

Subedar and Others Vs Mrs. Ram Kunwari and Others**F.A.F.O. No. 513 of 1982**

Court: Allahabad High Court**Date of Decision:** Sept. 22, 1983**Acts Referred:**

Civil Procedure Code, 1908 (CPC) " Order 41 Rule 23, Order 41 Rule 23A, Order 43 Rule 1, Order 7 Rule 10, Order 7 Rule 10A#Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 " Section 331

Hon'ble Judges: N.N. Mithal, J**Bench:** Single Bench**Advocate:** R.N. Bhalla, for the Appellant; Radha Krishna, for the Respondent**Final Decision:** Dismissed

Judgement

N.N. Mithal, J.

A suit was brought by the Plaintiff-Respondent with the allegation that the sale deed in dispute purporting to have been

executed in the name of the Plaintiff was obtained by false impersonation and was as such void. The trial Court, by its order dated 17-12-1980

held that the suit was not cognizable by the Civil Courts and thus directed the return of the plaint for presentation to the proper Court.

2. When an appeal was filed, the lower appellate Court was of the view that on the plaint allegations, it was obvious that the revenue Court would

not be competent to grant the relief of cancellation of the sale deed and no relief in respect of the said sale-deed could be granted by those Courts.

It, therefore, held that in view of Section 331 of the U.P. Zamindari Abolition and Land Reforms Act, the jurisdiction of the Civil Courts was not

barred. Accordingly the appeal was allowed and the case was sent down to the trial Court for trial. Against this order, the present FAFO has been

filed purporting to be one under Order 43 Rule 1(u) CPC treating the order passed by the lower appellate Court as one of remand.

3. A preliminary objection has been taken by Sri. Radha Krishna, learned Counsel appearing for the Respondent. According to him the order of

the lower appellate Court is not one for remand but in fact it is an order setting aside the decision of the Court below under Order 7 Rule 10 Code

of Civil Procedure. According to him the trial Court order was appealable under Order 43 Rule 1(a) CPC and in exercise of that right, the

Plaintiffs had filed an appeal before the Court below. Once, that appeal has been decided and the order of the trial Court is set aside a consequent

order was necessary that the suit should go down to the trial Court to be proceeded with from the stage where the plaint was ordered to be

returned by it. He, further, urged that in view of Section 104(2) CPC no further appeal would lie to this Court.

4. There appears to be sufficient force in this submission. An order of remand contemplated under Order 43 Rule 1(u) CPC is one that is passed

by the Court in appeal against the decree under Rule 23 or 23A of Order 41 of the CPC and the relevant provision reads as under:

1. Appeals from orders.- An appeal shall lie from the following orders under the provisions of Section 104, namely:

(a) to (t) ...

(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.

5. Order 41 deals with appeals against the decree. In this case no decree had been passed. What the trial Court had done was to determine the

jurisdiction of the Court and to order return of the plaint for being presented to the proper Court. An order of this nature is covered by Order 7

Rule 10 of the Code which reads as under:

10. Return of plaint. (1) Subject to the provisions of Rule 10A, the plaint shall at any stage of the suit be returned to be presented to the Court in

which the suit should have been instituted.

Explanation.- For the removal of doubts, it is hereby declared that a Court of appeal or revision may direct, after setting aside the decree passed in

a suit, the return of the plaint under this sub-rule.

(2) Procedure on returning plaint.- On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the

party presenting it, and a brief statement of the reasons for returning it.

6. Thus Rule 10 of Order 7 CPC deals exclusively with the jurisdiction of the Court and wherever the Court finds that it had no jurisdiction to

entertain the suit, it has the right to order its return for being presented to the proper Court. This was the sort of order which was passed by the

trial Court. It was not one dismissing the suit on merits resulting in a decree passed by it. This is also clear from the definition of the word "decree

as given in Section 2(2) of the Code and it excludes specifically an adjudication from which an appeal lies as an appeal from an order. As seen

above the order passed by the trial Court was in the nature of an order from which an appeal was provided under Order 43 Rule 1(a). Thus the

trial Court order could not amount to a decree within the meaning of Section 2(2) of the Code. That being the position, the appeal that had been

filed before the lower appellate Court was not an appeal against a decree but merely an appeal against an order and, therefore, even after a

direction remanding the case to the Court below, it did not amount to an order coming within the ambit of Rule 23 or 23A of Order 41. It is

against such Orders only which fall under Rule 23 and 23A that an appeal can be filed under Order 43 Rule 1(u) and not otherwise. It is thus

obvious that the order which has been passed by the lower appellate Court was not one of remand of the case but merely an order reversing the

order of the Court below and as a consequence thereof directing the trial Court to proceed with the trial of the suit.

7. Section 104 CPC deals with orders from which appeal lies and it provides that only from those orders from which an appeal has been provided,

such an appeal would be maintainable. As if to fortify this, Sub-section (2) of the Section provides that no appeal shall lie from any order passed in

appeal under this section. It would thus be obvious that when once the matter has been decided in an appeal from order passed under Order 7

Rule 10 CPC no further appeal shall lie in view of Section 104(2).

8. Learned Counsel for the Respondent has sought support from a Single Judge decision in *Raj Kumar Garg v. Ibrahim* 1981 ALJ 662, where an

appeal against an order passed by the appellate Court in an appeal against interim injunction order had been filed and it was held that in view of

Section 104(2) a further appeal against the order of the lower appellate Court was not maintainable. Similarly in *Jagannath v. Union of India* 1975

ALJ 591, another Single Judge of this Court was dealing with a matter between the employer and employee and the lower appellate Court had

directed the return of the plaint for presentation to the proper Court. On a second appeal being filed against that order it was held that no second

appeal lay but a first appeal from order was maintainable and. the second appeal was treated as a first appeal from order. In that case, the lower

appellate Court for the first time had passed an order purporting to be one under Order 7 Rule 10 CPC and such an order being appealable it was

rightly held by the learned single Judge that a first appeal from order would lie.

9. From the above two decisions and in view of the discussion made earlier, it was obvious that this appeal is not legally maintainable and is,

therefore, dismissed with costs.