

Nabin Pandey Vs Indian Tube Company (1953) Ltd. and Another

Court: Patna High Court

Date of Decision: March 11, 1966

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Order 41 Rule 23, Order 41 Rule 25, 107, 151

Citation: AIR 1966 Patna 422

Hon'ble Judges: S.C. Misra, J

Bench: Single Bench

Advocate: Mahendra Prasad Pandey, for the Appellant; K.D. Chatterji and Laila Seth, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

S.C. Misra, J.

This application is directed against the judgment of the Additional Subordinate Judge, Jamshedpur, dated the 19th June,

1964 passed in Title Appeal No. 91/55 of 1963/64. The petition is on behalf of defendant No. 1, who was respondent No. 1 in the court of

appeal below. It arises out of the title suit brought by the Indian Tube Company Ltd., Jamshedpur, opposite party No. 1, for eviction of defendant

No. 1 from the Company"s quarters No. 16/29 and for delivery of Khas possession. In substance, the case of the plaintiff-Company was that

quarters No. 16/29 belonged to the plaintiff-company. Defendant No. 1 was the General Secretary of the Tube Company Workers" Union and he

was allowed occupation of quarters No. 14/19 as a monthly tenant in October, 1957 during the currency of the term of his office as General

Secretary. In April, 1960, defendant No. 1 approached the Company for a better house, and, accordingly, he was allotted another quarters No.

16/29 on a monthly rental of Rs. 40.50nP. besides electric charges. On the 8th June, 1960, defendant No. 1 ceased to be the General Secretary,

and, another gentleman named one Shri Sidheshwari Choudhari was elected General Secretary in his place. Defendant No. 1, therefore, had no

right to continue In the quarters allotted to him after the 8th June, 1960. There was a further allegation incidental to it that the Company required

this house for use and occupation by its own employee. It is not necessary for me to refer to the other matters which have been brought on the

plaint by amendment, since that is not necessary for the determination of the question in dispute before me in the present application.

2. Several pleas were raised in the written statement, one of which, that is important is that according to defendant No. 1 the quarters in question

were allotted to him not as the General Secretary of the Union but in his personal capacity. He denied, however, that he ceased to be the General

Secretary with effect from the 8th June, 1960 The defendant, therefore, challenged the right of the plaintiff to evict him from the house on these and

other technical grounds.

3. The learned Munsif, who tried the suit, accepted the defence case in so far as he held that the house from which the defendant was sought to be

evicted was allotted to him not as General Secretary of the Workers' Union but in his personal capacity The Court also found against the plaintiff

in so far as its case was based on the Company's necessity for getting vacant possession of the house. In the result, the suit was dismissed.

4. The court of appeal, however, on a consideration of the case of the parties has held that an important issue in the case which should have been

framed and decided by the learned Munsif was not at all framed by him. The consequence of that was that the suit was remanded to that court in

order to enable that court itself to come to a decision. He observed as follows:

In my opinion it was a very vital question to be decided in this case and the learned Munsif should have given a finding on this point because it was

the main ground on which the plaintiff wanted to eject the defendant No. 1 from the quarters in question. I would myself have given a finding on the

evidence on the record but it is just possible that the matter may go up to the higher courts and the appellate courts may require the finding of the

trial court on this point.

The specific issue to be framed by him was as to whether the defendant No. 1 continued to be General Secretary of the Union or not. The learned

Additional Subordinate Judge also commented upon the finding of the court below on other issues but did not express an opinion howsoever he

differed from the trial court on those questions of fact. Defendant No. 1 has moved this Court in revision against that order.

5. Mr. Mahendra Prasad Pandey has contended that the court of appeal below exercised its jurisdiction with material irregularity in remanding the

suit to the trial court for a fresh decision on that point. He has referred to the following cases in support of his contention:

Delho Hansda Vs. Charani Hansda and Others, , Ratilal Sakarlal and Another Vs. Gandabhai Muljibhai, , and Surjan Singh v Punjab Singh. AIR

1950 Pepsu 49. Reference was also incidentally made to Kalu Dalpat Patil Vs. Narayan Dagadu Sutar, and Annaji Ramchandra Vs. Thakubai

Dattatraya Deshpande, . Mr. K. D. Chatterji for the opposite party has relied upon Mst. Bibi Qamrun and Others Vs. Mohammad Ali Sabir, ;

Balla Mallayya Vs. Peddi Veerayya and Others, and Chandmal and Another Vs. Ramakishan and Another, . So far as Chandmal and Another Vs.

Ramakishan and Another, is concerned, it may be stated that the correctness of that decision is open to considerable doubt inasmuch as it

proceeds upon the footing that an order of remand also is in the nature of a decree which may be appealed from. There are, however, several

decisions which are more relevant for deciding the question as to whether a court of appeal can refer to the provisions of Section 151 of the CPC

for remanding a suit for fresh hearing to the trial court when the ground on which that order has been passed is specifically covered by Order 41,

Rule 23 or Order 41, Rule 25 of the Code of Civil Procedure. The trend of the decisions on which Mr. Pandey has relied, however, is that where

there is a specific provision such as Order 41, Rule 23, or Order 41 Rule 25 of the CPC and if the ground which will weigh with the court For

ordering remand comes within the purview of these two provisions: the question of resorting to the general inherent powers of the court u/s 151 of

the Code does not arise.

