

J. BALAJI SINGH

v.

DIWAKAR COLE & ORS.

(Civil Appeal No. 5540 of 2017)

APRIL 24, 2017

[R. K. AGRAWAL AND ABHAY MANOHAR SAPRE, JJ.]

*Code of Civil Procedure, 1908 – Or.41, rr.27, 23, 23-A, 25 and Or.43, r.1(u) – Jurisdictional error – Appellant filed suit against the respondents for declaration of title and permanent injunction over the suit property – Suit dismissed by trial court – Aggrieved appellant filed appeal before the first Appellate court and also filed an application u/Or.41, r.27, to file additional evidence (documents) – Both appeal and application u/Or.41, r.27 allowed by first Appellate court and matter remanded back to trial court to decide the suit afresh on merits – However, High Court examined the case on merits and set aside the judgment of first Appellate court and further, dismissed the suit by restoring the judgment/decree of trial court – On appeal, held: Once the first Appellate court allowed the application u/Or.41, r.27 and took on record the additional documents, it rightly set aside the judgment/decree of trial court and enabled it to decide the suit afresh in light of entire evidence – First Appellate court was justified in taking recourse to power conferred u/Or.41, r.23-A for remanding case back to trial court – High Court committed jurisdictional error by again examining the case on merits and setting aside the judgment of the first Appellate court and restoring the judgment of trial court – High Court was to only examine legality of the remand order in appeal u/Or.43, r.1(u) – It could only have remanded the case to the first Appellate court with direction to decide the first appeal on merits – High Court had no jurisdiction to decide the case on merits – Jurisdiction.*

**Allowing the appeal, the Court**

**HELD: 1. Once the first Appellate Court allowed the application under Order 41 Rule 27 of CPC and took on record the additional evidence, it rightly set aside the judgment/decree of the Trial Court giving liberty to the parties to lead additional**

A evidence in support of their case which, in turn, enabled the Trial  
Court to decide the civil suit afresh on merits in the light of entire  
evidence. The first Appellate Court was, therefore, justified in  
taking recourse to powers conferred on the Appellate Court under  
Order 41 Rule 23-A for remanding the case to the Trial Court.  
B There is no fault in exercise of such power by the first Appellate  
Court. [Para 21][561-C-D]

2. The only error which the first Appellate Court committed  
was that it went on to record the findings on merits. It was not  
necessary to do so while passing the order of remand. The reason  
is that once the first Appellate Court formed an opinion to remand  
C the case, it was required to give reasons in support of the remand  
order as to why the remand is called for in the case. Indeed, the  
remand was made only to enable the Trial Court to decide the  
case on merits. Therefore, there was no need to discuss much  
less record findings on several issues on merits. It was totally  
D uncalled for.[Para 22][561-E-F]

3. In so far as the impugned order is concerned, the High  
Court committed jurisdictional error when it also again examined  
the case on merits and set aside the judgment of the first Appellate  
Court and restored the judgment of the Trial Court. The High  
E Court, should not have done this for the simple reason that it  
was only examining the legality of the remand order in an appeal  
filed under Order 43 Rule 1(u) of the Code. Indeed, once the  
High Court came to a conclusion that the remand order was bad  
in law then it could only remand the case to the first Appellate  
Court with a direction to decide the first appeal on merits.[Para  
F 23][561-G-H]

4. The High Court failed to see that when the first  
Appellate Court itself did not decide the appeal on merits and  
considered it proper to remand the case to the Trial Court, a  
*fortiori*, the High Court had no jurisdiction to decide the appeal  
on merits. Moreover, Order 43 Rule 1(u) confers limited power  
G on the High Court to examine only the legality and correctness  
of the remand order of the first Appellate Court but not beyond  
that. [Para 24] [562-A-B]

5. It is well settled law that the jurisdiction to decide the  
H appeal on merits can be exercised by the Appellate Court only

when the appeal is filed under Section 96 or 100 of the Code against the decree. Such was not the case here. [Para 25] [562-C-D] A

6. In the light of above mentioned discussion, it is clear that the High Court had no jurisdiction to consider much less deciding the entire case of the parties on merits in such appeal. [Para 26] [562-D-E] B

