SIRAJUDHEEN

v.

ZEENATH & ORS.

(Civil Appeal No. 1491 of 2023)

FEBRUARY 27, 2023

[DINESH MAHESHWARI* AND SUDHANSHU DHULIA, JJ.]

Code of Civil Procedure, 1908 – Order XLI Rule 23, 23A, 24, 33 – Remand for trial de novo by the High Court – Justified or not – The two civil suits filed by the plaintiff-respondent No. 1 for cancellation of sale deed and for prohibitory injunction were dismissed, the two other civil suits filed by her sisters seeking partition of respective properties were decreed – These four decisions were challenged by the respondent No.1 in the High Court by way of four appeals – The instant appeal is directed against the common judgment and order passed by the High Court, whereby the appeal filed by the plaintiff-respondent no.1 against dismissal of her suit for cancellation of a sale deed and for a prohibitory injunction was disposed of with directions to the Trial Court to decide the suit afresh after de novo trial, essentially with the observation that the evidence necessary for proper determination of suit had not been brought on record - Whether the High Court was justified in remanding the matter for trial de novo – On appeal, held: The High Court has not adverted to the findings of the Trial Court pertaining to the present case and has not specified as to how the findings recorded by the Trial Court were unsustainable or unjustified – The scope of remand in terms of Rule 23 of Order XLI CPC is extremely limited and that provision is inapplicable because the suit in question had not been disposed of on a preliminary point – The remand in the present case cannot be held justified in terms of Rule 23-A of Order XLI CPC because there is no reason whatsoever available in the impugned judgment as to why and on what basis the decree was reversed by the High Court – The Court has not specified as to what specific evidence was considered necessary to enable it to pronounce judgment or for any substantial cause – Merely because the High Court could not reach to a conclusion on preponderance of probabilities, the evidence on record could not have been treated as insufficient so as to not pronounce the judgment in terms of Rule 24 of Order XLI CPC – Further, merely because a particular evidence which ought to have been adduced but had not been adduced, the Appellate Court cannot adopt the soft course of remanding the matter – The remand of the suit for trial de novo cannot be considered justified in the present case from any standpoint.

* Author

Allowing the appeal, the Court

Held:

1. **Real question calling for determination in this appeal is as to whether the High Court has been justified in remanding the matter for trial de novo? [Para 8.1]**

2. **It could at once be noticed that in terms of Rule 33 of Order XLI CPC, the Appellate Court is empowered to pass any decree and to make any order which ought to have been passed or made; and which may be considered requisite in a case. While the said Rule 33 prescribes general powers of the Court of appeal, the specific powers of remand are prescribed in Rules 23 and 23-A of Order XLI CPC. Hence, for the purpose of the case at hand, reference to aforesaid Rule 33 remains inapposite. [Para 10]**

3. **With respect, what turns on the observations in the impugned judgment is that the High Court was unable to arrive at a conclusion on the basis of the material on record. However, fact of the matter remains that on the basis of the same material on record, the Trial Court had indeed arrived at a definite conclusion that the plaintiff had failed to establish her case and hence, the suit was liable to be dismissed. As indicated hereinabove, the High Court has not at all referred to the findings of the Trial Court and it is difficult to find from the judgment impugned as to why at all those findings of the Trial Court were not to be sustained or the decree was required to be reversed. [Para 11.1]**

4. **The scope of remand in terms of Rule 23 of Order XLI CPC is extremely limited and that provision is inapplicable because the suit in question had not been disposed of on a preliminary point. The remand in the present case could only be correlated with Rule 23-A of Order XLI CPC and for its applicability, the necessary requirements are that "the decree is reversed in appeal and a re-trial is considered necessary". As noticed hereinabove, there is no reason whatsoever available in the impugned judgment as to why and on what basis the decree was reversed by the High Court. Obviously, the reversal has to be based on cogent reasons and for that matter, adverting to and dealing with the reasons that had prevailed with the Trial Court remains a sine qua non. Thus, remand in the present case cannot be held justified even in terms of Rule 23-A of Order XLI CPC. [Para 11.2]**

