

submissions made by learned counsel for the parties, the evidence on record, and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is **allowed**.

39. Let the applicant- **Saurabh Meena** involved in aforementioned case crime number be released on bail on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions.

(i) The applicant shall not tamper with evidence.

(ii) The applicant shall remain present, in person, before the Trial Court on dates fixed for (1) opening of the case, (2) framing of charge and (3) recording of statement under Section 313 Cr.P.C/351 B.N.S.S. If in the opinion of the Trial Court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the Trial Court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

40. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail. Identity, status and residence proof of the applicant and sureties be verified by the court concerned before the bonds are accepted.

41. It is made clear that observations made in granting bail to the applicant shall not in any way affect the learned trial Judge in forming his independent opinion based on the testimony of the witnesses.

(2025) 2 ILRA 9

**APPELLATE JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 17.02.2025

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

First Appeal From Order No. 32 of 2022

Prakash Narain & Ors. ...Appellants
Versus
Hari Bux Singh & Ors. ...Respondents

Counsel for the Appellants:
Ankit Pande

Counsel for the Respondents:
Onkar Nath Pandey

Civil Law-The Code of Civil Procedure, 1908-Sections 96, 100 & 107 - Order 41 - Rule 17, 23, 23-A, 25 & Order 43 Rule 1 (u))-Appeal under Order XLIII Rule 1(U) against the remand order passed by the Appellate Court---If particular issue of limitation was not framed by the trial court as recorded by the lower appellate court and on the basis of record the trial court has recorded a finding which shows the suit is not time barred, it could have considered the same and recorded a finding thereon, if the evidence is sufficient by framing a issue, if required as first appeal is in continuation of the suit and appellate court has all the powers for considering suit on facts as well as law---Admittedly the commission report is on record, but no objection to the same has been filed by the defendant-respondents and no finding has been recorded by the trial court that it is not satisfied with the proceedings and the report of commissioner, therefore, it stands final and if it has not been considered by the trial court and the lower appellate court was of the view that it was required to be considered, it could have considered the same and upon considering it an independent finding could have been recorded and after it if the appellate court was of the view that the matter is required to be remanded, it could have remanded recording specific findings as remand on technical ground without affecting merit is not tenable.**(Para 36 & 40)**

The impugned order was passed without dealing with the case as an appellate court under Section 96 of C.P.C. and exercising the powers

under Section 107 of C.P.C. read with Order-41, Rules-23, 23-A and 25 and passing judgment without complying with the provision of under Order 41 Rule 31 of C.P.C., therefore, the impugned judgment and order passed by the lower appellate court is liable to be set aside and the matter is liable to be remanded to the lower appellate court to consider and decide the appeal afresh in accordance with law and the observations made herein-above in this order. (E-15)

(Para 41)

List of Cases cited:

1. Abdur Rahman & ors.Vs Athifa Begum & ors.; (1996) 9 SCC 62
2. Janki Prasad Vs Sanjay Kumar & ors.; 2022 (1) ADJ 312 (LB)
3. Narayanan Vs Kumaran & ors.; (2004) 4 SCC 26
4. Vasant Ganesh Damle Vs Shrikant Trimbak Datar & anr.; (2002) 4 SCC 183
5. Malluru Mallappa (dead) through legal representatives Vs Kuruvathappa & ors.; (2020) 4 Supreme Court Cases 313
6. Syeda Rahimunnisa Vs Malan BI (Dead) by L.Rs. & anr.; 2016 (119) ALR 485
7. Jagannathan Vs Raju Sigamani & anr.; (2012) 5 SCC 540
8. P. Purushottam Reddy & anr. Vs Pratap Steels Ltd.; (2002) 2 SCC 686
9. Maya Devi (Dead) through LRs Vs Raj Kumari Batra (Dead); (2010) 9 SCC 486
10. Sathanath & anr. Vs Sarojamani; (2022) 7 Supreme Court Cases 644
11. Smt. Urmila Devi Vs Shyam Sunder & ors.2021 (151) RD 73
12. Sayeda Akhtar Vs Abdul Ahad (2003) 7 Supreme Court Cases 52,
13. Nagubai Ammal & ors.Vs B. Shama Rao & ors.1956 AIR (SC) 593

14. Arya Pratinidhi Sabha & ors.Vs Arvind Niketan Charthawal & anr. 1979 All.LJ 1220.

(Delivered by Hon'ble Rajnish Kumar, J.)

1. The instant appeal under Order XLIII Rule 1(U) of the Civil Procedure Code, 1908 (herein-after referred as C.P.C.) has been filed against the Judgment and order dated 04.01.2022 passed in Civil Appeal No.110 of 2011; Hari Bux Singh and others versus Prakash Narain and others by the Additional District and Sessions Judge, Court No.1, Sultanpur, by means of which the appeal has been allowed and the Judgment and decree passed by the trial court has been set aside and the matter has been remanded back to the trial court for fresh decision of the suit on merits.

