section 100 mentions the grounds on which an appeal from appellate decree shall lie. The section begins with a saving clause. If there is any express provision in the Code or in any other law for the time being in force providing for hearing of second appeal on grounds other than those stated in Section 100, then second appeal can be heard on other grounds as well, e.g.,

Section 103 is an exception to Section 100 as Section 103 confers powers on the High Court to determine issues of fact in the situations envisaged in that section. Further Section 100, C.P.C., is to be read with Section 101, C.P.C., which is couched in a negative language and it provides that no second appeal shall lie except on the grounds mentioned in Section 100. In view of this statutory inhibition, no questions or issues of facts can be heard in second appeal. As regards the power of the High Court to determine issues of fact, there is an express provision contained in Section 103, C.P.C., which prior to its amendment by the Amendment Act of 104 of 1976, contemplated two situations when issues of fact can be determined by the High Court. One situation is that when any issue of fact necessary for the disposal of the appeal has not been determined by the lower appellate court and the evidence on the record is sufficient for the determination of that issue of fact. The second situation is when the issue of fact has been wrongly determined by such court by reason of any illegality, omission, error or defect such as is referred to in Sub-section (1) of Section 100. It may be stated that Section 103, CP.C., does envisage that issue of fact can be determined by the High Court if that issue of fact has not been determined by the first appellate court when the evidence on record is sufficient. But if the issue has been remitted by the High Court to the first appellate court under Order 41, Rule 25, C.P.C., then the question arises as to whether the memorandum of objections submitted under Order 41, Rule 26, C.P.C., is to be confined to the grounds stated, in Section 100, C.P.C. Thus, the controversy, in our opinion, lies in a very narrow compass and it is to be seen that the provision of Order 42, Rule 1, if read with the provisions contained in Sections 100, 101 and 103, C.P.C., can any such limitation be placed on the scope of memorandum of objections under Order 41, Rule 26, so that the objections may not go beyond the scope of Sections 100 and 101, C.P.C.

13. Having surveyed, scrutinized and analysed the relevant provisions, we now proceed to consider the cases cited at the bar. In *Bal Kishen v. Jasoda Kuar* ((1885) ILR 7 All 765) (FB) the point of law referred to the Full Bench was as follows:--

'Whether, when a case comes before the Court on second appeal, and an issue of fact has been remitted, the finding on that issue can be challenged upon the

evidence as in first appeals?'

14. The Full Bench consisted of four Judges. Chief Justice Petheram and Justice Straight and Justice Brodhurst answered the reference in negative, whereas Tyrrel, J., dissented. Separate judgments were delivered by the Judges who answered the reference in negative. Petheram, C. J., and Brodhurst, J., expressed that the findings of fact are open to the objections referred to in *Nivath Singh v. Bhikki Singh* ((1885) ILR 7 All 649) (FB) that is, the findings of fact can be challenged only on such grounds on which they are open to attack, in second appeal, for example, when they are based on no evidence or are perverse or they are arrived at as a result of misreading of evidence. Petheram, C. J., in his judgment recorded the reasoning that 'the provisions of Section 566 are, 'as far as may be', incorporated in the chapter relating to second appeals; but inasmuch as the findings on the remanded issues and the evidence upon them are, when returned, part of the record in second appeal, the findings are, subject to the same incident as the other findings of fact in the case, and can only be disputed on the grounds prescribed by the judgment of the Court in the recent Full Bench decision in *Nivath Singh's* case. Straight, J., stated that it is true by Section 587 of the Code, the provisions of Chapter XLI, regulating first appeals, are declared to be . applicable, 'as far as may be,' to second appeals, but it is obvious, this does not mean that they are. to be adopted indiscriminately or in their entirety. It was observed that the lower appellate Court entertains and decides the issues of fact virtually as a Court of first instance, and for the first time, yet the High Court cannot disturb those findings in second appeal unless they are open to the objections set forth in *Nivath Singh's* case (*supra*). Straight, J., further observed as under:--

'But suppose it appears to this Court that the lower appellate Court has omitted to frame or try an essential question of fact, of which there is, or is not, evidence on the record, then adopting the provisions of Section 566, as far as they can conveniently be applied, it has long been the practice to remand the issue for trial, that is to say, to direct the lower appellate Court to do what it ought to have done under Sections 565, 566 or 568, as the circumstances required, and then to return the results of its findings to this Court. If this course has been adopted, I fail to see how the position is in any way altered from what it would have been had the lower

appellate Court properly fulfilled its functions under Sections 565 or 566 when originally disposing of the appeal; or why its findings of fact in obedience to the remand are to be treated on a different footing to what they would have been had they come up with the record when the second appeal was first preferred. I may add, without going at greater length into the matter, that I concur in the views expressed by Mahmood, J., in *Ramnarain v. Bhawanideen* (1882 All WN 104) and *Sheoambar Singh v. Lallu, Singh* (1882 All WN 158) and I cannot, hold that any sanction is to be implied from Section 587 of the Code to this Court's deciding questions of fact in any shape or at any stage of a second appeal.'

