

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

BEFORE

HON'BLE SHRI JUSTICE ANAND PATHAK

ON THE 1st OF SEPTEMBER, 2023

MISC. PETITION NO. 4329 of 2023

BETWEEN:-

1. **RAMNATH S/O DEVI PRASAD KUSHWAH, AGED ABOUT 63 YEARS.**
2. **MALTI W/O KAILASH KUSHWAH, AGED ABOUT 51 YEARS.**
3. **DHARMENDRA S/O LATE KAILASH KUSHWAH, AGED ABOUT 24 YEARS.**
4. **BINNU D/O LATE KAILASH KUSHWAH, AGED ABOUT 20 YEARS.**
5. **MAHESH S/O LATE SHRI KAILASH KUSHWAH, AGED ABOUT 16 YEARS, MINOR THROUGH GUARDIAN MOTHER MALTI WD/O KAILASH KUSHWAH, AGED 51 YEARS.**

ALL RESIDENT OF WARD NO. 5 MAU, TEHSIL GOHAL DISTRICT BHIND (MADHYA PRADESH)

.....PETITIONERS

(BY SHRI ABHISHEK SINGH BHADOURIYA - ADVOCATE)

AND

1. **RAGHUNATH SINGH S/O HISABI KUSHWAH, AGED ABOUT 56 YEARS.**
2. **RATAN SINGH S/O HISABI KUSHWAH, AGED ABOUT 61 YEARS**
BOTH ARE RESIDENT OF WARD NO.12 MAU, TEHSIL GOHAL DISTRICT BHIND (MADHYA PRADESH)
- 2(a). **GHANSHYAM SONI S/O JAGDISH PRASAD SONI, AGED ABOUT 41 YEARS, R/O WARD NO. 5 MAU, TEHSIL GOHAL DISTRICT BHIND (MADHYA PRADESH)**
3. **RAMPYARI W/O LATE VIDHYARAM KUSHWAH, AGED ABOUT 71 YEARS.**
4. **MOTIRAM S/O LATE VIDHYARAM KUSHWAH, AGED ABOUT 40 YEARS.**
5. **RAMSAHAY S/O LATE VIDHYARAM KUSHWAH, AGED 39 YEARS.**
6. **BALRAM S/O LATE VIDHYARAM, AGED ABOUT 37 YEARS.**
7. **NANDRAM S/O LATE VIDHYARAM KUSHWAH, AGED**

- ABOUT 33 YEARS.
8. PHOOL SINGH S/O RAMDAYAL KUSHWAH, AGED ABOUT 56 YEARS.
9. KAILASHI W/O RAMESH KUSHWAH, AGED ABOUT 56 YEARS.
ALL RESIDENT OF WARD NO. 12 MAU, TEHSIL GOHAL DISTRICT BHIND (MADHYA PRADESH)
10. STATE OF MP THROUGH COLLECTOR BHIND (MADHYA PRADESH)
11. RAJNI D/O LATE KAILASH KUSHWAH, AGED ABOUT 22 YEARS, R/O WARD NO. 5 MAU, TEHSIL GOHAL DISTRICT BHIND (MADHYA PRADESH)

.....RESPONDENTS

(SHRI HARISH KUMAR DIXIT- ADVOCATE FOR RESPONDENT NO.2(a) AND SHRI NEELESH SINGH TOMAR – GOVERNMENT ADVOCATE, NONE FOR OTHER RESPONDENTS)

This petition coming on for admission this day, the court passed the following:

ORDER

1. The present petition under Article 227 of the Constitution is preferred by the petitioners being crestfallen by the order dated 09-11-2022 passed by the I Additional District Judge Gohad District Bhind whereby Miscellaneous Appeal under Order XLIII Rule 1 (r) of CPC preferred at the instance of respondent No.2(a)/defendant No.2(a) was partly allowed and matter was remanded back to the trial Court for fresh adjudication of application under Order XXXIX Rule 1 and 2 of CPC preferred by the petitioners/plaintiffs (vide I.A.No.1/2022) and another application preferred by defendant No.2(a) under Order XXXIX Rule 1 and 2 of CPC (I.A.No.06/2022) for analogous hearing.
2. Precisely stated facts of the case are that the plaintiffs/petitioners were co-owners of one piece of the land and went for partition before Tahsildar. Vide order dated 22-09-2009 land was partitioned by Tahsildar. On 05-05-2011 SDO, allowed the appeal of

plaintiff/petitioner No.2 -Malti and set aside the order of partition and remanded the matter to Tahsildar for fresh hearing. Grievance of Malti before SDO was that she was not given opportunity of hearing in partition proceedings.

