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THE HIGH COURT OF MADHYA PRADESH
Writ Petition No.8177/2013
Salim Khan alias Pappu Khan and another Vs. Shahjad Khan
and another

Gwalior, Dated :09/04/2019

Shri Sumant Mishra, Advocate for petitioners.

Shri K.L. Gupta, Advocate for respondents.

This petition under Article 227 of the Constitution of India has been filed challenging the order dated 8/10/2013 passed by Seventh Civil Judge, Class-II, Gwalior in Civil Suit No.35A/2013, by which the prayer made by the petitioner for framing of additional issue with regard to the maintainability of the suit in absence of prayer for possession has been rejected.

2. It is submitted by the counsel for the petitioners that the respondents have filed one more suit against the petitioners for eviction from the property in dispute. Both the suits are pending between the same parties and the subject matter of the suit is also same. In one suit the respondents have prayed for eviction, which clearly shows that the respondents are not in possession of the land in dispute. The present suit has been filed for declaration of title and permanent injunction. Accordingly, the petitioners have filed their written statement and have specifically pleaded that the respondents are not in possession of the land in dispute. Accordingly, the petitioners had filed an application under Order XIV Rule 5 CPC seeking framing of additional issue relating to the maintainability of

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the suit in absence of consequential relief of possession. The said application has been rejected only on the ground that since the plaintiffs/respondents have claimed that they are in possession of the property in dispute, therefore, there is no need to frame the additional issue.

3. *Per contra*, it is submitted by the counsel for the respondents that the respondents are in possession of the property in dispute, but fairly conceded that the respondents have also filed a suit for eviction against the petitioners.

4. Heard learned counsel for the parties.

5. Where the question of possession is in dispute, then this Court is of the considered opinion that the trial court must frame a issue with regard to the maintainability of the suit in absence of consequential relief of possession.

6. The Supreme Court in the case of **Mst. Rukhmabai v. Lala Laxminarayan and others** reported in **AIR 1960 SC 335** has held as under:-

“30.It is not necessary in this case to express our opinion on the question whether the consequential relief should have been asked for; for, this question should have been raised at the earliest point of time, in which event the plaintiff could have asked for necessary amendment to comply with the provisions of S. 42 of the Specific

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Relief Act. In the circumstance, we are not justified in allowing the appellant to raise the plea before us.”

The Supreme Court in the case of **Union of India vs. Ibrahim Uddin and another** reported in **(2012) 8 SCC 148** has held as under:-

"Section 34 of the Specific Relief Act, 1963

55. The Section provides that courts have discretion as to declaration of status or right, however, it carves out an exception that a court shall not make any such declaration of status or right where the complainant, being able to seek further relief than a mere declaration of title, omits to do so.

56. In *Ram Saran v. Ganga Devi* (1973) 2 SCC 60, this Court had categorically held that the suit seeking for declaration of title of ownership but where possession is not sought, is hit by the proviso of Section 34 of Specific Relief Act, 1963 (hereinafter called 'Specific Relief Act') and, thus, not maintainable. In *Vinay Krishna v. Keshav Chandra* AIR 1993 SC 957, this Court dealt with a similar issue where the plaintiff was not in exclusive possession of property and had filed a suit seeking declaration of title of ownership. Similar view has been reiterated observing that the suit was not maintainable, if barred by the proviso to Section 34 of the Specific Relief Act. (*See also: Gian Kaur v. Raghubir Singh* (2011) 4 SCC 567).

57. In view of above, the law becomes crystal clear that it is not permissible to claim the relief of declaration without seeking consequential relief.

58. In the instant case, suit for declaration of title of ownership had been filed though, the plaintiff/respondent no. 1 was admittedly not in possession of the suit property. Thus, the suit was barred by the provision of Section 34 of the Specific Relief Act and, therefore, ought to have been dismissed solely on this ground. The High Court though

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framed a substantial question on this point but for unknown reasons did not consider it proper to decide the same. "

85.12. The suit was barred by the proviso to Section 34 of the Specific Relief Act, for the reason that plaintiff/respondent No.1, admittedly, had not been in possession and he did not ask for restoration of possession or any other consequential relief. "

The Supreme Court in the case of **Venkatarama and Others vs. Vidyane Doureradjaperumal (Dead) Through Legal Representatives and Others**, reported in **(2014) 14 SCC 502** has held as under:-

"**27.** In view of the above, it is evident that the suit filed by the appellants/plaintiffs was not maintainable, as they did not claim consequential relief. The respondent nos. 3 and 10 being admittedly in possession of the suit property, the appellants/plaintiffs had to necessarily claim the consequential relief of possession of the property. Such a plea was taken by the respondents/defendants while filing the written statement. The appellants/plaintiffs did not make any attempt to amend the plaint at this stage, or even at a later stage. The declaration sought by the appellants/plaintiffs was not in the nature of a relief. A worshipper may seek that a decree between the two parties is not binding on the deity, as mere declaration can protect the interest of the deity. The relief sought herein, was for the benefit of the appellants/plaintiffs themselves."

7. Thus, it is clear that the question with regard to the maintainability of the suit in absence of consequential relief cannot be allowed to be raised for the first time before the appellate court, but it should be raised at the earliest because if so required, the

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plaintiffs can amend the plaint. Under these circumstances, this Court is of the considered opinion that the trial court should have framed the additional issue with regard to the maintainability of the suit in absence of consequential relief of possession.

8. Accordingly, the order dated 8/10/2013 passed by Seventh Civil Judge, Class-II, Gwalior in Civil Suit No.35A/2013 is hereby set aside. The application filed by the petitioners under Order XIV Rule 5 CPC for framing additional issue is allowed. The trial court is directed to frame the additional issue as sought by the petitioners.

9. The petition succeeds and is hereby **allowed**. The interim order dated 27/11/2013 is hereby recalled.

Arun*

(G.S. Ahluwalia)
Judge