

Court No. 78

Case :- SECOND APPEAL No. - 599 of 2023

Appellant :- Shrivatsa Goswami

Respondent :- Anant Prasad Singh And Another

Counsel for Appellant :- Tarun Agrawal

Counsel for Respondent :- Dinesh Kumar Misra, Anita Singh, Ishir Sripat

Hon'ble Dr. Yogendra Kumar Srivastava, J.

1. A seminal question has arisen as regards the legal remedy available against an order passed in an appeal arising out of an order of rejection of plaint passed under Order VII Rule 11 of the Civil Procedure Code, 1908¹.

2. It has been pointed out that there is considerable obfuscation on the issue with no clear enunciation of law on the point.

3. Heard Sri Tarun Agrawal, learned counsel for the appellant and Sri Rahul Sripat, learned Senior Counsel appearing along with Sri Ishir Sripat for the respondents. Sri Ajay Kumar Singh, learned counsel has also been heard.

4. The present appeal is directed against the judgment and order dated 07.04.2023 passed by the Additional District Judge, Court No. 8, Mathura in Civil Appeal No. 67 of 2022 (Anant Prasad Singh Vs. Shrivatsa Goswami and Another), whereby the appeal has been allowed and the earlier order dated 22.11.2022 passed by the trial court rejecting the plaint

¹ the Code

under Order VII Rule 11 of the Code, has been set aside.

5. The facts giving rise to the aforesaid controversy emanates from an original suit being O.S. No. 83 of 2022 instituted by the plaintiff-respondent, seeking to declare as null and void a registered gift deed dated 25.05.1986 executed in favour of the predecessor-in-interest of the defendant as well as the subsequently registered gift deed dated 17.10.1987 executed in favour of the father of the defendant-appellant herein.

6. The suit having been instituted in the year 2022, years after the first gift deed registered on 25.05.1968, the defendant moved an application under Order VII Rule 11(d) for rejection of the plaint as being barred by limitation.

7. The trial court allowed the application under Order VII Rule 11 and held the suit to be barred by limitation and accordingly rejected the plaint.

8. The decree dated 22.11.2022 passed by the trial court rejecting the plaint, was assailed by the plaintiff-respondents in Civil Appeal No. 67 of 2023.

9. The aforesaid appeal has been allowed by an order dated 07.04.2023 setting aside the earlier order of rejection of the plaint dated 22.11.2022, with a direction to the trial court to restore the suit to its original number, re-register the Original Suit No. 83 of 2020, invite objections/written statements from the defendants, in addition to other issues, frame an issue regarding limitation and after taking evidence give a decision on all the issues that have been framed. The lower appellate court, also fixed a date for appearance of the parties before

the trial court and directed that the records of the case be remitted to the trial court for proceeding with the case.

10. It is against the aforesaid order dated 06.03.2023 passed by the lower appellate court in Civil Appeal No. 67 of 2022, that the defendant-appellant has preferred the instant appeal under Section 100 of the Code.

11. The question with regard to the maintainability of the appeal has been raised on behalf of the plaintiff-respondent by pointing out that the order dated 07.04.2023 passed by the lower appellate court being an order of remand under Order XLI Rule 23/23-A of the Code, the same would be amenable to an appeal from an order as described under Order XLIII Rule 1(u) of the Code read with Section 104(1)(i).

12. It is submitted that the trial court having disposed of the suit on the preliminary issue of limitation and the lower appellate court having set aside the aforesaid judgment/decreed passed by the trial court with a direction to decide the suit on the said preliminary issue after framing other issues, the order passed by the lower appellate court would be referable to its powers under Order XLI Rule 23 of the Code. The order would be amenable to an appeal under Order XLIII Rule 1(u) and cannot be subjected to a Second Appeal under Section 100 of the Code. The present appeal would therefore not be maintainable and is liable to be dismissed.

