IN THE HIGH COURT AT CALCUTTA
(CIVIL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

S.A. 129 of 2022

SAMPA ACHARYYA
VS.
MALAY ACHARYYA

For the Appellant	: Mr. Probal Kumar Mukherjee, Sr. Adv. Mr. Dhiraj Trivedi, Adv. Mr. Bikash Kumar Singh, Adv. Mr. Sunil Gupta, Adv. Ms. Swapna Jha, Adv.
For the Respondent	: Mr. Saptangshu Basu, Sr. Adv. Mr. Saunak Bhattacharyya, Adv. Mr. Avirup Halder, Adv.
Hearing concluded on	: 22nd June, 2023
Judgement on	: 30th June, 2023

Siddhartha Roy Chowdhury, J.:

1. Challenge in this Second Appeal is to the judgement and decree passed by learned Additional District Judge, 7th Court, Barasat, North 24 Parganas, in Title Appeal No. 6 of 2016 on 3rd July, 2019 affirming thereby the judgement and decree passed by learned Civil Judge, Senior Division, 2nd Court, Barasat dismissing the Title Suit No. 69 of 2007.

2. To appreciate the appeal in its proper perspective it is expedient to narrate the facts of the case in brief. The Appellant in the Second Appeal, filed a suit for eviction, mesne profit and permanent injunction against her full blood bother Malay Acharyya. It is contended that father

of the plaintiff Sri Kiran Chandra Acharyya was allotted the land by the State of West Bengal in Sector-III of Bidhannagar (Salt Lake Town City within District North 24 Parganas). Subsequently, on 26th July, 1982 a deed of indenture was executed by the State of West Bengal in favour of Sri Kiran Chandra Acharyya who thereafter, constructed a two storied building over the said land and started residing there. Malay Acharyya, one of the sons of Kiran Chandra Acharyya has also been staying in the first floor of the suit house with his wife and son, with the permission of his father. Subsequently, Sri Kiran Chandra Acharyya decided to transfer the property including his lease hold right in favour of his daughter Smt. Sampa Acharyya and after obtaining permission from the government he transferred the property by executing a deed of gift in favour of his said daughter, the plaintiff/appellant herein. After the property was acquired by plaintiff/appellant, the defendant/respondent, (hereinafter referred to as Plaintiff and Defendant respectively for convenience) who happens to be her brother, approached her seeking permission to continue his stay in the first floor of the 'A' Schedule Property, depicted as Schedule 'B' for 6-7 months with an undertaking that he would quit and vacate the first floor of the 'A' Schedule Property in favour of plaintiff and would move to his new place of abode. As it was from the brother, the plaintiff acceded to such request. However, she started possessing the property after mutating her name by paying rates and taxes to the Municipal Authority. But when the plaintiff Sampa Acharyya requested the defendant to quit and vacate the property, the defendant refused to surrender his possession and challenged the authority of the plaintiff. Hence, the suit.

3. The defendant contested the suit by filing written statement denying all material averments made by the plaintiff in her plaint. It is the specific case of the defendant that Kiran Chandra Acharyya did not construct the house, rather he instructed his son, the defendant, to undertake the work of construction of the building and assured him that the property would be given to him in due course of time. His father would execute required documents. Thus on good, the defendant borne the entire cost of the construction and started occupying the property like owner of the same. According to the defendant the deed of gift was never executed by his father. The document is not valid. The defendant further contended that the deed of gift dated 15th September, 2006 is void, it was never acted upon, it was obtained by practicing fraud upon his father and he prayed for dismissal of the suit.

4. Learned Trial Court after considering the pleadings the parties framed issues and started witness action. Debabrata Acharyya, the husband of the plaintiff, adduced evidence on behalf of the plaintiff as P.W. 1 and produced the documents namely the lease deed executed by the State of West Bengal in favour of Kiran Chandra Acharyya, Deed of gift being no. 9808 dated 15th September, 2006 executed by Kiran Chandra Acharyya in favour of her daughter, Mutation certificate issued by Bidhannagar Municipal Authority, Bills showing payment of property tax issued by Bidhannagar Municipal and Challan. The documents were admitted as Exhibit 1 to 5.