5. **None of the parties have sought any permission to adduce evidence nor the High Court has specified as to what specific**

evidence was considered necessary to enable it to pronounce judgment or for any substantial cause. It does not appear from the judgment of the High Court if the plaintiff/respondent No. 1, ever projected that the Trial Court did not allow her to produce any evidence that was sought to be produced. It is also not borne out if any of the parties at all made out any case for production of additional documents or oral evidence with reference to the applicable principles. Hence, the general observations of the High Court cannot be correlated with Rule 27(1) either. [Para 12]

6. **Trial Court had returned its findings on the basis of evidence on record. Whether those findings are sustainable or not is a matter entirely different and the High Court may examine the same but merely because the High Court could not reach to a conclusion on preponderance of probabilities, the evidence on record could not have been treated as insufficient so as to not pronounce the judgment in terms of Rule 24 of Order XLI CPC. [Para 13]**

7. **Merely because a particular evidence which ought to have been adduced but had not been adduced, the Appellate Court cannot adopt the soft course of remanding the matter. [Para 14]**

8. **Suffice it would be to sum up that for a few tentative observations about certain circumstances existing in favour of the plaintiff and certain other circumstances existing in favour of the defendants and then, with another observation that plaintiff was a vital witness, the High Court was not justified in remanding the matter for trial de novo without recording any finding if the plaintiff was prevented from examining herself or from adducing any other evidence as also without explaining as to on what ground the decree was being reversed. [Para 15]**

Municipal Corporation, Hyderabad v. Sunder Singh **(2008) 8 SCC 485 : [2008] 9 SCR 635 – relied on.**

Sanjay Kumar Singh v. State of Jharkhand **(2022) 7 SCC 247 – held inapplicable.**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1491 of 2023.

From the Judgment and Order dated 28.06.2019 of the High Court of Kerala at Ernakulam in RFA No. 247 of 2014.

Mahabir Singh, Sr. Adv., Zulfiker Ali P. S., Sajeeb S., Ms. Lakshmi Sree P., M/s SRM Law Associates, Advs. for the Appellant.

James P. Thomas, Abid Ali Beeran P., Advs. for the Respondents.

The Judgment of the Court was delivered by

DINESH MAHESHWARI, J.

Leave granted.

2. This appeal is directed against the common judgment and order dated 28.06.2019, passed by the High Court of Kerala at Ernakulam insofar as relating to RFA No. 247 of 2014, whereby the appeal filed by the plaintiff (respondent No.1 herein) against dismissal of her suit for cancellation of a sale deed and for prohibitory injunction was disposed of with directions to the Trial Court to decide the suit afresh after *de novo* trial, essentially with the observations that the evidence necessary for proper determination of the suit had not been brought on record.

3. In the impugned common judgment and order dated 28.06.2019, the High Court has decided four appeals arising out of four different civil suits but concerning the same contesting parties and involving inter-related issues. Though, the present appeal relates only to one of those appeals in the High Court, being RFA No. 247 of 2014 that arose from OS No. 293 of 2012 in the Court of Subordinate Judge, Karunagapally (originally OS No. 390 of 2006 in the Court of Subordinate Judge, Kollam) but, for a proper comprehension of the facts, a brief reference to the subject-matter of the said four civil suits and findings therein shall be apposite. The relevant factual and background aspects could thus be noticed, in brief, as follows:

   3.1 The respondent No. 1 filed the subject civil suit (OS No. 293 of 2012) against the present appellant as defendant No. 1 and other respondents, her sisters, as defendant Nos. 2 to 5, for setting asidea sale deed bearing No. 285 of 2006 dated 15.03.2006, registered in the Office ofSubRegistrar,Karunagapally.

   3.2 The suit schedule property, consisting of 54 Ares and 90 Sq. meters of land and the cinema theatre building thereupon, comprisedin Block No. 5, Resurvey No. 551/3 ofAdinadu Village, Kulashekharapuram Panchayat, Karunagapally Taluk, Kollam District, was originally owned by father of the respondents; and after his demise, the respondents and their mother executed a partition deed bearing No. 291 of 2003, whereby the suit

schedule property was kept in joint possession andenjoyment of the respondents. A partnership deed was also executed amongst the respondents for running of the said cinema theatre and the husband of respondent No. 1 was managing the cinema theatre named 'Tharangam theatre' on behalf of the partners.