2. Learned counsel for the plaintiff-appellants submitted that the defendant-respondents were not present when the case was called for hearing on the date fixed, therefore, the appeal could not have been decided on merit by the lower appellate court and it should have been dismissed under Order XLI Rule 17 of C.P.C. He further submitted that the lower appellate court has decided the civil appeal in violation of Order XLI Rule 31 of C.P.C. without framing points for determination and recording the findings thereon.

3. He further submitted that the plea of limitation taken by the defendant-respondents was in the knowledge of the parties and accordingly the evidence was adduced which shows that the suit was within limitation, therefore, merely because any issue was not framed in regard to limitation it cannot be a ground for setting aside the Judgment and decree passed by the trial court and remanding the matter. It

was further submitted that no objection to the commission report was filed by the defendant-respondents, therefore, there was no dispute in regard to the commission report and if court would have been dissatisfied with the report of the commissioner, it could have directed further inquiry in the matter or examined the commissioner, but it was not done, therefore, it can also not be a ground for remand. Thus submission was that the impugned Judgment and order is not sustainable in the eyes of law and it is liable to be set aside. He relied on the following case laws:

i. Nagubai Ammal and others versus B. Shama Rao and others; 1956 AIR (Supreme Court) 593

ii. Arya Pratinidhi Sabha and others versus Arvind Niketan Charthawal and another; 1979 All.LJ 1220

iii. Abdur Rahman and others versus Athifa Begum and others; (1996) 9 Supreme Court Cases 62,

iv. Sayeda Akhtar versus Abdul Ahad; (2003) 7 Supreme Court Cases 52,

v. Malluru Mallappa (dead) through legal representatives versus Kuruvathappa and others; (2020) 4 Supreme Court Cases 313,

vi. Smt. Urmila Devi versus Shyam Sunder and others; 2021 (151) RD 73,

vii. Sathyanath and another versus Sarojamani; (2022) 7 Supreme Court Cases 644,

viii. Janki Prasad versus Sanjay Kumar and others; 2022 (1) ADJ 312 (LB),

ix. Benny D'Souza and ors. Versus Melvin D'Souza & Ors.; 2023 LiveLaw (SC) 1032

4. Per contra, learned counsel for the defendant-respondents submitted that

the lower appellate court has allowed the appeal and the appeal has been finally decided on the insistence of the plaintiff-appellants, therefore, the plea that in absence of learned counsel for the plaintiff-respondents, the appeal should have been dismissed under Order XLI Rule 17 of C.P.C. is not tenable. Even otherwise he is not an aggrieved person, once an appeal has been decided and allowed by the lower appellate court because the appeal was filed by the defendant-respondents and they have no grievance. The defendant-respondents may have aggrieved person to challenge it, if it would have been dismissed. It was further submitted that the plaintiff-appellants have been heard by lower appellate court and their arguments have been considered and no objection to the commission report was filed. However, portion of possession during pendency of the suit is not identifiable.

5. On the basis of above, the submission of learned counsel for the defendant-respondents was that the impugned Judgment and order passed by the lower appellate court does not suffer from any illegality or error. The appeal has been filed on misconceived and baseless grounds, which is liable to be dismissed with costs.

6. I have considered the submissions of learned counsel for the parties and perused the records.

7. The plaintiff-appellants filed a suit for permanent injunction and mandatory injunction claiming the land in dispute. The suit was contested by the defendant-respondents by filing written statement. On the basis of pleadings of the parties, six issues were framed by the trial court. Thereafter oral as well as

documentary evidence was adduced by the parties. A commission was also got conducted during pendency of the suit and the commission report along with site plan was submitted by the Commissioner. The learned trial court, after considering the pleadings of the parties, evidence and material on record, decreed the suit for permanent injunction as well as mandatory injunction by means of the Judgment and decree dated 30.04.2011 passed in Original Suit No.47 of 2005; Prakash Narain Shukla & others versus Hari Bux Singh & others and the defendant-respondents were directed to remove the construction, if any made during pendency of the suit on the land in dispute shown as Da, Ya, Ma, Ka, Ba, Kha Da. Being aggrieved by the Judgment and decree passed by the trial court Civil Appeal No.110 of 2011 was filed by the defendant-respondents, which was not being argued by the defendant-respondents and was being got adjourned repeatedly, therefore, on 04.01.2022, the request for adjournment of the appeal was rejected as serious objection was also raised on adjournment by learned counsel for the plaintiff-appellants. The learned lower appellate court, after considering an order passed by predecessor rejecting application for adjournment and order passed by High Court and submissions of plaintiff-appellants that since the defendant-respondents are not arguing the appeal despite sufficient opportunity granted by the court and in these circumstances instead of dismissing the appeal in casual manner, it would be appropriate to pass order on merit, decided the appeal after hearing learned counsel for the plaintiff-appellants and considering his submissions.

