

(1988) 03 GAU CK 0004

Gauhati High Court

Case No: M.A.(S) No. 4 of 1984

Md.Nizamuddin

APPELLANT

Vs

MD.Mahmud Ali

RESPONDENT

Date of Decision: March 11, 1988**Acts Referred:**

- Civil Procedure Code, 1908 - Order 41 Rule 23, Order 41 Rule 23A, Order 43 Rule 1(u), Order 6 Rule 17
- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 23, Order 41 Rule 23A, Order 43 Rule 1(u), Order 6 Rule 17

Citation: (1988) 1 GLJ 446 : (1988) 2 GLR 115**Hon'ble Judges:** S.N.Phukan, J**Bench:** Single Bench**Advocate:** A.K.A.Laskar, J.C.Das, N.Chakraborty, J.Das, Advocates appearing for Parties

Judgement

1. This appeal is directed against the judgment and decree passed in Title Appeal No. 5 of 1982 by the learned District Judge, Kamrup at Gauhati by which the learned lower appellate Court remanded Title Suit No. 93 of 1977 to the learned trial Court for fresh disposal after giving an opportunity to the plaintiffs to amend the plaint and allowing the party to adduce evidence on new issues framed by the learned lower appellate Court.

2. Respondent No. 1 herein as plaintiff filed the suit praying, inter alia, for a decree for ejectment of the Appellants/Defendants/ from the suit land and the house thereon on the allegation that he purchased the suit land for valuable consideration and by registered sale deed dated 5.8.87 from Mustt. Amiunnessa, wife of proforma Respondent No. 6 and that he was dispossessed by the defendants. In the proceeding U/S. 145 Cr. P. C. the possession was decided in favour of the respondent No. 1 but the order could not be given effect to on the technical ground that house situated on the suit land was not mentioned in the order. The suit was

contested only by the present appellants who were impleaded as defendant Nos. 1 and 2 defendant No. 1 is the husband of defendant No. 2. According to appellants, Mustt. Amiunnessa was not the wife of proforma defendant No. 6, and as such, he had no right, title or interest to sell the land and that the suit land was gifted to them by proforma defendant No. 6. It is further alleged that appellant No. 1 is the son of proforma Respondent No. 6. The appellants also pleaded adverse possession in respect of the suit land.

3. A preliminary point was raised by Mr. Chakravarty, learned counsel for the respondents that the present appeal does not lie and he learned lower appellate Court remanded the suit. When the attention of learned counsel was drawn" to Clause (u) of Rule 1 of Order 43 C.P.C. this point was not pressed. Clause (u) of Rule 1 of Order 43 runs as follows :

◆(u) An order under Rule 23 or Rule 23A of Order XLI remanding a case, where an appeal would lie from decree of the Appellate Court".

Thus the above legislative mandate is clear that against an order of remand passed under Rules 23 or 23A an appeal would lie.

4. Rules 23, 23A and 25 of Order 41, inter alia, provide for remand of a case by an appellate Court. Rule 23 is attracted only when the trial Court has disposed of the whole suit and not a portion of it., on a preliminary point. Rule 23A will be attracted when the trial Court has disposed of the "entire case other than on a preliminary point and the decree is reversed in appeal and a retrial is considered necessary. Rule 25 empowers the appellate Court to frame issues and refer the same for trial to the learned lower Court with the direction to take additional evidence and after decision of the learned trial Court on issues so framed the trial Court shall return the evidence, to the appellate Court with its finding and reasons therefor. Rule 25 is attracted when the learned trial Court omits to frame or try any issue or to determine any question of facts essential to the right decision of the suit on merits. In exercising power under Rule 25 the learned appellate Court need not set aside the decree of the trial Court in its entirety and remit the entire litigation to trial Court.

5. In the case in hand the learned trial Court considered and decided all the issues framed and decreed the suit. From the impugned judgment of the learned lower appellate Court it appears that the appeal was allowed by setting aside the judgment and decree of the learned trial Court and it was remanded for fresh disposal according to law. Thus from the facts of the case and the impugned judgment it is clear that the impugned order is an order of open remand, and as such, it squarely falls under Rule 23 " of Order 41 of the Code of Civil Procedure. As the impugned judgment and order come under Rule 23A, the present appeal is maintainable in view of Clause (u) of Rule 1 of Order 43.

