

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.8716-8717 OF 2017

(Arising out of S.L.P (C) Nos.27029-27030 of 2016)

Smt. Nirmala Devi

Appellant(s)

Versus

The Gurgaon Scheduled Caste and
Vimukta Agriculture Thrift and
Credit Society Limited and Others

Respondent(s)

O R D E R

Leave granted.

The present appeals, by special leave, call in question the legal propriety of the judgment and order dated 1st February, 2016, in R.S.A. No.2046 of 2012 passed by the High Court of Punjab & Haryana at Chandigarh, vide which the learned Single Judge after considering various aspects has held thus:-

"At this stage, without embarking upon merits of this case, lest it may prejudice anybody's case at the relevant stage, it can be appreciated that the trial Court has adverted only to the findings under issues No.1 and 2 and such findings have been made subject matter of decision of issues No.3 and 4. Issue No.3 could have been framed on the basis of stand taken in the written statement as well as on the basis of pleadings of the counter claim. No specific issue of counter claim was framed though the onus of issue No.3 was fastened upon the defendants.

Even, if, it is taken to be an issue framed on counter claim, the findings were required to be returned by the trial Court independently. As mentioned in para No.22 of the judgment of the trial Court, the findings under issue No.3 have been returned on the basis of findings recorded on issue No.1 and 2. No decision has been given on the counter claim in the concluding part of the judgment nor the relief of counter claim was incorporated in the relief clause. Even the defendants did not consider themselves to be aggrieved by the decision of the trial Court giving no decision on counter claim. The lower Appellate Court in para No.27 of the judgment has recorded a fact that in view of findings given by the trial Court on all the issues, particularly on issue No.3, counter claim in favour of defendant No.3 can be presumed to have been allowed. Once there is no finding under issue No.3 by the trial Court, there was no occasion for the lower Appellate Court to give such a finding, which is claimed to be totally misreading of evidence. Since the counter claim has not been adverted to by the trial Court nor the same was incorporated in the relief clause, nor any proper issue was based upon counter claim, therefore, the requirement of Order 8 Rule 6-A of CPC has not been complied with.

At this stage, this Court feels that in the absence of decision on counter claim, any finding given on merits may prejudice the case of either party, therefore, it will be just and expedient to call upon the trial Court to advert to the counter claim and give necessary findings after framing proper issue on the counter claim. Since the plea of counter claim may affect findings under other issues as well, therefore, while remanding the case to the trial Court, the findings on other issues are necessary to be reversed. Ordered accordingly. However, trial Court shall decide all the necessary issues afresh without being influenced by anything recorded herein-above. Trial Court would make every endeavour to decide the suit expeditiously by giving short adjournments to the parties."

It is submitted by Mr. S.R. Singh, learned senior counsel appearing for the appellant that the counter claim singularly pertain to ownership and an issue was framed with regard to the ownership and, therefore, the parties were well aware as to what the issue was about. Additionally, it is submitted by Mr. Singh that the High Court has been misdirected by the conclusion arrived at by the lower appellate court that the counter claim preferred by the respondent presumed to have been allowed, without appreciating the fact that the pertinent issue was the ownership and evidence was adduced with regard to the same.

Mr. V.K. Bhardwaj, learned senior counsel appearing for the respondent No.1, in support of the judgment passed by the High Court would submit that the High Court has correctly remanded the matter and, therefore, this Court should not interfere in exercise of its jurisdiction under Article 136 of the Constitution.

On a perusal of the judgment of the trial Court, it is perceivable that the issue No.3 pertained to ownership. A finding had been recorded in favour of the defendant, the respondent herein. In First Appeal, the same was affirmed, but, in Second Appeal, the High Court on the grounds, as has been stated herein-above, has set aside the same and remitted the matter to the trial court.

