

(2009) 08 DEL CK 0421

Delhi High Court

Case No: Writ Petition (C) 3641 of 1999 and CM Mo. 7352 of 2009

Pradeep Kumar Sagar

APPELLANT

Vs

Financial Commissioner of Delhi
and Others

RESPONDENT

Date of Decision: Aug. 10, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 23, Order 41 Rule 23A

Hon'ble Judges: Hima Kohli, J

Bench: Single Bench

Advocate: V.P. Singh and D.R. Bhatia, for the Appellant; Sujata Kashyap, for the Respondent

Judgement

Hima Kohli, J.

By way of the present writ petition, the petitioner has impugned the order dated 17.5.1999 passed by the Financial Commissioner, Delhi in a matter entitled Gaon Sabha Ghitorni v. Shri Pradeep Kumar Sagar.

2. By the impugned order dated 17.5.1999, the revision petition filed by the Gaon Sabha, respondent No. 1 herein, against the order dated 03.06.1998 passed by the Deputy Commissioner (South West), Delhi (Annexure P-8), setting aside the vesting order of the Revenue Assistant dated 29.12.1997 (Annexure P-7) in case No. 37/RA/97, was disposed of by the Financial Commissioner, who remanded the case to the Revenue Assistant, for fresh determination on facts/merits without touching the merits of the case.

3. Learned Counsel for the petitioner submits that the impugned order, remanding the case back to the Revenue Assistant, is liable to be set aside as the said order is contrary to the provisions of Order 41 Rules 23 and 23A of the CPC. In support of the aforesaid submission, reliance is placed on a judgment of the Supreme Court entitled [Municipal Corporation, Hyderabad Vs. Sunder Singh](#), . Order 41 Rule 23 CPC

deals with remand of case by Appellate Authority and the Rule 23A deals with remand in other cases. The said provisions are reproduced herein below for ready reference:

Order XLI, Rule 23. Remand of case by Appellate Court Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand.

23A. Remand in other cases. Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23.

4. As is apparent from a perusal of the aforesaid provisions, it is only where the Court from whose decree an appeal is preferred, disposes of the suit upon a preliminary point and the appellate court, if it thinks appropriate, remands the case, that it may further direct as to the nature of issue/issues which should be tried in the remanded case.

5. Order 41 Rule 23A CPC comes into play in a situation where the Court from whose decree an appeal is preferred, disposes of the case on merits, and the decree is reversed in appeal and a re-trial is considered necessary. In such circumstances, the Appellate Court has the same powers, as it has under Rule 23.

6. Admittedly, the present case is not one which was disposed of on a preliminary point; nor did the Financial Commissioner reverse the decree in appeal. Instead, a simplicitor remand order was passed without specifying the nature of issue/issues which were required to be tried in the case so remanded. In the case of *Sunder Singh* (supra) also, the Supreme Court observed that the scope of remand in terms of the Order 41 Rule 23 CPC, is extremely limited and in the given facts of the aforesaid case, it was held that the provisions of Order 41 Rule 23A CPC were not attracted, and nor was a case made out for invoking the jurisdiction of Order 41 Rule 23 CPC. The observation of the Supreme Court with regard to the provisions of Order 41 Rule 23 CPC are reproduced herein below:

18. It is now well settled that before invoking the said provisions, the conditions precedent laid down therein must be satisfied. It is further well settled that the court should loathe to exercise its power in terms of Order 41 Rule 23 of the CPC and an order of remand should not be passed routinely. It is not to be exercised by the appellate court only because it finds it difficult to deal with the entire matter. If it

does not agree with the decision of the trial court, it has to come with a proper finding of its own. The appellate court cannot shirk its duties.

7. A perusal of the impugned order dated 17.5.1999 shows that the Financial Commissioner had, while remanding the appeal, overlooked the fact that the order passed by the Deputy Commissioner was not one decided upon a preliminary point, but was a detailed one, on merits. In these circumstances, the provisions of Order 41 Rule 23 CPC are not attracted. The Financial Commissioner also did not make any observation to the effect that a re-trial was necessary in the present case, so as to attract the provisions of Order 41 Rule 23A CPC. Hence, the impugned order suffers from a lacuna, as it does not conform to the provisions of Order 41, Rules 23 and 23A CPC.

8. In these circumstances, the impugned order dated 17.5.1999 is quashed. The Appellate Authority is directed to dispose of the revision petition of respondent No. 1 by passing an order on merits. The parties are directed to appear before the Financial Commissioner on 8th September, 2009, to enable him to fix a date of hearing in the matter.

9. Considering the fact that the petitioner has placed on record certain additional facts by filing an affidavit under index dated 12.3.2009, she shall be entitled to rely upon the aforesaid documents by placing them on the record, for the consideration of the Financial Commissioner, at the time of hearing the appeal. The respondent shall also be entitled to rebut the aforesaid documents and place on record any other relevant documents that they seek to rely upon before the learned Financial Commissioner.

10. Till the parties appear before the Financial Commissioner and a hearing is granted to them, the order dated 9.6.1999, by which the parties were directed to maintain status quo in respect of the possession and title of the impugned property, shall continue to operate.

11. The writ petition is disposed of along with the pending application.