

**Janwat Raj Vs. Dev Kumar**

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**Court :** Rajasthan

**Decided On :** Feb-02-1999

**Reported in :** 1999(1)WLN167

**Judge :** A.K. Singh, J.

**Appeal No. :** S.B. Civil Misc. Appeal No. 194 of 1996

**Appellant :** Janwat Raj

**Respondent :** Dev Kumar

**Judgement :**

**A.K. Singh, J.**

1. Heard the learned Counsels for the parties.

2. This appeal under Order 43 Rule 1 of the Civil Procedure Code is directed against the judgment and decree dated 10th April, 96 passed by the learned Additional District Judge, Sojat (camp Jaitaran) in appeal against decree No. 20/95 Dev Kumar v. Janwat Raj. By the impugned judgment and decree, the learned Additional District Judge, Sojat remanded the case to the trial court with the direction that the defendant be given opportunity to lead his evidence on issues Nos. 1, 2, 3, 5, 6, 7, 8, 10, 11 and 12.

3. It appears that the appellants Janwat Raj and Manak Raj filed the civil suit No. 6/92 Janwat Raj v. Dev Kumar in the Court of the learned Civil Judge (Sr. Division), Jaitaran for eviction and arrears of rent. The suit was contested by the respondent-defendant on several grounds. As many as 13 issues were framed by the learned Civil Judge (Sr. Division). During the trial provisional rent was determined by the trial court under Sub-section (3) of Section 13. The provisional rent was however not deposited within the prescribed period. Consequently, the defence of the defendant-respondent against eviction was struck off. After recording the statement of the defendant, it was urged before the learned trial Judge that since defence of the defendant had been struck off, the defendant could not be permitted to produce any evidence in respect of any issue. The learned trial Judge on 24th May, 95 made an order to the effect that since the defence of the defendant had been struck off, he was not entitled to defend directly or indirectly. In view of this order, the defendant examined himself and did not produce any evidence. The suit was decreed by the learned trial Judge on 3rd June, 95.

4. Civil Appeal Decree No. 20/95 was filed against the judgment and decree dated 3rd June, 95 passed by the learned Civil Judge (Sr. Division), Jaitaran. The appeal was disposed of by the learned Additional District Judge, Sojat (Camp at Jaitaran) by judgment dated 10th April, 96. It appears that it was contended before the learned Additional District Judge that the effect of striking out of the defence of the tenant was not to prevent the tenant from producing evidence on issues, which did not relate to his eviction. The learned Additional District Judge observed that the tenant had disputed the rate of rent and the right of the plaintiff to file the suit for eviction was also challenged and the defendant had been denied an opportunity to produce the evidence. The learned Additional District Judge, therefore, set aside the judgment and decree passed by the trial court and remanded the case to the court of learned Civil Judge (Sr. Division), Jaitaran. It is against the judgment and decree passed by the learned Additional District Judge, Jaitaran, this appeal has been filed.

5. The learned Counsel for the appellant has contended that in the instant case, the order of remand of the case to the trial court was improper and even if the

learned Additional District Judge considered it necessary that the defendant should be permitted to adduce additional evidence, the proper course for him was to proceed under Rule 25 of Order 41 of the Civil Procedure Code. It is further contended by him that some of the issues framed by the learned trial judge were not necessary as the suit was merely for eviction and arrears of rent and the defendant-tenant was estopped Under Section 116 of the Evidence Act from challenging the title of the landlord. He has therefore, prayed that the judgment and decree passed by the learned Additional District Judge be set aside and suitable orders be passed.

6. The learned Counsel for the respondent has supported the impugned judgment and decree passed by the learned Additional District Judge. Reliance has been placed on the decision given by a Division Bench of this Court in Ramesh Chand Pandey and Anr. v. Babulal and Ors. 1995 DNJ (RAJ.) 549. The learned Counsel for the respondent has submitted that in spite of the striking out the defence of the respondent-tenant for non-payment of provisional rent, the respondent could not be prevented from adducing evidence on issues, which were not related to his eviction and the order passed by the trial judge denying the respondent tenant an opportunity to produce the evidence on issues other than those which are related to his eviction was not justified, and therefore, the learned Additional District, Judge was within his rights to remand the case to the trial Judge.

7. So far as the effect of striking of the defence under Sub-section (5) of Section 13 of the Rajasthan Premises (Control of Rent and Eviction) Act is concerned, in Ramesh Chand's case (supra), Hon'ble the Chief Justice Shri A.P. Ravani speaking for the Division Bench observed-

The order passed under Section 13(5) of the Rajasthan Act striking out the defence of a tenant against eviction, would apply only to the grounds of eviction specified in Section 13(1)(a) of the Rajasthan Act.

8. In view of the Division Bench decision of this Court the order striking out the defence of the respondent-tenant could not authorise the learned trial Judge to prevent the respondent-tenant from producing evidence on issues which were not related to grounds of eviction specified in Section 13(1) of the Rajasthan Act.