13. An objection has been raised by the Stamp Reporter, also, with regard to the maintainability of the appeal.

14. Learned counsel for the appellant while responding to the aforesaid objections regarding maintainability of the appeal, has sought to point out that the lower appellate court while allowing the appeal has directed the issue of limitation to be decided after receiving evidence. In the last paragraph of the order the appellate court has further directed that the matter be sent back to the trial court to decide the suit in terms of the directions given.

15. It is submitted that it is the last paragraph of the order that has perhaps given rise to a confusion as to the nature of the order dated 06.04.2023, on the basis whereof the plaintiff-respondent has questioned the maintainability of the present second appeal on the ground that the impugned order is, in fact, an order of remand under Order XLI Rule 23 of the Code against which an appeal from order, under Order XLIII Rule 1(u), would lie.

16. It is pointed out that the trial court has allowed the appeal by holding that the issue of limitation being a mixed question of law and fact could not be decided without receiving evidence. The question was, therefore, left open to be decided after framing of issues and receiving evidence. The application of the plaintiff under Order VII Rule 11 of the Code has been rejected for the reason that the parameters of consideration at this stage would be entirely different from those available after the framing of issues.

17. It is submitted that while deciding the application under Order VII Rule 11 of the Code, the court can only consider the

allegations made in the plaint; however, while deciding the issue of limitation, the court would necessarily have to consider the averments made in the plaint and the written statement as well as the evidence led by the parties. The directions contained in the impugned order being tantamount to rejection of the application under Order VII Rule 11 of the Code, there was no requirement for the lower appellate court to issue any further direction to the trial court, and the directions in this regard by the lower appellate court are superfluous.

18. It is contended that the remand contemplated under Order XLI Rule 23 of the Code, requires an exercise of judicial discretion on part of the appellate authority, and therefore the matter could be remanded only where the appellate court while reversing or setting aside the decree considered it in the interest of justice to remand the case. While passing an order referable under Order XLI Rule 23 of the Code, revival of proceedings before the trial court is not automatic but contingent upon the exercise of judicial discretion on part of the appellate authority. In the present case, the revival of the suit is not seen to be contingent upon exercise of any judicial discretion on part of the lower appellate court regarding the demands of interest of justice. Once the decree was reversed the revival of the suit before the trial court was automatic, and was not contingent upon any further determination on part of the lower appellate court regarding the necessity to remand the case.

19. It is sought to be urged that an appeal under Order XLIII

Rule 1(u) of the Code, in a case of such nature, would be a futility inasmuch as it would not be open to the appellant to question the exercise of discretion by the appellate authority in remanding the case as the revival of the suit is automatic and not contingent upon any judicial discretion.

20. It is further urged that Order XLI Rule 23 of the Code, applies only in a situation where the suit has been disposed of upon a preliminary point. A 'preliminary point' being distinct from a 'preliminary issue', the court may, after framing the issues, decide any issue as a preliminary point. In the present case, the issues having yet not been framed, there was no question of the impugned judgment having been passed on a preliminary point.

21. It is also submitted that the scope of examination while deciding an 'issue' is entirely different inasmuch as at that stage the trial court is required to take into account the averments made in the plaint and the written statement as also the evidence led by the parties; accordingly, while deciding an application under Order VII Rule 11 of the Code, the trial court does not dispose the suit on a preliminary point as this stage can only arise after framing of issues. The judgment of the lower appellate court reversing the decree is, therefore, not referable to Order XLI Rule 23 of the Code.

22. In order to appreciate the controversy at hand, the relevant statutory provisions of the Civil Procedure Code, 1908, are being extracted hereinbelow:

“**Section 2(2)** "decree" means the formal expression of an adjudication which, so far as regards the Court

expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include--

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.---A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;

96. Appeal from original decree.--- (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed *ex parte*.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed ten thousand rupees.

