MANU/BH/0042/1966

Equivalent Citation: AIR1966Pat209

IN THE HIGH COURT OF PATNA
FULL BENCH

A.F.A.D. No. 263 of 1959

Decided On: 22.12.1965

Appellants: **Bandhu Kunjra**
Vs.
Respondent: **Rahman Kunjra and Ors.**

Hon'ble Judges/Coram:
R.L. Narasimham , C.J., Udai Sinha and S.N.P. Singh , JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Ugra Singh and Birendra Mohan Singh, Advs.

For Respondents/Defendant: Syed Akbar Hussain and Nakuleshwar Prasad, Advs.

JUDGMENT

Udai Sinha, J.

1. This appeal, filed by the plaintiff, has been referred to a Full Bench for decision. The point stated by the Divisional Bench in the order of reference will be clear after the facts have been narrated.

2 . The plaintiff has instituted a suit, out of which this appeal has arisen, for declaration, of title to and for recovery of possession of certain lands, mentioned in the plaint, along with mesne profits. The right claimed by the plaintiff was that of an under-raiyat. It was alleged that 1.78 acres of land in village Bachiar was the raiyati Kasht lands of two brothers, named Durga Bhagat and Kishun Dayal Bhagat. Durga Bhagat had left four sons, and Jagarnath Bhagat was the only son of Kishun Dayal Bhagat. As a result of Title Partition Suit No. 9 of 1935, these lands had fallen to the share of Jagarnath Bhagat. It was contended that the plaintiff was inducted as an under-raiyat of the disputed lands by Durga Bhagat, on an annual rent of Rs. 100. Having remained in possession for more than twelve years, the plaintiff contended that he had acquired right of occupancy in the disputed land.

It was alleged that the defendants first party had purported to purchase the disputed lands from Jagarnath Bhagat, knowing fully that the plaintiff was in occupation as an under-raiyat. It was alleged, further, that the defendants first party had purported to have executed a farzi rehan deed in favour of defendants second party, only to establish their claim under their sale deeds. There was a proceeding under Section 144 of the Code of Criminal Procedure which had terminated in favour of the defendants on the 30th March, 1947, when the plaintiff was dispossessed from the disputed lands. Hence, this suit had to be instituted.

According to the defendants, after the survey, the under-raiyats in possession were removed and Durga Bhagat as karta of his family came in possession of the disputed lands, After his death, Kishun Dayal became the karta. As a result of the title partition

suit, mentioned above, these lands fell to the share of Jagarnath Bhagat alone and soon thereafter, defendant No. 1 approached him to let out the lands to him in Batai settlement. Defendants first party were let in possession as Bataidars and on the 21st October 1946, defendants Nos. 1 and 2, purchased the lands by two sale deeds. The defendants supported the usufructuary mortgage to defendants second party and all other allegations to the contrary made by the plaintiff were denied. According to the defendants, the plaintiff was never in possession and the suit was fit to be dismissed.

3. That suit was dismissed by the trial Court by judgment and decree dated the 28th February, 1950. After two stages in the matter to which it is not necessary to refer in detail, the suit was decreed by the court of appeal below by its judgment and decree dated the 25th March, 1955. The defendants, thereupon, came to this Court in Second Appeal No. 629 of 1955. On hearing the parties, Sahai, J., by judgment dated the 20th August, 1958, allowed the appeal, set aside the decree of the Court of appeal below and remanded the case to that Court for reconsideration. It was ordered that the court of appeal below should decide the appeal afresh in accordance with law, keeping in view the observations made by this Court. Thereafter, the appeal has been decided by the court of appeal below afresh and the appellate decree has affirmed the decree of the trial Court, with the result that the plaintiff's suit stands dismissed. The plaintiff has, thus, come up to this Court.

The case was at first placed for hearing before a learned Single Judge of this Court, and by order dated the 3rd November, 1960, the appeal was referred to a Division Bench for hearing. Presumably, it was done on the supplementary grounds filed by the appellant on that very day. Ground No. 1 of the supplementary grounds urged that Sahai, J., had no jurisdiction to interfere with the findings of fact arrived at by the Court of appeal below prior to the remand, and therefore, the judgment of the Court of appeal below, delivered after remand, must be set aside. According to this ground, further, the order of remand passed by this Court was void and had no existence in the eye of law, and therefore the judgment of the Court of appeal below, in pursuance of the remand order, is vitiated. It is substantially upon this ground that the Division Bench, before which the appeal was placed for hearing, made the order of reference to the Full Bench.