5. Kiran Chandra Acharyya also adduced evidence as P.W. 2 and he tendered one letter issued by OSD and Ex-officio, Joint Secretary to the Government of West Bengal dated 20th September, 2006, according

permission to him to transfer the property by executing a deed of gift which was admitted as Exhibit-6. While adducing evidence as P.W. 2 Kiran Chandra Acharyya admitted to have executed the deed of gift. During cross-examination he stated that the suit property is a two storied building, the first floor is occupied by his elder son, the defendant, while the plaintiff, Sampa Acharyya - his daughter, her husband and P.W. 2 himself are occupying the ground floor of the property. He denied the suggestion that he requested his son after retirement to construct the house as he did not have sufficient fund.

6. No evidence was adduced by the defendant. Learned Trial Court after considering the evidence on record adduced by P.W. 1 and P.W. 2 was pleased to pass the decree as prayed for.

7. The said judgement and decree was challenged in Title Appeal No. 43 of 2009. Learned Appellate Court was pleased to set aside the judgement and decree passed by learned Trial Court on 28th May, 2009 and the suit was remanded to the learned Trial Court with direction to frame issues, taking into consideration the counter claim of the defendant after amendment if any and to decide the suit afresh after "hearing the evidence of the parties". Liberty was also given to the plaintiff to file written statement.

8. In compliance with the direction of the Appellate Court the suit was readmitted to its original file by the learned Trial Court.

9. The counter claim was amended by the defendant. Plaintiff submitted written statement to the counter claim and after framing issues learned Trial Court proceeded with de-novo trial of the suit. Debabrata Acharyya as P.W. 1 adduced evidence on behalf of the plaintiff but defendant

again did not adduce any evidence to prove the averments made in his pleadings.

10. Learned Trial Court directed the plaintiff by order vide no. 54 dated 18th September, 2013 to re-tender the documents. The said order was challenged in CO No. 3855 of 2013. But the petition of the plaintiff praying for re-admission of the documents already marked as Exhibit 1 to 6, was rejected by learned Trial Court and order no. 54 was modified on 12th May, 2015 vide order no. 63.

11. Learned Trial Court after considering the evidence on record, however, was pleased to dismiss the suit on the ground that the plaintiff did not tender any documentary evidence to substantiate her claim. Counter claim of the defendant was also dismissed, as no evidence was adduced.

12. The judgement pronounced by the learned Trial Court on 15th December, 2016 was challenged in Title Appeal No. 6 of 2017 before the learned 7th Court of Additional District Judge, Barasat by the plaintiff. Learned First Appellate Court refused to accept the appeal and the judgement passed by learned Trial Court was affirmed.

13. Aggrieved by and dissatisfied with such judgement and decree passed in Title Appeal No. 6 of 2017 by the learned 7th Court of Additional District Judge, on 3rd July, 2019 the plaintiff has preferred the Second Appeal which was admitted to answer the following substantial question of law :-

i) Whether the parties to the proceedings are required to re-examine themselves and re-exhibit the documents, which have already been exhibited by proving with

cogent evidence as the appellate Court directed the trial Court to decide the issues afresh while remanding the matter?

ii) Whether both the Courts were justified in passing the impugned judgment as the exhibited documents were not re-exhibited after the remand and the other of the remand presupposes the fresh evidence to be adduced meaning thereby the evidence already-on-record has been wiped out don't from part of the record?

iii) Whether both the Courts were justified in passing the judgment, as the documents were not re-exhibited and the advantages taken in the cross examination shall loose its efficacy and shall remain on paper?

14. Impeaching the judgement pronounced by learned Courts below Mr. Probal Kumar Mukherjee, learned Senior Counsel submits that the impugned judgement is the manifestation of absolute misreading of the order of remand. Learned Appellate Court unambiguously stated that it would be open remand and purpose of remand was made clear – to allow the defendant and the plaintiff to adduce evidence to substantiate their respective pleadings relating to counter claim.

Rule 23 of Order XLI of the Code of Civil Procedure envisages that evidence recorded before trial, shall remain as evidence after remand if no exception is indicated. There is no room to conduct 'de novo trial' after remand and to answer the issues ignoring the evidence already on record.