15. Brodhurst, J., extracted the quotation from the judgment in *Mahomed Kamil v. Abdool Luteef* ((1875) 23 Suth WR 51) and expressed that the findings of fact recorded by a lower appellate Court in remand made to it in second appeal, under Section 566 of the Code, have not the effect of converting a second appeal into a first appeal, and this Court is not competent to consider and deal with the evidence recorded on remand in second appeal in the same way that it would have done, had that evidence been taken on a remand in first appeal.

16. In his dissenting judgment Tyrrel, J., expressed that 'where the 'substantial defect in the procedure' of the courts below (Section 584 (c) of the then C.P.C.) has been their neglect to decide a question of fact essential to the decision of the case upon the merits, he did not see why this Court should not follow the rule of Section 566, which forbids the reference of an omitted issue for trial when the evidence on record is sufficient to enable the Court to determine such issue or question for itself'. He further expressed that the evidence returned under Section 566 (is) as fully and as much open to examination as the evidence if taken in second appeal under Section 568 and the provision of Section 568 can be adopted under Chapter XLII.

17. This majority judgment was followed in *Nehal Singh v. Sewaram* (AIR 1917 All 112: 40 Ind Cas 128) and it was observed that findings on issues referred to a lower appellate court in second appeal are just as much findings of fact as the findings in the original suit and cannot be disturbed by the High Court in second appeal.

18. In *Ram Mehr v. Pali Ram* (AIR 1924 Lah 455) the Division Bench of the Lahore High Court also observed, following the Full Bench decision of the Allahabad High Court in *Bal Kishen v. Jasoda Kuar* (1885) ILR 7 All 765 (supra) that the findings under Order 41, Rule 25 are not open to attack on the evidence in second appeal, as they are in first appeal.

19. In *Tejpal Jamna Das v. Earnest V. David* (AIR 1928 PC 219) the observations are to the effect that a finding of fact by the lower appellate court is binding on the Privy Council as on the High Court. In that case the Allahabad High Court remitted the case to the District Judge in order that he might deal with and find the facts upon six questions. Upon the District Judge's report the High Court found that there was no question of law upon which they could review his decision and that his findings of fact dispose of the matter, so the appellant's claim must fail, but the High Court gave leave to appeal, This is how the matter came up before the Privy Council. It may be stated that the Privy Council proceeded on the basis as if the legal position is settled and the findings given by the District Judge being findings of fact were taken to be binding on the High Court.

20. The question has been examined thoroughly by Vivian Bose, J., as he then was, in *Balaji Sadashiv v. Vishnu Ganaji* (AIR 1936 Nag 140). In that case an issue was remitted in revision and the evidence was taken by the appellate court and not the original court which passed the decree. The question arose as to whether the evidence on which the finding is based, can be re-weighed in revision. On the facts of that case Bose, J., observed that the principle underlying Rules 25 and 26 is more nearly applicable as seisin of the case was retained. Bose, J., further observed that first appeals present no difficulty under these Rules, for, the powers of the first appellate Court to deal with the evidence are undoubted, but when the remand is made by the Court of second appeal, the question naturally arises whether it can reopen finding of fact given on remand of the issue. Reference was made to the Full Bench decision of the Allahabad High Court *Bal Kishen V. Jasoda Kuar* (1385) ILR 7 All 765 (supra), where the three Judges considered that such findings should be treated as if they had been properly given in the first instance, and had come up to the High Court in the ordinary way along with the rest of the appeal. In that case, however, Tyrrell, J., dissented and thought

the High Court should deal with the matter in much the same way as if it had taken the evidence itself. Reference was also made to a decision of Madras High Court in *Hinde v. Brayan* ((1884) ILR 7 Mad 52) in which it was stated that the learned Judges took an intermediate view and wherein they said when the evidence was taken by the lower appellate Court, the High Court can consider it, because a suitor is entitled to the opinion of a second Court on the facts. But in the case before them two Courts had already considered the matter, so they held, they were bound by the ordinary rule which excludes questions of fact from a second appeal. Bose, J., expressed that he is unable to agree with the ratio decidendi, although he would not dissent from the decision itself, especially after the introduction of Section 103 into the Civil Procedure Code. It may be stated that the observations in the Madras case are only obiter and they cannot be considered to be the ratio decidendi of the case. The facts of the case did not warrant the said observations.

