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THE HIGH COURT OF MADHYA PRADESH
M.A. No.995/2011

(Smt. Kusum Bai & Ors. vs. Smt. Vimla Devi (dead) & Ors.)
Gwalior, Dated 03/07/2019

Shri K.S. Tomar, Senior Advocate with Ms. Sapna Tomar,
Counsel for appellants.

Ms. Sudha Shrivatava, Counsel for respondent no.7.

None for others, though served.

This Misc. Appeal under Order 43 Rule 1(U) of C.P.C. has been filed challenging the order dated 6-4-2011 passed by 2nd Additional District Judge, Vidisha in Regular Civil Appeal No. 12A/2011, thereby reversing the order dated 7-3-2009 passed by 1st Civil Judge Class II, Vidisha in Civil Suit No. 132A/1998.

2. In order to decide this appeal, it is not necessary to mention the case of the parties, but suffice it to say that the respondents no. 1 to 5/plaintiffs have filed a civil suit for declaration of title and permanent injunction in respect of land bearing survey No. 1042/07 situated at New Hospital Road, Vidisha on the allegations that they are the owners of the disputed plot.

3. An application under Section 11 of C.P.C. was filed before the Trial Court for dismissal of the suit on the ground that it is barred by the principle of *res judicata*.

4. The Trial Court by order dated 7-3-2009, after considering the various orders/judgments passed in different cases, came to the conclusion that the suit filed by the respondents no. 1 to

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5/plaintiffs is barred by the principle of *res judicata* and accordingly it was dismissed.

5. Being aggrieved by the order dated 7-3-2009, the respondents no. 1 to 5/plaintiffs filed a Civil Appeal which was registered as RCA No. 12A/2011. The 2nd Additional District Judge by order dated 6-4-2011, came to the conclusion that the Trial Court, while deciding the application filed under Section 11 of C.P.C. has not considered various aspects, therefore, remanded the matter for reconsideration of application filed under Section 11 of CPC after setting aside the order dated 7-3-2009.

6. Challenging the order of remand, it is submitted by the Counsel for the appellants that all the orders/judgments on the basis of which the Trial Court had dismissed the suit as barred to the principle of *res judicata* were before the Appellate Court. The Appellate Court, instead of remanding the matter back to the Trial Court, for decision afresh on the question of *res judicata*, should have decided the appeal on its own. To buttress his contentions, the Counsel for the appellants has relied upon the judgments passed by the Supreme Court in the case of **Zarif Ahmad v. Mohd. Farooq** reported in **(2015) 13 SCC 673**.

7. Per contra, it is submitted by the Counsel for the respondent no. 7 is that since, the suit was not decided on merits, and was dismissed in the light of Section 11 of CPC, therefore, other issues

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are yet to be decided, therefore, the Appellate Court, did not commit any mistake in remanding the matter.

8. Heard, the learned Counsel for the parties.

9. The Trial Court, after allowing the application filed under Section 11 of CPC had dismissed the suit as barred by principle of *res judicata*. Thus, the suit has been dismissed at the preliminary stage. However, the Appellate Court has not remanded the case back with a direction to decide the question of *res judicata* along with other issues, but has remanded the suit back for decision afresh on the application filed under Section 11 of C.P.C.

10. Order 41 Rule 23 CPC reads as under :

"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."

11. It is not the case of the parties, that any additional evidence was produced before the Appellate Court along with an application under Order 41 Rule 27 of C.P.C. Thus, in the

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considered opinion of this Court, the Appellate Court should not have remanded the matter back for re-writing the order on the question of *res judicata*. The Appellate Court should have adopted the procedure laid down in Order 41 Rule 23 of C.P.C. and should have decided the question of *res judicata* by itself. Further more, the Appellate Court must not remand the matter, simply for re-writing the judgment as it would shake the confidence of the litigants in the judicial system, as such a course would cause undue delay in the disposal of the litigation. In absence of any additional evidence, if the Appellate Court comes to a conclusion that the order passed by the Court below is not in accordance with law, then it should decide the matter by itself only.

12. The Supreme Court in the case of **Lisamma Antony v. Karthiyayani** reported in **(2015) 11 SCC 782** has held as under :

17. Needless to say, in the present case, the suit was not disposed of on any preliminary issue by the trial court. The second appellate court should have restrained itself from remanding a case to the trial court. Remanding a case for reappreciation of evidence and fresh decision in the matter like the present one is nothing but harassment of the litigant. The unnecessary delay in final disposal of a lis, shakes the faith of litigants in the court.

13. Thus, the order dated 6-4-2011 passed by 2nd Additional District Judge Vidisha in R.C.A. No. 12A/2011 is hereby set aside.

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14. The matter is send back to the Appellate Court with a direction to decide the question of *res judicata* on the basis of the material which is available on record, and if it is held that the suit was not barred by principle of *res judicata*, then to proceed further as per the provisions of Order 41 Rule 23 C.P.C.

15. Let the entire exercise be completed as early as possible without any further delay.

16. With aforesaid observations, the appeal is **finally disposed of.**

(alok)

(G.S. Ahluwalia)
Judge