To buttress his point Mr. Mukherjee relies upon the judgement of Hon'ble Apex Court pronounced in the case of ***J. BALAJI SINGH VS. DIWAKAR COLE & ORS.*** reported in **(2017) 14 SCC 207**.

15. According to Mr. Mukherjee the reasoning given in the interlocutory order no. 54 dated 18th September, 2013 by learned Trial Court, is the foundation of the decision taken by learned Trial Court, post order of remand of the suit. The propriety of the reasoning given by learned Trial Court and duly endorsed by learned Appellate Court by the impugned judgement has been challenged in this Second Appeal, in consonance with the provision as laid down under Section 105 of the Code of Civil Procedure.

The defendant did not adduce evidence. Testimony of P.W. 1 coupled with Exhibit 1, 2, 3, 4 and 5 unerringly indicate the ownership of the plaintiff in the suit property. Therefore, there is no reason to deny the decree to the plaintiff, as prayed for.

16. Mr. Saptangshu Basu, learned Senior Counsel for the defendant/respondent supporting the impugned judgement submits that the learned Trial Court acted in consonance with the direction given to him by the learned First Appellate Court while remitting the suit.

17. In the order dated 18th September, 2013 it was held by learned Trial Court :- "As per direction of learned Appellate Court this Court is practically holding the trial in the suit de-novo". De-novo trial according to Mr. Basu, demands recording of evidence afresh and evidence includes both oral and documentary evidence.

18. Mr. Basu with vehemence submits that the learned Trial Court was left with no other option but to record the evidence afresh as he was directed by learned Appellate Court. Had it been a case of remand simplicitor, learned Trial Court would have the obligation to consider the evidence already on record but such obligation got obliterated in view of the direction passed by learned Additional District Judge in Title Appeal No. 43 of 2009.

19. It is further submitted by Mr. Basu that the interlocutory order no. 54 dated 18th September, 2013 was challenged in a proceeding under Article 227 of the Constitution of India and it was dismissed being not pressed.

20. According to Mr. Basu, such order of dismissal, therefore, should be construed, though not passed on merits, as an order that affirmed the said interlocutory order no. 54 dated 18th September, 2013. This Court cannot set the clock back by reopening the said order. It is barred by the principle of res-judicata. Thus it is not amenable to judicial scrutiny under Section 105 (1) of the Civil Procedure Code. To buttress his point further Mr. Basu, learned Senior Counsel, relies upon the judgement pronounced i***n SATYADHYAN GHOSAL & ORS. VS. DEORAJIN DEBI & ORS.*** reported i**n AIR 1960 SC 941** wherein it is held:-

> *"The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings."*

21. It is contended by Mr. Basu that this issue is to be considered taking lumen from Order XXIII Rule 3A of the Code of Civil Procedure. As no

leave was taken while praying for an order for disposal of the petition being CO No. 3855 of 2013 for non-prosecution, order no. 54 dated 18th September, 2013 cannot be said to be amenable to Sub-Section 1 of Section 105 of the Code of Civil Procedure. I do not find any reason to imbibe myself with the submission made by Mr. Basu.

22. The question that calls for consideration now is whether the order no. 54 dated 18th September, 2013 can be said to have reached its finality and not amenable to appeal as submitted by Mr. Basu.

23. Indisputably if any interlocutory order decides a controversy in part between the parties, it would bind the parties and operate as res-judicata at all subsequent stages of the said suit.

24. True it is a Civil Revisional Application being CO No. 3855 of 2013 was filed by the petitioner was withdrawn before it could be adjudicated according to law. Such disposal, in my humble opinion cannot be considered as disposal on merit, rather such disposal of the revisional application, for non prosecution tantamounts to effacing it.

