SAO 4/2010
BEFORE
HON'BLE MR. JUSTICE SUMAN SHYAM

JUDGMENT AND ORDER (Oral)

1. Heard Mr. S. Ali, learned counsel appearing for the appellants/plaintiffs. Also heard Mr. Z. Mukit, learned counsel appearing for the respondents.

2. This SAO has been filed against the judgment and order dated 04.11.2009 passed by the Court of Civil Judge No.1, Kamrup, Guwahati disposing of Title Appeal No.31/2009 as well as Title Appeal No.32/2009 by the common judgment and order dated 04.11.2009 thereby remanding the connected Title Suits to be decided afresh by the trial Court.

3. The factual background of the case is as follows. The appellant No.1/plaintiff No.1 had instituted Title Suit No.333/2006 before the Court of Munsiff No.1, Kamrup, inter alia, praying for a decree declaring her right, title and interest over the suit land; recovery of khas possession of Schedule-B land; for declaring that Sale Deed Nos.796/86 and 797/86 were void, illegal and not binding upon the appellant No.1/plaintiff No.1; for a decree of permanent injunction and for other consequential reliefs. The case of the appellant No.1/plaintiff No.1 as set out in the plaint is that the appellant No.3/plaintiff No.2, Babulal Sutradhar, was the original owner in possession in respect of a plot of land measuring 3 kathas covered by Dag No.24 of NK Patta No.12 which was described in the Schedule-A to the plaint. The said plot of land was purchased by the plaintiff No.2 from one Rathindra Barua in the year 1975 by means of a registered deed of sale pursuant whereto plaintiff No.2 was put in possession of the land wherein he had carried out earth filling work and thereafter constructed an Assam Type house. In the year 1980, the plaintiff No.2 had to leave for Gujarat in search of job and as such he had left the Schedule-A land under the care and custody of the defendant No.4, Rajesh Tiwari. Subsequently, the plaintiff No.1 had approached the plaintiff No.2 with a proposal to purchase the Schedule-A land but since the plaintiff No.2 was not willing to sell a part of Schedule-A land, hence, plaintiff No.1 along with one Gautam Sutradhar (appellant No.2 in the SAO) had purchased the entire Schedule-A land in equal halves. Thus, the plaintiff No.1 purchased 1 Katha 10 Lechas of land described in Schedule-B to the plaint and Gautam Sutradhar purchased the remaining part of the land measuring 1 katha 10 lechas. On 02.02.2004 when the plaintiff No.1 and her brother Gautam Sutradhar visited the suit land so as to take over possession of the same, the defendant No.4 asked the plaintiff No.1 to come after 2/3 days. Later on, when the plaintiff No.1 visited the suit land she was told by the defendant No.4 that the plaintiff No.2 had already sold the suit land to the defendants by registered deed of sale. On enquiry it was discovered that the defendants have forged Sale Deed Nos.796/86 and 797/86 pertaining to the Schedule-A land and on the basis of such forged sale deeds they claimed to have purchased the entire Schedule-A land from the plaintiff No.2.

4. Sri Gautam Sutradhar had instituted Title Suit No.336/2006 as the plaintiff No.1. From the perusal of the pleadings in the plaint it can be seen that th

e facts and circumstances of the plaintiffs' case in both Title Suit No.333/2006 as well as Title Suit No.336/2006 are identical and based on common grounds wherein similar reliefs have been prayed for against the same set of defendants. The only difference between the two suits is that while in Title Suit No.333/2006, Smti. Sumitra Roy is the plaintiff No.1, in Title Suit No.336/2006 Sri Gautam Sutradhar is the plaintiff No.1. The suit land in both the Title Suits have been described in Schedule-B to the plaint which is one half of the Schedule-A land purchased by the respective plaintiff No.1 from the plaintiff No.2 out of the Schedule-A land which originally belonged to the plaintiff No.2.

5. The defendant Nos.1 and 2 in both the aforementioned Title Suits contested the suits by filing their written statement contending, inter alia, that the defendants were not permissive occupiers but were bona fide purchasers of the suit land. It is their pleaded stand that the plaintiff No.2 had sold the entire Schedule-A land to the defendants vide two registered deed of sale which are under challenge in the Title Suit. It is their case that the aforementioned two registered deed of sale executed in the year 1986 are valid in the eye of law and hence not liable to be declared as void. The defendants have therefore, prayed for dismissal of the respective Title Suits filed by the plaintiffs.

