(1966) 05 MP CK 0001

Madhya Pradesh High Court

Case No: C. R. No. 672 of 1965

Rashida Khatoon		APPELLANT
	Vs	
Abdul Samad Khan and Others		RESPONDENT

Date of Decision: May 4, 1966

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 43 Rule 1(u), 2(2)

Citation: (1969) JLJ 686 : (1969) MPLJ 587

Hon'ble Judges: P. K. Tare, J

Bench: Single Bench

Advocate: P. S. Khirwadkar and K. L. Issrani, for the Appellant; A. S. Usmani, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

P. K. Tare, J.

This order shall also govern the disposal of Civil Revision No. 673 of 1965 (Kumari Camarunnisa v. Abdul Samad). These two revisions have been filed by the plaintiffs, who are real sisters and who had filed independent suits claiming damages for libel against the respondents. The present revision arises out of the order of remand, dated 24-6-1965, passed by the District Judge, Bhopal, in Civil Appeal No. 17-B of 1964, arising out of the decree, dated 17-6-1963, passed by the II Civil Judge Class 2, Bhopal, in Civil Suit No. 53-B of 1959. The connected revision (C. R. No. 673 of 1965) arises out of the order of remand passed by the District Judge, Bhopal on 24-6-1965 in Civil Appeal No. 18-B of 1964, arising out of the decree, dated 17-6-1963 passed by the Second Civil Judge Class II, Bhopal, in Civil Suit No. 53-B of 1959.

The respective petitioners filed separate suits claiming damages from the respondents alleging that they had defamed them by printing some pamphlets and

by holding public meetings protesting against the conduct of the petitioners attributing them such actions which would cast an aspersion on their character.

The respondents denied to have issued the pamphlets or to have convened any public meetings. They denied that they defamed the respective plaintiffs in any manner so as to entitle them to claim any damages.

The trial Court held the respective plaintiffs entitled to damages. Therefore, a decree for Rs. 5,000 in favour of each of the petitioners was passed. Although there were separate suits, the same had been consolidated by the trial Judge, and instead of passing a separate decree in each case, he purported to pass a consolidated decree holding the plaintiffs to be entitled to a sum of Rs. 10,000 as damages. As was rightly observed by the learned District Judge, there ought to be two separate decrees. Consolidation of suits is merely for the purpose of facilitating the trial; and duplication of evidence is avoided. Consolidation of suits does not mean that the suits are blended into one, with the result that the Court need not pass a separate decree in each of the suits. Therefore, I would endorse the view of the learned District Judge that separate decrees and separate judgments were necessary in both the cases. However, even now it is open to this Court or the first appellate Court to direct the parties to apply to the trial Court for drawing up separate decrees in the two suits; and if the trial Court refuses to draw up separate decrees, such an order would be revisable, as laid down by a Full Bench of this Court in AIR 1943 204 (Nagpur) . It would be for the respondents, who are appellants in the first appellate Court, to apply to the trial Court for drawing up separate decrees in the two suits ; and after obtaining certified copies of those decrees, the same may be filed in the first appellate Court.
Against the decree of the trial Court, the defendants filed separate appeals before the District Judge. In the course of those appeals the defendants filed amendment applications in that Court seeking an amendment of their written statement alleging that-

(i) On a previous occasion, two other sisters of the plaintiffs had filed a suit which was dismissed. Therefore, that judgment will operate as res judicata;

(ii) that during the pendency of the litigation, some of the joint tortfeasors had died and their legal representatives had not been brought on record. Therefore, according to the defendants, the cause of action had abated in its entirety;

(iii) that the plaintiffs had deliberately abandoned their claim against some of the joint tortfeasors, with the result that it operated as a discharge of the other joint tortfeasors ;

(iv) that as the trial Court had passed a consolidated decree for a sum of Rs. 10,000 in favour of the two plaintiffs, the consolidated decree was beyond the pecuniary jurisdiction of the Court and, therefore, it was rendered illegal.