21. Bose, J., also referred to the Lahore case (AIR 1924 Lah 455) (*supra*) and observed that the learned Judges did not discuss the question at all and merely referred to the Allahabad case cited above.

22. Bose, J., after noting the marked difference between the provisions of Rules 25 and 26 on the one hand and Rules 27 and 28 on the other, of Order 41, proceeded to give the following reasoning:--

'In the case of remand, the additional evidence taken and the finding of lower Court 'form a part of the record in the suit' but not so the additional evidence recorded under Rule 28. What is the meaning of differentiation? Surely this. In the latter case the lower Court acts only in a ministerial capacity. It decides nothing and discharges no judicial function. The evidence does not form part of the record till the appellate Court scrutinises it and either admits it to the record or rejects it. This is also clear from the fact that the parties are required to present a memorandum of objections from any findings they want to challenge in the former case, and that there is no similar provision in the latter. Of course there are no findings to challenge in the latter case, but that merely indicates that the lower Court is not expected to discharge any judicial function and to make a decision,

not even as to what is to form evidence in the case, and what is not. That being so, I can only conclude that the decision of an issue under Rules 25 and 26 is meant to be incorporated into the record just as if it had been given before the appeal was filed, and the memorandum of objections added to the grounds of appeal or cross-objection as the case may be.'

23. From the above reasoning it would be evident that the memorandum of objections has to be confined to the grounds under Section 100, C.P.C. Bose, J., further observed that under Rule 2-6 (2) the appellate court is required to determine the appeal after the expiry of the period of presentation of the memorandum of objections and he could not see how a Court can be a Court of appeal and an original Court at one and the same time, nor yet a Court of second or first appeal. After so observing, he opined

'When a case is remanded under Order 41, Rule 25, it is not open to a Court of second appeal to examine the facts, except in so far as it is empowered to do so under Section 103, and it is immaterial whether the first Court takes the evidence or the lower appellate Court. The underlying principle seems to be that the matter must be treated, as far as it can be in exactly the same way as if the lower Court had discharged its function properly in the first instance. If that is so, then I am bound to apply the same principles when a remand is made in similar circumstances under the inherent powers of the Court. Consequently I am not entitled to scrutinise the evidence afresh in this case.'

24. A Division Bench of the Nagpur High Court in *Brijmohan Mathulal v. Chandrabhagabai* (AIR 1939 Nag 173), had an occasion to consider the decision of Bose, J., and the Division Bench dissented with the view taken by Bose, J., with regard to the remand of the issue to the first Court and stated that the remark about the first Court is an obiter dictum and the possible difference between the two cases had not been examined. In that case the issue was remanded to the trial court in second appeal and the trial court after taking evidence gave its finding and objections to the finding were put in by the appellant-defendant in the second appeal. The plaintiff-respondent contended that the finding is one of fact which cannot be questioned in second appeal, whereas on behalf of the appellant it was

maintained that such a finding after remand is open to scrutiny by the appellate Court on merits. While considering this question it was observed that the cases reported in (1885) ILR 7 AH 765 (FB), (1898) ILR 25 Cal 98, (1884) ILR 7 Mad 52 and ILR 5 Lah 268: (AIR 1924 Lah 455), all refer to findings coming back on remitted issue from the lower appellate Court. It was further observed as under:--

'If the lower Court had proceeded under Order 41, Rule 28, Civil P. C., it would undoubtedly have had to assess the evidence on its merits, and we think that the same thing must be done when there is merely a finding of the first Court. If it were otherwise, the result might well be that the case would be virtually decided on this finding of the first Court untouched by the scrutiny of the lower Appellate Court. The matter is different when the lower Appellate Court comes to the finding because owing to its higher status the finding of such a Court has more weight. The same result is arrived at on a broad application of Section 103, Civil P. C. This issue had not been determined by the lower Appellate Court, and when the case came before this Court the evidence on record was found to be insufficient. That evidence is now sufficient. There is now a finding on it, it is true, but the point still 'has not been determined by the lower Ap'pellate Court'. This section therefore allows the High Court to determine the issue of fact itself.'