5. The defendant Nos.3 and 4 had also filed their written statement and contested the suits.

6. Upon pleadings of the parties the learned trial Court framed the following issues in Title Suit No.336/2006 :-

1. Whether the suit is maintainable in present form?
2. Whether the suit is barred by limitation?
3. Whether the sale deeds No.796/86 and 797/86 are void and illegal?
4. Whether the plaintiff No.1 has right, title, interest over the suit land?
5. Whether the plaintiff No.1 has purchased the suit land and took delivery of possession?
6. Whether the plaintiffs are entitled to get the decree as prayed for?
7. To what relief the parties or any of them are entitled to?

7. As regards Title Suit No.333/2006 the following issues were framed based on the pleadings of the parties :-

1. Whether the suit is maintainable in its present form?
2. Whether there is a cause of action for the suit?
3. Whether the suit is barred by limitation?
4. Whether the sale deeds No.796/86 and 797/86 are void and illegal?
5. Whether the plaintiffs are entitled to get the decree as prayed for?

8. It appears that having regard to the similarity of the facts and circumstances involved in both the aforementioned Title Suits as well as the common nature of reliefs prayed by the parties in both the suits against the same set of defendants, the learned trial Court had tried both the suits analogously. Thereafter, by the common judgment and decree dated 24.02.2009 passed in Title Suit No.333/2006 as well as Title Suit No.336/2006 both the suits filed by the plaintiffs were decreed by the learned Munsiff No.1, Kamrup, Guwahti.

9. Being aggrieved by the aforesaid common judgment and decree dated 24.02.2006 passed by the learned Munsiff No.1, Kamrup, Guwahati in Title Suit No.333/2006 and Title Suit No.336/2006, the defendant Nos.1 to 4 preferred Title Appeal No.31/2009 arising out of Title Suit No.333/2006 before the Court of Civil Judge No.1, Kamrup, Guwahati on the grounds and reasons taken in the memo of appeal. Another appeal being Title Appeal No.32/2009 arising out of Title Suit No.336/2006 was also preferred by the aforesaid defendant Nos.1 to 4 before the Court of Civil Judge No.1, Kamrup on more or less identical grounds. After hearing the learned counsels for the parties the Title Appeal No.31/2009 as well as Title Appe

al No.32/2009 were disposed of by the common judgment and order dated 04.11.2009 passed by the Civil Judge No.1, Kamrup, Guwahati thereby remanding both the suits to be re-tried by the trial Court on the grounds and reasons mentioned in the impugned judgment and order.

10. Being highly aggrieved and dissatisfied with such common judgment and order dated 04.11.2009 passed by the learned Civil Judge No.1, Kamrup remanding the suits back to the trial Court for re-trial the respective plaintiffs as appellants have preferred this Second Appeal against the said Judgment and Order which was admitted by this Court to be heard on the following substantial question of law :-

Whether the learned lower appellate court committed error in remanding the case to the learned trial Court without recording any finding as to whether evidence on record was sufficient for the party to determine the case finally?

11. Mr. S. Ali, learned counsel for the appellants, submits that the learned First Appellate Court has failed to give any justification for interfering with the judgment and decree passed by the learned trial Court. Even if it is assumed for the sake argument that the observations made by the First Appellate Court as regards the issues involved in the proceedings is valid in the eye of law, even in that case the learned First Appellate Court has failed to furnish any justification for remanding the suits back for a re-trial by the trial Court. Mr. S. Ali, learned counsel for the appellants, submits that from a perusal of the judgment it appears that the learned First Appellate Court has passed the impugned judgment and order by taking note of the fact that there was mis-match of a few issues in both the Title Suits inasmuch as whereas as many as 7 issues had been framed in connection with Title Suit No.336/2006, on the other hand only 5 issues have been framed in Title Suit No.333/2006. It appears that the learned First Appellate Court was of the opinion that since the total number of issues framed in both the suits did not tally in their number count, as such the learned trial court could not have answered the disputes issues in both the suits merely by referring to the serial numbers of the issue.

12. Besides the aforesaid factor, the learned First Appellate Court, submits Mr. Ali, seems to have arrived at a conclusion that the sale deeds under challenge i.e. Exts-A and H ought to have been sent for an expert opinion of a Handwriting Expert and the same not having been done, the matter was required to be remanded back to the trial Court for re-trial.