The learned District Judge thought that it was necessary to have these issues tried introduced by way of amendment at the appellate stage. Therefore, in exercise of inherent powers, the learned appellate Judge, after allowing the amendment applications in the two suits, remanded the cases for a fresh trial with special reference to the pleas introduced by way of amendment. The present revisions are directed against the order of remand passed by the District judge in the two appeals respectively.

As regards the tenability of a revision, it is clear that this Court does not ordinarily entertain a revision where a specific remedy by way of an appeal is provided for. As against an order of remand passed under Order 41, rule 23, C. P. C, an appeal is provided by virtue of Order 43, rule 1 (u), C. P. C. As regards an order of remand passed under Order 41, rule 25, C. P. C, there can be no doubt that it will be revisable; and no appeal against such an order will lie, for the simple reason that an appeal is not provided for against it in the CPC ; and moreover it will not amount to a decree within the meaning of section 2(2) of the Code of Civil Procedure. However, as regards an order of remand passed in exercise of inherent powers, it has been the view of this Court as laid down by a Division Bench in Sheolal v. Jugalkishore (1) that where a remand is made in exercise of inherent powers, it will be appealable if it fulfils the conditions mentioned in section 2(2), C. P. C. and if it amounts to a decree. It will be useful to reproduce the observations of the Division Bench at page 547, as follows;

What are the cardinal points in this case ? One is whether the family of the mortgagors is joint or separate. According to their Lordships that has been finally decided by the lower appellate Court. Then again there is the question of redemption. That also is finally decided so far as the lower appellate Court is concerned. Neither of these points could be raised again either in that or the trial Court.

''Now the definition of a ""decree" is the formal expression of an adjudication which ''So far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final,''

If we have interpreted their Lordships aright then it is clear that the decision of the lower appellate Court conclusively determines, so far as that Court is concerned, two at least of the cardinal issues in the suit and therefore fulfils the provisions of the definition. We cannot see how the decision can be lifted out of the ambit of the definition simply because the Legislature, whether by way of abundant caution or otherwise, has taken other decisions, which would also have fallen within this definition, out of it and made them appealable as others. We consider therefore that the order in question is appealable.

Therefore, an appeal will He where an order of remand passed by the first appellate Court amounts to a decree. It means that the first appellate Court must have decided some cardinal issues finally binding on the parties, as laid down in AIR 1943 204 (Nagpur) . In this connection, I may also refer to the case of Mst. Zenab Bi Vs. Wajahat Husen Karamat Hussain, decided by Dixit J. (as he then was), wherein the learned Judge followed the Division Bench case of the Nagpur High Court in AIR 1940 349 (Nagpur) and held that where the first appellate Court has not disposed of any cardinal issue, but has merely sent back the case to the Court of first instance for a retrial, such an order of remand will not amount to a decree : and in that event, the order of remand will be revisable, and not appealable. In this connection, it may be pertinent to note the Full Bench case of Manohar v. Baliram 1953 N L J 58 : I L R 1952 Nag. 471 : AIR 1952 Nag 357 decided by Sinha C. J. (as he then was), Hidayatullah and Mudholkar JJ. (as they then were), wherein the question with reference to different kinds of remand orders was considered by the learned Judges for the purpose of deciding whether such an order will amount to a judgment which in effect means a decree for the purposes of clause 10 of the Letters Patent. This case was not brought to the notice of my Lord, the Chief Justice in the case of Mst. Zenab Bi Vs. Wajahat Husen Karamat Hussain, . The main judgment was delivered by Hidayatullah J. with which Sinha C. J. agreed and Mudholkar J, dissented. The proposition Jaid down by the majority judgment is that when a remand order by a single Judge of the High Court sitting in second appeal merely remits an issue for trial or orders some evidence to be taken, but does not decide the controversy either wholly or partially, the remand order cannot be treated as a judgment within the meaning of clause 10 of the Letters Patent of the Nagpur High Court; but where the Court sets aside a decree and making a binding order on the merits of the controversy, remits the case for trial according to its decision, the order must be treated as a judgment within the meaning of the clause. This means that where the Court passes an order of remand under Order 41, rule 25, C. P. C. and remits an issue to the Court below, it will not amount to a decree. But where inherent powers of remand are exercised and a binding order is made against the parties by setting aside the decree of the Court below, which is directed to decide the case again in accordance with the view expressed in the remand order, such an order will undoubtedly amount to a decree. After dealing with the question exhaustively in all its aspects, Hidayatullah J. answered the question as mentioned above, with which Sinha C. J. agreed. In his dissenting judgment, Mudholkar J. opined that such an order will not amount to a decree. I may observe that the view as expressed by Dixit J. (as he then was) in Mst. Zenab Bi Vs. Wajahat Husen Karamat Hussain, would be in consonance with the minority view of Mudholkar J., but contrary to the majority view of Sinha C. J. and Hidayatullah J. in the said Full Bench case. Therefore, being bound by the view of the Full Bench, I would, in all humility, express the opinion that in accordance with the principles laid down in AIR 1940 349 (Nagpur) and Manohar v. Baliram 1953 N L J 58 : I L R 1952 Nag. 471 : AIR 1952 Nag 357 where a Court in exercise of inherent powers sets aside a decree of the Court below and passes an