It has been stated in the order of reference dated the 22nd August, 1963, that, one of the most important points that arise for consideration is whether an appeal lay under the Letters Patent of this Court against an order of remand passed under Section 151 of the Code of Civil Procedure by a Single Judge. After referring to the decisions of Munshi Lal v. Mohanth Ramasis Puri reported in MANU/BH/0298/1922 : AIR 1922 Pat 384, Baawari Lal v. Shukrullah, reported in MANU/BH/0138/1932 : AIR 1933 Pat 139, and Brajo Gopal v. Amar Chandra, reported in MANU/WB/0272/1928 : AIR 1929 Cal 214 (FB) the order of reference has stated that except the case reported in MANU/BH/0298/1922 : AIR 1922 Pat 384, which was a case before the amendment of Clause 10 of the Letters Patent of this Court, there is no other decision on the point as to whether the untrammelled right of appeal having been conditioned under the amended Clause 10, it could be said that an aggrieved party has a right of appeal under the Letters Patent, so that he cannot challenge the correctness of a remand order in an appeal filed against the decree passed after remand.

4. Learned counsel for the appellant has based his argument under Section 105 of the Code of Civil Procedure, read with the provision in Clause 10 of the Letters Patent which states, inter alia, that "an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court..... where the Judge who passed the

judgment declares that the case is a fit one for appeal.....". In order to appreciate the contentions raised in the case, Section 105 of the Code of Civil Procedure is quoted below:

> "105. (1) Save as otherwise expressly pro vided, 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 as 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."

According to learned counsel for the appellant, the order of remand passed by the learned Single Judge in Second Appeal No. 629 of 1955, on the 20th August, 1958 was not a judgment within the meaning of Clause 10 of the Letters Patent, and therefore, Section 105(1) of the Code is attracted. Thus, it is argued, that, in this second appeal the "order of remand can be set aside on the ground that the order had interfered with the findings of fact arrived at by the court of appeal below on the earlier occasion. According to the learned counsel, Section 105(2) is not applicable in any case, because this order of remand was not an appealable order, as under Clause 10 of the Letters Patent, there is no right of appeal unless the Judge in question declares that the case is a fit one for appeal.

Before I deal with the questions mentioned above, I would deal with a number of decisions of this Court where the sanctity of an order of remand has been considered by a Court of coordinate jurisdiction. In the case, of (Rai) Brij Raj Krishna v. Chathu Singh, reported in AIR 1923 Pat 226 a batch of second appeals had come up for hearing before a Division Bench of this Court. The decrees of the court of appeal below were set aside by this Court and the appeals were remanded to the lower appellate Court. The appeals then came up to this Court again after the court of appeal below had given its fresh decision. This Court held thus :

> "There can be no doubt to my mind, whether I am prepared to agree with it or not is another matter, that the finding of this Court in second appeal was that upon the facts found by the Munsif, the Court was perfectly justified in arriving at a conclusion that there was fraud. That was a question of law and, in so far as that question was determined by two Judges of this Court of co-ordinate jurisdiction in a final judgment which set aside the decision of the lower Court, I think we must hold ourselves bound by that decision and cannot go behind it. Had it merely been a case of keeping the appeal pending in this Court and remanding the case for further findings on an issue not decided we should no doubt have been entitled, when the matter came up for final consideration, to disregard the reasons given for remanding the case but the present decision appears to me to be one which we cannot ignore. It is, as I have said a decision era a point of law by a Court of co-ordinate jurisdiction and it is final in so far as it sets aside the decision of the lower appellate Court and lays down the law to be followed by that Court on remand."

This decision was followed by another Division Bench of this Court, in the case of

Baraboni Coal Concern Ltd. v. Ram Chandra, reported in MANU/BH/0187/1939 : AIR 1939 Pat 580. The question under consideration had arisen in that case in two miscellaneous appeals and a civil revision arising out of two applications for execution of a decree obtained by the respondent of that case. There was an earlier order of remand passed by this Court, and when the cases came to this Court once again, this Court said thus:

