
Ramkishore Vashist Vs Mithlesh

W.P. No. 1198/2011 (I)

Court: Madhya Pradesh High Court (Gwalior Bench)

Date of Decision: June 27, 2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Order 14 Rule 5, Order 18 Rule 3#Evidence Act, 1872
" Section 101

Hon'ble Judges: Sujoy Paul, J

Bench: Single Bench

Advocate: K.B. Chaturvedi, Sr. Advocate and G.P. Chaurasiya, Advocate for the Appellant;
Harish Dixit, Advocate for the Respondent

Final Decision: Disposed Off

Judgement

@JUDGMENTTAG-ORDER

Sujoy Paul, J.

In a Civil Suit filed by the respondent No. 1/plaintiff, the petitioner/defendant No. 1 filed a counter claim. The Court below

framed eight issues on 18.10.2010 (Annexure P/4). The petitioner preferred an application under Order 14 Rule 5 C.P.C. and prayed for framing

of certain other issues. During course of argument, Shri Chaturvedi, learned Sr. Counsel stated that he is not pressing relief regarding reframing of

issue mentioned in para 2 of application Annexure P/5. The respondent No. 1/plaintiff preferred an application under Order 18 Rule 3 C.P.C.

Annexure P/7, wherein It is prayed that whole case of defendants is based on a will, thus the burden to prove factum of will is on the shoulders of

defendant No. 1. Hence, defendant No. 1 be directed to lead evidence first. The Court below by the impugned order, allowed the application

preferred under Order 18 Rule 3 C.P.C. and rejected the application Annexure P/4. This rejection order dated 24.01.2011 is called in question in

the present petition.

2. Shri K.B. Chaturvedi, learned Sr. Counsel criticized the order of the Court below. In para 3 of Annexure P/5 it is urged that issue was required

to be made whether there exists any property which is mentioned in the map enclosed with the plaint. Learned Sr. Counsel further submits that no

issue is framed as pointed out in para 4 of the application (Annexure P/5). It is submitted that the Court below should have decided the issue No. 3

as preliminary issue. Criticizing the impugned order, it is submitted that Court below has merely stated that issue already framed covers the

grievance of the petitioner. No reasons are assigned in the impugned order, which runs contrary to the judgment of this Court reported in 2012 (4)

MPLJ 164 (Rasul Kha S/o Ajmeri Kha Vs. State of M.P.). He further submits that there is no whisper in the order as to why issue No. 3 should

not be decided as preliminary issue. It is further submitted that respondent No. 1 is the plaintiff and burden lies on his shoulders to prove his case.

Court below has erred in allowing the application under Order 18 Rule 3 C.P.C.

3. Shri Harish Dixit, Advocate for the respondent No. 1 supported the order and drew attention of this Court on the pleadings of the parties. He

also relied on certain judgments.

4. I have heard learned counsel for the parties and perused the record.

5. In para 3 of application under Order 14 Rule 5 C.P.C., the petitioner has prayed for framing of issue on the ground that there is no property in

existence as alleged as per the map enclosed with the plaint. The Court below has framed issue No. 1 as under:-

In the opinion of this Court, aforesaid issue covers the grievance of the petitioner. Needless to mention that without establishing the right and title,

plaintiff cannot get declaration about the property mentioned in the enclosed map.

6. On the basis of counter claim and pleadings, the petitioner prayed that no issue is framed regarding illegal encroachment on the guest room. The

Court below has framed issue No. 7 which reads as under:-

7. In the opinion of this court, issue No. 1 & 7 cover the grievances of the petitioner. The Court below has not committed any error of law in

holding that existing issues cover the grievance of the petitioner. Thus, no fault can be found to this extent in the order impugned.

8. So far order regarding application under Order 18 Rule 3 is concerned, the Court below has directed the petitioner to lead evidence first

because the claim of the petitioner is based on a will. The Apex Court in Mahesh Kumar (Dead) By L.Rs. Vs. Vinod Kumar and Others, opined

that will has to be proved in the manner provided in para 30. The Court below has taken a plausible view in this regard. Section 101 of Evidence

Act places burden of proof on particular party who asserts the facts. Until such burden is discharged, the other party is not required to be called

upon to prove his case [See: Rangammal Vs. Kuppuswami and Another,]. The judgment cited by petitioner has no application in the facts and

circumstances of the present case.

9. In the opinion of this Court, there is no flaw in the order whereby application under Order 18 Rule 3 C.P.C. is allowed. The Court below has

taken a plausible view. Only error which can be gathered from the impugned order is that the Court below has not dealt with the request of the

petitioner to decide the issue No. 3 as preliminary issue.

10. Considering the aforesaid, order Annexure P/1 date 24.01.2011 is affirmed to the extent request of framing of issues is rejected and

application under Order 18 Rule 3 C.P.C. is allowed. The impugned order is interfered only to the extent petitioner's application for deciding the

issue No. 3 as preliminary issue is not considered.

11. In the result, the petition is disposed of by directing the Court below to consider the prayer of the petitioner for deciding the issue No. 3 as

preliminary issue. The parties shall address on the said aspect on the next date of hearing. The Court below shall decide said prayer in accordance

with law. It is made clear that on this aspect, no view is expressed by this Court.

12. Petition is disposed of with aforesaid direction.