3.3 As per the case of plaintiff-respondent No. 1, on 15.03.2006, the respective husbands of respondent Nos. 3 and 5asked her to reach the Office of the Sub Registrar, Karunagapally for execution of a security bond in favour of a film distributor; and though she made a request for postponing the execution of such document because her husband wasout of station, the husbands of respondent Nos. 3 and 5 insisted that the said security was to be executed on that particular day itself orelse, functioning of the cinema theatre would be affected. As the respondent No. 1 had utmost faith and belief in them, she reached the Sub Registrar's Office, and put her signatures on the document as required by them. On 15.09.2006, when respondent No. 1 enquired about the accounts of cinema theatre from respondent No. 5,it was informed that her share in the said property had already been sold. On hearing the same, the respondent No. 1 rushed to the Office of the Sub Registrar for getting a copy of the document executed on 15.03.2006 and, on going through the same, she realized that she was made to sign on a sale deed and not on a security document as told to her earlier. Further, no consideration was received by her and hence, the said sale deed was void and *non est*.

3.4 The suit aforesaid was duly contested by the defendants. After framing of issues, the parties adduced documentary and oral evidence where, on behalf of the plaintiff-respondent No. 1, her husband was examined as PW-1 whereas a relative of her husbandwas examined as PW-2; and on the other hand, in defendants' evidence, the present appellant was examined as DW-1 whereas the husband of respondent No. 4was examined as DW-2.

3.5 Apart from the above civil suit bearing OS No. 293 of 2012, the plaintiff-respondent No. 1filed another civil suit for prohibitory injunction, which was registered as OS No. 238 of 2012. Both these civil suits, being OS No. 293 of 2012 and OS No.

238 of 2012 were decided together by the Trial Court in its common judgment dated 28.01.2014. After examining the evidence on record, the Trial Court rejected the case of the plaintiff-respondent No. 1 with the findings, *inter alia*, that the circumstances placed on record did not probabilise the case that by defrauding her, the husbands of her sisters got executed the sale document (Ex. A-1) while making her believe that it were a security document for getting new films. The Trial Court also found that no steps were taken by the plaintiff-respondent No. 1 to examine the Sub Registrar who had registered the sale deed whereupon she had put her signatures on being allegedly made to believe it to be a security document; and she failed to discharge the burden of proof in terms of Section 103 of the Indian Evidence Act, 1872[1]. Without much elaboration, we may take note of the relevant findings of the Trial Court as under: -

"22…..So the aforesaid circumstance never probabalise the case advanced on part of plaintiff that by defrauding her the husbands of D3 and D5 succeeded to execute Ext.A1 by making her believe that it was a security document for getting new films from a distributor as claimed….

*** *** ***

24. Though plaintiff is having the case that Ext.A1 is the result of fraud, undue influence and coercion etc exerted upon her by the persons whom she was having confidence, no steps has been taken on the part of the plaintiff to examine the registrar who registered Ext.A1 sale deed wherein plaintiff has put her signature being it as a security document for getting new films as made believe on the par to D3 and D5, though burden of proof is upon her as per Section 103 of Indian Evidence Act. So from the available evidence in my opinion the Ext. A1 sale deed cannot be set aside since it was voluntarily executed by the plaintiff in favour of D1. Hence I find these issues against the plaintiff."

3.6 In view of the above, the Trial Court proceeded to dismiss both the civil suits, being OS No. 293 of 2012 and OS No. 238 of 2012, while leaving the parties to bear their own costs.

1 Hereinafter referred to as 'the Evidence Act'.

3.7 There had been two other civil suits, being OS No. 181 of 2007 and OS No.497 of 2006, which were filed by the respondent Nos. 2 to 5 of the present appeal (sisters of the respondent No. 1), seeking partition respectively of theatre and land on one hand and shopping complex on the other. These civil suits for partition, as filed by the four sisters of respondent No. 1, were decreed by the Trial Court.