Since the defendant was denied the opportunity to produce his evidence on issues other than those which are concerned with the grounds of eviction mentioned in Section 13(1)(a), it must be said that the trial conducted by the learned Civil Judge (Sr. Division) was not in accordance with law. Where the trial by the subordinate court is not in accordance with law and the procedure adopted by the trial judge suffers from a serious legal infirmity, the ordinary course to be adopted would be to direct a retrial so that a proper trial in accordance with the law may be held. Of course, the exceptions to this general rule may be found; for example, where the illegality or irregularity committed by the trial court is not of such a nature and magnitude as to vitiate the entire proceedings. If the appellate Court considers the illegality or irregularity committed by the trial court not of such a nature and magnitude as to vitiate the trial, it may in its discretion adopt any course other than one provided under Rule 23A or Order 41 C.P.C. and may have recourse to Rule 25 of Order 41 C.P.C.

9. The learned Counsel for the appellant has laid much stress on the delay which is likely to occur by remand of the case to the trial court and he has therefore, prayed that instead of permitting the remand order, the proper course would be to direct the first appellate Court to exercise the powers conferred by Rule 25 of Order 41 C.P.C.

10. This argument should be considered in light of the fact that there are certain irregularities which vitiate the trial and where a trial is vitiated on account of a serious defect, the appellate Court should not ignore the fact that trial is vitiated on account of illegality. Hence a distinction has to be drawn between the cases in which an order of remand should be passed by the appellate Court and those in which an order of remand may be held not necessary. There may be cases in which the order of remand is the only appropriate order necessary for securing the ends of justice in view of the vitiating of the trial on account of legal infirmity. The cases in which an order of remand may not be necessary would be those in which the proceedings in the trial court are not vitiated by any legal defect. It is in the latter category of cases that the first appellate court may decline to remand the case and may give suitable directions under Rule 25 of Order 41 C.P.C.

11. So far as the remand of the case by the appellate court is concerned; Rules 23 and 23 A of Order 41 C.P.C. read:

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 a 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 readmit 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.

23. 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.

12. Rule 23 A of Order 41 C.P.C. was inserted by the Civil Procedure Code (Amendment) Act, 1976. A bare reading of Rules 23 and 23 A of Order 41 C.P.C. shows that the legislature did not consider the provisions of Rule 23 of Order 41 C.P.C. sufficient. Hence, the legislature deemed it necessary to empower the Appellate Court to remand the case even in those cases, which were not squarely covered by Rule 23 of Order 41 C.P.C. and inserted Rule 23 A in order 41 of the Civil Procedure Code. The only condition necessary for invoking the powers under Rule 23 A of Order 41 C.P.C. appears to be the opinion of the Appellate Court that a re-trial is necessary. Of course, the formation of the opinion by the Appellate Court about the necessity of re-trial would be a judicial act and will have to be performed in a judicial manner. But, if the Appellate Court comes to the conclusion that a re-trial is necessary then even in those cases, which are not directly within the scope of Rule 23 of Order 41 C.P.C, the Appellate Court would have the statutory power to order remand. A judicial necessity for making an order of remand is thus the justification for making an order of remand by the Appellate Court. Rule 25 of Order 41 C.P.C. and Rule 23 and 23 A of Order 41 C.P.C. need

harmonious construction. The rule of harmonious construction does not mean that two or more provisions of the Statute should be interpreted in such a way as to cover the same field and empower the doing of the same thing in identical manner. The rule of harmonious construction presumes that two or more provisions of the Statute have different objects or they apply to different matters or they deal with different subjects and there is no inconsistency between them and there is no superimposition caused by over-lapping by one over the other. The rule of harmonious construction, therefore, aims at avoiding superimposition by one provision over the other so that the apparent inconsistency may be avoided and the two provisions may become applicable without falling in conflict with each other. Rule 25 of Order 41 C.P.C. harmoniously construed with the provisions contained in Rule 23, and 23A C.P.C. would suggest that in cases where the Appellate Court considers a remand to be necessary for securing the ends of justice, it is Rule 23A of Order 41 C.P.C, which should be applied in place of having recourse to the provisions contained in Rule 25 of Order 41 C.P.C. On other hand, where the Appellate Court comes to the conclusion that a remand is not necessary for securing the ends of justice, but it is necessary to direct the trial Court to take action as contemplated by Rule 25, the Appellate Court may have recourse to Rule 25 of Order 41 C.P.C. If Rule 23 and 23A of Order 41 C.P.C. are harmoniously construed with the provisions contained in Rule 25 of Order 41 C.P.C. no conflict would arise in their application.

