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## Bashir Ahmad Vs Smt. Zainabun Nisan and Others

F.A.F.O. No. 245 of 1971

Court: Allahabad High Court

Date of Decision: Dec. 15, 1972

**Acts Referred:** 

Civil Procedure Code, 1908 (CPC) â€" Order 41 Rule 27

Citation: AIR 1973 All 339

Hon'ble Judges: Om Prakash Trivedi, J

Bench: Single Bench

Advocate: Shanti Swarup Bhatnagar, for the Appellant; R.H. Zaidi, for the Respondent

Final Decision: Allowed

## **Judgement**

Om Prakash Trivedi, J.

The first appeal has been filed by defendant-Bashir Ahmad and arises from the order dated 5-8-1971 passed by

Sri G. S. N. Tripathi, Additional Civil Judge, Meerut under the following circumstances.

2. The plaintiff-respondents, who are the landlords of certain premises which are in occupation of the appellant as a tenant, filed a suit for the

appellant"s ejectment in the court of Munsif, Meerut on the basis of a permission and also on the ground that the defendant was in arrears alleging

that the defendant"s tenancy had been terminated by a notice served upon him u/s 106 of the Transfer of Property Act. The suit was contested on

diverse grounds which need not be stated here. The defendant was absent in spite of service of summons and the suit was decreed ex parte. The

defendant filed an appeal against the ex parte decree. The appeal was allowed, the ex parte decree was set aside and the suit was remanded by

the lower appellate court for retrial. On the date fixed by the trial court for rehearing both the parties were present. The plaintiffs made a statement

before the trial court to the effect that they will not adduce any further evidence. Before passing of the ex parte decree the plaintiff had examined

himself and also produced three documents copy of the notice claimed to have been served upon the defendant u/s 106 of the Transfer of Property

Act, postal receipt and postal acknowledgment relating to the notice. The defendant examined one witness. It may be mentioned here that in the

written statement the defendant had contested not only service of notice upon him but also the fact that any notice as required by Section 106 of

the Transfer of Property Act had been given to him. The suit was decided by the trial Court on the basis of the oral and documentary evidence

which was adduced before passing of the ex parte decree, Again the defendant appealed. The appeal was al-lowed, the lower appellate court

taking the view that the ex parte decree having been set aside the evidence produced behind the back of the defendant before the passing of the ex

parte decree could not be read against the defendant and the plaintiffs should have adduced fresh evidence in the presence of the defendant. On

this view relying upon a Calcutta case: Phani Bhushan Mukherjee v. Phani Bhushan Mukherjee, AIR 1957 Cal 170 the appeal was allowed and

the case was remanded for decision of the suit afresh according to law.

- 3. Plaintiffs have filed cross-objection to the appeal.
- Learned counsel for the appellant urged that the lower appellate court erred in passing the order of remand when the plain-tiffs had made a

statement to the trial court to the effect that they did not want to adduce any further evidence. It is urged that in the circumstances the lower

appellate court should have decided the case on the basis of evidence on record i.e., on merits instead of providing fresh opportunity to the

plaintiffs to adduce evidence at the trial. On hearing learned counsel for the parties I am of the opinion that this submission is well-founded. Similar

matter came up before a Division Bench of this Court in the case of Mst. Lakshmi Devi Vs. Roongta and Co. and Others, . In that case an ex

parte decree was earlier passed against the appellants which was set aside and on 4-7-1951, the date fixed for hearing again the appellants were

absent. On that date the counsel for the plaintiff-respondents made a statement of the effect that he relied upon the evidence already recorded

before passing of the ex parte decree and did not wish to produce any further evidence. Relying on that evidence the learned Judge decreed the

suit against the appellants on merits. It was this decree that was challenged in first appeal before this Court. It was held that the earlier ex parte

decree against the appellants having been set aside they became en-titled to be relegated to the stage at which they were absent and could insist

that everything which had been done in their absence should be done again in there presence as the reason for absence having been found to be

sufficient they could say that the witnesses should be examined again and that no decree could be passed against them on the basis of the evidence

recorded in their absence. I am in respectful agreement with the view taken in this case. It is clear that even if the statement which was made on

behalf of the plaintiffs before the trial Court to the effect that the plaintiffs did not want to produce any further evidence were taken to imply that

they wanted to rely upon the evidence which was produced behind the defendant"s back before passing of the ex parte decree that statement

cannot be taken advantage of by the plaintiffs because in any case the oral evidence adduced before passing of the ex parte decree had been

produced in the absence of the defendant and the documents also had been exhibited be-hind the defendant's back. After the exparte decree was

set aside by the appellate Court these documents will be deemed to have been de-exhibited. They should, therefore, have been exhibited again in

the presence of the parties and the evidence of the witnesses examined behind the back of the defendant and in his absence also could not be read

in spite of the plaintiff"s statement expressing an intention to rely upon that evidence. That being the position of law, the lower appellate Court

should have decided the appeal on merits instead of passing an order of remand, it being well settled by authority that a remand order cannot be

passed to provide a fresh opportunity of producing evidence to a party or to provide opportunity to a party to fill up lacuna or lacunae in his

evidence.

5. It was urged by the learned counsel for the respondents that in passing the remand order the lower appellate Court appears to have exercised

power conferred by Order 41, Rule 27 of the Code of Civil Procedure. This submission, however, does not bear examination for there is nothing

in the impugned order to indicate that the lower appellate Court required any document to be produced or any witness to be examined to enable it

to pronounce judgment or for any other substantial cause. In fact the lower appellate Court did not specify any document or oral evidence which it

thought was necessary to enable it to pronounce judgment or for any other substantial cause while passing the remand order. The case appears to

have been remanded to provide an opportunity to the plaintiffs to produce evidence afresh.

6. Coming now to the cross-objection, the only point urged by the learned counsel for the respondent was that it was not open to the appellant to

raise an objection for the first time before the lower appellate Court about absence of proof of the documents which were on record because no

such objection was raised at the trial when the documents had already been exhibited. This argument appears to be misconceived firstly, because

the judgment of the lower appellate Court does not disclose that the order of remand was passed upon any objection being raised by the appellant

with regard to the proof of the documents. The case appears to have been remanded, on the other hand, on the ground that the lower Court had

passed its judgment on evidence which was not legally admissible. In so far as the argument that the documents having already been exhibited no

objection could be raised before the lower appellate Court to the effect that they should be treated as de-exhibited, suffice it to say that the

documents were exhibited before passing the ex parse decree behind the defendant"s back when the defendant had no opportunity of objecting to

their being exhibited. After the ex parte decree had been passed these documents will be deemed in law to have been de-exhibited. I find no force

in the cross-objection which is, therefore, dismissed.

7. For the foregoing reasons, this appeal is entitled to succeed. It is, therefore, allowed and the judgment and decree dated 5-8-1971 passed by

the lower appellate Court are set aside and the case is remanded to the lower appellate Court for decision of the appeal on merits according to

law. Parties to bear their own costs.