3.8 For what has been noticed hereinabove, the net result had been that while the two civil suits filed by the plaintiff-respondent No. 1 for cancellation of sale deed and for prohibitory injunction were dismissed, theother two civil suits filed by her sisters seeking partition of respective properties were decreed.These four decisions were challenged by the respondent No. 1 in the High Court by way of four appeals, being RFA No. 96 of 2012 (pertaining to OS No. 497 of 2006), RFA No. 287 of 2010 (pertaining to OS No. 181 of 2007), RFA No. 238 of 2014 (pertaining to OS No. 238 of 2012) and RFA No. 247 of 2014 (pertaining to OS No. 293 of 2012). All these four appeals were decided together by the High Court in its common judgment and order dated 28.06.2019.

4. As noticed, the present appeal relates only to RFA No. 247 of 2014 (pertaining to OS No. 293 of 2012). Therefore, dilation on all the factual aspects of the four civil suits and respective findings of the High Court may not be of direct relevance for the present purpose but, for the fact that they relate to cognate mattersand the appeals have been decided by the common judgment, for a comprehension of the views of the High Court, it would be profitable to take a brief note of the findings in the impugned judgment.

4.1 The High Court observed that the common issue arising for determination in the appeals was regarding the character of the subject-property namely, theatre with land and shopping complex with land after the five sisters, i.e., respondent No. 1 and respondent Nos. 2 to 4 entered into the partnership arrangement. The High Court adverted to the question as to whether the properties obtained by them under the partition would partake the character of partnership assets after theformation of partnership; and took note of the principles as to how a property could be brought in as a partnership asset

expressly or by conduct. The High Courtobserved that merely because separate properties of the partners were used for the business of the partnership, it would not entail a presumption that the properties were brought in as partnership assets. After dealing with the relevant clauses of the partnership deed as also the other two sale deeds dated 10.11.2004 and 17.01.2004, executed jointly by five sisters, the High Court ultimately held that the properties obtained by these five sisters under the partition deed continued to be held as co-ownership properties even after execution of the partnership deed dated 28.01.2003. The High Court, therefore, held the properties to be co-ownership properties and consequently, upheld the judgment and decree of the Trial Court in relation to OS No. 497 of 2006 and OS No. 181 of 2007 for partition of properties. The High Court observed and held as under: -

"13. Having held the properties to be co-ownership properties, the suits OS 497/06 and OS 181/07 for partition of the properties are liable to be decreed. The judgment and decree of the trial court are only to be upheld and I do so."

4.2 Reverting to the two civil suits filed by the respondent No. 1, the High Court, in the first place, referred to OS No. 238 of 2012, wherein the plaintiff-respondent No. 1 had claimed prohibitory injunction against the defendants. It was noticed that the relief was claimedby her in the capacity of a partner of the firm against other partners. The High Court observed that the partnership was an unregistered one and, therefore, the suit was barred under Section 69(1) of the Indian Partnership Act, 1932. Hence, the decree of the Trial Court dismissing the suit (OS No. 238 of 2012) was affirmed.

5. After dealing with the aforesaid three civil suits, the High Court referred to the questions involved in OS No. 293 of 2012 and noted the grounds on which the relief was claimed for cancellation of the sale deed. The High Court summarised the grounds of challenge as follows:-

"17. In OS 293/12 from which RFA 247/14 arises, the relief claimed is for setting aside Ext.A1 Sale Deed. The grounds on which the sale deed is sought to be set aside are: -

(a) The property being a partnership asset, the interest of a partner in a specific item of partnership property is inalienable. **(*AddankiNarayanappa v. Bhaskara Krishnappa (dead) and others* AIR 1966 SC 1300).**

(b) The terms of the partnership deed expressly prohibits a partner from alienating his share in the partnership without the consent of the other partners.

(c) "Non est factum" – the plaintiff was made to believe that she was executing a security deed for the distributionship of a film; she never intended to execute a Sale Deed."

