

(1972) 12 AHC CK 0016**Allahabad High Court****Case No:** F.A.F.O. No. 245 of 1971

Bashir Ahmad

APPELLANT

Vs

Smt. Zainabun Nisan and Others

RESPONDENT

Date of Decision: Dec. 15, 1972**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - 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 allowed, 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.

4. Learned counsel for the appellant urged that the lower appellate court erred in passing the order of remand when the plaintiffs 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 entitled 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 their 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 behind the defendant's back. After the ex parte 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 parte 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.