

(2009) 01 MP CK 0052

Madhya Pradesh High Court (Indore Bench)

Case No: None

Dr. Arvind

APPELLANT

Vs

Mannalal

RESPONDENT

Date of Decision: Jan. 19, 2009**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 151

Citation: (2009) ILR (MP) 1075 : (2009) 4 MPHT 197 : (2009) 1 MPLJ 620**Hon'ble Judges:** Shantanu Kemkar, J**Bench:** Single Bench**Final Decision:** Allowed

Judgement

@JUDGMENTTAG-ORDER

Shantanu Kemkar, J.

With the consent heard finally.

Both these appeals have been filed under Order 43 Rule 1(u) of the CPC (for short "the CPC") against the common judgment and decree dated 22-1-2008 passed by the 1st Additional District Judge, Neemuch in Regular First Appeal Nos. 10-A and 11-A/2007. As the question of facts and law involved in both the appeals are common, they are being decided by this common order.

Briefly stated, the respondent/plaintiff filed a Civil Suit No. 86-A/2005 for permanent injunction for restraining the defendant from interfering into his possession on the part of the plot admeasuring 60 x 40 square feet situated at Village Antri Bujurg, Tehsil Manasa. According to the plaintiff he being owner and in possession of the said plot, the respondent has no right to restrain him from raising construction over it and to forcibly dispossess him by demolishing the construction raised over it.

The appellant/defendant filed a written statement and counterclaim. He averred that for the legal necessity of family the plaintiff, his brother Karulal and his mother Suhag Bai had sold part of the said plot admeasuring 18 x 60 sq. feet to one Guman Singh vide agreement to sale dated 13-1-1982. According to the defendant, he purchased the said part of the plot from Guman Singh vide agreement dated 9-3-1991 and also obtained its possession. He further averred that the plot was then mutated in his name by the Gram Panchayat. He, therefore, sought a decree of declaration so as to declare him to be the owner of the part of the plot to the extent of 18 x 60 sq. feet as per the description given by him in the written statement and also prayed for decree of delivery of possession of it from the plaintiff.

The counter-claim of the defendant was denied by the plaintiff by filing reply of the same. It was alleged that the said Guman Singh had no right and title to sale the plot to the defendant. He stated that on the basis of the alleged agreement of sale, the defendant cannot raise the plea of ownership.

The Trial Court framed as many as 6 issues and after giving full opportunity to the parties to lead their respective evidence vide its judgment and decree dated 2-7-2007, dismissed the plaintiffs suit holding that though he is in illegal possession of the suit plot, has failed to prove his title over the suit plot. The Trial Court allowed the counter-claim of the defendant holding the possession of the plaintiff to be illegal and held the defendant to be the owner of the plot on the basis of the agreement of sale with Guman Singh. However, it held that since the documents relating to sale being not registered, the execution of the decree can be filed by the defendant only after getting the documents (Exhs. D-1 and D-2) registered in accordance with law.

Aggrieved by the aforesaid judgment and decree passed by the Trial Court both the parties preferred first appeals. The Appeal No. 10-A/2007 which was filed by the plaintiff was against the dismissal of his suit, holding his possession to be illegal and also against allowing the defendant's counter-claim by granting him decree of possession as also of permanent injunction. The Appeal No. 11-A/2007 filed by the defendant was to challenge the direction given in Para 31(3) of the impugned judgment and decree holding that the execution of the judgment and decree can be filed only after registration of documents of sale of the plot.

Both the aforesaid appeals have been decided by the common judgment and decree dated 21-2-2008 passed by First Appellate Court. The Appellate Court by the impugned judgment and decree remanded the suit for retrial on the ground that neither Guman Singh has been made a party in the suit nor he has been examined as a witness, in the circumstances in the absence of his say in the suit the Trial Court has not decided the suit effectively. The Appellate Court, while remanding the suit to the Trial Court directed the Trial Court to implead Guman Singh as party to the suit and also directed to the Trial Court, that it shall make all endeavour to record the evidence of Guman Singh and thereafter decide the suit in accordance with law.

Dissatisfied with the aforesaid remand order the appellant/defendant has filed these two appeals.