8. Learned lower appellate court considering the grounds raised in the

appeal and the arguments advanced by learned counsel for the plaintiff-appellants allowed the appeal on two grounds, first of which is that despite specific plea in paragraph 44 of the written statement of suit being time barred, no issue has been framed and if issue would have been framed, the defendant-respondents would have to prove the same by adducing the evidence and the parties would have led evidence accordingly on the same. The second is that though the report of the commission was on record, but the same has not been adjudicated on merits and remanded the matter after setting aside the Judgment and decree passed by the trial court for decision afresh on merits after framing additional issue and disposal of commission report on merit and affording opportunity of hearing to both the parties.

9. In view of above, first question for consideration in this appeal is as to whether lower appellate court has committed an illegality or error in deciding and allowing the appeal in absence of learned counsel for the defendant-respondents, who had filed the appeal, on the date fixed for hearing.

10. Order XLI Rule 17 of C.P.C. provides dismissal of appeal for appellant's default. Sub rule 1 of Rule 17 has been amended by High Court Amendment deleting the words "on the day fixed, or on any other day to which the hearing may be adjourned". The Rule 17 of Order XLI C.P.C. along with High Court Amendment is extracted below:

"17. Dismissal of appeal for appellants' default.—(1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called

on for hearing, the Court may make an order that the appeal be dismissed.

[Explanation.—Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.]

(2) Hearing appeal ex parte.—Where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte.”

High Court Amendment

Allahabad- In sub rule (1) delete the words “on the day fixed, or on any other day to which the hearing may be adjourned””

11. Sub rule 1 of the aforesaid Rule 17 of Order XLI as amended by the High Court Amendment provides that “where the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed”. Explanation inserted to sub rule 1 w.e.f. 01.02.1977 provides that nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits. Thus where the appellant does not appear when the appeal is called on for hearing, the court may dismiss the appeal, but it would not be dismissed on merits in absence of appellant.

12. In the present case, learned counsel for the defendant-respondents, who had filed the appeal before the lower appellate court, sought adjournment on the date when the appeal was called for hearing. It was opposed by the plaintiff-appellants on the ground that despite sufficient opportunity granted, the defendant-respondents are not arguing the appeal. The lower appellate court, considering the application and objection and rejection of request earlier by his

predecessor and an order dated 02.11.2018 passed by Allahabad High Court in Misc. Single No.32718 of 2018; Hari Bux Singh versus Addl. District Judge Court No.1 Sultanpur and Ors. in which it was held that the case would not be adjourned, rejected the request for adjournment and considering the opposition of the plaintiff-appellants and recording that despite sufficient opportunity granted, the defendant-respondents, appellants therein are not participating in hearing, it would be appropriate to pass order on merit instead of dismissing the appeal in a causal manner. Thereafter proceeded to consider the grounds of appeal and the contentions of the plaintiff-appellants and allowed the appeal on the aforesaid grounds referred in paragraph 8 of this order, Thus firstly the appeal has not been dismissed on merit in absence of the appellants therein i.e. the defendant-respondents by the lower appellate court. Secondly, after considering the grounds raised in the appeal and contentions of learned counsel for the plaintiff-appellants, lower appellate court found that there are procedural errors committed by learned trial court and allowed the appeal and after setting aside the decree remanded the matter for disposal afresh on merit, therefore, the contention of learned counsel for the plaintiff-appellants is misconceived and not tenable in the eyes of law as the appeal has not been dismissed on merit or even the case has not been decided finally on merit. Even otherwise the defendant-respondents, who had filed the appeal are not aggrieved by it.

13. The Hon’ble Supreme Court, in the case of ***Abdur Rahman and others versus Athifa Begum and others (supra)***, held that the Explanation to Order XLI Rule 17(1) C.P.C. says that nothing in this sub-rule shall be construed as empowering

the Court to dismiss the appeal on the merits in absence of appellant's counsel. A coordinate Bench of this Court, in the case of **Janki Prasad versus Sanjay Kumar and others (supra)**, has taken similar view.

14. Now the question arises as to whether the procedural errors on which the lower appellate court has allowed the appeal, are such, which could not have been considered and decided by lower appellate court and the matter was inevitably to be remanded to the trial court to decide afresh as directed by the lower appellate court, which is to be seen in appeal under Order 43 Rule (1) (u) of C.P.C.