100. Second appeal.--- (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate

that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

104. Orders from which appeal lies.--- (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:-

(ff) an order under Section 35-A;

(ffa) an order under Section 91 or section 92 refusing leave to institute a suit of the nature referred to in Section 91 or Section 92, as the case may be;

(g) an order under Section 95;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;

(i) any order made under rules from which an appeal is expressly allowed by rules:

Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section.

Order VII Rule 11:

11. Rejection of plaint.--The plaint shall be rejected in the following cases:—

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and

the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails comply with the provision of Rule 9;

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

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 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.

Order XLIII Rule 1(u):

Appeals from orders.---An appeal shall lie from the following orders under the provisions of Section 104, namely:--

(a) ...

...

(u) an order under Rule 23 or Rule 23-A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellant Court;

...”

23. It would also be relevant to refer to the Notification dated Allahabad, April 27, 1957 published in the U.P. Gazette, Part II, dated June 1, 1957, whereby the High Court of Judicature at Allahabad had made certain amendments in the First Schedule of the Code of Civil Procedure, 1908, in exercise of powers under Section 122 and with the previous approval of the Government of the State as required by Section 126 of the Code. The amendment relating to Order XLI Rule 23 is as follows:

“(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”.”

24. The term 'decree' has been defined under Section 2(2) of the Code, wherein it has been provided that the rejection of the plaint shall be deemed to be included within the definition of the term.

25. The Code has defined the term 'decree' under Section 2(2) to include the determination of any preliminary matter and the said definition is extended to an order rejecting a plaint even though it may not be a decision on merits and the rights of the parties may not have been adjudicated finally.

26. The order, aforementioned, by reason of Section 2(2), would be deemed to be a 'decree' and hence would be appealable under Section 96 as an appeal from original decree. It is to be treated as a decree as the effect of the order

is denial of the reliefs sought, and therefore a virtual dismissal of the suit.

27. An order rejecting a plaint, even otherwise, would have to be held to be a decree, as it amounts to refusal of any relief to the plaintiff in the particular suit. This would lead to dismissal of the suit, and would, therefore, be a decree within the main part of the definition under Section 2(2) also.

28. The distinction which is sought to be borne in mind is that under the deeming clause of Section 2(2), what is held to be a 'decree' is not the 'order', which may be of an interlocutory nature, but its effect in the ultimate or final dismissal of the suit, which, under law, disposes of the suit, though by a decision on a particular issue, as distinguished from an adjudication on all the issues.

29. A deeming provision is generally utilised in statutory enactment to deem what is not there in reality, thereby requiring the subject matter to be treated as if it were. There are, however, authorities to show that a deeming fiction can also be used to put beyond doubt a particular construction that might otherwise be uncertain or to give to the statutory language a comprehensive description so that it includes what is obvious.

30. **Stroud's Judicial Dictionary of Words and Phrases**², defines 'deemed' as follows:

“Deemed' – as used in statutory definitions “to extend the denotation of the defined term to things it would not in ordinary parlance denote”, is often a convenient

2 Stroud's Judicial Dictionary of Words and Phrases (7th Edn., 2008)

device for reducing the verbiage or an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words “deem” and “deemed” when used in a statute thus simply state the effect or meaning which some matter or things has—the way in which it is to be adjudged; this need not import artificiality or fiction; it may simply be the statement of an indisputable conclusion.”

31. The meaning of word 'deemed' as used in statutory definitions, has been explained by **Lord Radcliffe** in **St. Aubyn Vs. Attorney General**³, in the following words:

“... The word “deemed” is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.”

32. The use of the word “deemed” in statutory definitions was explained by **Windener, J.**, in **Hunter Douglas Australia Pty. v. Perma Blinds**⁴, by stating:-

“14. ‘Deemed’, as used in statutory definitions [is meant] ‘to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient devise for reducing the verbiage of an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words “deem” and “deemed” when used in a statute thus simply state the effect or meaning which some matter or thing has — the way in which it is to be adjudged; this need not import artificiality or fiction; it may simply be the statement of an undisputable conclusion.’”