13. Questioning the validity of such a view adopted by the learned First Appellate Court, Mr. Ali submits that the Court is required to give its verdict on all the issues on the basis of materials available on record. Neither of the parties to the suit have approached the Courts below with an application for referring the matter for the opinion of Handwriting Expert and as such there was no occasion for the learned First Appellate Court to seek such an opinion, let alone remanding the matter back to the trial Court for a fresh trial on such ground.

14. Referring to the judgment and decision of the Hon’ble Apex Court reported in (2008)8 SCC 485 [Municipal Corporation, Hyderabad vs. Sunder Singh] Mr. Ali submits that remand of a matter in appeal has to be as per the conditions mentioned in Order XLI Rules 23 or 23-A CPC, as the case may be, and the scope of a remand in terms of the said provisions of CPC is extremely limited. An order of remand cannot be passed on mere ipse dixit of the court but there has to be good and sufficient reason for the appellate court to remand the matter back to the trial court for a re-trial.

15. To buttress his argument Mr. Ali has further relied upon a decision of the Hon’ble Apex Court reported in (2008)12 SCC 372 [Bachahan Devi and another vs. Nagar Nigam, Gorakhpur and another] to argue that there was no compulsion upon

the appellate court to remand the matter since the power of the appellate court is co-extensive under the Code as that of the trial Court. The First Appellate Court would have powers to analyse factual position and can also decide an issue or an additional issue. Therefore, an order of remand should not be passed as a matter of routine. It is only when an issue requires additional evidence that a remand to the trial Court may be justified. Mr. Ali further submits that under Order XIV Rule 5 the court, including the first appellate court being the final court of fact, is vested with adequate powers, if necessary to recast/reframe th e issues and give a decision in respect thereof. In support of his argument Mr. Ali has placed reliance upon the decision of the Hon'ble Apex Court reported in (2014)10 SCC 702 [Tajender Singh Ghambhir and another vs. Gurpreet Singh and oth ers] as well as a judgment of this Court reported in 2005(1) GLT 407 [Premomay B asu vs. Rita Purakayastha and others] to argue that in the facts and circumstanc es of the case if the learned First Appellate Court was of the view that the iss ues framed by the trial Court was not done properly, since there was sufficient evidence on record to pronounce a judgment, there was nothing stopping the Appel late Court below from recasting the issues and giving its decision on such issue s. Such being the position the order of remand made by the First Appellate Court is dehors the principles of law and hence not sustainable in law inasmuch as th e sole purpose of the said order would be nothing else but to give a second oppo rtunity to the defendants to plug the lacuna on their part before the trial Cour t.

16. Mr. Z. Mukit, learned counsel for the respondents, submits that even tho ugh there is no specific observation made by the First Appellate Court to the ef fect that the evidence on record was not sufficient to pronounce a judgment, yet from the tenor of the judgment and order under appeal what follows is that the First Appellate Court did not consider it appropriate to pronounce the judgment on the basis of materials available on record, particularly having regard to the fact that the opinion of the Handwriting Expert was not available on record. Si nce obtaining such opinion of scientific expert would call for receiving additio nal evidence, hence, there was no illegality committed by the First Appellate Co urt in remanding the matter back to the trial Court for a re-decision on all the issues.

17. I have considered the rival submissions made by and on behalf of the par ties and have also perused the records.

18. It is settled law that a matter in appeal can be remanded back for a re-trial by the trial court once the appellate court has arrived at a finding that the judgment and decree under appeal was vitiated by illegality and was liable t o be set aside. Order XLI Rule 23-A of the CPC lays down the conditions on fulfi llment of which the appellate court can remand a matter for retrial after settin g aside the decree if the case was decided otherwise than on preliminary point. Order XLI Rule 23-A is quoted herein below for ready reference :-

> 23-A. Remand in other cases.-Where the Court from whose decree an appeal is pr eferred 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 Appella te Court shall have the same powers as it has under rule 23.