6. The view of a learned single Judge of this Court expressed in Delho Hansda Vs. Charani Hansda and Others, is that where a specific provision

is made in a statute which is applicable to the facts of a particular case, the question of the Court resorting to its inherent jurisdiction u/s 151 of the

CPC does not arise. In a case, therefore, where the appellate court has to take a decision, when a remand ,is called for as to whether it should be

a remand under Order 41, Rule 23, or. Order 41, Rule 25, or, Section 151 the Court must specifically decide with care and caution whether

Order 41, Rule 23 or Rule 25 would be applicable, If it appears that the course to be adopted in deciding the point in controversy is one which is

not covered by either of these two rules, the inherent jurisdiction tinder Section 151 of the Code which is of a residuary character and arises only

when there has been no proper trial of the suit in the circumstances of the particular case resulting in injustice to the parties is attracted and the

Court can refer to the provisions of. Section 151 of the Code and remand the case to the trial court. This case, namely Delho Hansda Vs. Charani

Hansda and Others, , has relied upon a decision of the Full Bench of the Calcutta High Court in Abdul Karim Ghuznavi v. Allahabad Bank Ltd.

ILR Cal 929: (AIR 1917 Cal 44) It is true no doubt that the specific point for decision before the Full Bench in that case, which alone was to be

decided, was question No. 1, and that was whether in spite of the provisions of Order 41, Rule 23 or Rule 25, the inherent jurisdiction of the

Court to remand the case was still available to it or its power was confined to the circumstances and to the method provided under these two rules.

The answer of the Full Bench was that the power to remand a case u/s 151 of the Code, vested in a Court, was not confined only to these

provisions of Order 41; but that in a suitable case the Court of appeal might remand the case to the court below even otherwise than what was

enacted in Order 41, Rule 26 or Rule 25 of the Code.

A more direct authority, however, is a decision of the Calcutta High Court in *Mansurali Sarkar Vs. Jamiran Bewa and Others*, . That was a case

where the Subordinate Judge, whose judgment was sought to be revised, thought it proper to have the issue framed instead of resorting to Order

41, Rule 25 which covers such a situation. The learned Subordinate Judge who was the court of appeal below set aside the judgment of the trial

court and sent the case back to that court for deciding it by framing an issue which the learned Subordinate judge considered necessary for the

decision of the case. The learned judges held in those circumstances that Order 41, Rule 25 of the Code provided for framing an issue by the court

of appeal itself where a specific issue should have been framed but was not framed, and, in such a case, a finding might be called for by the Court

of appeal below which in that particular case the court of appeal below had failed to do. Order 41, Rule 25 provides:

""Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which

appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court, may, if necessary, frame issues, and

refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional

evidence required;

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the

reasons therefor.

Order 41, Rule 25 of the Code, therefore is invoked where an issue should be framed for a proper decision of the suit but was not framed by the

trial Court. It also provides for the method to be followed by the appellate court which is that after a finding is called for and after it is received by

the appellate court, it is for the appellate court to dispose of the suit taking into consideration the findings of the trial court on other matters together

with the evidence thereon wherever necessary as also the finding received on a remand under Order 41, Rule 25 of the Code. This does not

contemplate remand of the entire case to the trial court. This obviously is a highly convenient procedure, and courts of appeal must bear the

provision of Order 41, Rule 25 of the Code in mind, because it is noticed in civil cases that the courts of appeal below do not keep in mind the

distinction between Order 41, Rule 25 and the remand under the exercise of inherent power of jurisdiction; and, even where an issue has to be

framed, the entire case is sent down to the trial court which obviously results in inconvenience to the parties because when the entire case is

remanded and a fresh Judgment is given by the trial court, it necessitates a fresh appeal from that judgment. On the other hand, if Order 41, Rule

85 of the Code is borne in mind, the trouble of the parties is very much minimised inasmuch as the appeal is kept pending in the file of appellate

court and it is disposed of only on receipt of a finding on an issue not already framed which would thus avoid another appeal to that very court.

Difficult position as indicated above is likely to result if resort is had to the exercise of inherent jurisdiction of Court.

In the present case also, a similar situation had to be considered by the court of appeal below; and as is clear from the extract that I have given

from the judgment, the only issue in the opinion of the appellate court was whether defendant No. 1 continued to be the General Secretary of the

Union or not. I am not able to understand the reasoning of the learned Additional Subordinate Judge in so far as he says that he would himself have

given a finding on the evidence on the record, but it was just possible that the matter might go up to the higher courts and the appellate court might

require the finding of the trial court on this point. The learned Subordinate Judge is in error in this. When he is satisfied that he could have given a

finding, then there was no occasion for him to remand the suit for a fresh bearing by the trial court. Remand is actually necessary even in terms of

Order 41, Rule 25 of the Code when obviously a fresh issue is framed which would necessitate the recording of fresh evidence, and the evidence

on the record is not enough to enable the court of appeal to come to a proper decision. If such evidence is, however, available, it is entirely

superfluous for the court of appeal to refer the matter back to the trial court because once an appropriate finding is recorded by the appellate court

on an issue on evidence already on record, the superior court will not take it that less weight is to be attached to such a finding than to the finding of

the trial court.

7. Apart from what I have already indicated, this is a case of framing an issue which was not framed by the trial court but it should have been

framed and, therefore, it is covered by the terms of Order 41, Rule 25 of the Code of Civil Procedure, and the lower appellate court should have

proceeded in terms of that provision of law.

8. In my opinion, therefore, the order of general remand passed by the court of appeal below must be reversed. The application is, accordingly,

allowed, and the order passed by the learned Additional Subordinate Judge is set aside, and instead the court of appeal below is directed to frame

an issue and call for a finding from the trial court and then proceed to decide the appeal in terms of Order 41, Rule 25 of the Code of Civil

Procedure. In the circumstances, there will be no order for costs.