

**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR
BEFORE**

HON'BLE SMT. JUSTICE SUNITA YADAV

ON THE 17th OF OCTOBER, 2023

MISC. APPEAL No. 4516 of 2019

BETWEEN:-

**NIHAL SINGH S/O SHRI HARNAM SINGH,
AGED ABOUT 37 YEARS, OCCUPATION:
AGRICULTURIST, R/O VILLAGE
JAGTHAR, TEHSIL SIRONJ, DISTRICT
VIDISHA (MADHYA PRADESH)**

.....APPELLANT

**(BY SHRI SAMEER KUMAR SHRIVASTAVA -
ADVOCATE)**

AND

- 1. SAVITRI BAI D/O SMT. IMRAT BAI W/O
SHRI SUMER SINGH DANGI, AGED
ABOUT 45 YEARS, R/O VILLAGE BEHANE,
TEHSIL MUNGAWALI, DISTRICT
ASHOKNAGAR (MADHYA PRADESH)**
- 2. MEERA BAI D/O SMT. IMRAT BAI W/O
PRATAP DANGI, AGED ABOUT 43 YEARS,
R/O VILLAGE BEHANE, TEHSIL
MUNGAWALI, DISTRICT ASHOKNAGAR
(MADHYA PRADESH)**
- 3. SHEELA BAI D/O SMT. IMRAT BAI W/O
JAGANNATH DANGI, AGED ABOUT 41
YEARS, R/O VILLAGE BAREKHEDI,
TEHSIL KURWAI, DISTRICT VIDISHA
(MADHYA PRADESH)**
- 4. SUKHWATI BAI D/O SMT. IMRAT BAI W/O
MAJJU, AGED ABOUT 39 YEARS, R/O
VILLAGE HANSALKHEDI, TEHSIL
BEENA, DISTRICT SAGAR (MADHYA
PRADESH)**
- 5. SUSHILA BAI D/O SMT. IMRAT BAI W/O
CHANDRABHAN SINGH, AGED ABOUT 37
YEARS, R/O VILLAGE JOAP, TEHSIL**

- BEENA, DISTRICT SAGAR (MADHYA PRADESH)
6. SHARDA BAI D/O SMT. IMRAT BAI W/O KARAN SINGH DANGI, AGED ABOUT 35 YEARS, R/O VILLAGE JOAP, TEHSIL BEENA (MADHYA PRADESH)
 7. COLLECTOR SINGH S/O MEHTAB SINGH, AGED ABOUT 40 YEARS, R/O VILLAGE JAGTHAR TEHSIL SIRONJ, DISTRICT VIDISHA (MADHYA PRADESH)
 8. DESHRAJ SINGH S/O MEHTAB SINGH, AGED ABOUT 30 YEARS, R/O VILLAGE JAGTHAR, TEHSIL SIRONJ, DISTRICT VIDISHA (MADHYA PRADESH)
 9. KHOOB SINGH S/O ROOP SINGH DANGI, AGED ABOUT 50 YEARS, R/O VILL JAGTHAR, TEHSIL SIRONJ, DISTRICT VIDISHA (MADHYA PRADESH)
 10. NARAYAN SINGH S/O ROOP SINGH DANGI, AGED ABOUT 48 YEARS, R/O VILLAGE JAGTHAR, TEHSIL SIRONJ, DISTRICT VIDISHA (MADHYA PRADESH)

.....RESPONDENTS

(BY SHRI R.P. RATHI - ADVOCATE)

This appeal coming on for hearing this day, the Court passed the following:

ORDER

This Misc. Appeal Order 43 Rule 1(u) of CPC has been filed against the order dated 18.07.2019 passed by First Additional District Judge Sironj, District Vidisha (M.P.) in Regular Civil Appeal No.5-A/2017 whereby, the judgment and decree passed dated, 30.11.2016 passed by Civil Judge Class-II, Sironj District Vidisha (M.P.) has been set aside and the matter has been remanded back for giving an opportunity to plaintiff to amend the plaint and seek the recovery of

possession.