19. From a perusal of the said provision it is clear that in order to remand a matter by invoking the powers under Order XLI Rule 23-A the Appellate Court h as to come to a definite conclusion that the decree under appeal calls for reve rsal and thereafter record satisfaction that a retrial is considered necessary f or the grounds and reasons indicated therein. On a perusal of the judgment and o rder under appeal nothing is discernible to show that the learned First Appellat e Court had cited cogent reasons warranting reversal of the decree under appeal nor is there any satisfaction recorded by the First Appellate Court to the effe ct that retrial of the case was necessary. The appellate court cannot remand a m atter for re-trial unless the conditions in Order XLI Rule 23/23-A of the CPC ar

e fulfilled and a satisfaction to that effect is arrived at by the Appellate Cou rt by recording reasons.

20. That apart, there is no observation recorded with any degree of clarity or precision that the evidence on record was not sufficient for the First Appel late Court to pronounce a judgment on merits for the purpose of disposing of the appeal. When the evidence on record is sufficient for the First Appellate Court to pronounce a judgment, remand would be impermissible.

21. On an examination of the judgment and decision rendered by the learned t rial Court it is apparent that although the serial number of issues framed in bo th the Suits do not tally, yet, the learned trial Court had substantially dealt with all the issues individually and recorded its finding by giving proper reaso ns. Therefore, there was no occasion for the First Appellate Court to remand the suit for re-trial on the ground that there was any error committed by the learn ed trial Court either in framing the issues or in manner of determining any of t he issues having a material bearing in the outcome of the suit. Even assuming th at there was any discrepancy in framing the issues there was nothing preventing the First Appellate Court to recast/amend the issues by invoking powers under Or der XIV Rule 5 and thereafter giving a decision on merits by determining each of the issues. Such a power was available to the First Appellate Court as it was t he final court of fact having powers to decide questions of law as well. However , no such recourse was taken by the First Appellate Court for reasons that are n ot available on record.

22. As regards the issue of referring the sale deeds for examination by Hand writing Expert, it can be seen from the records that neither party to the suit h as made any such application for referring the matter for opinion of the Handwri ting Expert. Order XLI Rule 27 of the CPC permits the Appellate Court to receive additional evidence subject to fulfillment of the conditions contained therein by the applicant. In the event either of the parties was interested to seek such an opinion, the First Appellate Court itself had the powers to refer the matter for expert opinion and there was no necessity to remand the suit back to the tr ial Court only for that purpose. In the instant case, the Appellate Court was re quired to give its decision on the contested issues based on the evidence on rec ord, by bearing in mind, the principles as enshrined in Order XLI Rule 31 of the CPC while discharging the functions of an Appellate Court. There was no occasio n for the First Appellate Court to go beyond the evidence available on record so as to give its verdict as regards the merit of the appeal as long as evidence o n record was sufficient to pronounce a judgment. Such being the position, this C ourt is of the view that the impugned judgment and order dated 04.11.2009 remand ing the matter to the trial Court for a retrial is not sustainable in the eye of law in view of the discussions made herein before.

23. In view of the foregoing reasons, the judgment and order under appeal is hereby set aside. The First Appellate Court would now decide the Title Appeal N os.31/2009 and 32/2009 on merit on the basis of the materials available on recor d without being influenced by any observation made herein before by this Court. If necessary, the First Appellate Court will be entitled to recast/reframe the i ssues and also invoke Order XLI Rule 27 of the CPC subject to the conditions lai d down therein be met. The learned First Appellate Court would decide and dispos e of the appeal on merit having regard to the requirement of Order XLI Rule 31 C PC.

24. The parties will now appear before the First Appellate Court on 5th of M ay, 2015.

25. Before parting with the records, it is necessary to point out that altho ugh by the judgment and order under appeal two appeals i.e. Title Appeal No.31/2 009 and Title Appeal No.32/2009 have been disposed of by the common judgment and

order under appeal, yet, the aforesaid judgment and order passed by the learned First Appellate Court has been assailed by the plaintiffs/appellants by filing one composite appeal i.e. SAO No.4/2010. Even the Court Fee has been paid in respect of one appeal only. In view of the above, it is made clear that the judgment and order passed by this Court today would apply only in respect of Title Appeal No.32/2009. The plaintiffs/respondents in Title Appeal No.31/2009 would be entitled to avail benefits flowing under this order subject to payment of Court Fee equal to what has been already paid while filing the SAO No.4/2010 before this Court. The Court Fee so directed to be paid will be tendered before the Registry of this Court within a period of two weeks from today.

26. With the above observation and directions the SAO No.4/2010 stands disposed of. However, having regard to the facts and circumstances of the case, there would be no order as to cost.

27. Registry shall transmit the LCR at the earliest.