25. The above decision thus makes a distinction when issues are remitted to (1) original court and (2) first appellate court in second appeal. In case the issue is remitted to the first Court, that is, the original court, then in that case even the findings of fact can be gone into in second appeal, as there is no finding of the first appellate court, but in case the issue is remitted to the first appellate court the position is different and the reasoning given is that the first appellate court being of higher status the finding of such a court has more weight. The same result is arrived at on a broad application of Section 103, C.P.C.

26. In Subodh Gopal Bose v. Brajendra Kishore (AIR 1954 Cal 90) the view taken by the Division Bench is that the finding of the lower appellate court on the remitted issue is binding in second appeal on facts. It was observed that the fact that an order under Order 41, Rule 25 of the Code was made, does not turn the second appeal into a First Appeal. The appeal remains an appeal against a decree

passed in appeal. It has not become an appeal against a decree of the original Court, It seems to be absurd to say that though it remains a second appeal, it should be treated for certain purposes as a First Appeal. While dealing with the nature of objections to be filed under Order 41, Rule 26, it was observed that only such objections can be filed which are admissible in law. Their Lordships of the Calcutta High Court further observed as under {at p. 94):

'The objections to a finding of fact that are admissible in second appeal must be within the limits prescribed by Section 100 of the Code and there is no reason to ignore the words of Section 100 of the Code while interpreting the words 'memorandum of objections' in Order 41, Rule 26 of the Code.

'The words 'so far as may be' in Order 42, Rule 1 make it clear beyond any shadow of doubt that in applying the different rules of Order 41, to second appeals the Court has to, take due notice of the limitations prescribed by Section 100 of the Code.

'Hence where findings are remitted to the High Court by the first appellate Court under Order 41, Rule 25 the appeal in the High Court continues to be a second appeal and in the absence of special provisions in law, the findings of facts, when they are before the High Court, are immune from attack, except on the ground of error of law or procedure within the meaning of Section 100 of the Code.

'There is nothing in principle or in authority to support the, proposition that the finding of facts received under Order 41, Rule 25 unlike other findings of facts by the first appellate Court, can be challenged in second appeal on the ground that they are not supported by evidence.'

Reliance was placed on the Full Bench case of the Allahabad High Court and the decisions of the Lahore and Nagpur High Courts stated supra and reference was also made to Brijmohan Mathulal Marwadi's case of the Nagpur High Court for which it was stated that in that case the finding of fact was received by the High Court from the trial Court and not from the first appellate Court.

27. The view propounded in this Calcutta case was followed by' the Division Bench of the Mysore High Court in Ishwara Bhatta v. Ishwara Bhatta (AIR 1962 Mys 61).

28. In another Nagpur case Kesheo v. Tukaram (AIR 1951 Nag 8) the scope of Order 41, Rule 22, C.P.C., in second appeal arose for consideration. In this connection it was observed that under Order 42, Rule 1, C.P.C., the rules of Order 41 shall apply, so far as may be, to appeals from appellate decrees. It is, therefore, not each and every rule and every part of each rule in Order 41 that would apply to second appeals. It will always have to be seen if a part or the whole of a particular rule of Order 41 can or cannot apply to second appeals. After referring to Order 41, Rule 22, it was observed that it no doubt allows the respondent to support the decree on any of the grounds decided against him in the Court below but it is a rule governing first appeals wherein questions of fact as well as law can be agitated. This rule applies 'so far as may be' to appeals from appellate decrees. It clearly means that if any other provision prohibits the respondent from agitating any of the grounds, he would not be able to support the decree on those grounds. After so observing it was examined whether Sections 100 and 101, lay down any prohibition, and after considering that, it was held that a Court of second appeal cannot interfere with a finding of fact either at the instance of the appellant or at the instance of the respondent if there is evidence to support it.

29. On the parity of reasoning Rule 26 can only be interpreted to have limitations, as provided under Sections 100 and 101, C.P.C., so far as the nature and scope of objections are concerned.

30. The contrary view has been expressed by the Rajasthan, Assam and Madras High Courts. The Madras case Hinde v. Brayan ((1884) ILR 7 Mad 52) was considered in the judgment of Vivian Bose, J., referred to above. In this case the issue was remitted to the District Judge, though there was a finding already arrived at by the first Court and the question was not decided by the District Judge and the District Judge concurred with the finding of the first Court. So there were the findings of the two courts below, as such there was no need to express any opinion as to whether the finding given by the first Court on the remitted issue can

be examined in second appeal. The following observations, thus, appear to be only obiter dictum:--

'It may be that if a new issue has been framed, or if evidence were taken, upon which one Court only had formed an opinion, the High Court would be competent to examine the facts, because the Legislature recognizes the right of the suitor to the opinion of a second Court upon the facts.'