15. 27. The Hon'ble Supreme Court, in the case of **Narayanan Vs. Kumaran and Others; (2004) 4 SCC 26**, has held that it is quite safe to adopt that appeal under order 43 Rule (1) clause (u) should be heard only on the ground enumerated in Section 100. The relevant paragraph-17 of the judgment is extracted here-in-below:-

"17. It is obvious from the above rule that an appeal will lie from an order of remand only in those cases in which an appeal would lie against the decree if the Appellate Court instead of making an order of remand had passed a decree on the strength of the adjudication on which the order of remand was passed. The test is whether in the circumstances an appeal would lie if the order of remand were it to be treated as a decree and not a mere order. In these circumstances, it is quite safe to adopt that appeal under order 43 Rule (1) clause (u) should be heard only on the ground enumerated in Section 100. We, therefore, accept the contention of Mr. T.L.V. Iyer and hold that the appellant

under an appeal under order 43 Rule (1) clause (u) is not entitled to agitate questions of facts. We, therefore, hold that in an appeal against an order of remand under this clause, the High Court can and should confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and cannot convass all the findings of facts arrived at by the Lower Appellate Court."

16. The appeal under Section 96 C.P.C. is a valuable right of a party and Section 107 of the C.P.C. provides the powers of appellate court, which is extracted here-in-below:-

"107. Powers of Appellate Court.—(1) *Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—*

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

(2) *Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."*

17. According to the aforesaid Sub Section 1 of Section 107 an appellate court has power to determine a case finally after taking additional evidence, if required, or to frame issues and refer for trial and require any evidence to be taken, if required or remand a case. Sub-Section (2) of Section 107 of C.P.C. provides that subject to the provisions made in sub-section(1), the appellate court shall have

the same powers and duties as are conferred and imposed on the courts of original jurisdiction of suits instituted therein. Thus, the first appellate court has all the powers of a trial court while deciding the appeal, therefore, the appellate court is required to consider all the pleadings of the parties, evidence and material available on records while deciding the appeal. Therefore, if any plea or evidence has not been considered by the trial court, the first appellate court can consider the same also and frame the issue, if required, and consider it on the basis of evidence, if it is sufficient or taking additional evidence or get the evidence recorded and record the findings accordingly, while deciding the appeal.

18. Order XLI Rule 31 of C.P.C. provides the contents etc. of judgment of appellate court, which is extracted here-in-below:-

“31. Contents, date and signature of judgment.—The judgment of the Appellate Court shall be in writing and shall state— been recorded

- (a) the points for determination;*
- (b) the decision thereon;*
- (c) the reasons for the decision;*

and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

Allahabad. *_ At the end of the rule, substitute a semi-colon for the full stop and add the following:*

"Provided that where that presiding Judge pronounces his judgment by dictation to a shorthand-writer in open court, the transcript of the judgment so

pronounced shall, after such revision as may be deemed necessary, be signed by the Judge and shall bear the date of its pronouncement."

19. In view of above, the appellate court is required to record its reasons for the decision and it can reverse or vary the decree against which the appeal has been preferred and in such case the relief to which the appellant is entitled, therefore, the appellate court can not only reverse the findings of the trial court but also take a different view and it can be done after considering the pleadings, evidence and material on record as a trial court and also considering the findings recorded by the trial court and as to whether the same have rightly and in accordance with law been recorded or not after evaluating the pleadings, evidence and material on record as a trial court. It is for the reason that if any plea or evidence has been left to be considered by the trial court, it may appropriately be considered by the first appellate court to avoid injustice to either of the parties and to determine the case finally, if it can be done. Thus the first appeal is in continuation of trial.

20. The Hon'ble Supreme Court, in the case of ***Vasant Ganesh Damle Vs. Shrikant Trimbak Datar and Another; (2002) 4 SCC 183***, has held that the appeal is considered to be an extension of a suit because under Section 107 of the Code of Civil Procedure, the appellate court has the same powers as conferred by the code on courts of original jurisdiction in respect of suits situated therein. The relevant paragraph-9 is extracted here-in-below:-

"9. The appeal is considered to be an extension of the suit because under Section 107 of the Code of Civil Procedure,

the appellate court has the same powers as are conferred by the Code on courts of original jurisdiction in respect of suits instituted therein. Such a power can be exercised by the appellate court "as nearly as may be" exercised by the trial court under the Code. If the powers conferred upon the trial court are under a specified statute and not under the Code, it has to be ascertained as to whether such a power was intended to be exercised by the appellate court as well. Such a position can be ascertained by having a reference to the specified law by keeping in mind the legislative intention of conferment of power on the appellate court either expressly or by necessary implication."

