

Court No. - 7

Case :- FIRST APPEAL FROM ORDER No. - 1285 of 2023

Appellant :- Smt. Yasmeen Zia

Respondent :- Smt. Haneefa Khursheed And 2 Others

Counsel for Appellant :- Devansh Misra, Sudheer Rana

Counsel for Respondent :- Pankaj Agarwal

Hon'ble Dr. Yogendra Kumar Srivastava, J.

1. Heard Shri Devansh Mishra, learned counsel for the appellant and Shri Pankaj Agarwal, learned counsel for the respondents.

2. The present appeal is directed against the order dated 08.05.2023 passed in Civil Appeal No. 22 of 2022, arising out of the judgment and decree dated 31.03.2022, passed in Original Suit No. 649 of 2016.

3. By order dated 31.03.2023, the trial court had disposed of the suit upon a preliminary point, and the decree was reversed in appeal in terms of the order dated 08.05.2023, and the case was remanded to the trial Judge.

4. Counsel appearing for the respondents has raised a preliminary objection to the hearing of the present appeal by pointing out that the order of remand has been carried out and the trial court has passed an order dated 18.08.2023 disposing of 'Issue no. 9', as directed in terms of the order dated 08.05.2023 passed in the civil appeal. It is accordingly submitted that the remedy open to the appellant would be to

file an appeal against the subsequent order passed by the trial court, and the present appeal against the order of remand is now without any purpose.

5. It is further sought to be argued that in the absence of an appeal being filed against the later order passed by the trial court deciding the issue on which the remand had been made, the said order would remain in force even if the earlier order is set aside, and therefore, it would be an exercise in futility in reversing the earlier order by entertaining the present appeal.

6. Counsel for the appellant has controverted the aforesaid objection by submitting that an appeal against an order of remand, cannot be held to have become redundant with the passing of the consequential order by the trial court in pursuance of the order of remand. It is contended that the right of appeal granted by Order XLIII, Rule 1(u) against an order of remand cannot be taken away or nullified with the passing of the consequential order pursuant to the order of remand. Learned counsel has placed reliance upon the decision in **Kanakaya Vs. Lakshmayya**¹.

7. The preliminary issue on which submissions have been made by the counsel for the parties, raises a legal question as to whether the passing of a final order pursuant to the remand would constitute a bar either to the institution or the hearing of appeal under Order XLIII Rule 1(u) against the remand order.

1 AIR 1951 Mad 218

8. The Civil Procedure Code, 1908² gives a right of appeal to a party aggrieved against an order of remand in a case where the decree of the appellate court would be open to appeal and also imposes serious disability in terms of Section 105(2) precluding an appellant from taking in an appeal from the final decree any objection that might have been urged by way of an appeal from an order of remand.

9. There is no provision in the Code, express or otherwise, that may be held to have an effect of taking away the right of a party to appeal from an order of remand, in case the preliminary point on which the remand had been made, stood disposed of before the appeal against the order of remand was presented or heard and disposed of.

10. Under Order XLIII Rule 1(u), an appeal lies from an order remanding a case, where an appeal would lie from the decree of the appellate court. This would mean that the order of remand would be appealable only in a case in which an appeal would lie from the decree which would have been passed by the appellate court had that court decided the case without remand.

11. In a case where no appeal is preferred from the order of remand, the party aggrieved by the order cannot afterwards dispute its correctness in an appeal from the final decree in view of the provision contained under Section 105(2).

12. Section 104, read with Order XLIII, Rule 1, expressly authorizes and creates a forum for appeal against orders

² the Code

falling under various clauses of Order XLIII, Rule 1. The right of appeal, thus conferred by the statute, is a substantial right, and in the absence of any express provision to the contrary, it would not be legitimate to read into the statutory provision granting a right of appeal, any limitation or disability which the legislature did not deem it appropriate to insert. The abrogation of a statutory right of appeal is not to be readily inferred, particularly in a situation where non-filing of such an appeal has the effect of imposing a serious disability on the right of the party concerned from disputing the correctness of the order at a subsequent stage.

13. Order XLIII, Rule 1(u) does not contain any express bar by providing any condition that an order of remand would be appealable only if the case had not been finally determined by the trial court before filing of the appeal or during its pendency. There is also no provision which may lead to an inference that an appeal filed against an order of remand would be rendered infructuous in case the preliminary point on which the remand had been made was disposed of during the pendency of the appeal.

14. The right of appeal and the jurisdiction for the purpose, having been conferred expressly by the statute, cannot be taken away except by express words, or by necessary implication. The Code does not say, in express terms or otherwise, that the appeal against the order of remand would lie only if the point on which the remand had been made, had not been finally determined by the court of first instance,

before the appeal is preferred or is heard.