5.1 The first two grounds aforesaid were rejected by the High Court with reference to the fact that the property in question was a co-ownership property and not a partnership asset; and what was purported to be conveyed under the sale deed in question (Ex. A-1) was 1/5th right of the plaintiff as the co-owner of the property and it was not in the assignment of the right of a partner. The High Court, therefore, rejected these two grounds. Moving on to the third ground pertaining to *non est factum,* the High Court observed that on the evidence available on record, there were certain circumstances leaning in favour of the plaintiff and there wereother circumstances leaning in favour of the genuineness of the sale. The observations of the High Court as regards the competing sets of evidence read as under: -

"21. On the evidence available, certain circumstances lean in favour of the plaintiff. According to the defendants, the husband of the plaintiff was acting as the Manager of the firm. On the day on which Ext. A1 sale deed was executed, admittedly he was out of station. The extreme urgency for execution of Ext.A1 on that day, in his absence, has not been brought out. Ext.A1 sale deed is stated to have been executed pursuant to an agreement for sale dated 23.11.05. The agreement for sale is claimed to have been executed by all the five sisters together in favour of the first defendant – Sirajudeen. The execution of the agreement for sale is disputed by the plaintiff. Though the alleged agreement for sale relates to the interests of all the sisters. Ext.A1 sale relates to the rights of the plaintiff alone. This is under normal circumstances improbable. The defendants

set up a case that the proposed purchaser Sirajudheen sought for time for completing the sale and that the husband of the plaintiff was not agreeable and it was under such circumstances that Ext.A1, regarding the plaintiff's share alone, was executed. There is nothing to indicate that the plaintiff or her husband were in urgent need of money. After having entered into an agreement for sale in respect of a property, under ordinary circumstances a prudent purchaser would not purchase a mere 1/5 shares out of the property especially when the subject matter is a theatre. Further, though Ext.A1 sale deed recites the sale consideration as ₹ 6 lakhs, according to the defendants, the total consideration paid for Ext.A1 was ₹ 50 lakhs. There is absolutely no evidence to prove the passing of consideration. According to the plaintiff, no consideration has passed since no sale deed was under contemplation. Relying on the decision of this Court in ***Pathu v. Katheesa Umma*, [1990(2) KLT SN.51]**, it is argued by the respondents that since the document is a registered one, its due execution is to be presumed. However, as held in ***Ponnan v. Kuttipennu*[1987 (2) KLT 455]**, when the execution is denied, registration does not amount to proof of execution.

22. As against the above circumstances, there are various circumstances, as pointed out by the defendant, which favour the genuiness of the sale. In addition to Ext.A1 sale deed, Ext.B17 sale note was executed regarding the furniture and other equipments in the theatre. This probabilises the execution of Ext.A1 sale. According to the plaintiff, the execution and registration of Ext.A1 did not take place at the Sub Registrar's Office; she was made to affix signatures while she was at the ground floor of the building. However, the Sub Registrar or the Document writer have not been examined. The document writer is the same person who executed sale deed in respect of the other two items(items 1 and 4) that belonged to the sisters under the partition. Though in paragraph 3 of the plaint, it is alleged that the brother of the plaintiff's husband accompanied the plaintiff to the SRO, he has not been examined. The plaintiff who is said to have been defrauded has not stepped into the witness box. Though under Section 120 of the Indian Evidence Act, the husband may be a competent witness to depose on behalf of wife, in the nature of the allegations as made, the plaintiff was a vital witness and her non-examination looms large."

5.2 After the observations aforesaid, the High Court expressed that the evidence necessary for proper determination of the suit had not been brought on record; and that the evidence on record was insufficient to arrive at a proper finding in favour of or against the sale deed. For these observations, the High Court considered it appropriate that the parties be given an opportunity to adduce further evidence and the matter be considered afresh. The High Court concluded on the matter with the following observations and directions: -

"23. From the above, I notice that evidence necessary for a proper determination of the suit has not been brought on record. The evidence on record is insufficient to arrive at a proper finding in favour of or against Ext.A1 Sale Deed. Material witnesses have not been examined. No evidence has been brought in with regard to passing of consideration. In the circumstances I am of the opinion that it would only be appropriate if the parties are given an opportunity to adduce further evidence and the matter be considered afresh. The decree and judgment in OS 293/12 is to be set aside and the suit remanded back to the trial court for disposal de novo.