13. The learned Counsel for the appellant has placed reliance on some decision of this Court.

14. The first decision on which reliance has been placed by the learned Counsel for the appellant is *Karam Chand v. Lallu Ram and Anr.* RLR 1991 (2) 591. In that case the District Judge remanded the case to the trial Court under Rule 23 A or Order 41 C.P.C. on the ground that the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 had been amended and according to Section 14(2) of the said Act, as amended, a decree for ejection against a tenant on ground of reasonable and bonafide requirement of the premises could not be passed unless it was satisfied that hardship to the landlord would be greater than to the tenant if a decree for ejection was passed. There was no other reason for remanding the

suit. The trial conducted by the Civil Court before the amendment in the Rajasthan Premises (Control of Rent and Eviction) Act was not vitiated on any ground whatsoever and it was in these circumstances that a learned Single Judge of this Court held that in place of remanding the case under Rule 23 A of Order 41 C.P.C. the District Judge should have acted under Order 41 Rule 25 C.P.C. The decision given in Karam Chand's case (supra) has no application to the present case, because in Karam Chand's case the trial by the Civil Court was not vitiated by any defect whatsoever and the necessity for framing an additional issue regarding comparative hardship arose after the amendment in the Statute. In the instant case, the trial by the learned Civil Judge (Sr. Division) suffers from a very serious infirmity that the defendant-tenant was denied the legal opportunity to produce the evidence on issues other than those, which are related to grounds for eviction mentioned in Section 13(1) of the Rajasthan Act.

15. The next case relied upon by the learned Counsel for the appellant is Bhikam Chand and Anr. v. Tara Chand and Anr. WLN 1977 630. In that case the suit for eviction was dismissed by the trial Judge. The plaintiffs feeling aggrieved by the judgment and decree passed by the trial Judge filed an appeal, which was decided by the learned Civil Judge, Ajmer. The judgment and decree of the learned trial Court were set aside and the case was remanded to the trial Court with the direction that an additional issue may be framed keeping in view the amendment in Section 14(2) of the Rajasthan Premises (Control of Rent and Eviction) Act. The facts of the case show that trial was not vitiated on account of any infirmity and all that was necessary was to frame an additional issue in view of the amendment brought in the Statute, and therefore, it was held that the proper course was to have recourse Rule 25 of Order 41 C.P.C. rather than remand the case after setting aside the judgment and decree. For the reasons mentioned above, this decision has also no application to the present case.

16. The next case relied by the learned Counsel for the appellant is Jai Narain v. Panna Lal WLN (UC) 1978, page 39. The facts of that case were that the plaintiff-respondent Panna Lal filed a suit in the Court of Civil Judge for eviction and arrears of rent regarding the suit shop described in the plaint inter alia on the ground reasonable and bonafide necessity as well as on the ground of subletting

and defaults in the payment of rent. The suit filed by the plaintiff was dismissed by the learned Civil Judge. Nagaur by his judgment dated 19.9.1973 so far as the prayer for ejectment was concerned. Aggrieved by the judgment and decree of the Civil Judge, the plaintiff preferred an appeal before the District Judge. During the pendency of appeal in the Court of learned District Judge, an amendment was made in Section 14 of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 and this amendment made it necessary for the court to frame additional issue regarding comparative hardship and to decide the same. Consequently, an application for amendment of the plaint for adding para No. 7A regarding comparative greater hardship to the plaintiff was made. The application for amendment was allowed in view of the amendment made in Section 14 of the Rajasthan Act and the plaint, the District Judge considered it necessary to remand the case with necessary direction. The trial conducted by the civil court was not vitiated by any such legal infirmity, as is present in this case. Therefore, this decision also does not help the learned Counsel for the appellant in supporting submission that the learned Additional District Judge ought to have adopted the course prescribed in Rule 25 of Order 41 C.P.C. in place of remanding the case to the trial court.

17. At the cost of repetition, it may be stated that when Rule 23 and 23 A of Order 41 C.P.C. are harmoniously construed with Rule 25 of Order 41 C.P.C. it would be proper to infer that where the proceedings of the trial court are vitiated on account of a legal infirmity and the illegality or irregularity committed by the trial is of such a nature as cannot be easily cured, the proper course would be to make an order of remand of the case under Order 23 A of Order 41 C.P.C. On the other hand, if the proceedings of the trial court are not vitiated by any legal infirmity or illegality or irregularity committed by the trial court is not of such a nature and magnitude as to vitiate the proceedings, the Appellate Court may in place of exercising the power under Rule 23 A of Order 41 C.P.C., invoke its jurisdiction under Rule 25 of Order 41 C.P.C.

18. For the reasons mentioned above, I am of the opinion that in this case, the learned Additional District Judge was justified in making the order of remand, because the learned Trial Judge committed a serious illegality in preventing the

respondent- defendant from producing evidence in respect of issues other than which dealt with the grounds of eviction Under Section 13(1)(a) of the Rajasthan Act. I, therefore, do not find any justification to interfere with the impugned order of remand passed by the learned Additional District Judge.

19. The learned Counsel for the appellant has further submitted that some of the issues were completely unnecessary and that the defendant-tenant was estopped Under Section 116 of the Evidence Act from challenging the title of the landlord. In view of this submission, it is directed that if any application for amendment of the issues is moved before the learned Trial Judge, the same shall be heard and disposed of in accordance with law and the issues, which are unnecessary may be deleted. Needless to say that the learned Trial Judge shall take every permissible step to expedite the disposal of this case. The parties are directed to appear before the learned trial Judge on 25.2.1999. A copy of this judgment along with the record of the case be transmitted to the lower court without any delay.

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