

Nanchi and ors. Vs. Lala and ors.

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Court : Rajasthan

Decided On : Jul-15-2005

Reported in : RLW2005(4)Raj2547; 2005(4)WLC311

Judge : Narendra Kumar Jain, J.

Acts : Code of Civil Procedure (CPC) - Order 43, Rule 1(U) - Order 41, Rules 23, 23A and 24

Appeal No. : S.B. Civil Misc. Appeal No. 211 of 2000

Appellant : Nanchi and ors.

Respondent : Lala and ors.

Advocate for Def. : Anoop Dhand, Adv.

Advocate for Pet/Ap. : Ajay Gupta, Adv.

Disposition : Appeal allowed

Judgement :

Narendra Kumar Jain, J.

1. Plaintiff appellants have filed this Misc. Appeal under order XLIII rule 1 (U) C.P.C. against the judgment and judgment dated 14th October, 1999 passed by Additional District Judge, Neemkathana, District Sikar in Civil Appeal No. 63/87

whereby he allowed the appeal of the defendants and remanded the case to the lower court for deciding the suit afresh in accordance with the provisions of the law.

2. Plaintiff-appellants filed a suit for permanent injunction on 20th April, 1976, which was decreed by the Trial Court on 28th September, 1987 in their favour. Being aggrieved with the same, the defendants filed an appeal which was allowed by Additional District Judge, Neemkathana. The lower appellate court after setting aside the judgment and decree of the Trial Court remanded the matter to the trial for fresh decision. Against this judgment of the lower appellate court, the plaintiff appellants have filed the present appeal.

3. Heard learned Counsel for the parties.

4. Learned Counsel for the appellants submits that the learned lower appellate court has committed illegality in remanding the matter to the Trial Court for afresh decision in accordance with the provisions of the law whereas in the facts and circumstances of the case, the matter should not have been remanded back and it should have been heard and decided by the lower appellate court itself. It is then submitted that the lower appellate court has not considered the provisions of Order XLI rules 23, 23A and 24 C.P.C. As per learned Counsel for the appellants, matter can be remanded by the lower appellate court only within four corners of Rules 23, 23A and 24 of Order XLI C.P.C. The lower appellate court has observed that Trial Court has not recorded a specific finding in respect of issue relating to possession of the land in dispute. Learned Counsel submits that both the Courts below have considered oral as well as documentary evidence and only thereafter recorded the finding about possession of plaintiff appellants and then the decree was passed but the lower appellate court without appreciating the finding of the Trial Court set aside the judgment of the Trial Court and that it was not a fit case to remand the same to the Trial Court for afresh decision. Counsel added that if the lower appellate court was of the view that finding of the Trial Court is not proper and the Trial Court has not properly appreciated the oral as well as the documentary evidence then on this ground the lower appellate court should not have remanded the matter. It is further contended that the suit was filed in the year 1976, which

remained pending before the Trial Court for about 11 years and thereafter the appeal remained pending before the lower appellate court for about 12 years and thus, after lapse of period of about 23 years, there was no occasion or justification to remand the matter to the Trial Court. To support the arguments, learned Counsel for the appellants has placed reliance on the decision of the Apex Court in the case of Ashwinkumar K. Patel v. Upendra J. Patel and Ors. : AIR 1999 SC1125 .

5. Learned Counsel for the respondents submits that in the present case 11 witnesses were examined on behalf of defendants to prove possession whereas the lower court did not consider statement of a single witness and, in these circumstances, the lower appellate court was of the view that it was the duty of the Trial Court to discuss and appreciate the evidence in respect of possession and when the decree has been passed by the Trial Court without discussing and appreciating the statements of defendants' witnesses, the lower appellate court had two options. Either it should have decided the appeal itself or should have remanded the matter to the Trial Court for fresh decision taking into consideration the evidence produced by the parties. As per learned Counsel for respondents, the lower appellate court in the facts and circumstances of the case, has remanded the case to the Trial Court for afresh decision, it has committed no illegality. In support of his contentions, learned Counsel for the respondents has placed reliance on the decision of Patna High Court in the case of Brijnandan Roy and Ors. v. Jadunandan Singh and Ors. : AIR1960 Pat41 and the decision of Calcutta High Court in the case of Sailendra Nath Komar and Ors. v. Chillar and Anr. : AIR1955 Cal251 .

6. I have considered the submissions of the learned Counsel for the parties.

7. For convenience provisions of Order XLI rules 23, 23A and 24 C.P.C. Are reproduced as under:

'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, which 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 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.

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.'

8. In Ashwinkumar K. Patel (supra), the Apex Court considering the provisions of Order XLI rule 23 has held as under:

'In our view, the High Court should not ordinarily remand a case under Order 41 Rule 23 CPC to the lower court merely because it considered that the reasoning of the lower court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or the other. It could have considered the various aspects of the case mentioned in the order of the Trial Court and reversed or modified. It could have easily considered the documents and affidavits and decided about the prima facie case on the material available. In the matters involving agreements of 1980 (and 1996) on the one hand and an agreement of 1991 on the other, as in this case, such remand orders would lead to further delay and uncertainty. We are, therefore, of the view that the remand by the High Court was not necessary.'

9. A bare reading of the finding of the Trial Court on issue No. 1 regarding possession of the plaintiff on the disputed land would reveal that Trial Court has relied upon the Ex. 1 Patta produced by the plaintiff, statements of PW. 5 Manohar Lal, PW. 7 Radha Kishan and PW. 8 Ram Swaroop and also Ex. 6 and 7. reports of the Commissioner. The Trial Court has also discussed the case of the defendants that no documentary evidence has been produced by them in rebuttal of Ex.1 produced by the plaintiffs. Although the Trial Court has not discussed each and every witness of the defendant but has taken cognizance of their statements. However, without going into all these aspects of the matter as it may prejudice the case of the either party and without considering any thing more on finding issue No. 1, I find that Rule 24 of Order XLI C.P.C. clearly speaks that where the evidence on the record is sufficient to enable the Trial Court to pronounce judgment, the appellate court may finally determine the suit. The only argument of the learned Counsel for the appellants is that if the evidence of the defendant was not properly discussed by the Trial Court, then only on that ground the matter could not have been remanded. The order of the lower appellate court does not fall within the four corners of Rules 23, 23A and 24 of Order XLI C.P.C. rather the same is contrary to the provisions of Rule 24 of Order XLI C.P.C. Both the parties do not dispute that sufficient evidence was available on record in relation to issue No. 1 and whether it was considered properly or not was the only question to be decided by the lower appellate court. Therefore, it was the duty of the lower appellate court to consider the entire evidence available on record and then to decide the appeal on merits instead of remanding the case to the Trial Court. Therefore, I am of the opinion that judgment of the lower appellate court is contrary to the provisions of law relating to remand of cases by appellate court.

10. In the result, the appeal is allowed. The judgment of the lower appellate court dated 14th October, 1999 is set aside. The Additional District Judge, Neemkathana, District Sikar is directed to hear and decide the regular first appeal No. 63/87 on merits. Parties are directed to appear before the Additional District Judge, Neemkathana on 8th August, 2005. Parties have already been informed about the date through their advocates who are present in the Court. Since the case is old one, therefore, learned Addl. District Judge, Neemkathana is directed to try to decide the appeal on priority basis within three months from the date of

furnishing a copy of this order. In the facts of the case, the parties are directed to bear their own cost.

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