order of remand directing the Court below to decide the case afresh in accordance with the directions given in the remand order, such an order will amount to a decree and, therefore, be appealable. For this reason, I am unable to subscribe to the view expressed by Dixit J. (as he then was) following the minority view of Mudholkar J. in Manohar v. Baliram 1953 N L J 58 : I L R 1952 Nag. 471 : AIR 1952 Nag 357 that where a Court merely remits a case for a fresh decision, such an order will not amount to a decree and, therefore, it will be revisable. The result of the case would not turn on this question, as in the present case, an appeal as also a revision will lie to this Court; and it is immaterial whether this Court entertains the case as an appeal or a revision. An appeal can be converted into a revision and vice versa. Therefore, without dilating on the question further, but merely following the majority view in Manohar v. Baliram 1953 N L J 58 : I L R 1952 Nag. 471 : AIR 1952 Na 357, I would hold that properly speaking an appeal lies against the remand order in the present case.

The further question is whether the learned appellate Judge was justified in allowing an amendment sought by the defendants at the appellate stage. It is no doubt true that all amendments which are necessary for the purposes of deciding the real questions of controversy between the parties ought to be allowed, as laid down by their Lordships of the Supreme Court in Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others, . If I had found that an adjudication of any of the points raised by the defendants by way of an amendment was necessary, I would have been inclined to uphold the order of remand. But as presently I propose to illustrate, the meaningless pleas which are concluded by well considered decisions and which are contrary to the accepted propositions of law have been allowed to be raised by way of amendment; and but for this aspect, I would not have been inclined to interfere with the order of remand passed by the learned District Judge. Earlier, I have already mentioned the points which are sought to be introduced by the defendants by way of amendment. The question is whether (hose points at all need adjudication. Instead of leaving that question to the trial Court, I feel that they ought to be finally disposed of in the present revisions, as they are wholly unnecessary ; and they are meaningless pleas which have been raised for the sake of raising some defence.

As regards the question whether a consolidated decree is rendered illegal as being in excess of the pecuniary limit of the trial Court''s jurisdiction, it is difficult to accept the contention of the learned counsel for the respondents that the decree should be considered to be one and indivisible. In fact, the trial Judge committed a procedural error in failing to pass separate decrees. But he purported to pass a consolidated decree saying that the claim of both the plaintiffs is decreed to the extent of Rs. 10,000, which means Rs. 5,000 for each of the plaintiffs. Earlier, I have already indicated that as laid down by a Full Bench of this Court in AIR 1943 204 (Nagpur) , the respondents ought to make an application to the trial Court for drawing up of separate decrees. Therefore, that question docs not need any fresh adjudication at

the hands of the trial Judge; and a remand for that purpose only would be wholly unnecessary.