33. It may, therefore, be inferred that the use of a deeming clause in a statutory enactment is not always for the purpose

³ 1952 AC 15 (HL)

⁴ (1970) 44 Aust LJR 257

of creating a fiction but, at times, to state something which follows as an obvious consequence. The rejection of a plaint has a natural consequence of the reliefs being denied. It is possibly for this reason that the rejection of a plaint has been held to be a 'decree' in terms of the deeming clause under Section 2(2) of the Code.

34. Order VII Rule 11 relates to rejection of the plaint, on the grounds specified therein. The conditions precedent to exercise of the said power are stringent, and the power to reject the plaint can be exercised only upon fulfilment of the conditions provided therein. In order to ascertain whether any of the grounds specified under Order VII Rule 11 are attracted, the court has to read averments in conjunction with documents relied upon in the plaint as a whole without addition or subtraction of any word. In substance, what is to be seen at that stage are only the averments made in the plaint, and the pleadings of the defendants in the written statement would be wholly irrelevant for the purpose.

35. The effect of rejection of a plaint is drastic, as in a way, it results in the conclusion of the proceedings. It is perhaps for this reason that an order rejecting the plaint has been held to be a 'deemed decree' under Section 2(2) of the Code.

36. The rejection of plaint under Order VII Rule 11 having been held to be covered within the definition of a 'decree' under Section 2(2), under its deeming clause, the said order becomes amenable to appeal under Section 96 of the Code which provides for an appeal from original decree.

37. Although, an order rejecting a plaint is neither an adjudication on merits nor it conclusively determines the rights of the party with regard to all or any of the matters in controversy in the suit, yet insofar as the court passing the order is concerned, it amounts to rejection of the case sought to be set up by the plaintiff and resultantly the right of the plaintiff to pursue the case stands exterminated. The order rejecting a plaint, thus, in a way, can be held to have a conclusive effect on the right of the plaintiff to prosecute that particular suit any further. The conferment of the status of a decree, adds a finality to the said order. It makes it binding upon the parties.

38. In the instant case, the trial court, by means of the order under Order VII Rule 11, rejected the plaint as being barred by law, i.e. limitation. Therefore, the order can be seen as conclusively determining the rights of the parties with regard to one of the matters in controversy in the suit, i.e. limitation. Although, it was not an order passed after framing an issue, at the same time, there was adjudication on the question as to whether the suit was barred by limitation. The deeming clause under sub-section (2) of Section 2 of the Code, thus, becomes attracted, and the order passed by the trial court would have to be held to be a 'decree' within the meaning of the term as defined under the sub-section.

39. It is this order of the trial court rejecting the plaint, which was carried in appeal under Section 96 of the Code, and the said appeal has been allowed in terms of the order dated 07.04.2023, against which the present appeal has been filed.

40. If, it were a situation where the appeal filed against the order rejecting the plaint under Order VII Rule 11, had been dismissed, it would be effectively an order determining the rights of the parties and concluding the proceedings. The order passed in the appeal would, therefore, again be a 'decree' within the meaning of the Section 2(2), and the same would be subject to a further appeal under Section 100 of the Code.

41. However, in the present case, the appeal filed against the order of the trial court rejecting the plaint under Order VII Rule 11, having been allowed, and the matter having been remitted to the trial court for fresh adjudication, a question has arisen as to whether the order passed in the appeal, can be held to be a 'decree' within the meaning of Section 2(2), so as to be amenable to a further appeal under Section 100, or it would have to be held to be an order of remand referable to the provisions under Order XLI Rule 23 so as to be subject to an 'appeal from an order' under Section 104 read with Order XLIII Rule 1(u) of the Code.