3. On 02-03-2015, Tahsildar recorded consent of plaintiff/petitioner No.2 – Malti over previous partition and passed a fresh order of partition. Said order became final because no appeal was preferred by any party against the order of partition. On 22-11-2021 respondent No.2(a) -Ghanshyam Soni purchased the land from the share of defendant No.2 – Ratan Singh.
4. Petitioners/plaintiffs filed a suit for declaring the order of Tahsildar as null and void in which respondent No.2(a) was impleaded as party defendant and moved an application under Order XXXIX Rule 1 and 2 of CPC for restraining the respondents from alienation of property.
5. It appears that on 06-06-2022, petitioners/plaintiffs themselves attempted to erect wire fencing on the property and therefore, FIR at Crime No.165/2022 was registered against them. Immediately thereafter it appears that Ghanshyam Soni -respondent No.2(a) filed an application for restraining the plaintiffs from interfering in possession and from changing the status of the property purportedly under Order XXXIX Rule 1 read with Section 151 of CPC.
6. On 27-06-2022, order was passed by the trial Court on the application of plaintiffs restraining alienation of property but order on the application of defendant No.2 (a) was not passed and it was passed on 13-09-2022 whereby the application of defendant No.2(a) was rejected observing that there is already an order of injunction against defendant No.2(a) passed earlier by the trial Court.

7. It appears that after passing of the impugned order dated 27-06-2022 and before passing of order dated 13-09-2022 rejecting the injunction application of defendant No.2(a), he filed an appeal purportedly under Order XLIII Rule 1 of CPC against the order dated 27-06-2022 *inter alia* raising the ground that the trial Court has not decided his application under Order XXXIX Rule 1 and 2 of CPC. On 09-11-2022 the appellate Court partly allowed the appeal preferred by defendant No.2(a), directing the trial Court to decide both the applications preferred under Order XXXIX Rule 1 and 2 of CPC preferred by the parties while hearing analogously. Till then restrained defendant No.2(a) from alienating, selling and transferring the property.
8. Thereafter, against said order dated 09-11-2022 petitioners filed miscellaneous appeal under Order XLIII Rule 1 of CPC before this Court and thereafter moved an application for conversion of miscellaneous appeal into miscellaneous petition and said application was allowed and thereafter matter is heard on miscellaneous petition under Article 227 of the Constitution.
9. It is the submission of learned counsel for the petitioners that all the parties in suit were not impleaded as party by defendant No.2(a) in miscellaneous appeal, therefore, same not maintainable. As defendant, he cannot claim any relief for temporary injunction in the jurisdiction under Order XXXIX of CPC. It is the submission of learned counsel for the petitioners that in miscellaneous appeal, the appellate Court cannot pass the order of remand because that power is available to regular first appellate Court and not available to miscellaneous appellate Court. He relied the judgment of this Court in the case of **Dineshchandra Sharma and Ors. Vs. Rana Dharampal**

Singh and Ors., AIR 2020 MP 54, Mangilal Vs. Ganpatlal, 2019 (3) MPLJ 86 and Sanju Devi Kashyap and Ors. Vs. Uma Bai and Ors. AIR 2019 CG 56.