21. The Hon'ble Supreme Court, in the case of ***Malluru Mallappa (Dead) through Legal Representatives Vs. Kuruvathappa and Others (supra)*** has held that it is a settled position of law that an appeal is a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a re-hearing on law as well as on fact and is invoked by an aggrieved person. The first appeal is a valuable right of the appellant and therein all questions of fact and law decided by the trial court are open for re-consideration, unlike second appeal under Section 100 CPC. Therefore, the first appellate court is required to address itself to all the issues and decide the case by giving reasons. The court of first appeal must record its findings only after dealing with all issues of law as well as fact and with the evidence, oral as well as documentary, led by the parties. The relevant paragraphs 10 to 14 are extracted here-in-below:-

"10. Section 96 of the CPC provides for filing of an appeal from the decree passed by any court exercising

original jurisdiction to the court authorized to hear the appeals from the decisions of such courts. In the instant case, the appeal from the decree passed by the trial court lies to the High Court. The expression 'appeal' has not been defined in the CPC. Black's Law Dictionary (7th Edn.) defines an appeal as "a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority." It is a judicial examination of the decision by a higher court of the decision of a subordinate court to rectify any possible error in the order under appeal. The law provides the remedy of an appeal because of the recognition that those manning the judicial tiers too commit errors.

11. In *Hari Shankar v. Rao Girdhari Lal Chowdhury* 1 it was held that a right of appeal carries with it a right of re-hearing on law as well as on fact, unless the statute conferring a right of appeal limits the re-hearing in some way as has been done in second appeal arising under the CPC.

12. In *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat* 2 it was held thus:

5. In the well known work of Story on Constitution (of United States), Vol. 2, Article 1761, it is stated that the essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted and does not create that cause. The appellate jurisdiction may be exercised in a variety of forms and, indeed, in any form in which the Legislature may AIR 1963 SC 698 1969 (2) SCC 74 choose to prescribe. According to Article 1762 the most usual modes of exercising appellate jurisdiction, at least those which are most known in the United States, are by a writ of error, or by an appeal, or by some process of removal of a suit from an inferior

tribunal. An appeal is a process of civil law origin and removes a cause, entirely subjecting the fact as well as the law, to a review and a retrial....."

13. It is a settled position of law that an appeal is a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a re-hearing on law as well as on fact and is invoked by an aggrieved person. The first appeal is a valuable right of the appellant and therein all questions of fact and law decided by the trial court are open for re-consideration. Therefore, the first appellate court is required to address itself to all the issues and decide the case by giving reasons. The court of first appeal must record its findings only after dealing with all issues of law as well as fact and with the evidence, oral as well as documentary, led by the parties. The judgment of the first appellate court must display conscious application of mind and record findings supported by reasons on all issues and contentions [see: Santosh Hazari v. Purushottam Tiwari (Deceased) By Lrs.3, Madhukar and others v. Sangram and Others4, B. M. Narayana Gowda v. Shanthamma (Dead) By Lrs. and Another5, H. K. N. Swami v. Irshad Basith (Dead) By Lrs.6 and M/s. Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar7].

14. A first appeal under Section 96 of the C.P.C. is entirely different from a second appeal under Section 100. Section 100 expressly bars second appeal unless a question of law is involved in a case and the question of law so involved is substantial in nature."

22. The provisions of remand made in Rule-23, 23-A and 25 of Order XLI of C.P.C. are relevant for considering the issue of remand, which can be invoked

while deciding an appeal. The same are extracted here-in-below:-

"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 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, with 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 to all just exceptions, be evidence during the trial after remand.

The Following Allahabad High Court Amendment has been made in aforesaid Rule 23:

a. (i) Insert the following after the words 'and the decree is reversed in appeal', namely:

"or where the Appellate Court while reversing or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case, it"; and

(ii) delete the words "the Appellate Court" occurring thereafter and delete also the words

"if it thinks fit", occurring after the words "may".

23.(A)- 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 retrial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from. - *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 within such time as may be fixed by the Appellate Court or extended by it from time to time.*”

23. In view of above, Rule 23 as amended by the Allahabad High Court is '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 or where the Appellate Court while reversing or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case, it may by order remand the case, and may further direct what issue or issues 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, with 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 to all just exceptions, be evidence during the trial after remand.' The aforesaid Rule 23(A) provides in regard to the appeal, which has been preferred against the decree which has been made 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. In both the aforesaid rules, the power of First Appellate Court is one and the same as given in Rule 23 according to which, in case of reversal of a decree in appeal the Appellate Court may remand the case for re-trial. Rule 25 provides the contingencies in which the Appellate Court can frame the issues and refer the matter to the Trial Court for taking evidence on them and trying the said issues, who shall send then to the same with it's findings thereon to the Appellate Court and the Appellate Court can decide the appeal accordingly. Rule 25 provides that 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 is essential to the right decision of the suit upon merits, the Appellate Court may frame the said issues and refer to the concerned court for trial of same after taking evidence and referring to the Appellate Court with it's findings and reasons thereon and then the Appellate Court may decide the appeal. Thus this procedure can be followed if the Trial Court has omitted to frame or try any issue or determine any question of fact.

