

(2025) 02 JH CK 0025

Jharkhand High Court

Case No: Miscellaneous Appeal No. 558 Of 2015

Most. Tara Devi and
Others

APPELLANT

Vs

Surji Mandalain and
Others

RESPONDENT

Date of Decision: Feb. 13, 2025

Hon'ble Judges: Gautam Kumar Choudhary, J

Bench: Single Bench

Advocate: Rajiv Sinha, Shreesha Sinha, Rita Kumari, Sonal Pandey

Final Decision: Allowed

Judgement

Gautam Kumar Choudhary, J

1. The instant appeal is against the order of remand passed by the learned first appellate court.

2. Plaintiff's suit for partition of his 5/ 6th share in Schedules-A, B and C property was decreed by the learned trial court.

3. Both the plaintiff and defendants preferred Title (Partition) Appeal No. 23/2007 and Title (Partition) Appeal No. 24/2007. The plaintiff was

aggrieved by apportionment of share as half in the schedule property, whereas the defendants, who are appellants in Title (Partition) Appeal No.

24/2007, were aggrieved as they claimed 1/ 6th share in the suit property and further the plaintiff had no share in the said property which exclusively

belongs to Ludhu Mandal and presently to defendant nos. 1 and 2.

4. The First Appellate Court did not frame any issue(s) for determination and the judgment and decree was set aside and the order of remand was

passed on the ground that the plaintiff had not brought the entire joint family property in the schedule of the plaint. The plaintiff was directed to amend

his pleading by incorporating and the entire joint family property either sold or still possessed by the parties in the hotchpotch of partition and to file

additional documents and to lead further evidence in support of the amended pleadings.

5. The order has been impugned by the plaintiff-appellant on the ground that the First Appellate Court made out a case of its own by holding that there

was some joint family property which were left out or yet to be partitioned. This was something which was beyond the pleadings of either the plaintiff

or the defendants. What was the property left out was also not been stated in the judgment.

6. It is argued by learned counsel for the appellant that the suits are to be decided on the basis of the pleadings of the parties and the evidence on

record and not on hypothetical issues which are not there. It is further argued that if any property was left out, then the plaintiff would suffer and

cannot claim any right over it in view of Order 2 Rule 2 of CPC.

7. It is further argued that the learned First Appellate Court has recorded a finding in Paras 13 & 14 that the plaintiff(s) remained in possession of

various joint family property and sold certain part of the same which was adduced into evidence on behalf of defendant(s) as Ext.B which is with

respect to Sale-deed dated 24.06.1970 by which, plaintiff(s) mother, Gulabi Mandalain sold some part of the joint property. A specific reference

is made to the judgment of the learned Trial Court wherein these issues have been considered and negated by the learned Trial Court.

8. The plea of previous partition has been denied and also a finding, has been recorded with respect to Ext.7 that the sale-deed was a self-acquired

property of Ludhu Mandal alone which was sold by one Rashmi Mandalain. Thus, there was no pleading or evidence in support of the partition and,

therefore, the learned First Appellate Court could not have made out a new case and without framing any issue, remanded the case to the Trial Court

for adjudication afresh. Reliance in this regard is placed on (2016) 10 SCC 315

9. It is further submitted by learned counsel for the appellants that in this case earlier an order of stay was passed vide order dated 05.02.2016, but

despite the order of stay and in view of the ratio laid down by Hon'ble the Supreme Court in the case of Asian Resurfacing Of Road Agency P.

Ltd. vs Central Bureau Of Investigation, reported in 2018 (16) SCC 299, the learned Trial Court proceeded with the suit and finally disposed of, the

suit whereby and whereunder the suit has been decreed again with respect to the same property i.e. Schedule A, B & C.

10. It is argued that since the decree passed after the remand, the judgment and decree passed pursuant to the order of remand is dependent on the

order passed by the learned First Appellate Court which was under challenge before this Court, and, therefore, it will depend on the final outcome of

the present Misc. Appeal. In any case, if the order is found to be not sustainable, the subsequent decree passed by the learned Trial Court will be non

est.

11. Learned Senior Counsel argues at length and defends the order of remand, but could not point out from the pleading as to what was property left

out in the written statement which was sought to be included in pursuance to the order of remand.

12. This is yet another instance of an order of remand being passed by the First Appellate Court in complete disregard to the provisions of CPC and

the law settled on the point by long line of judicial precedent. It has been held in Shiv Kumar @ Ors Vs Sharanbasappa, 2020 SCCOnLine SC 385

“ 25.4. A conjoint reading of Rules 23, 23A and 24 of Order XLI brings forth the scope as also contours of the powers of remand that when the available

evidence is sufficient to dispose of the matter, the proper course for an Appellate Court is to follow the mandate of Rule 24 of Order XLI CPC and to determine the

suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a re-trial is considered necessary that the Appellate Court shall adopt

the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely

elongates the life of the litigation without serving the cause of justice. An order of remand only on the ground that the points touching the appreciation of

evidence were not dealt with by the Trial Court may not be considered proper in a given case because the First Appellate Court itself is possessed of jurisdiction

to enter into facts and appreciate the evidence.

13. I find much force in the argument advanced on behalf of the appellants that the first appellate court committed a gross error of law to make out a

new case, not pleaded by either sides and remanded the case for retrial after including the entire property of the joint family in the schedule of the

plaint. This was clearly impermissible when it was no body's case that some specific property had not been included in the schedule of the plaint.

Mere vague averment on properties as made in para 12 of the WS filed by Defendant no.1 regarding it without giving any details could not be a

ground to hold that the plaintiff/appellant had deliberately left out certain property. Furthermore, as pointed out that event after the remand, during the

pendency of this appeal, the title (partition) suit no.18/1990 was tried and partly decreed vide Judgment dated 31st January 2020 only with respect to

Schedule A, B and C of the plaint.

14. Under the circumstance the impugned order is set aside, and the first appellate Court is directed to decide Title Appeal No. 23 of 2007 without any

further delay, preferably within four months from the date of this order . Both the sides shall appear before the Court of District and Addl. Sessions

Judge III, Dumka or its successor Court on 18th March 2025 for hearing of the first appeal. In the event of their non-appearance the Court shall

proceed ex parte as per law. Since the order of remand has been set aside, therefore the Judgment delivered by the trial Court on 31.01.2020 in

pursuant to the order of remand is non est in the eyes of law.

Miscellaneous Appeal is accordingly allowed.

Pending I.A(s)., if any, stands disposed of.