7. The High Court held that the first Appellate Court instead of remanding the case to the Trial Court should have heard the appeal on merits. This finding is bad in law for the reason that firstly, it was not possible for the first Appellate Court to have recorded the evidence at the appellate stage. Secondly, having regard to the nature of factual controversy involved and keeping in view the nature of additional evidence filed which too needed to be proved in evidence, it was not possible to retain the appeal to itself and invite finding only on additional evidence by taking recourse to powers under Rule 25; and lastly, wholesome remand, as directed by the first Appellate Court, would enable the Trial Court to appreciate the entire evidence in its proper perspective while deciding the suit afresh on merits. [Para 27] [562-E-G] C D

8. The High Court erred in reversing the finding of the first Appellate Court, in so far as it pertained to application filed by the plaintiff under Order 41 Rule 27 of the CPC. No fault could be found in the finding of the first Appellate Court on this issue for the following reasons: First, the additional evidence sought to be filed at the first appellate stage was held to be material and necessary for proper adjudication of the suit; and second, the reasons as to why it could not be filed during the trial also found acceptance to the first Appellate Court. [Paras 28, 29] [562-G-H; 563-A] E F

9. In order to enable the parties to have fair trial in civil suit and with a view to do substantial justice, the first Appellate Court rightly allowed the plaintiff to file the additional documents in appeal which satisfied the requirements of Order 41 Rule 27 of the Code. Therefore, there is no concurrence with the reasoning and the conclusion arrived at by the High Court. [Paras 30, 31] [563-B-C] G

CIVILAPPELLATE JURISDICTION: Civil Appeal No. 5540 of 2017. H

A From the Judgment and Order dated 26.09.2013 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Civil Miscellaneous Appeal No. 645 of 2012.

D. Bharat Kumar, Tadimalla Baskar Gowtham, Vishal Arun, Advs. for the Appellant.

B Guntur Prabhakar, Y. Raja Gopala Rao, Advs. for the Respondents.

The Judgment of the Court was delivered by

**ABHAY MANOHAR SAPRE, J.** 1. Leave granted.

C 2. This appeal is filed by the plaintiff against the final judgment and order dated 26.09.2013 passed by the High Court of Judicature, Andhra Pradesh at Hyderabad in Civil Misc. Appeal No.645 of 2012 whereby the learned Single Judge of the High Court allowed the appeal filed by the defendants (respondents herein) and set aside the judgment and decree dated 17.02.2012 passed by the Additional District Judge, Kadapa and confirmed the judgment and decree dated 31.12.2009 passed by the Senior Civil Judge, Kadapa in Original Suit No.62 of 2005.

D 3. Facts necessary for the disposal of the appeal, which lies in narrow compass, need mention infra to appreciate the controversy involved in the appeal.

E 4. The appellant is the plaintiff whereas the respondents are the defendants in a civil suit out of which this appeal arises.

F 5. The appellant filed a civil suit being O.S. No.62 of 2005 before the Senior Civil Judge, Kadapa against the respondents for declaration of his title over the suit property (described in detail in the Schedule to the plaint) and also sought permanent injunction against the respondents restraining them from interfering in his possession over the suit property.

G 6. The respondents filed their respective written statements and denied the appellant's claim over the suit property. The Trial Court framed issues on law and facts on the basis of the pleadings for adjudicating the rights of the parties arising in the case. The parties filed the documentary evidence and adduced oral evidence in support of their respective case.

H 7. The Trial Court, vide judgment/decree dated 31.12.2009 in O.S. No.62 of 2005 dismissed the appellant's suit. Felt aggrieved, the appellant filed first appeal being A.S. No.42 of 2010 before the VI Additional District Judge, Kadapa. In appeal, the appellant filed one application

(I.A. No. 211 of 2011) under Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as “the Code”) and sought permission to file additional evidence (documents) in support of his case which, according to him, was material and necessary for the proper disposal of the suit. It was alleged that the additional evidence could not be filed in suit at that time due to its non-availability with the plaintiff. The respondents opposed the application.