42. The order passed by the lower appellate court allowing the appeal and setting aside the order passed by the trial court rejecting the plaint under Order VII Rule 11 with a further direction to re-register the suit, invite objections from the defendants for framing issues and after taking evidence give a decision on all the issues, cannot be held to be a judicial determination conclusively determining the rights of the parties. The order, therefore, cannot be held to be a 'decree' so as to amenable to a further appeal under Section

100 of the Code.

43. The question which remains for consideration is as to whether the order passed by the lower appellate court can be held to be an order of remand so as to be amenable to an appeal in terms of the provisions of Section 104 of the Code read with Order XLI Rule 23.

44. Rule 23 of Order XLI, as it reads consequent to the Allahabad Amendment, is as under:

“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 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 the copy of its judgment and order to the court from whose decree the appeal is preferred, with directions to readmit 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 evidenced during the trial after remand.”

45. A plain reading of the aforesaid provision indicates that Rule 23 (as amended by the Allahabad Amendment), contemplates a remand in the following two situations:

- I. 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
- II. where the appellate court while reversing or setting aside a decree under appeal considers it necessary in the interest of justice to remand the case.

46. The Allahabad Amendment to Order XLI Rule 23 of the Code has thus widened the scope of the provision, whereas formerly a remand could be made only in a case where the decree of the lower court disposing the case had proceeded on a preliminary point, the position consequent to the amendment is that a remand order can also be passed in a case where the court considers it necessary in the interest of justice to do so. In other words, a remand order can be passed in a case which was disposed of on a preliminary point as also in a case where the court is of the opinion that the interest of justice requires remand of the case.

47. Under the unamended provision, a remand could be made where the suit had been decided on a preliminary issue and there was no adjudication in respect of the other pleas, whereas in a case covered by the amended provision a remand can also be made where there has been an adjudication on all the pleas by lower court and the court considers it necessary in the interest of justice to remand the case for rehearing.

48. The first appellate court while reversing a decree arising out of a preliminary point must as of necessity remand the case. This power to remand the case flows from sub-section (1)(b) of Section 107 of the Code, as also from Order XLI Rule 23, as referred above.

49. The contention that rejection of the application under Order VII Rule 11 of the Code, at the appellate stage, would result in automatic restoration of the suit without the

appellate court being required to pass any specific order of remand, suffers from an inherent fallacy which is not difficult to fathom.

50. The trial court becomes *functus officio* once it passes a decree. An order rejecting the plaint is a decree by virtue of the deeming clause under Section 2(2) of the Code. Therefore, the trial court, having once passed the decree, would not automatically regain *seisin* over the matter unless it is remanded back to it. This possibly explains the insertion of Rule 26-A under Order XLI, by the Amending Act of 1976, requiring the appellate court to fix a date for the appearance of the parties before the trial court consequent to the remand. This also flows from the language of Order XLI Rule 43, which requires the appellate court to issue directions to the trial court to re-admit the suit under its original number in the register of civil suits and proceed to determine the suit. This leaves no room for doubt that there is no automatic revival or restoration of the suit unless an order of remand is passed. Thus, whenever a decree of the trial court is reversed by the appellate court, unless there is any express order of remand, the trial court would not regain *seisin* of the matter and would continue to remain *functus officio* in that regard.

51. There being no provision in the Code providing automatic revival of the suit, the order of the appellate court directing re-admission of the suit, cannot be said to be superfluous; rather the direction to re-admit the suit under its original number in the register of civil suits and to proceed to determine the suit, would be necessary together with the

order of remand.

52. In every case where a decree on a preliminary point is reversed, the matter would, as of necessity, have to be returned to the court below for completion of the trial. It is for this reason that Order XVI Rule 23 contemplates an order of remand. If the resumption of the suit were automatic, a provision of remand may not have been necessary under Rule 23 of Order XLI.