25. In this regard we can profitably rely upon the judgement of Hon'ble Apex Court pronounced in ***RANI CHOUDHURY VS. LT. COL. SURA JIT CHOUDHURY*** reported in **AIR 1982 SC 1397**, wherein it is held:-

> *"The Code of Civil Procedure (Amendment) Act, 1976 was enacted with the avowed purpose of abridging and simplifing the procedural law. By enacting the Explanation, Parliament left it open to the defendant to apply under R. 13 of O. 9 for getting aside an ex parte decree only if the case where he had preferred an appeal, the appeal had been withdrawn by him. The withdrawal of the appeal was tantamount to effacing it."*

26. Hon'ble Apex Court in ***ARJUN SINGH VS. MOHINDRA KUMAR & ORS.*** reported in **AIR 1964 SC 993** held the following :-

> *"11……Similarly, as stated already, though s. 11 of the Civil Procedure Code clearly contemplates the existence of two suits and the findings in the first being res judicata in the later' suit, it is well-established that the principle underlying it is equally applicable to the case of decisions rendered at successive stages of the same suit or proceeding. But where the principle of res judicata is invoked in the case of the different stages of proceedings in the same suit, the nature of the proceedings, the scope of the enquiry which the adjectival law provides for the decision being reached, as well as the specific provisions made on matters touching such decision are some of the material and relevant factors to be considered before the principle is held applicable. One aspect of this question is that which is dealt with in a provision. like s. 105 of the Civil Procedure Code which enacts:*
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> *"105.(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.*
> *(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."*
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> *It was this which was explained by Das Gupta, J. in Satyadhayan Ghosal's case, (1960) 3 SCR 590 : (AIR 1960 SC 941) already referred to:*
>
> *"Does this, however, mean that because at an earlier stage of the litigation a court has decided an interlocutory matter in one*

way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again?..... It is clear therefore that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order."

27. The order no. 54 dated 18th September, 2013 did not decide in any manner the issue stems out of the pleadings of the parties, the said order neither decided any issue nor did it decide any right of the parties. It was passed touching a procedural aspect of the matter. Therefore such order is amenable to judicial scrutiny in Second Appeal.

28. Therefore, in my humble opinion, Section 11 of the Code of Civil Procedure cannot be pressed into service to preclude the plaintiff/appellant from getting the benefit of documents already admitted into evidence as Exhibit 1 to 6.

The provision of Rule 3A of the Order 23 of the Code of Civil Procedure cannot be considered to have any application to answer the issue, as adverted by Mr. Basu.

29. The suit, it goes without saying can be remanded under Order 41 Rule 23, Rule 23A and Rule 25 of the Code of Civil Procedure which enunciate :-

"23.Remand of case by appellate court.—Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the appellate court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment

and order to the court from whose decree the appeal is preferred, with directions to 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-A. 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 retrial is considered necessary, the appellate court shall have the same powers as it has under Rule 23.

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 within such time as may be fixed by the appellate court or extended by it from time to time."

30. Rule 23 of Order 41 of the Code of Civil Procedure unerringly indicates that the evidence recorded during the original trial shall be evidence during the trial after remand. The principle laid down under Rule 23 is applicable to Rule 23A of Order XLI of the Code of Civil Procedure.

31. Rule 25 enunciates the Appellate Court may 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 additional evidence required; and such Court shall proceed to try such remand, and shall return the evidence to the Appellate Court together with its finding therein and the reason thereafter within such time may be fixed by the Appellate Court or extended by it from time to time.

In this regard, we may also rely upon the decision of Hon'ble Supreme Court in ***J. Balaji Singh vs. Diwakar Cole & Ors. (supra)*** wherein Hon'ble Supreme Court held :-

> *"14.2. So far as Rule 23-A is concerned, it enables the Appellate Court to remand the case to the Trial Court when it finds that though the Trial Court has disposed of the suit on all the issues but on reversal of the decree in appeal, a re-trial is considered necessary by the Appellate Court.*
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> *14.3. So far as Rule 25 is concerned, it enables the Appellate Court to frame or try the issue if it finds that it is essential to the right decision of the suit and was not framed by the Trial Court. The Appellate Court in such case may, accordingly, frame the issues and refer the same to the Trial Court to take the evidence and record the findings on such issues and return to the Appellate Court for deciding the appeal. In such cases, the Appellate Court retains the appeal to itself."*

32. Therefore, it can safely be said upon perusal of the aforesaid provisions, that law does not permit the Court to shut its eyes to the evidence already recorded by the Court during trial before the order of remand was passed, of course subject to just exception.