As regards the question whether the previous decision in the suit filed by two other sisters operates as res judicata, it is clear that if four sisters were defamed by a single action of the defendants, each one of them will get a separate cause of action. Their causes of action cannot be said to be joint and indivisible. But each one can file a suit separately against the defendants. It may be that there may be common questions of fact and law involved in such suits. But the plaintiffs in such a case cannot be said to be representatives of each other, and they cannot be said to be claiming through each other. Their causes of action being purely individual and separate, no judgment passed in one case can operate as res judicata in another suit filed by one of them. For the applicability of section 11, C. P. C, it is necessary that the matter directly and substantially in issue must have been directly and substantially in issue in a former suit between the same parties or between the parties under whom they or any of them claim litigating under the same title. Therefore, if two persons are defamed by a single action of the defendants, they do not become each other''s representative, or they cannot be said to be claiming under the said title. It is, therefore, clear that although the previous suit filed by two other sisters may have been dismissed, the present plaintiffs at least are not bound by that decision, as it is not inter-parties; and the plaintiffs are not their representatives. Therefore, the question about the previous judgment operating as res judicata against the tenability of the present suit is wholly immaterial and meaningless. It will not serve any useful purpose by requiring the trial Judge to adjudicate on this question raised by way of an amendment introduced by the defendants.

As regards the question about the suit or appeal abating on account of the death of some of the joint tortfeasors in the absence of legal representatives being brought on record, the case law is settled. Joint tortfeasors have no legal representatives except the remaining tortfeasors. Therefore, on account of the death of some of the joint tortfeasors, the suit or appeal does not abate, if their personal heirs are not brought on record. Their legal representatives will be the remaining tortfeasors who are on record. In this connection, I may only refer to the observations of a Division Bench of the Calcutta High Court in Raja Promode Nath Roy and Others Vs. Secretary of State for India and Others, , as also a Division Bench of this Court in S. Chatterji Vs. Dr. T.B. Sarwate and Others, . Therefore, there is no propriety in having an adjudication on this point to be made by the trial Judge as regards the fact of death of some of the joint tortfeasors. Clearly a suit or appeal would not abate ; and the cause of action will survive against the remaining tortfeasors. Therefore, a remand was wholly unnecessary for the decision of this point as well.

As regards the question whether the other joint tortfeasors were discharged on account of the action of the plaintiffs in deliberately abandoning their claim against

some of the tortfeasors, it is well known proposition of law that where a plaintiff compromises with some of the joint tortfeasors in respect of the entire wrong, other tortfeasors would be discharged by such an action. But joint tortfeasors would not be released from their obligation merely because the plaintiff fails to sue; or after having sued, fails to prosecute the suit against some of the joint tortfeasors. In this connection, I may refer to the Division Bench case of AIR 1944 292 (Nagpur) , which has later on been followed by a Division Bench of the M. P. High Court in S. Chatterji Vs. Dr. T.B. Sarwate and Others, .

Thus, according to the allegations made in the amendment application, the other tortfeasors are said to have been discharged from their obligation because the respective plaintiff has deliberately abandoned her claim against some other tortfeasors. This is nothing, but a failure to sue, or a failure to prosecute after having sued. Such an action, in no case, can result in discharging the obligation of the other joint tortfeasors. So this point also does not need any adjudication at the hands of the trial Judge, and I feel that the learned appellate Judge allowed the amendment application mechanically without applying his mind whether the so-called points of controversy were really the points of controversy or were meaningless or imaginary points of controversy. From this point of view, allowing an amendment application itself constituted an action of exercise of jurisdiction with material irregularity so as to bring the case within the scope of section 115(c) of the Code of Civil Procedure. The meaningless and wholly infructuous amendments based on imaginary questions have been allowed by the learned District Judge; and as such, the order of remand in exercise of inherent powers was not at all warranted in the circumstances. If the learned District Judge had applied his mind to the questions sought to be raised by way of amendment, he would undoubtedly have come to the conclusion that no remand was at all necessary; and if necessary, he could as well have decided those questions of law himself instead of remanding the case to the trial Court. I may observe that the questions sought to be raised by way of amendment are pure questions of law which are not dependent on any facts pleaded. From this point of view also, the order of remand was absolutely unwarranted.

As a result of the discussion aforesaid, I set aside the order of remand passed by the learned District Judge; and instead remit this case to that Court for a decision of the appeal on merits. The respective petitioners will be entitled to the costs of this Court. Counsel''s fee in this Court shall be Rs. 50, if certified in each case.