Heard the learned Counsel for the parties and perused the record.

Having gone through the impugned judgment and the record, I am in agreement with the contention of the learned Counsel for the appellant that when the case was not falling under any of the provisions of Order 41 Rule 23 or Rule 23A or Rule 25 of the CPC the Appellate Court was not justified in passing the impugned judgment of remand.

In the case of [P. Purushottam Reddy and Another Vs. Pratap Steels Ltd.](#), the Supreme Court has held as under:

It was a settled position of law before the 1976 Amendment that the Court, in an appropriate case could exercise its inherent jurisdiction u/s 151, CPC to order a remand if such a remand was considered pre-eminently necessary ex debito justitiae, though not covered by any specific provision of Order 41, CPC. In cases where additional evidence is required to be taken in the event of any one of the Clauses of Sub-rule (1) of Rule 27 being attracted, such additional evidence, oral or documentary, is allowed to be produced either before the Appellate Court itself or by directing any Court subordinate to the Appellate Court to receive such evidence and send it to the Appellate Court. In 1976, Rule 23A has been inserted in Order 41 which provides for a remand by an Appellate Court hearing an appeal against a decree if (i) the Trial Court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the Appellate Court can exercise the same power of remand under Rule 23A as under Rule 23. After the amendment, all the cases of wholesale remand are covered by Rules 23 and 23A. In view of the express provisions of these Rules, the High Court cannot have recourse to its inherent powers to make a remand. It is only in exceptional cases where the Court may now exercise the power of remand dehors Rules 23 and 23A. To wit, the Superior Court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 41 Rule 31, CPC and hence it is no judgment in the eye of the law, it may set aside the same and send the matter back for rewriting the judgment so as to protect valuable rights of the parties. An Appellate Court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25, CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided.

In yet another case of [Municipal Corporation, Hyderabad Vs. Sunder Singh](#), while dealing with the powers of the Appellate Court to pass an order of remand the Supreme Court has held as under:

Before invoking the provision regarding remand of a case by the Appellate Court under Order 41 Rule 23, CPC the conditions precedent laid down therein must be satisfied. Order 41 Rule 23 would be applicable when a decree has been passed on a preliminary issue. The Appellate Court must disagree with the findings of the Trial Court on the said issue. Only when a decree is to be reversed in appeal, the Appellate Court may if it considers necessary, remand the case in the interest of justice. It provides for an enabling provision. It confers a discretionary jurisdiction on the Appellate Court. The Court should be loathe to exercise its power in terms of Order 41 Rule 23 and an order of remand should not be passed routinely. It is not to be exercised by the Appellate Court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the Trial Court, it has to come with a proper finding of its own. The Appellate Court cannot shirk its duties.

Admittedly, it was nobody's case that Guman Singh was a necessary party to the suit or that though they wanted to examine him as witness but that opportunity has been illegally denied by the Trial Court. In the circumstances if the said Guman Singh was not made a party or that he has not been examined as witness, there was no justification for the Appellate Court to have remanded the case, with the aforesaid directions, by setting aside the judgment and decree of the Trial Court. On the contrary, the Appellate Court in exercise of its powers under Order 41 Rule 24 of the CPC was required to decide the appeals on the basis of evidence available on record.

Having regard to the aforesaid legal position and noticing the fact that no grievance was raised by any of the parties before the Trial Court or even in the Appellate Court, that in the absence of joining the said Guman Singh as party to the suit the Trial Court could not have passed the impugned judgment and decree, the order of remand is not sustainable. So far as non-examination of Guman Singh as a witness, the effect of it on the merits of the claims of either side could have been considered and decided by the Appellate Court itself. In the circumstances, the impugned judgment and decree passed by the Appellate Court being in contravention of powers of remand provided under Order 41 Rules 23, 23A and 25 of the CPC, the same cannot be sustained.

Accordingly, both the appeals are allowed. The impugned judgment and decree passed by the Appellate Court deserves to be and is hereby set aside.

The Appellate Court is directed to decide the appeals filed by the plaintiff and the defendant on the basis of the evidence available on record.

Parties to bear their own costs.