2. The facts in brief to decide the present appeal are that plaintiffs - Imrat Bai, Collector Singh and Dehsraj Singh filed a civil suit for declaration of title and possession in respect to disputed land bearing survey no.400 area 1.063 hectare, min 400/2 area 0.532 hectare before the Civil Judge, Class-II Sironj, District Vidisha (M.P.) [hereinafter referred to as "the trial Court"]. The learned trial Court dismissed the suit filed by the plaintiffs. Against the impugned judgment and decree dated, 30.11.2016 passed by trial Court, a Regular Civil Appeal No.5A/2017 was preferred before First Additional District Judge Sironj, District Vidisha (M.P.) [hereinafter referred to as " the first appellate Court "]. The first appellate Court after hearing the parties remanded the matter back by impugned order on the ground that under the proviso of Section 22 (2) of Specific Relief Act, the plaintiffs should have been granted an opportunity for amendment in plaint, against which the present appeal has been filed.

3. Learned counsel for the appellant argued that the order impugned passed by first appellate Court is against the settled principles of law as well as material available on record, therefore, the same is liable to be set-aside. It is further argued that learned first appellate Court has failed to consider that the possession of respondents/plaintiffs has not been proved in civil suit and the possession of appellant/defendant was admitted by the plaintiff herself. Further argument is that there was no prayer on behalf of respondents/plaintiffs for amendment in suit, however, learned first appellate Court granted the relief which is barred by limitation and cannot be granted in the light of the proviso of Order 6 Rule 17 of CPC. Learned first appellate Court has also passed the

impugned judgment against the provision of Order 41 Rule 23-A of CPC, therefore, the impugned order be set aside.

4. On the other hand, learned counsel for the respondents argued that impugned judgment is in accordance with settled principles of law because the Court should grant an opportunity to plaintiffs to amend the suit before rejecting it, therefore, the present appeal be dismissed.

5. Heard learned counsel for the rival parties and perused the material available on record.

6. On perusal of record it is crystal clear that present appellant/defendant filed written statement and specifically pleaded that the plaintiffs/respondents were having possession over the disputed land and without seeking the relief of possession, the civil suit is not maintainable. It is further pleaded by appellant/defendant that he is having right in the disputed property. The learned trial Court after recording of evidence in which the possession of appellant/defendant was admitted by plaintiffs, held that since the plaintiffs have not sought any relief of recovery of possession and in view of the admission of plaintiffs that defendant is in possession of the property prior to institution of the suit, the civil suit is not maintainable in view of the proviso to Section 34 of Specific Relief Act. It is apparent that amendment was not sought for by the respondents/plaintiffs before the learned Courts below.

7. The first appellate Court has passed the impugned order by citing the proviso of Section 22 of Specific Relief Act which reads as under;

22. Power to grant relief for possession, partition, refund of earnest money, etc.—

(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), **any person suing for the specific performance** of a contract for the transfer of

immovable property may, in an appropriate case, ask for—

- (a) possession, or partition and separate possession, of the property, in addition to such performance; or
- (b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or 1[made by] him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21.

8. On plain reading of Section 22 of Specific Relief Act indicates that this provision is applicable for the specific performance of contract for the transfer of immovable property. In this case, suit is not filed for specific performance of contract, but is filed for declaration of title and, therefore, the learned first appellate Court has committed illegality by applying the proviso of sub-Section 2 of Section 22 of Specific Relief Act.

9. In the case at hand, it is apparent that the appellant/defendant from the very beginning claimed to have possession over disputed land and pleaded that the plaintiffs/respondents are not in possession, therefore, the suit is not maintainable under the proviso of Section 34 of Specific Relief Act.

10. The Apex Court in the case of **Union of India Vs. Ibrahim Uddin [(2012) 8 SCC 148]**; held that if relief of recovery of possession has not been asked for, then the suit is required to be dismissed. Hon'ble Apex Court nowhere has held that an opportunity should be given to cure the lacuna. Once the suit is filed without claiming consequential

relief then the suit is required to be dismissed.

11. It is also apparent that impugned order of remand was passed by learned first appellate Court against the provision of Order 41 Rule 23(A) of CPC which reads as under;

[23A. Remand in other cases.-

Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.]

12. However in the case at hand, the learned first appellate Court has not given any finding that re-trial is necessary. Unless and until there is a finding that re-trial is necessary, the case cannot be remanded back.

13. The Apex Court in the case of **Municipal Corporation, Hyderabad Vs. Sunder Singh [(2008) 8 SCC 485]**; held in order to exercise the power of remand under Order 41 Rule 23A of CPC, there has to be a specific finding of the Court that a retrial is necessary.