53. To address the question which has fallen for consideration regarding the maintainability of the present second appeal, it would be necessary to examine the remedies available consequent to an order being passed by the civil court under the provisions of the Code. A close reading of the provisions of the Code would lead to an inference that the remedies available under the Code would be the following:

(i) where the order is a 'decree' as defined under Section 2(2) of the Code, it would be subject to an appeal under Section 96, with a further remedy of a second appeal under Section 100 of the Code;

(ii) where the order is not a 'decree' but is an order of the nature as described under Section 104 read with Rule 1 of Order XLIII, it would be subject to an appeal as an appeal from an order under Section 104 read with Order XLIII Rule 1 of the Code, without any provision for a further second appeal.

(iii) where the order is neither a 'decree' nor an 'appealable order' as specified under Section 104 read with Order XLIII

Rule 1, it may be subject to a revision under Section 115, subject to fulfilment of the requirements of the section.

54. A noticeable difference between a 'decree appealable under Section 96' and an order 'appealable under Section 104' is that the remedy of a second appeal is available against a decree passed in an appeal under Section 96, whereas no further appeal lies from an order in an appeal under Section 104 read with Order XLIII Rule 1 of the Code.

55. The position which emerges from the foregoing discussion, in regard to the remedies available against an order passed in an appeal arising out of an order rejecting a plaint under Order VII Rule 11 of the Code, may thus be summarised in the following manner:

I. In a case where the application under Order VII Rule 11 has been allowed by the trial court and as a consequence the suit has been dismissed, and the said order is affirmed in appeal, the order of the first appellate court assumes the character of a 'decree' in terms of Section 2(2) of the Code, and a second appeal under Section 100 would lie against such a decree.

II. Alternatively, where in an appeal filed against an order of the trial court rejecting the plaint under Order VII Rule 11, the first appellate court reverses the order thereby restoring the suit to be tried on merits, it would in effect be an order of remand referable to Order XLI Rule 23, and would be subject to an appeal under Order XLIII Rule 1(u).

The appeal in latter case, though not a second appeal under Section 100, would nonetheless be required to be admitted

and heard on a substantial question of law and on grounds on which a second appeal is heard under Section 100, as has been laid down in **Narayanan Vs. Kumaran and Others**⁵ and **Gegannathan Vs. Raju Sigamani and Another**⁶.

56. Putting it succinctly, it may be stated as a legal proposition that where an order rejecting a plaint under Order VII Rule 11 is affirmed in appeal, it would be subject to a further remedy of second appeal under Section 100, alternatively, if the appellate court reverses the order of rejection of the plaint, the remedy would be to file an 'appeal against an order' under Order XLIII Rule 1(u).

57. Applying the aforestated legal principles, to the facts of the present case, leads to the inference that the order dated 07.04.2023 passed in Civil Appeal No. 67 of 2022 in terms of which the order dated 22.11.2022 passed by the trial court rejecting the plaint under Order VII Rule 11 of the Code, has been reversed with a direction to restore the suit to its original number and proceed to determine the suit, cannot be held to be a 'decree' amenable to a second appeal under Section 100 of the Code.

58. The order in question would have to be held a 'remand order' covered under Order XLI Rule 23 of the Code (as read in terms of the Allahabad Amendment), and it would be subject to the remedy of an 'appeal from an order' under Section 104 read with Order XLIII Rule 1(u) of the Code.

59. The objection of the Stamp Reporter, in this regard,

5 (2004) 4 SCC 26

6 (2012) 5 SCC 540

therefore, cannot be held to be unsustainable.

60. Counsel for the appellant is permitted to convert the present appeal filed under Section 100 to 'an appeal against an order' under Section 104 read with Order XLIII Rule 1(u) of the Code.

61. A week's time is granted to the appellant to file a fresh memorandum of appeal, if so required.

62. Office is directed to re-register the appeal as an 'appeal from an order' under Section 104 read with Order XLIII Rule 1(u) of the Code, and **place it as fresh, before the appropriate Bench, on 30.01.2024.**

Order Date :- 17.01.2024
Arun K. Singh

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