In the result, RFA Nos.96/12, 827/10, 238/14 are dismissed, but without costs. RFA 247/14 is allowed. The judgment and decree in OS 293/13 is set aside and the suit is remitted back to the trial court for disposal de novo after affording opportunity to all the parties to adduce further evidence. Parties to appear before the trial court on 24.07.2019."

6. Assailing the aforesaid judgment and order dated 28.06.2019, learned counsel for the appellant has strenuously argued that want of production of sufficient evidence had been a failure on the part of plaintiff-respondent No. 1 to prove her case but this failure on her part cannot be a ground to put the matter into another round of proceedings in the Trial Court. It has also been submitted that the High Court ought not to have remanded the suit for a fresh trial while requiring the parties to adduce fresh evidence because neither any ground was pleaded nor any relief was sought to that effect. Learned counsel would elaborate that it had not been the case of the plaintiff-respondent No. 1 that the Trial Court failed to consider any evidence adduced by her or that she could not produce any vital piece of evidence for any valid reason. On the contrary, she

neither got examined herself nor examined the Sub Registrar, who had registered the sale deed; and rather, the plaintiff's husband,who was an attesting witness to the earlier agreement for sale, was examined in evidence on her behalf as PW-1. With reference to illustration (g) to Section 114 of the Evidence Act, learned counsel for the appellant has argued that adverse inference ought to have been drawn against the plaintiff-respondent No. 1 for not presenting herself in the witness-box, particularly when the allegations of fraud were sought to be made the basis of her claim. Learned counsel has also submitted that none of the elements of proviso (1) to Section 92 of the Evidence Act having been established,the Trial Court, after appreciation of evidence, took a reasonable view of the matter while finding that the circumstances were probabilising the case of the defendant-appellant. Hence, for the suit having rightly been dismissed, there was no reason to remand the case for a trial *de novo*.Learned counsel has referred to and relied upon the decision of this Court in the case of ***Municipal Corporation, Hyderabad v. Sunder Singh:*** **(2008) 8 SCC 485.**

7. *Per contra*, with reference to the background aspects, the learned counsel for the plaintiff-respondent No.1 has vehemently argued that the sale deed in question is a void document as no consideration was passed on to her and hence, the same is liable to be set aside. According to the learned counsel, when the Appellate Court came to the conclusion that necessary evidence for proper determination of suit had not been brought on record, it had wide and ample powers to even *suo motu* remand the matter to the Trial Court; and the High Court cannot be faulted in adopting this course in the present matter for securing the ends of justice. Learned counsel has referred to the provisions contained in Rules 23, 23-A, 24, 27(1)(b) and 33 of Order XLI of the Code of Civil Procedure, 1908[2] to submit that the High Court has rightly remanded the matter after coming to the conclusion that the evidence on record was insufficient to arrive at a proper finding in favour of or against the sale deed. It has also been submitted that as per Section 120 of the Evidence Act, husband of the plaintiff-respondent No. 1 was a competent witness as he was the Manager of the theatre and was having knowledge about

2 'CPC', for short.

all the affairs of the theatre and hence, it was entirely immaterial that the plaintiff-respondent No. 1 did not enter the witness-box. Learned counsel has reiterated the stand of the plaintiff that she was made to sign on the sale deed as if it were a security document and therefore, the sale deed, suffering from misrepresentation by the defendants as also want of consideration, deserves to be set aside. It is also submitted that the alleged agreement for sale dated 23.11.2005 is also a disputed document and no reliance could be placed on the same. Learned counsel has referred to and relied upon a decision of this Court in the case of ***Sanjay Kumar Singh v. State of Jharkhand*: (2022) 7 SCC 247.**

8. We have given anxious considerations to rival submissions and have examined the record with reference to the law applicable.

8.1 Though learned counsel for the parties have made a few submissions touching upon the merits of the case but, we would leave those submissions concerning merits of the case at that only because the real question calling for determination in this appeal is as to whether the High Court has been justified in remanding the matter for trial *de novo*?