15. The reason why the legislature, in its wisdom, did not provide any such exclusionary clause, in express terms, would stem from the fact that in the event, a party, for any reason, is unable to appeal against the order of remand before an order is passed consequent to a remand, it would lose all opportunity of objecting to that order in view of Section 105(2), and simultaneously, it would also be deprived of the right of appeal expressly conferred by Section 104(1) read with Order XLIII Rule 1(u).

16. The fallacy in taking a position to the contrary would be manifest by taking the illustration of a situation where the first appellate court passes an order of remand, and before it is subjected to appeal under Order XLIII Rule 1(u), the trial court passes an order on merits pursuant to the remand order, and the order so passed is unassailable. If a view is taken that in such a situation, the only remedy available to the party concerned would be to challenge the consequential order passed by the trial judge pursuant to the remand order, the party concerned would be forced to file an appeal against the order of trial court even though the said order may be unimpeachable, and by virtue of the bar under Section 105(2), he would not be entitled in that appeal to attack the remand order. This would, obviously, create a serious prejudice to the rights of the party and any such exclusion in the absence of any express provision to the said effect having been provided by the legislature, cannot be readily inferred.

17. It would be seen that under the scheme of the Code, an order of remand has an independent existence, with an independent right of appeal having been provided against such an order. The disability created in terms of Section 105(2), in a case where the party concerned fails to exercise its right of appeal against an order of remand, makes the right of appeal provided under Order XLIII, Rule 1 Clause (u), even more valuable.

18. The order of remand under the statutory scheme would, therefore, be seen to have independent existence and cannot be held to have been nullified merely for the reason that the remand order has subsequently been given effect and the point on which the remand had been made, has been decided. This is more so for the reason that a separate right to appeal is provided against such an order under Order XIII, Rule 1(u), and under Section 105(2), an obligation is cast on a person aggrieved with the order of remand to appeal from it, and in the absence of doing so, he would be precluded from raising any objection with regard to propriety or correctness of the order at a subsequent stage of litigation. It would, therefore, not be possible to read into the Code any provision to the effect that the passing of a final order pursuant to the remand would constitute a bar either to the institution or the hearing of any appeal against the remand order.

19. An analogy may be drawn with Section 97 of the Code, which provides that where any party aggrieved by a preliminary decree does not appeal from such decree, he shall

be precluded from disputing its correctness in any appeal which may be preferred from the final decree. Although, the provisions of Section 97 would have no applicability to the facts of the present case, the analogy would be apt for the reason that the position of an appeal from the order of remand and an appeal from a preliminary decree would be very similar as in both the situations, if the appeal which is provided by the statute, is not preferred, the order or the decree, as the case may be, cannot be challenged at a subsequent stage.

20. The question whether the passing of a final decree would affect the maintainability of the appeal, already filed, from the preliminary decree, has been the subject matter of consideration before various High Courts, and it has been held that the passing of a final decree subsequent to the institution of an appeal would not affect the maintainability of the appeal. Reference in this regard may be made to the decisions in **Kanhaiyalal v. Tribeni Sahai**³, **Ramien v. Veerappudian**⁴, **Gokul Kalwar v. Chandar Sekhar**⁵, **Madhu Sudan v. Chhalimaddin Ahammad**⁶, **Gurmukh Singh v. Shiv Ram**⁷, **Basawant Mallappa v. Kallappa Virbhadrappa**⁸, **Madhoroa Paikaji v. Ekanathrao Balappa**⁹, and **Uppala Subbaiah v. Chitrala Narsimloo**¹⁰.

3 AIR 1914 All 380

4 AIR 1914 Mad 473(2)

5 AIR 1926 All 665

6 AIR 1928 Cal 167

7 AIR 1935 Lah 482

8 AIR 1938 Bom 222

9 AIR 1948 Nag 56

10 AIR 1956 Hyd 161

21. The common reasoning taken to come to the aforesaid conclusion, is twofold: firstly, that the preliminary decree has an independent existence and it cannot be assailed in an appeal from the final decree; and secondly, if the preliminary decree was set aside, the final decree would fall on its own. It was also held that the preliminary decree having an independent existence and the person aggrieved being bound to appeal from it, that right could not be taken away by a final order being passed either before or after the presentation of an appeal from the preliminary decree.

22. An order of remand made under Order XLI Rule 23, is also having an analogous position, being appealable under Order XLIII, Rule 1(u), with a condition that if no appeal is filed therefrom, it cannot be challenged in view of the bar under Section 105(2). Thus, the order of remand would have an independent existence and if any person is aggrieved thereby, he would have no other alternative but to appeal from it, otherwise, he would be precluded from disputing its correctness later on.