This 'just exception' shall have to be indicated by the learned Court while passing the order of remand, taking lumen from Rule 23, or 23A of

Order XLI of the Civil Procedure Code, it cannot be imported from nowhere.

33. It is expedient to reproduce the order of remand to appreciate the follow up action, taken by learned Trial Court. It was held by learned Appellate Court :-

> *"Since remand only on the point of counter claim may invite further complications in disposal of the entire matter completely and effectively, and since the points of plaint and counterclaim are interrelated to each other, let there be an open remand for adjudication of the suit and the counter claim fresh.*
>
> *Hence it is*
>
> *O R D E R E D*
>
> *that the instant appeal be and the same is hereby allowed on contest but without any order as to costs. The judgment and decree dated 28.05.2009 passed by the learned Civil Judge, Senior Division, 2nd Court at Barasat, North 24 Parganas in Title Suit No- 69 of 2007 is set aside. The matter is sent back on remand for adjudication afresh, on both the plaint and the counter claim.*
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> *The Learned trial court shall assess the court fees on counter claim within 15 days of the first appearance of the parties and the defendant shall pay the court fees upon the same within 15 days thereafter. If the defendant brings any application for amendment of counterclaim, the same shall be filed at the earliest opportunity and would be disposed of by the learned trial court in accordance with law. Then Learned Court shall*

frame the issues afresh after giving opportunity to the plaintiff to file written statement to the counter claim and shall determine the suit and the counter claim on hearing the evidence afresh, as per law, and would endeavour to dispose of the same as expeditiously as possible, without granting unnecessary adjournments to any of the parties, preferably within six months from the date of communication.

Send down the L.C.R. with copy of this judgment at once. Both the parties are directed to appear before the learned trial court on 29.2.2012 for receiving appropriate direction."

34. Upon plain reading of the order it appears that purpose of remand was to allow the defendant to amend his counter claim and to adduce evidence, and also an opportunity was given to the plaintiff to file written statement and to adduce further evidence, if necessary. It was never spelt out that the evidence already on record, should be expunged or to be treated as non-est. In absence of such mandate, it was not open to learned Trial Court to act in such a manner that would cause infraction to the procedural law.

35. Learned Appellate Court while passing the impugned judgement did not consider the relevant procedure as laid down under Order XLI Rule 23, 23A and 25 of the Code of Civil Procedure. Rule 23 and 23A envisage the evidence on record, subject to all just exceptions, be evidence during the trial after remand. Rule 25 of the Code of Civil Procedure speaks of recording additional evidence upon issues framed by learned Appellate Court.

36. It goes without saying that when law mandates a course of action in a particular manner, it is to be done in that manner only and not otherwise. In this regard, we can rely upon the judgement of Privy Council in the case of ***NAZIR AHMED VS. KING EMPEROR*** reported in **1936 SCC OnLine PC 41** wherein it is held :-

> *"..... that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods or performance are necessarily forbidden."*

37. In ***CHANDRA KISHORE JHA VS. MAHAVIR PRASAD & ORS.*** reported in **(1999) 8 SCC 266**, Hon'ble Supreme Court held as under :-

> *"17..... It is a well-settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. (See with advantage: Nazir Ahmad v. Kind Emperor [(1935-36) 63 IA 372 : AIR 1936 PC 1253 (II)]."*

38. In the case of ***CHIEF SECRETARY, GOVERNMENT OF ANDHRA PRADESH & ORS.*** reported in **(2015) 13 SCC 722** Hon'ble Apex Court held :-

> *"14. Where the law prescribes a thing to be done in a particular manner following a particular procedure, it shall be done in the same manner following the provisions of law without deviating from the prescribed procedure....."*

39. Therefore, in absence of any direction, indicating just exception, both the Courts below had no reason to dismiss the suit and appeal only because the documents already admitted into evidence were not "re-exhibited". There was no reason for the learned Trial Court and learned First Appellate Court to hold that evidence on record got wiped out as an aftermath of order of remand by operation of law.