24. The Hon'ble Supreme Court, in the case of ***Syeda Rahimunnisa Vs. Malan BI (Dead) by L.Rs. and Another; 2016 (119) ALR 485***, has held that the power of the Appellate Court to remand the case to subordinate court is contained in order XLI Rule 23, 23-A and 25 of C.P.C. It is, therefore, obligatory upon the appellant to bring the case under any of these provisions before claiming a remand and the Appellate Court is required to record reasons as to why it has taken recourse to any one out of three Rules of Order XLI of C.P.C. for

remanding the case to the Trial Court. Relevant paragraph 35 is extracted here-in-below:-

"35. It is a settled principle of law that in order to claim remand of the case to the Trial Court, it is necessary for the appellant to first raise such plea and then make out a case of remand on facts. The power of the Appellate Court to remand the case to subordinate court is contained in order XLI Rule 23, 23-A and 25 of CPC. It is, therefore, obligatory upon the appellant to bring the case under any of these provisions before claiming a remand. The Appellate Court is required to record reasons as to why it has taken recourse to any one out of the three Rules of Order XLI of CPC for remanding the case to the Trial Court. In the absence of any ground taken by the respondents (appellants before the First Appellate Court and High Court) before the First Appellate Court and the High Court as to why the remand order in these cases is called for and if so under which Rule of Order XLI of CPC and further in the absence of any finding, there was no justification on the part of the High Court to remand the case to the Trial Court. The High Court instead should have decided the appeals on merits. We, however, do not consider proper to remand the case to High Court for deciding the appeals on merits and instead examine the merits of the case in these appeals."

25. The Hon'ble Supreme Court, in the case of **Jagannathan Vs. Raju Sigamani and Another; (2012) 5 SCC 540**, has held that where the Trial Court has disposed of the Suit on merits and the decree is reversed in appeal and the Appellate Court considered that retrial is necessary, the Appellate Court may remand the suit to the

Trial Court. The relevant paragraph-7 is extracted here-in-below:-

"(7) Order 41 Rule 23A has been inserted in the Code by Act No. 104 of 1976 w.e.f. February 1, 1977. According to Order 41 Rule 23A of the Code, the Appellate Court may remand the suit to the Trial Court even though such suit has been disposed of on merits. It provides that where the Trial Court has disposed of the Suit on merits and the decree is reversed in appeal and the Appellate Court considers that retrial is necessary, the Appellate Court may remand the suit to the Trial Court."

26. The Hon'ble Supreme Court, in the case of **P. Purushottam Reddy and Another Vs. Pratap Steels Ltd.; (2002) 2 SCC 686**, has held that the Appellate Court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23-A or Rule 25 C.P.C. and an unwarranted order of remand gives the litigation an undeserved lease of life and, therefore must be avoided.

27. The Hon'ble Supreme Court, in the case of **Maya Devi (Dead) through LRs Vs. Raj Kumari Batra (Dead); (2010) 9 SCC 486**, has held that whether or not the Appellate Court should remit the matter is discretionary with the Appellate Court and would largely depend upon the nature of the dispute, the nature and the extent of evidence that may have to be appreciated, the complexity of the issues that arise for determination and whether remand is going to result in avoidable prolongation of the litigation between the parties. The relevant paragraph-30 is extracted here-in-below:-

"(17). Recording of reasons in cases where the order is subject to further appeal is very important from yet another angle. An Appellate Court or the authority ought to have the advantage of examining the reasons that prevailed with the Court or the authority making the order. Conversely, absence of reasons in an appealable order deprives the Appellate Court or the authority of that advantage and casts an onerous responsibility upon it to examine and determine the question on its own. An Appellate Court or authority may in a given case decline to undertake any such exercise and remit the matter back to the lower Court or authority for a fresh and reasoned order. That, however, is not an inflexible rule, for an Appellate Court may notwithstanding the absence of reasons in support of the order under appeal before it examine the matter on merits and finally decide the same at the appellate stage. Whether or not the Appellate Court should remit the matter is discretionary with the Appellate Court and would largely depend upon the nature of the dispute, the nature and the extent of evidence that may have to be appreciated, the complexity of the issues that arise for determination and whether remand is going to result in avoidable prolongation of the litigation between the parties. Remands are usually avoided if the Appellate Court is of the view that it will prolong the litigation."