9. As regards the question calling for determination in the present appeal and with reference to the submissions made, we may, in the first place, take note of the relevant provisions of law and the expositions of this Court in the cited decisions.

9.1 The provisions contained in Rules 23, 23-A, 24, 27 and 33 of Order XLI CPC read 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 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 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.

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27. Production of additional evidence in Appellate Court.- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

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33. Power of Court of Appeal-The Appellate Court shall have power to pass any decree and make any order which ought to have been

passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

9.2 While explaining the scope of Rules 23 and 23-A of Order XLI CPC, in the case of ***Municipal Corporation, Hyderabad*** (supra), this Courthas observedas under: -

"**32.** A distinction must be borne in mind between diverse powers of the appellate court to pass an order of remand. The scope of remand in terms of Order 41 Rule 23 is extremely limited. The suit was not decided on a preliminary issue. Order 41 Rule 23 was therefore not available. On what basis, the secondary evidence was allowed to be led is not clear. The High Court did not set aside the orders refusing to adduce secondary evidence.

33. Order 41 Rule 23-A of the Code of Civil Procedure is also not attracted. The High Court had not arrived at a finding that a retrial was necessary. The High Court again has not arrived at a finding that the decree is liable to be reversed. No case has been made out for invoking the jurisdiction of the Court under Order 41 Rule 23 of the Code.

34. An order of remand cannot be passed on ipse dixit of the court….."

9.3 In the case of ***Sanjay Kumar Singh*** (supra) relied upon by the learned counsel for the respondent No. 1, this Court has observed as under: -

"**7.** It is true that the general principle is that the appellate court should not travel outside the record of the lower court and cannot

take any evidence in appeal. However, as an exception, Order 41 Rule 27CPC enables the appellate court to take additional evidence in exceptional circumstances. It may also be true that the appellate court may permit additional evidence if the conditions laid down in this Rule are found to exist and the parties are not entitled, as of right, to the admission of such evidence. However, at the same time, where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed. Even, one of the circumstances in which the production of additional evidence under Order 41 Rule 27CPC by the appellate court is to be considered is, whether or not the appellate court requires the additional evidence so as to enable it to pronounce judgment or for any other substantial cause of like nature.

8. As observed and held by this Court in *A. Andisamy Chettiar v. A.SubburajChettiar* [(2015)17 SCC 713], the admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. It is further observed that the true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced."

10. It could at once be noticed that in terms of Rule 33 of Order XLI CPC, the Appellate Court is empowered to pass any decree and to make any order which ought to have been passed or made; and which may be considered requisite in a case. While the said Rule 33 prescribes general powers of the Court of appeal, the specific powers of remand are prescribed in Rules 23 and 23-A of Order XLI CPC. Hence,for the purpose of the case at hand, reference to aforesaid Rule 33 remains inapposite. Having said so, we may proceed to examine if the order of remand in the present case could be justified with reference to the other referred provisions of Order XLI CPC?

11. One of the striking features of the impugned judgment dated 28.06.2019 is that even while dealing with a regular first appeal against the judgment and decree of the Trial Court, the High Court has not even adverted to the findings of the Trial Court pertaining to the present case and has not specified as to how the findings recorded by the Trial Court were unsustainable or unjustified. As noticed, in the impugned judgment, the High Court has narrated a few circumstances leaning in favour of the plaintiff (in paragraph 21) and then a few other circumstances which favour the genuineness of the sale in question (in paragraph 22) and thereafter, has observed that the evidence necessary for a proper determination of the suit had not been brought on record; and that the evidence on record was insufficient to arrive at a proper finding in favour or against the sale deed in question. The High Court would further observe that material witnesses have not been examined and no evidence has been brought in with regard to passing of consideration.

    11.1 With respect, what turns on the observations in the impugned judgment is that the High Court was unable to arrive at a conclusion on the basis of the material on record. However, fact of the matter remains that on the basis of the same material on record, the Trial Court had indeed arrived at a definite conclusion that the plaintiff had failed to establish her case and hence, the suit was liable to be dismissed. As indicated hereinabove, the High Court has not at all referred to the findings of the Trial Court and it is difficult to find from the judgment impugned as to why at all those findings of the Trial Court were not to be sustained or the decree was required to be reversed.