Mr. S.R. Singh, learned senior counsel for the appellant has drawn our attention to paragraph 10 of a two-Judge Bench decision in P. Purushottam Reddy and Another vs. Pratap Steels Ltd. (2002) 2 SCC 686. The said paragraph reads as follows:-

"The next question to be examined is the legality and propriety of the order of remand made by the High Court. Prior to the insertion of Rule 23A in Order 41 of the Code of Civil Procedure by CPC Amendment Act 1976, there were only two provisions contemplating remand by a court of appeal in Order 41 of CPC. Rule 23 applies when the trial court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in appeal. Rule 25 applies when the appellate court notices an omission on the part of the trial court to frame or try any issue or to determine any question of fact which in the opinion of the appellate court was essential to the right decision of the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand in as much as the subordinate court can try only such issues as are referred to it for trial and having done so, the evidence recorded, together with findings and reasons therefore of the trial court, are required to be returned to the appellate court. However, still it was a settled position of law before 1976 Amendment that the court, in a appropriate case could exercise its inherent jurisdiction under Section 151 of the CPC to order a remand if such a remand was considered pre-eminently necessary ex debito justitiae, though not covered by any specific provision of Order 41 of the CPC. In cases where additional evidence is required to be taken in the event of any one of the clauses of sub-rule (1) of Rule 27 being attracted, such additional evidence oral or documentary, is allowed to be produced either before the appellate court itself or by directing any court subordinate to the appellate court to receive such evidence and send it to the appellate court. In 1976, Rule 23 A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23A as it is under Rule 23. After the amendment, all the cases of wholesale remand are covered by

Rule 23 and 23 A. In view of the express provision of these rules, the High Court cannot have recourse to its inherent powers to make a remand because, as held in *Mahendra v. Sushila*, AIR (1965) SC 365, at p. 399), it is well settled that inherent powers can be availed of ex debito justitiae only in the absence of express provisions in the Code. It is only in exceptional cases where the court may now exercise the power of remand de hors the Rules 23 and 23A. To wit, the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 41 Rule 31 of the CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for re-writing the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 of the CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided."

In this context, we may also refer to a decision in *Nedunuri Kameswaramma vs. Sampati Subba Rao* AIR 1963 SC 884, wherein it has been held that 'where the parties were fully aware about the rival case and led the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mis-trial which vitiates proceedings.' We have referred to this judgment solely for the purpose of the counter claim. As we have noted earlier, the issue pertained to denial of the ownership of the plaintiff and assertion of the same by the defendants and, therefore, the plaintiff was well aware that there was refutation of the claim. The counter claim was not, in that way, an independent claim.

In view of the aforesaid, the High Court should have been well advised to dwell upon the merits of the case and

should not have remanded the matter to the trial court.

Resultantly, the appeals are allowed, the judgment and order passed by the High Court is set aside and the High Court is requested to adjudicate the Second Appeal in accordance with law. As we are remanding the matter, the parties shall maintain *status quo*, existing as on today, till the Second Appeal is decided by the High Court. There shall be no order as to costs.

.....J.
[Dipak Misra]

.....J.
[A.M. Khanwilkar]

New Delhi
July 07, 2017.

ITEM NO.12

COURT NO.2

SECTION IV-B

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petition(s) for Special Leave to Appeal (C) Nos.27029-27030/2016

(Arising out of impugned final judgment and order dated 01-02-2016 in RSA No. 2046/2012 18-03-2016 in RARS No. 30/2016 18-03-2016 in RSA No. 2046/2012 passed by the High Court of Punjab & Haryana at Chandigarh)

NIRMALA DEVI

Petitioner(s)

VERSUS

GURGAON SCHEDULED CASTE AND VIMUKTA
AGRICULTURE THRIFT AND CREDIT SOCIETY
LIMITED, GURGAON

Respondent(s)

Date : 07-07-2017 These petitions were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE DIPAK MISRA
HON'BLE MR. JUSTICE A.M. KHANWILKAR

For Petitioner(s) Mr. S.R. Singh, Sr. Adv.
Ms. Pritha Srikumar, AOR
Mr. Shujoy Mazumdar, Adv.

For Respondent(s) Mr. V.K. Bhardwaj, Sr. Adv.
Mr. Daya Krishan Sharma, AOR
Mr. Subhash Sharma, Adv.
Mr. Abhishek, Adv.
Ms. Monika Sharma, Adv.
Mr. Rohit Vats, Adv.

Mr. Harikesh Singh, Adv.
Mr. Kamal Mohan Gupta, Adv.

UPON hearing the counsel the Court made the following
O R D E R

Leave granted.

The appeals are allowed in terms of the signed order.

(Chetan Kumar)
Court Master

(H.S. Parasher)
Court Master

(Signed order is placed on the file)