> "Sir Manmatha Nath Mukharji, however, contended that the order of remand did not finally determine the question of the liability to account, and did not finally decide that on failure to account for the assets, the appellant Company would be personally liable for the decree under execution. He placed before us a number of authorities, some of which are at first sight not reconcilable. We do not propose to examine them in detail, but consider it sufficient to refer to a decision of this Court. 4 Pat LT 35: (AIR 1923 Pat 226) in which it was held that when one Bench set aside the decision of the lower court and remanded the case after laying down the law to be followed, the decision of the Bench on the point of law is final and another Bench, a Court of coordinate jurisdiction, cannot go behind it in appeal against the decision passed after remand. The authorities on the whole establish the proposition that if a Bench remands a case to the lower court either under Order 41, Rule 23 or under Order 41, Rule 25 or under the inherent powers of the Court (the remand in this case comes neither under Rule 23 nor under Rule 25), the matters finally disposed of by the order of remand cannot, any of them, be re-opened when the case comes back from the lower court, but if at the time of remand no final decision is given on a point though some observations only are made in respect of it, it is open to another Bench when finally determining the case to come to its own conclusions on it. Applying this principle, the appellants are, in our opinion, precluded from raising the question now."

(The case reported in 4 Pat LT 35 is the same case that is reported in AIR 1923 Pat 226.)

This matter has been dealt with in some detail in another Division Bench decision of this Court, in the case of Sundar Ahir v. Phuljharia, reported in MANU/BH/0162/1957 : AIR 1957 Pat 534. In that case, the plaintiffs' suit having been decreed by the trial Court, there was an appeal filed by the defendant in the court of appeal below. That court remanded the suit to the trial Court, giving certain directions. The decree of the trial Court was set aside. Thereafter, the trial Court again decreed the suit. The defendant again filed an appeal in the court of appeal below. That court allowed the appeal and dismissed the plaintiffs' suit. The plaintiffs thereupon came up to this Court in second appeal. The point in controversy in this Court arose, because the court of appeal below, on the first occasion, had accepted the plaintiffs' genealogy and the order of remand had contained certain directions for the guidance of the trial Court. When the appeal came to the Court of appeal below for the second time, that court held that the genealogy given by the plaintiffs was incorrect. The question agitated in this Court was whether the court of appeal below, which decided the appeal on the second occasion, could disagree with the findings arrived at, on the first occasion, by the court of appeal, before remand, and came to a contrary finding. Reference was made to the cases reported in AIR 1923 Pat 226 and MANU/BH/0187/1939 : AIR 1939 Pat 580, and the point was summarised thus:

> "On a consideration of the above decisions, therefore, in my judgment, the

guiding principles which can be extracted therefrom, are:

> (1) That if a Bench of the High Court remands a case to the lower Court under its inherent powers, the matters finally disposed of by the order of remand cannot, any of them, be re-opened, when the case comes back from the lower court but, if at the time of remand, no final decision is given on a point, though some observations only are made in respect of it, it is open to another Bench, a court of coordinate jurisdiction, when finally determining the case, to come to its own conclusions on it; and (2) that even in a case decided by the first court of appeal other than a case, decided by the High Court, if a Judge on appeal decides certain points and remands the case, his decision is binding on his successor, before whom the case comes up again on appeal from the judgment after remand, because such a court is a court of co-ordinate jurisdiction, and, therefore he cannot go behind the earlier final decision of his predecessor before remand.

The test, therefore, in such a case, to ascertain if a particular finding given by the Judge on appeal is a final decision or not is to find out, if, by the order of remand, the Judge on appeal, has remanded the suit for determination of all the points at issue, or, it has determined some points in controversy, and remanded the suit for determination of the remaining points, which may include the question of maintainability of the plaintiffs' suit itself, in which case the decree of the first court has to be set aside, and, the suit remitted to the Court below for a fresh decision of the case according to law.

Applying the above principles to the present case, I would answer the question posed by me in the negative, and hold that the court of appeal below on remand, was not entitled to go behind the decision of its predecessor on the first occasion before remand, for the reasons stated hereafter."