28. Hon'ble Supreme Court, in the case of **Sathyanath and another versus Sarojamani** (supra), has held that the objective of the provisions of Order XLI Rules 24 and 25 is that if evidence is recorded by the learned Trial Court on all the issues, it would facilitate the first Appellate Court to decide the questions of fact even by reformulating the issues. It is only when the first Appellate Court finds

that there is no evidence led by the parties, the first Appellate Court can call upon the parties to lead evidence on such additional issues, either before the Appellate Court or before the Trial Court. All such provisions of law and the amendments are to ensure one objective i.e., early finality to the lis between the parties. Relevant paragraph 34 of which is extracted herein-below:

"34. The objective of the provisions of Order XLI Rules 24 and 25 is that if evidence is recorded by the learned Trial Court on all the issues, it would facilitate the first Appellate Court to decide the questions of fact even by reformulating the issues. It is only when the first Appellate Court finds that there is no evidence led by the parties, the first Appellate Court can call upon the parties to lead evidence on such additional issues, either before the Appellate Court or before the Trial Court. All such provisions of law and the amendments are to ensure one objective i.e., early finality to the lis between the parties."

29. A Coordinate Bench of this Court, in the case of **Smt. Urmila Devi versus Shyam Sunder and others** (supra), upon considering the provisions of remand under Order 41 Rule 23, 23-A and Rule 25 of C.P.C. held that the lower court has ample material before it, however, it did not advert appropriately and it cannot be a reason for remand.

30. In view of above, the appeal is in continuation of trial, in which all the facts and laws are open to be considered by the first appellate court, therefore, it not only can reverse the findings of the trial court after considering the evidence but record its own findings also and also consider the case which has been left to be

considered by the trial court, but of course, recording its reasons on the basis of the pleadings, evidence and material on record and if on appreciation of evidence giving due weight to it, the appellate court finds that the remand is inevitable, it may remand after recording findings for it because the remand not only prolongs recording of life of litigation but burdens the litigants also further mentally and physically etc.

31. Adverting to the facts of the present case, the first ground for remand is non framing of the issue of limitation despite specific plea taken by the defendant-respondents in paragraph 44 of the written statement. Sub rule (1) of Rule 1 of Order XIV of the C.P.C. provides that issue arise when a material proposition of fact or law is affirmed by the one party and denied by the other. Sub rule (5) provides that at the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under Rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend, therefore, issues are required to be framed on the basis of pleadings made in the plaint and written statement on which the right decision appears to depend. Under Rule 5 of Order XIV, the court may any time before passing a decree amend the issues or frame additional issues and can strike out any issue under Rule 5 (2) of Order XIV, which may have wrongly been framed. Therefore, after exchange of pleadings, the court has to frame the issues on which the parties are at variance in their pleadings as per the procedure provided under Order

XIV of C.P.C., which are required to be decided.

32. The issue of limitation is an issue, which goes to the root of the matter and jurisdiction of the court, therefore, even if not raised or issue not framed it is to be considered by the concerned court before proceeding in the matter. Once it has been specifically pleaded, the court has to consider and decide the same before proceeding further in view of Section 3 of the Limitation Act, 1963 and the time barred suit is liable to be dismissed. However, the issue of limitation is a mixed question of law and facts and sometimes it may not be decided without evidence. Learned trial court in the present case though neither framed the issue of limitation nor recorded any specific finding in this regard, however, learned trial court has recorded an admission of the witness of the defendant-respondents i.e. D.W.-1 and in his cross examination at page 9, in which he stated that when defendant-respondents started to construct the boundary wall and the plinth, Prakash Narain etc. stopped and filed a suit. Thus the defendant-respondents themselves admitted that when they started to make construction after making possession in excess of the land purchased through sale deed, the suit was instituted by the plaintiff-respondents. Learned lower appellate court though recorded that the learned trial court has not framed any issue in this regard but has mentioned in paragraph 2 of page 11 of the judgment that the suit is not time barred but without considering it and recording any finding as to how it is not sufficient remanded the matter on technical ground, whereas once the parties had adduced the evidence knowing fully about the issues involved in the suit even if any issue was not framed and the same has been considered while

deciding any other issue, it would be merely a technicality to remand the matter for the said purpose and the remand can not be justified. Even the lower appellate court could have considered the same as first appellate court is the court of fact and law and if required it could have framed the issue and decided the same, if sufficient evidence and material was on record, failing which the additional evidence may also be taken or got recorded. Even otherwise parties being aware about the issues involved in the suit adduced the evidence and advanced respective submissions, no prejudice may be said to have caused nor it could be said that the proceedings are vitiated merely on this technical ground and the appellate court could have considered and decided the same to determine the case finally unless the remand is inevitable in the facts and circumstances of the case, for which a finding is liable to be recorded.

33. The Hon'ble Supreme Court, in the case of **Sayeda Akhtar versus Abdul Ahad** (supra), observed that it is true that the trial court did not frame any specific issue, therefore, but a bare perusal of the judgment passed by the learned trial court will clearly demonstrate that the parties were aware thereabout and not only adduced evidence in that behalf but also advanced their respective submissions in relation thereto and held that the High Court in the second appeal could not have without sufficient and just reason interfered with the concurrent findings of fact of the courts below.

