

Sher Bahadur Singh vs Mahabir Singh And Ors. on 8 February, 1952

Equivalent citations: AIR1952ALL919, AIR 1952 ALLAHABAD 919

JUDGMENT

Beg, J.

1. These are two miscellaneous appeals by the defendants against two orders of remand passed by the learned Civil Judge of Bara Banki setting aside the judgments and decrees of the Munsif of Bara Banki in two cases and directing him to try the cases in the light of the instructions given by him.
2. These appeals purport to have been filed under Order 43, Rule 1 (u), Civil P. C. Before the hearing of the appeals, a preliminary objection regarding the maintainability of the appeals was taken by the learned counsel for the respondents. In order to determine this objection a few preliminary facts might be stated.
3. The two suits out of which these appeals have arisen were filed by the same plaintiffs against the same defendants for possession of different tenancy plots situate in village Kanwan Danda, District Bara Banki, and for damages against the defendants who were alleged to be in unlawful possession of the same. The plaintiff's suits were based on the allegation that they were the daughter's sons of one Hardeo Singh, who was the last tenant of the plots in dispute, and after his death the defendants had taken forcible possession of the lands to which the plaintiffs were entitled.
4. The defendants contested the suits and pleaded that Hardeo Singh had died unmarried. They denied that the plaintiffs were the daughter's sons of Hardeo Singh and they further alleged that they were entitled to the tenancy being the nearest reversioners of the deceased. They also set up a custom under which the daughters' sons were excluded from inheritance.
5. It is, therefore, evident that both the parties admitted that Hardeo Singh was the last tenant of the plots in dispute and the only question that arose for decision in the case was whether the plaintiffs were the daughter's sons of the deceased Hardeo Singh and entitled to inherit the property on his death. To determine this question the trial Court framed issue No. 1, which runs as follows: "Whether the plaintiffs or the defendants are the tenants of the plots in suit?" In accordance with Section 288, U. P. Tenancy Act, he remitted this issue for decision by the revenue Court. In the revenue Court both parties adduced evidence of their title. The plaintiffs tried to establish the fact that they were the daughter's sons. The defendants tried to controvert it by producing counter-evidence. The question of custom also seems to have been raised. The revenue Court trying the issue, after a discussion of the entire evidence adduced by the parties, definitely came to the conclusion that the plaintiffs were not the daughter's sons of the deceased Hardeo Singh. The

revenue Court further held that the custom set up by the defendants was not substantiated by them. On receipt of these findings from the revenue Court, the trial Court incorporated them in his judgment, and accepting the said findings, he dismissed both the suits of the plaintiffs.

6. The plaintiffs preferred appeals against both the aforesaid judgments to the learned Civil Judge of Bara Banki who was of opinion that both the parties having admitted that Hardeo Singh was the tenant of the plots in suit the main question in the case related not to tenancy rights but to the relationship of the parties with deceased tenant and this being a question of inheritance, the issue relating to the title should not have been remitted to the revenue Court but should have been decided by the Civil Court itself. He accordingly remanded the case to, the trial Court for framing proper issues in the light of the directions made by him and for the disposal of the cases after the evidence had been adduced by the parties. These miscellaneous appeals have been filed by the defendants against the said order.

7. In support of the preliminary objection, the learned counsel appearing for the respondents has invited my attention to Order 43, Rule 1 (u) which allows an appeal against an order under Rule 23 of Order XLI remanding a case, where an appeal would lie from a decree of the appellate Court. The question, therefore, that arises for determination is whether the order of remand passed by the lower Court was an order under Order 41, Rule 23 or not. The provisions of Order 41, Rule 23 have been amended by the High Court of Allahabad and the amended rule runs as follows:

"Where an appellate Court has reversed a decree and all questions arising in the case have not been decided it may, if it thinks fit, by order remand the case and may further direct what issue or issues shall be tried in the case so remanded...."

In the present case the only questions at issue between the parties were whether the plaintiffs were the daughter's sons of the deceased Hardeo Singh and if they were the daughter's sons whether they were excluded from inheritance by custom. Both these questions were decided by the trial Court.

8. Learned counsel appearing for the appellants has argued that in fact the trial Court did not decide the questions, but having remitted the relevant issue to the revenue Court it only adopted the finding of the revenue Court on the said issue. I find it difficult to accept this contention of the learned counsel. The trial Court had no doubt accepted the findings of the revenue Court but the fact that he had accepted the findings of the revenue Court does not mean that he had not decided the question in controversy between the parties. The questions were decided by him, although they were decided in accordance with the findings of the revenue Court. Although he merely incorporated the findings of the revenue Court in his judgment the decision was, nonetheless, the decision of the civil Court, and the appeal preferred in the lower appellate Court was against the decision of the civil Court. It seems to me to be quite clear that it is not possible to contend that all the questions were not decided by the trial Court in the present case.

9. Learned counsel for the appellants has further argued that the words "all the questions arising in the case" refer to appellate Court and not to the trial Court. If this interpretation of the rule is accepted, then it seems to me that the said words would have no meaning for in every case of appeal

against an order of remand it could always be said that the appellate Court had failed to decide all the questions in issue. The very fact that the case is remanded by the appellate Court would necessarily show that certain questions had been left undecided by it. I am accordingly of opinion that these words refer to a decision by the trial Court and not to a decision by the appellate Court.

10. If Order 41, Rule 23 is found to be inapplicable to the present case, then the only provision of law under which the said order could be passed is Section 151, Civil P. C. No appeal is provided against such an order.

11. In Jagdish Singh v. Kateshar Singh, A. I. R. 1945 Oudh 133, the trial Court had remitted some of the issues, to the revenue Court for its findings under Section 288, U. P Tenancy Act, and decided the said issues in accordance with the findings of the revenue Court. The appellate Court reversed the decree of the trial Court holding that the trial Court had erred in remitting these issues to the revenue Court and remanded the suit to the trial Court for giving its independent findings on all the issues irrespective of the decision of the revenue Court on some of the issues remitted to that Court. In appeal it was held by a Bench of the late Chief Court of Avadh that the trial Court having decided all the questions arising in the case, the remand order did not come under Order 41, Rule 23 but was one under the inherent powers of the Court and was, therefore, not appealable.

12. A reference in this connection may also be made to Brij Manohar v. Ramanand, 14 Luck. 447 and Ashfaq Husain v. Moharram Ali, A.I.R. 1948 Oudh 220.

13. Learned counsel for the appellants has referred to Raj Bahadur Singh v. Mst. Ram Dasi, A. I. R. 1948 Oudh 107. In this case the trial Court had failed to decide the particular plea of limitation, which arose on the pleadings of the parties and the lower appellate Court had remanded the case on that ground. It could, therefore, be argued that the trial Court had failed to decide all the questions in the suit. This ruling has clearly no application to the facts and circumstances of the present case.

14. Having considered the law on the point, I am of opinion that the preliminary objection must prevail.

15. I accordingly dismiss both the appeals with costs. The stay order dated 1-9-1948, is hereby vacated.