Although Sundar Ahir's case MANU/BH/0162/1957 : AIR 1957 Pat 534 was considering the power of the court of appeal below on the second occasion, there is no distinction in principle as will appear from the next Division Bench decision of this Court, in the case of Smt. Lalbati Kuer v. Satchitanand Verma, reported in MANU/BH/0143/1960 : AIR 1960 Pat 418. In this case, the plaintiff's suit was dismissed by the trial Court, and on appeal to the court of appeal below, the appeal was dismissed. The matter came to this Court in second appeal and a learned Single Judge of this Court remanded the case for re-hearing by the lower appellate Court. After remand, the suit was decreed. Then, the matter came up here again in second appeal and another learned Single Judge of this Court remanded the case again to the lower appellate court. Thereafter, the court of appeal below dismissed the suit. The plaintiff came to this Court and the appeal was referred to a Division Bench for hearing by a learned Single Judge. Thereupon, the appeal was decided by a Division Bench. Certain questions decided by the learned Single Judge of this Court on the second occasion were challenged and this Court stated thus;

> "We do not think it is open to the appellant to raise this point at this stage. The reason is that the judgment of Misra, J., dated 22-12-1953, has finally disposed of all the matters in controversy between the parties except the

> point with regard to the genuineness of the mahadanama. Except with regard to this point all the matters in controversy between the parties have been decided by the Learned Judge, and those points cannot, therefore, be re-opened on the principle of constructive res judicata..... The principle applicable to a case of this description has been laid down by a Division Bench of this Court in MANU/BH/0162/1957 : AIR 1957 Pat 534. It was pointed out in that case, after a review of all the authorities on the point, that if a Bench of the High Court remands a case to the lower Court under its inherent powers, the matters finally disposed of by the order of remand cannot be reopened when the case comes back to the lower Court."

Thus, it is clear that a number of decision of this Court stand in the way of the contentions raised by learned counsel for the appellant when he urges before a Court of coordinate jurisdiction that Sahai, J. had wrongly set aside the decree of the court of appeal below in Second Appeal No. 629 of 1955. In my opinion Munshi Lal's case MANU/BH/0298/1922 : AIR 1922 Pat 384, to which reference has been made in this case, and other decisions of the Letters Patent Bench are hardly of any assistance for decision of the instant case. In Munshi Lal's case MANU/BH/0298/1922 : AIR 1922 Pat 384 the learned Single Judge of this Court had disagreed with the order of remand made earlier by another learned Single Judge in an appeal subsequently filed against the decree of the Court below. The Letters Patent Bench reversed the judgment of the learned Single Judge, given on the second occasion.

Although Munshi Lal's case MANU/BH/0298/1922 : AIR 1922 Pat 384 proceeded on the footing that the judgment of the learned Single Judge of this Court, gives on the first occasion, was open to appeal under Clause 10 of the Letters Patent, the Letters Patent Bench was sitting on appeal from the judgment of a Single Judge of this Court, whereas we are not. Munshi Lal's case MANU/BH/0298/1922 : AIR 1922 Pat 384 was followed in the case of Aju Chaudhuri v. Janak Lal, reported in MANU/BH/0203/1923 : AIR 1924 Pat 336, which was also a case before the amendment of Clause 10. This case has been followed in the case of Tapesar Raut v. Ram Jatan, reported in MANU/BH/0018/1962 : AIR 1962 Pat 60, which is a case on Clause 10 of the Letters Patent as it now stands. But, the decisions reported in MANU/BH/0203/1923 : AIR 1922 Pat 384 : AIR 1924 Pat 336 and MANU/BH/0018/1962 : AIR 1962 Pat 60, (to which, obviously, the attention of the Division Bench of this Court was not drawn), are all decisions by Letters Paleat Bench, and whether the order of Sahai, J., dated the 20th August, 1958, is a judgment within the meaning of Clause 10 of the Letters Patent or not does not really arise for decision in this appeal.

Even if it be held, in favour of the appellant of this appeal, that, the order of remand was not a judgment within the meaning of Clause 10 and Sub-section (1) of Section 105 of the Code of Civil Procedure applies and not Sub-section (2) of that section, the learned Single Judge of this Court, who referred the appeal to a Division Bench on the 3rd November, 1960, could not have set aside the order of remand passed by Sahai, J., being a Court of co-ordinate jurisdiction. This Bench, as constituted, is also a Court of co-ordinate jurisdiction, and, therefore, on the principles mentioned above, this Bench cannot question the validity of the order of Sahai, J.