6. My attention has been drawn to a decision of the Division Bench of this Court in *Md. Saifur Rahman vs State of Assam and others*, AIR 1985 Gauhati 107 in support of the contention that order of remand with a direction to take additional evidence and allowing the Respondent No. 1 to amend the plaint is violative of Order 30 and Order 31 of Rule 41. From the facts of that case it appears that the order was passed by the learned lower appellate Court under Clauses (aa) of Order 27, Rule 41 but the impugned order in the case in hand is an order passed under Order 23A, and as such, the above decision is not relevant for the present purpose. Reliance has also been placed in *Lalit Mohan Nath vs Mohan Nath* AIR 1974 Gauhati 68. From the facts of that case it appears that the order was passed by the learned lower appellate Court under Rule 25 and not under Rule 23A, and as such this decision is not relevant for the present purpose.

7. It has been urged on behalf of the appellants that by remanding the case and allowing the plaintiff to amend the plaint the learned lower appellate Court erred in law. In reply Mr. Chakravarty has placed reliance in *Saoatan Mohapatra and Ors. vs Hakim Mohammad Kazim Md and others*, AIR 1977 Orissa 194. In that case it was held that in case of an open order of remand the effect of the remand order is that the suit is relegated to the stage of trial where trial has commenced but is not concluded. It was further held that in absence of any specific direction in the remand order prohibiting amendment it is open to the parties to seek for amendment of their pleadings. With respect I agree with the decision of the learned Single Judge of the Orissa High Court and held that in case of an open remand under Rule 23(a), the suit is relegated to the stage of trial and unless there is a bar in the remand order prohibiting the parties to amend the pleadings, the parties will be at liberty to pray for amendment of their pleadings keeping in view the provisions of Order 6, Rule 17 of the Code of Civil Procedure.

8. The learned counsel for the appellant has urged that the remand order is illegal as the learned lower appellate Court without properly considering the judgment of the learned trial Court passed the impugned order. It is appropriate to consider the grounds on which the learned lower appellate Court remanded the suit for retrial. The first consideration was that though the plea of adverse possession was not tenable in view of the fact that the appellants claimed title through a gift, the learned lower appellate Court held, ♦ Learned trial Court should have gone into the claim of the defendants by framing an issue on the point ♦. The learned lower appellate Court was also of the opinion that as title of Mustt. Amiunnessa was disputed the learned trial Court should have framed an issue regarding nonjoinder of necessary party. The learned lower appellate Court was further of the opinion that without a specific prayer for declaration of his title the plaintiff cannot succeed in the suit.

9. I have perused the judgment of the learned trial Court and I find that while considering issue Nos. 2, 3, 4 and 5 the learned trial Court took into consideration

the following evidence on record namely, the registered sale deed executed by Mustt. Amiunnessa, wife of proforma defendant No. 6 in favour of the Respondent, and also the evidence of proforma defendant No. 6 from whom the present appellants also claimed title, the alleged deed of gift Ext. "Gha" in favour of appellant No. 2 and the evidence of proforma defendant No. 6 and thereafter decreed the suit after rejecting the pleas of the appellants that they acquired title over the land by gift made by proforma defendant No. 6 and the claim of adverse possession. But the learned lower appellate Court did not at all consider the evidence on record and the reasons given by the learned trial Court.

10. It is the duty of an appellate Court to consider whether remand of the suit is avoidable keeping in view that remand means delay in disposal of a suit and delay defeats justice. Before remanding a suit for retrial it is the duty of the appellate Court to record whether there is sufficient evidence to enable the Court to pronounce judgment under Rules 24 of Order 41 and unless it is done the order of remand cannot stand. As there is a failure on the part of the learned lower appellate Court to do so more particularly the learned lower appellate Court did not consider fully and sufficiently the evidence on record and the reasons given by the learned trial Court I am constrained to hold that the impugned judgment and order cannot stand.

11. In the result, the appeal is allowed and the case is remanded back to the learned lower Appellate Court to decide the appeal after hearing both the parties. I direct both the parties to appear before the learned Additional District Judge, Gauhati on 28th of March for obtaining necessary orders. No costs.