31. In *Kishan Lal v. Sohanlal* (AIR 1955 Raj 45) two suits were instituted and were tried together and the suit of Ambalal and others was decreed and that of Mohanlal was dismissed by the trial Court. There were then appeals by Mohanlal in both the suits. Both the appeals were allowed by the District Judge. Thereupon there were two second appeals in the Chief Court by Ambalal's son Sohanlal and others. These appeals came up for hearing before the Chief Court and the Chief Court remitted an issue to the lower Appellate Court. The District Judge after recording evidence gave his findings on the remitted issue and thereafter the two appeals were heard by the Chief Court and were allowed and the decrees of the District Judge were set aside and that of the trial court were restored. Then there were two appeals to the Ijlas-Khas, which came up for disposal before the High Court. The issue that was remitted by the Chief Court was,--

"Whether the villages Kanawas and Malpura were granted to one person or to two different persons, and who was the original grantee in respect of each of these two villages?"

Wanchoo, C. J., as he then was, speaking for the Court observed that 'the Chief Court were, in our opinion, entitled to go into the evidence in view of the provisions of Order 41, Rule 26, and form their own conclusions on it'. It would appear that the view was expressed having regard to the provisions of Order 41, Rule 26 and the provisions of Order 42, Rule 1 and Sections 100 and 101, C.P.C. were not taken into consideration.

32. In *Md. Hanif Mia v. Haladhar Lahkar* (AIR 1959 Assam 236) the learned single Judge proceeded on the assumption as if the position of law is well settled. While dealing with the contention of the Advocate-General appearing for the appellant,

that the findings are conclusive and that the plaintiff's suit should be decreed on the basis thereof, it was observed, 'of course these findings cannot preclude the High Court from going into the evidence, since the remand was under Order 41, Rule 25 of the Civil Procedure Code and this Court could examine the evidence, if it was thought necessary.' It may be stated that in this case two issues were remitted by the High Court to the Munsif under Order 41, Rule 25 and the Munsif, after recording evidence, gave his findings thereon. The observations of the learned Judge appear to be general and the above observations have not been made after considering the provisions of Order 42, Rule 1 and Sections 100 and 101, C.P.C., and the observations, in our opinion, need to be circumscribed to the facts of the case. It was not a case where the issues were remitted to the first appellate court. Thus, this case falls in line with the D. B. decision of the Nagpur High Court in *Brijmohan Nathulal v. Chandrabhagabai* (AIR 1939 Nag 173).

33. Having considered the case law which was brought to our notice we find ourselves in respectful agreement with the view that when an issue is remitted under Order 41, Rule 25, C.P.C., in second appeal to the first appellate court, the finding of fact sent back by the first appellate court is not open to attack, except on the grounds stated in Section 100, C.P.C. This view appears to be in consonance and harmony with the provisions contained in Order 42, Rule 1 and Sections 100, 101 and 103, C.P.C. Even in the amended Section 103, C.P.C., we find as to when the High Court can determine the issue of facts. The High Court is empowered to determine any issue necessary for the disposal of the appeal, if the evidence on the record is sufficient, when the same has not been determined by the lower appellate court or by the court of first instance and the lower appellate court, or which have been wrongly determined by such court or courts by reason of a decision on such question of law, as is referred to in Section 100. The power to determine the issues on facts, is limited to the situations mentioned in Section 103, In case the issue of fact has been determined by the lower appellate court, whether on being remitted in second appeal or otherwise, such a finding of fact given by the lower appellate court cannot be determined by the High Court and the reason appeals to be that as a senior and experienced Judge presides over the first appellate court, it will be taken that the findings of facts arrived at by him, are correct. If this would not have been the intention, an exception would have been

provided that even in second appeal when issue of fact is remitted to the first appellate court, the findings on that issue can be assailed in second appeal. Rather we find a contrary intention expressed in the language of Order 42, Rule 1, C.P.C., coupled with the legal bar provided in Sections 100 and 101, C.P.C, and if these provisions are further read with the provisions of Section ,103, the intention in our opinion becomes abundantly clear. The only way out appears to be that in order to obviate such an eventuality or result, the issues of fact should be remitted to the first court in second appeal.

34. In view of what we have discussed above, our answer to the question referred to us, is in the affirmative. Let the answer be returned to the Bench concerned. Answered in the affirmative.

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