A decision of the Letters Patent Bench of the Madhya Pradesh High Court, in the case of Budhilal Deviprasad v. Jagannathdas Bajrangdar, reported in MANU/MP/0113/1963 may be noticed. Without going into the details of the facts, it is enough to state, that at one stage a learned Single Judge of that High Court had set aside the judgment and decree of the lower appellate Court, in a second appeal, and had remanded the

case to it for fresh decision. He had based his judgment on a Full Bench decision of that Court. On remand, the court of appeal below affirmed the judgment and decree of the trial Court. The defendants appealed to the High Court and the appeal came before the same learned Single Judge. By that time, the decision of the Full Bench of that Court had been overruled by the Supreme Court, and hence it was argued that the order of remand was incorrect. The learned Single Judge held that he could not go behind his remand order, which, so far as he was concerned, was res judicata. The matter then came to the Letters Patent Bench on a certificate granted by the learned Single Judge. It was held that the learned Single Judge was correct in holding that he could not reconsider his order of remand when hearing an appeal from the judgment and decree passed by the lower appellate court after remand.

Reference was made to two decisions of this Court, one reported in AIR 1954 Pat 326 and the other reported in MANU/BH/0143/1960 : AIR 1960 Pat 418, which has already been considered above. The decision of the Supreme Court in the case of Satyadhan v. Smt. Deorajin Debi, reported in MANU/SC/0295/1960 : AIR 1960 SC 941 was dealt with. Learned counsel for the appellant has relied upon this decision of the Supreme Court for his contention that the order of remand passed by Sahai, J. was not a judgment within the meaning of Clause 10 of the Letters Patent. Reliance is placed on paragraphs 8 to 11 of the judgment for the contention that the order of Sahai, J., in this case, was not a final decision on any matter, and, therefore, it was not a judgment within the meaning of Clause 10. But in my opinion, the decision of the Supreme Court is in no sense in favour of the appellant, as urged.

It is clear that their Lordships of the Supreme Court were considering the question of finality or otherwise of an order of a Court vis-a-vis the power of the higher Court, and in Budhilal Deviprasad's case MANU/MP/0113/1963, the Madhya Pradesh High Court was right in taking into consideration this decision of the Supreme Court for its conclusion that the order of remand passed by a Single Judge on the first occasion could not be questioned by the same Court in an appeal from a decree passed after remand. Learned counsel for the appellant has also referred to the decisions reported in MANU/TN/0452/1954 : AIR 1954 Mad 1057 (FB), AIR 1964 Mad 194 (FB) and MANU/SC/0008/1961, for his argument that the order of remand passed by Sahai, J. in this case was an interlocutory order and not a judgment within the meaning of Clause 10 of the Letters Patent of this Court. But, as indicated earlier, this line of approach is unnecessary in a Court of co-ordinate jurisdiction. For the reasons given above, I am of the opinion that this Court cannot now set aside the order of remand passed by Sahai, J., on the 20th August, 1958, on the ground that it was an erroneous order. Reverting to the arguments of the learned counsel for the appellant, based on Section 105 of the Code of Civil Procedure and Clause 10 of the Letters Patent, it must be held that the arguments cannot succeed.

5. Learned counsel for the appellant has then gone back to the substantial point that had been taken in the memorandum of appeal as presented in this Court originally for urging that the court of appeal below did not follow the directions given in the order of remand made by this Court and hence its decision was erroneous. It is argued that the judgment and decree passed earlier had been set aside by Sahai, J., on appeal, and the case had been remanded to the court of appeal below for consideration on the entire evidence on record, whereas the decision under scrutiny is based only on two documents, namely, Exhibits 2(n) and 2(o) and not on all the materials on record. Having perused the judgment of the court of appeal below, carefully, I am of the opinion that this contention of the learned counsel is not valid. It is clear from paragraph 11 of the judgment that the counsel for the plaintiff-appellant had not

seriously relied upon the oral evidence adduced on behalf of the plaintiff. It appears that Exhibits 2(n) and 2(o) were relied upon before the Court of appeal below, and the court has refused to accept the plaintiff's case of possession for more than twelve years, based on these documents. It has been held that Exhibit 2(n) could not be connected with the disputed land and the genuineness of Exhibit 2(o) has been doubted. Learned counsel for the appellant has not been able to show that there were any other documentary evidence which could prove the plaintiff's possession for twelve years or more. Thus, the court of appeal below was right in stating:

> ''When both the receipts, Exts. 2(n) and 2(o) are disbelieved the plaintiff fails to prove his possession over the lands in suit for more than 12 years before 30-3-1947 from any other satisfactory evidence adduced in this suit and the suit accordingly fails."

Thus, in my opinion, the judgment of the court of appeal below cannot be reversed on merits either.

R.L. Narasimham, C.J.

6. I agree.

S.N.P. Singh, J.

7. I agree.