A

B

8. The first Appellate Court, by judgment/decree dated 17.02.2012, allowed the application (I.A.No.211 of 2011) filed by the appellant under Order 41 Rule 27 read with Section 151 of the Code and then proceeded to decide the appeal on merits. By his lengthy judgment (pages 97 to 129, Annexure P-10 to SLP paper book) the first Appellate Judge allowed the appeal, set aside the judgment/decree of the Trial Court and remanded the case to the Trial Court for deciding the suit afresh on merits uninfluenced by any of the observations made by him in the judgment. The parties were granted liberty to adduce additional evidence in support of their case in the Trial Court.

C

D

9. Felt aggrieved by the aforesaid judgment, the respondents (defendants) filed C.M.A. No.645 of 2012 before the High Court under Order 43 Rule 1 (u) of the Code.

10. By impugned judgment, the learned Single Judge allowed the appeal, set aside the judgment of the first Appellate Court and dismissed the suit by restoring the judgment and decree of the Trial Court. Felt aggrieved, the plaintiff has filed this appeal by way of special leave before this Court.

E

11. Heard Mr. D. Bharat Kumar, learned counsel for the appellant and Mr. Y. Raja Gopala Rao, learned counsel for the respondents.

F

12. Having heard learned Counsel for the parties and on perusal of the record of the case, we are constrained to allow the appeal, set aside the impugned judgment and remand the case to the Trial Court for deciding the civil suit afresh on merits in accordance with law.

13. The question, which arises for consideration in this appeal, is whether the High Court was justified in allowing the defendants’ appeal and thereby justified in restoring the judgment/decree of the Trial Court which had dismissed the suit. In other words, the questions which arose before the High Court were, whether the first Appellate Court was justified in setting aside the judgment/decree of the Trial Court; and if so,

G

H

A whether it was justified in remanding the case to the Trial Court for fresh trial of the suit in accordance with law. Another question, which fell for consideration, was whether the first Appellate Court was justified in allowing the application filed by the appellant (plaintiff) under Order 41 Rule 27 of the Code by which the plaintiff had sought permission to adduce additional evidence in appeal in support of his case.

B

14. As is clear from mere perusal of the impugned judgment, we find that the High Court recorded inconsistent finding insofar as it pertained to Order 41 Rule 27 of the Code. In Para 26, it was held as under:

C

**“26.....Assuming that the lower appellate Court felt that the additional documents filed by the plaintiff in the appeal before it have some bearing on the case, nothing prevented it from considering the same, giving opportunity to both parties to lead evidence and deciding the appeal.....”**

D

15. Whereas in the other part of the judgment, the learned Single Judge did not approve the approach of the first Appellate Court in granting indulgence to the appellant to fill the lacuna by adducing evidence. Be that as it may, having observed this, the High Court proceeded to examine the case on merits and eventually allowed the appeal, set aside the judgment of the first Appellate Court and restored the judgment/decree of the Trial Court. The effect of the judgment of the High Court is that the plaintiff's suit stands dismissed.

E

16. The main question, which fell for consideration before the High Court, was whether the first Appellate Court was right in remanding the case to the Trial Court for fresh trial on merits?

F

17. There are three provisions in the Code which deal with the power of the Appellate Court to remand the case to the Trial Court. These provisions are Order 41 Rules 23, 23-A, and 25.

G

18. So far as Order 41 Rule 23 is concerned, it enables the Appellate Court to remand the case to the Trial Court when it finds that the Trial Court has disposed of the suit upon a preliminary point. The Appellate Court in such cases is empowered to direct the Trial Court to decide all the issues on evidence on record.

H

19. 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. A

20. 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. B

21. Now coming to the facts of the case, we are of the considered opinion that once the first Appellate Court allowed the application under Order 41 Rule 27 of Code and took on record the additional evidence, it rightly set aside the judgment/decreed of the Trial Court giving liberty to the parties to lead additional evidence in support of their case which, in turn, enabled the Trial Court to decide the civil suit afresh on merits in the light of entire evidence. The first Appellate Court was, therefore, justified in taking recourse to powers conferred on the Appellate Court under Order 41 Rule 23-A for remanding the case to the Trial Court. We find no fault in exercise of such power by the first Appellate Court. C D