    11.2 After having taken note of the salient features of the impugned judgment as also the significant omissions therein, if we refer to the provisions empowering the Appellate Court to make an order of remand, it is difficult to find any justification for remand by the High Court in the present case. As noticed, the scope of remand in terms of Rule 23 of Order XLI CPC is extremely limited and that provision is inapplicable because the suit in question had not been disposed of on a preliminary point. The remand in the present case could only be correlated with Rule 23-A of Order XLI CPC and for its applicability, the necessary

requirements are that "*the decree is reversed in appeal and a re-trial is considered necessary".* As noticed hereinabove, there is no reason whatsoever available in the impugned judgment as to why and on what basis the decree was reversed by the High Court. Obviously, the reversal has to be based on cogent reasons and for that matter, adverting to and dealing with the reasons that had prevailed with the Trial Court remains a *sine qua non*. Thus, remand in the present case cannot be held justified even in terms of Rule 23-A of Order XLI CPC.

12. On the facts of the present case and the nature of order passed by the High Court, the enunciations and observations in the case of ***Sanjay Kumar Singh*** (supra) are of no application whatsoever as none of the parties have sought any permission to adduce evidence nor the High Court has specified as to what specific evidence was considered necessary to enable it to pronounce judgment or for any substantial cause. Moreover, it does not appear from the judgment of the High Court if the plaintiff-respondent No. 1 (appellant before the High Court), ever projected that the Trial Court did not allow her to produce any evidence that was sought to be produced. It is also not borne out if any of the parties at all made out any case for production of additional documents or oral evidence with reference to the applicable principles. Hence, the general observations of the High Court cannot be correlated with Rule 27(1) either. With respect, we are constrained to apply the observations of this Court in ***Municipal Corporation, Hyderabad*** (supra) to say that the present order of remand has been passed only on *ipse dixit* of High Court sans any reason or justification.

13. It gets perforce reiterated that in the suit filed by respondent No. 1, the Trial Court had indeed returned its findings on the basis of evidence on record. Whether those findings are sustainable or not is a matter entirely different and the High Court may examine the same but merely because the High Court could not reach to a conclusion on preponderance of probabilities, the evidence on record could not have been treated as insufficient so as to not pronounce the judgment in terms of Rule 24 of Order XLI CPC.

14. In regard to the want of any particular evidence, we may observe in the passing that if the Court finds any particular evidence directly

within the control and possession of a party having not been produced, the necessary consequences like those specified in illustration (g) to Section 114 of the Evidence Act[3] may follow but, merely because a particular evidence which ought to have been adduced but had not been adduced, the Appellate Court cannot adopt the soft course of remanding the matter. We would hasten to observe that we are not commenting on the merits of the case either way. The observations herein are only to indicate that the remand of the suit for trial *de novo* cannot be considered justified in the present case from any standpoint.

15. For what has been discussed hereinabove, suffice it would be to sum upthat for a few tentative observations about certain circumstances existing in favour of the plaintiff and certain other circumstances existing in favour of the defendants and then,with another observation that plaintiff was a vital witness, the High Court was not justified in remanding the matter for trial *de novo* without recording any finding if the plaintiff was prevented from examining herself or from adducing any other evidence as also without explaining as to on what ground the decree was being reversed.

16. Accordingly, and in view of the above, this appeal succeeds and is allowed. The impugned judgment and order dated 28.06.2019, insofar as relating to RFA No. 247 of 2014 (pertaining to OS No. 293 of 2012), is set aside; and the said appeal is restored for reconsideration by the High Court in accordance with law. The parties through their respective counsel shall stand at notice to appear before the High Court on 20.03.2023.

17. Having regard to the circumstances, there shall be no order as to costs of the present appeal.

Headnotes prepared by: Ankit Gyan (*Assisted by:* Mayank Batra, LCRA)

Result of the case: Appeal allowed.

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3 Illustration (g) to Section 114 of the Evidence Act reads under:-
"The Court may presume –
*** *** ***
(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;
*** *** ***"