The plaintiff had no obligation to tender the documents, already admitted into evidence and taken on record as exhibits 1 to 6, to re-exhibit the same, pursuant to the order of remand. The interlocutory order no. 54 was passed and virtually affirmed ignoring the provisions as laid down under Order XLI Rule 23A of the Code of Civil Procedure. The oral testimony of the witness, after an order of remand, unless otherwise directed, is nothing but additional evidence.

40. Section 105 of the Code of Civil Procedure says :-

> **"***Section 105 of Code of Civil Procedure 1908 "Other orders"*
>
> *(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as ground of objection in the memorandum of appeal.*
>
> *(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."*

41. Upon plain reading of the provision, it appears that every order, be it appealable or not, except an order of remand, may be assailed in an appeal from final decree on the following ground :-

a. *that it is erroneous*
b. *and such error affects the decision of the suit.*

Hon'ble Supreme Court in the case of ***NAWAB SHAQAFATH ALI KHAN & ORS. VS. NAWAB IMDAD JAH BAHADUR & ORS.*** reported in **(2009) 5 SCC 162** held:-

> *"38. It may be true that in terms of Section 105 of the Code of Civil Procedure when an appeal against the final decree is passed, legality of the said order could be challenged in the appeal. Only because a civil revision application has not been filed, the same, in our opinion, would not attract the principle of res judicata as an appeal from the final decree could still be maintained."*

42. In this case, as it is already pointed out by Mr. Mukherjee and quite correctly, the judgement impugned, is based on the reasoning given in the interlocutory order 54 dated 18th September, 2013. Therefore, provision of Sub-Section 1 of Section 105 of the Code of Civil Procedure is applicable.

43. Learned Courts below had no reason to insist for re-exhibiting the documents, already exhibited, while recording evidence of P.W. 1, after remand. Both the learned Trial Court and learned First Appellate Court committed grave error by holding that the evidence on record got obliterated with the order of remand. The evidence recorded by the learned Trial Court prior to the order of remand, by no stretch of imagination can be said to have crossed the Oblivion with all the probative value of the documents admitted as exhibit 1 to 6.

44. Be that as it may in my humble opinion in the absence of any specific direction to expunge the evidence already on record, such evidence, be that oral and documentary, recorded before the order of remand shall have to be considered as evidence on record after remand. There was no cogent reason to pass the judgement impugned, on the ground that documents already on record were not re-exhibited. Such finding is perverse.

45. Though learned Court had the obligation to allow the defendant to adduce evidence, based on the counter claim, the plaintiff had no such obligation, in absence of any evidence on counter claim. Neither the plaintiff nor the witness P.W. 1, had any obligation under law to re-exhibit the documents already exhibited. Learned Courts below committed grave error in passing the impugned judgement dismissing the suit and appeal as the exhibited documents were not re-exhibited by the plaintiff/appellant.

46. Exhibit 2 unerringly indicates that the plaintiff has acquired right title interest in respect of the suit property. Though the defendant in his pleadings claimed to have acquired ownership yet he refrained himself from attending the witness box to adduce evidence thereby exposed himself to the mischief of Illustration (g) of Section 114 of the Evidence Act.

47. That apart he has failed to discharge his onus to prove his claim of ownership that he wishes the Court to believe. Under such circumstances, it can be said that plaintiff has acquired the right title interest over the suit property on the strength of Exhibit 2.

48. A person other than an owner can possess the property either as a tenant, or licensee or as trespasser. Since it is the specific case of the plaintiff that the defendant being her elder brother was permitted by her father and her predecessor in interest to occupy the first floor of the suit house and after acquiring the ownership of the property the plaintiff allowed the defendant to continue with such possession, his status is that of a licensee. With the institution of the suit such licence has come to an end. Therefore, the defendant is liable to be evicted.

49. In view of the aforesaid, I am inclined to set aside the impugned judgement and decree. Consequently, the appeal is allowed.

50. The plaintiff/appellant do get decree for eviction of the defendant from the suit property. The defendant/respondent is directed to quit and vacate the suit property within two months from this day failing which the plaintiff shall be at liberty to put the decree in execution.

51. Department is directed to draw a decree in terms of this judgement within 15 days from date.

52. Let a copy of this judgement be sent down to the learned Trial Court along with lower Court record for information and necessary compliance.

53. Urgent photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)