34. The Hon'ble Supreme Court, in the case of **Nagubai Ammal and others versus B. Shama Rao and others** (supra), held that rule has no application to a case where parties go to trial with knowledge

that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto, therefore, result in any prejudice to the parties. Relevant paragraph 12 is extracted herein-below:

"12. It was argued for the appellants that as no plea of lis pendens was taken in the pleadings, the evidence bearing on that question could not be properly looked into, and that no decision could be given based on Exhibit J series that the sale dated 30-1-1920 was affected by lis; and reliance was placed on the observations of Lord Dunedin in Siddik Mahomed Shah v. Mt. Saran and others(1) that "no amount of evidence can be looked into upon a plea which was never put forward".

The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto.

*The rule applicable to this class of cases is that laid down in **Rani Chandra Kunwar v. Chaudhri Narpat Singh : Rani Chandra Kunwar v. Rajah Makund Singh** (2). There, the defendants put forward at the time of trial a contention that the plaintiff had been given away in adoption, and was in consequence not entitled to inherit. No such plea was taken in the written statement; nor was any issue framed thereon. Before the Privy Council, the contention was raised on behalf of the*

plaintiff that in view of the pleadings, the question of adoption was not open to the defendants.

It was held by Lord Atkinson overruling this objection that as both the parties had gone to trial on the question of adoption, and as the plaintiff had not been taken by surprise, the plea as to adoption was open to the defendants, and indeed, the defendants succeeded on that very issue. This objection must accordingly be overruled."

35. The aforesaid Judgment has been relied by this Court in the case of ***Arya Pratinidhi Sabha and others versus Arvind Niketan Charthawal and another*** (supra).

36. In view of above, even if particular issue of limitation was not framed by the trial court as recorded by the lower appellate court and on the basis of record the trial court has recorded a finding which shows the suit is not time barred, it could have considered the same and recorded a finding thereon, if the evidence is sufficient by framing a issue, if required as first appeal is in continuation of the suit and appellate court has all the powers for considering suit on facts as well as law.

37. The second ground for remand is that no order has been passed on commission report on merit, which was on record and no objection to the same was filed by the defendant-respondents.

38. Order XXVI of C.P.C. deals with commission. Rule 9 and 10 of Order XXVI deals with the commissions for local investigation, which are relevant in the present case and are reproduced for convenience:

"9. Commissions to make local investigations.—*In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:*

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

10. Procedure of Commissioner.—*(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.*

(2) Report and depositions to be evidence in suit.—*The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.*

(3) Commissioner may be examined in person.—*Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.*

39. In view of aforesaid Rule 10(2) of C.P.C. proceedings and report of the commissioner and the evidence taken by him with the report shall be evidence in the suit and shall form part of the record. However, the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation. As per Sub Rule (3) of Rule 10, if the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it thinks fit, therefore, in case the court has any doubt on the report and evidence taken by him during commission, the Commissioner may be examined in person and thereafter if the court is of the view that any further inquiry is required it may direct for the same.

40. Adverting to the facts of the present case, admittedly the commission report is on record, but no objection to the same has been filed by the defendant-respondents and no finding has been recorded by the trial court that it is not satisfied with the proceedings and the report of commissioner, therefore, it stands final and if it has not been considered by the trial court and the lower appellate court was of the view that it was required to be considered, it could have considered the same and upon considering it an independent finding could have been recorded and after it if the appellate court was of the view that the matter is required to be remanded, it could have remanded recording specific findings as remand on technical ground without affecting merit is not tenable

41. In view of above and considering overall facts and circumstances of the case,

this Court is of the view that the lower appellate court has set aside the impugned Judgment and decree passed by the trial court and remanded the matter without dealing with the case as an appellate court under Section 96 of C.P.C. and exercising the powers under Section 107 of C.P.C. read with Order-41, Rules-23, 23-A and 25 and passing judgment without complying with the provision of under Order 41 Rule 31 of C.P.C., therefore, the impugned judgment and order passed by the lower appellate court is liable to be set aside and the matter is liable to be remanded to the lower appellate court to consider and decide the appeal afresh in accordance with law and the observations made herein-above in this order.

42. The appeal is **allowed**. The impugned Judgment and order dated 04.01.2022 passed in Civil Appeal No.110 of 2011; Hari Bux Singh and others versus Prakash Narain and others by the Additional District and Sessions Judge, Court No.1, Sultanpur is hereby set aside. The matter is remitted back to the lower appellate court to consider and decide the civil appeal afresh in accordance with law and observations made here-in-above in this order. No order as to costs.

(2025) 2 ILRA 24
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.02.2025

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

First Appeal From Order No. 44 of 2021

Amrendra Bahadur Singh & Anr.

...Appellants

Versus

U.O.I.

...Respondent