14. Power to seek amendment in plaint is governed by the provisions contained in Order 6 Rule 17 of CPC. If any specific pleading or relief has not been asked for, then the substantive provision for seeking the relief is to ask for amendment under this provision. The provision under Order 6 Rule 17 of CPC is not absolute rather, it comes with a proviso.

15. For ready reference and convenience, Order 6 Rule 17 of CPC reads as under;

"[17. Amendment of pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of the due diligence, the

party could not have raised the matter before commencement of trial.

16. By the above mentioned provision, it is clear that the relief for amendment in pleadings cannot be asked at a later stage when the relief was available earlier and not asked for. In this case, no application seeking amendment in plaint was filed. Despite this fact, the learned lower appellate Court permitted the respondent/plaintiff to amend the plaint which is *per se* illegal.

17. Learned first appellate Court has also not considered the fact that the plaintiff is not in possession of the property even prior to the filing of the suit, therefore, the relief of amendment is now barred by time. It is settled principles of law that a relief which is barred by time cannot be granted.

18. Learned counsel for the respondents cited the decision of Apex Court in the case of **Mst. Rukhmabai Vs. Lala Laxminarayan and Ors. [AIR 1960 SC 335]** wherein, it is held that an opportunity should be given to amend the plaint before dismissing it on account of non compliance of claiming consequential relief of recovery of possession. However, this judgment of Hon'ble Apex Court is not applicable since in that judgment the objection of suit being barred under proviso to Section 42 of Specific Relief Act, 1877 was raised before the High Court for the first time in arguments. Therefore, Hon'ble Apex Court held that since for the first time the point of suit being barred for non compliance of claiming relief of recovery of possession, therefore, an opportunity should be given. However, in this case, since inception, a specific objection was raised that suit is not maintainable as it was filed without claiming the relief of possession, specific issue as regards to possession was also framed which was decided against the plaintiffs.

Therefore, the instant judgment is not applicable to the present facts.

19. Learned counsel for the respondents further cited the case of **Kalyan Singh Vs. Vakilsingh [AIR 1990 MP 295]** wherein, at para-20 this Court has held that an opportunity should be granted to amend the plaint before dismissing the same. Even this judgment does not lay down the said proposition of law in absolute terms. This judgment says that in the event of any subsequent fact enabling the plaintiff to claim consequential relief happened, then in that condition the suit cannot be dismissed without granting the opportunity to amend the plaint. Para-20 reads as under;

20. The legal position that flows from the above said authorities is as under :

- (i) Further relief than a mere declaration referred to in the proviso to Section 34 of Specific Relief Act, 1963 contemplates the entitlement of the plaintiff as obtaining on the date of the suit;
- (ii) Entitlement of the plaintiff enabling seeking further relief based on an event occurring during the pendency of the suit would not render the suit not maintainable;
- (iii) It is the choice of the plaintiff to rest content by a mere decree for declaration in that suit and then to sue for further relief by bringing an independent suit subject to Law of Limitation or to pray for further relief by making an amendment in the plaint in that suit itself;
- (iv) Bar enacted by the proviso does not automatically entail dismissal of the suit but the plaintiff must be afforded an opportunity of amending the plaint if so desired;
- (v) Further relief cannot be granted to the plaintiff without the same having been specifically asked for.

20. On bare perusal of Clause – (ii),(iii) & (v) it reflects that in the event of any subsequent fact happening, which entitles a person to claim consequential relief, then an opportunity should be granted to amend the plaint. Condition No.(v) itself clarifies that no such consequential relief can be granted unless it is asked for. In the case at hand, admittedly no application for amendment in plaint has been filed and, therefore, the

first appellate Court was having no jurisdiction to allow the plaintiffs to claim the consequential relief without even asking for the same.

21. In view of the aforesaid discussion, the impugned order of remand is found to be against the settled principles of law and perverse.

22. Consequently, the present appeal is **allowed** and the impugned judgment dated 18.07.2019 passed by First Additional District Judge, Sironj, District Vidisha (M.P.) in Civil Appeal No.5-A/2017 is found be against the settled principles of law and the same is hereby set aside. Learned first appellate Court is directed to decided the appeal on merits.

23. Registry is directed to immediately send back the record of the trial Court alongwith the copy of this Order.

**(SUNITA YADAV)
JUDGE**

Vpn/-