22. In our considered view, the only error which the first Appellate Court committed was that it went on to record the findings on merits. In our view, it was not necessary to do so while passing the order of remand. The reason is that once the first Appellate Court formed an opinion to remand the case, it was required to give reasons in support of the remand order as to why the remand is called for in the case. Indeed, the remand was made only to enable the Trial Court to decide the case on merits. Therefore, there was no need to discuss much less record findings on several issues on merits. It was totally uncalled for. E F

23. So far as the impugned order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the judgment of the first Appellate Court and restored the judgment of the Trial Court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the remand order in an appeal filed under Order 43 Rule 1(u) of the Code. Indeed, once the High Court came to a conclusion that the remand order was bad in law then it could only remand the case to the first Appellate Court with a direction to decide the first appeal on merits. G H

A           24. The High Court failed to see that when the first Appellate  
Court itself did not decide the appeal on merits and considered it proper  
to remand the case to the Trial Court, *a fortiori*, the High Court had no  
jurisdiction to decide the appeal on merits. Moreover, Order 43 Rule  
1(u) confers limited power on the High Court to examine only the legality  
B           and correctness of the remand order of the first Appellate Court but not  
beyond that. In other words, the High Court should have seen that Order  
43 Rule 1(u) gives a limited power to examine the issue relating to legality  
of remand order, as is clear from Order 43 Rule 1(u) which reads thus:-

C                           **“1(u) an order under rule 23 or rule 23A of Order XLI  
remanding a case, where an appeal would lie from the  
decree of the Appellate Court”**

D           25. It is well settled law that the jurisdiction to decide the appeal  
on merits can be exercised by the Appellate Court only when the appeal  
is filed under Section 96 or 100 of the Code against the decree. Such  
was not the case here.

E           26. In the light of abovementioned discussion, we are of the opinion  
that the High Court had no jurisdiction to consider much less deciding  
the entire case of the parties on merits in such appeal.

F           27. We are also unable to agree with the High Court when it held  
that the first Appellate Court instead of remanding the case to the Trial  
Court should have heard the appeal on merits. This finding, in our view,  
is bad in law for the reason that firstly, it was not possible for the first  
Appellate Court to have recorded the evidence at the appellate stage.  
Secondly, having regard to the nature of factual controversy involved  
and keeping in view the nature of additional evidence filed which too  
G           needed to be proved in evidence, it was not possible to retain the appeal  
to itself and invite finding only on additional evidence by taking recourse  
to powers under Rule 25; and lastly, wholesome remand, as directed by  
the first Appellate Court, would enable the Trial Court to appreciate the  
entire evidence in its proper perspective while deciding the suit afresh  
on merits.

H           28. We are also unable to agree with the High Court when it  
reversed the finding of the first Appellate Court, in so far as it pertained  
to application filed by the plaintiff under Order 41 Rule 27 of the Code.  
In our opinion, no fault could be found in the finding of the first Appellate  
Court on this issue for the following reasons:

29. First, the additional evidence sought to be filed at the first appellate stage was held to be material and necessary for proper adjudication of the suit; and second, the reasons as to why it could not be filed during the trial also found acceptance to the first Appellate Court. A

30. In order to enable the parties to have fair trial in civil suit and with a view to do substantial justice, the first Appellate Court, in our view, rightly allowed the plaintiff to file the additional documents in appeal which satisfied the requirements of Order 41 Rule 27 of the Code. B

31. We cannot, therefore, concur with the reasoning and the conclusion arrived at by the High Court in the light of reasoning mentioned above. C

32. In view of foregoing discussion, we allow the appeal, set aside the impugned order of the High Court and restore that of the first Appellate Court with modification as mentioned in para 22.

33. Liberty is granted to the defendants to file in rebuttal any additional evidence before the Trial Court in support of their case. The Trial Court will allow the parties to lead oral evidence to prove additional documentary evidence and then decide the suit afresh on merits strictly on the basis of evidence in accordance with law without being influenced by any observations made by the first Appellate Court, the High Court and this Court in their respective orders passed in these proceedings. D E

34. The Trial Court shall ensure disposal of the suit, as directed, within six months as an outer limit. Parties to appear before the Trial Court on 01.05.2017 to enable the Trial Court to decide the suit as directed above. F