23. The law gives to the person aggrieved by the order of remand, a right to appeal, and that right cannot be taken away only for the reason that a final order has been passed consequent to the remand, either before or after a person files an appeal against the remand order. So long as his appeal is otherwise in order, he would have a right to be heard, and such an appeal cannot be dismissed on the mere ground that another appeal has not been filed from the final order passed

by the trial court consequent to the remand. This would be so also for the reason that the final order which is passed by the trial court after the order of remand is in its nature dependent and subordinate to the order of remand, since it would be consequential to the same and is to be controlled by the terms of the remand order. It would, therefore, follow that if the remand order is set aside, the order passed by the trial court, consequent thereto, would also fall on the ground.

24. As regards the contention sought to be raised by the respondents that the later order passed by the trial court consequent to the remand order having not been appealed against, would remain in force even if the earlier order were to be reversed, and therefore, the present appeal would be of no consequence, it may be observed that the later order passed by the trial court merely carries out the directions of the remand made by the first appellate court, and it cannot in any way be held to have the effect of superseding the said order. The validity of the later order passed by the trial judge would, therefore, depend upon the validity of the earlier order passed by the first appellate court. The trial court's jurisdiction to hear the case being dependent upon the remand order, if the remand order is held to be invalid, the proceedings consequent to the remand order would be rendered *non est*.

25. The effect of reversal of the order of remand under Order XLI, Rule 23, would be that anything done in pursuance of such an order would *ipso facto* cease to have any effect and

the trial court would have no jurisdiction to pass any further order in the case. The contention raised by the respondent that the final order passed by the trial court, which is the result of the remand made by the first appellate court, would survive the reversal of the remand order, would, therefore, lead to an apparent logical inconsistency, and the argument would be unsupportable.

26. This may also be viewed from another perspective. It may very well be possible that a person has no objection to the final order passed by the trial court, provided the order of remand was correct, and his only objection may be to the order of remand itself. The final order being consequential upon or having the effect of merely carrying out the directions contained in the order of remand, there is no reason why the party concerned should be forced into filing an appeal against the said final order, when he has a statutory right of appeal under Order XLIII, Rule 1(u), against the order of remand, especially, when in the appeal against the final order it would not be open to him to impugn the correctness of the order of remand by virtue of the bar imposed by Section 105(2).

27. The appeal filed against an order of remand, if allowed, would render the appeal to be filed against the final order on the same grounds, unnecessary and without purpose. The jurisdiction of the trial court to carry on with the proceedings after the remand being dependent on the validity of the order of remand, if that order is set aside of an appeal, the final order passed consequent to the same, and all proceedings taken under the remand order, would fall with it.

28. The final order passed in pursuance of the order of remand in the same suit, would be dependent and subordinate to the order of remand. The appellate court, as long as it is in seisin of the appeal against the order of remand, would have the power to reverse or modify the remand order, and to this extent, would also have the power to resultantly affect the operation of the final order passed in pursuance of the remand order.

29. It may also be taken note of that the litigant has a statutory right of appeal against the order of remand, and he also has a right to contest the proceedings before the trial court pursuant to the order of remand. The two rights being independent, the exercise of one such right would not constitute a bar to the exercise of the other. It would not be a question of a choice between two alternative rights; rather, it would be the same right that the party concerned may agitate both in the appeal against the remand order and at further stages of the trial consequent to the remand.

30. The right to appeal against the order of remand would not be lost merely because the party concerned has contested the proceedings in the trial court after the remand. It goes without saying that if the order of remand is ultimately reversed on the appeal against it, the subsequent order passed by the trial court, which depends for its validity on the earlier order of remand, would *ipso facto* cease to have effect. The subsequent proceedings conducted in pursuance of an order of remand would be subordinate and dependent, and would

be liable to be superseded by the reversal of the order of remand, which is subject matter of appeal before a higher forum.

31. The final order, in its nature, being dependent and subordinate, as it has been passed as a consequence of the proceedings directed and controlled by the remand order, when the said order is set aside, the final order stands superseded automatically. The order passed by the trial court consequent to the order of remand, therefore, cannot remain in force if the remand order on which it is dependent, is reversed in appeal.

32. Having regard to the foregoing discussion, it would follow that an appeal against an order of remand, properly presented, and otherwise in order, would not be rendered defunct or inconsequential by the passing of a final order giving effect to the terms of the remand order.

33. The appealability of the remand order passed under Order XLI, Rule 23, would in no manner be affected by the passing of a final order consequent to the remand.

34. The objections raised to the maintainability of the appeal, are, therefore, held to be legally unsustainable.

35. As prayed by learned counsel for the parties, list for admission on **27.09.2023, as fresh.**

Order Date :-20.9.2023
Vipasha

[Dr. Y.K. Srivastava, J.]