10. Learned counsel for the petitioners further submitted that the jurisdiction of appellate Court was barred by limitation with respect to the order impugned because at the time of challenging the order, limitation of 30 days was over, therefore, the relief against the said order was time barred. He relied upon the judgment of Supreme Court in the case of **City and Industrial Development Corporation Vs. Dosu Aardeshir Bhiwandiwalla and others, (2009) 1 SCC 168** and **Assistant Commissioner (CT) LTU, Kakinada and others Vs. M/s Glaxo Smith Kline Consumer Health Care Limited, (2020) 19 SCC 681** to contend that jurisdiction under Article 226 of the Constitution is to look into the factum and laws of limitation.
11. Learned counsel for the respondents opposed the submissions and submitted that an appeal is maintainable against the order of remand under Order XLIII Rule 1 of CPC. He relied upon the judgment of Apex Court in the case of **Resham Singh Pyara Singh Vs. Abdul Sattar, (1996) 1 SCC 49**. It is the submission of learned counsel for respondent No.2(a) that rules of Order XLI of CPC shall apply, so far as may be, to appeal from orders. In the case of **Balwant Vs Mainabai, AIR 1991 MP 11**, this Court held that by virtue of Order XLIII Rule 2 of CPC, provisions of Order XLI rule 22 of CPC would be applied, enabling the provisions of cross-objections maintainable against the order also.
12. He also relied upon the provisions of Section 108 of CPC whereby procedure has been provided about the “Procedure in appeals from appellate decrees and orders” and it includes orders made under CPC

and therefore, applicability of Order XLI in appeal governs Order XLIII rule 1 of CPC also. This aspect has been considered in **Rupinder Singh Anand Vs. Gajinder Singh Anand and others, 2011 (1) MPLJ 646** by the Division Bench of this Court. Similarly, the provisions of Order XLI Rule 27 of CPC regarding production of additional evidence have been found applicable in the appeal under Order XLIII rule 1 CPC in view of the judgment of Karnataka High Court in the case of **M/s Patel Enterprises Vs. M.P. Ahuja, ILR 1992 Kant. 3772**.

13. On same analogy, provisions of Order XLIII Rule 1 of CPC are also applicable in appeals under Order XLIII rule 1 of CPC. He also relied upon the judgment of this Court in the case of **Khadak Bahadur alias Rajendra Pal Singh Lodhi Vs. Niranjana Singh, 2016 (I) MPWN 110** to submit that two applications under Order XXXIX Rule 1 and 2 of CPC should be heard and decided analogously by the trial Court.
14. Heard learned counsel for the parties and perused the documents appended thereto.
15. This is a case where petitioners/plaintiffs have filed a suit for declaration of title and permanent injunction against the defendants with further relief that respondent No.2(a) has no right to interfere in possession of plaintiffs. Suit was filed on the allegations that defendant No.1 without partition has sold out a specific share of land to defendant No.2(a) and on the premise of said sale deed, defendant No.2(a) is trying to interfere in possession of plaintiffs.
16. So far as maintainability of application for temporary injunction at the instance of defendant is concerned, said aspect has been considered by the Madras High Court in the matter of **Sivakami Achi**

Vs. Narayana Chettiar, AIR 1939 Madras 495 holding that an application under Order XXXIX Rule 1(a) of the CPC can be made on behalf of defendant. This judgment has been considered by the Division Bench of this Court in the matter **Churamani and another Vs. Ramadhar and others, 1991 MPLJ 311** holding that the defendant has right to move application under Order XXXIX Rule 1 (a) of CPC if any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to a suit or wrongfully sold in execution of a decree. This analogy has been further advanced in **Ram Narayan Singh Vs. Rikhranj Singh, 1997 MPWN 34**. Recently, this Court in the case of **Nandu S/o Bhagwan Das and Another Vs. Jamuna Bai and Others, (2016) 3 MPLJ 604** has elaborately discussed this issue holding that application for temporary injunction moved on behalf of defendant is maintainable.

17. Therefore, defendant for limited purpose as provision mandates can move an application under XXXIX Rule 1 of CPC. Thus, the application if any preferred by the defendant No.2(a) for temporary injunction under Order XXXIX Rule 1(a) of CPC, then it is maintainable to that extent.
18. So far as the question whether appellate Court under the miscellaneous appellate provision under Order XLIII of CPC could have remanded the matter, then it appears that in view of Division Bench judgment of this Court in the case of **Rupinder Singh Anand (supra)** it has been held that Section 108 of CPC makes Chapter VII apply to all appeals irrespective of whether they arise from decree or not. Relevant para 15 is reproduced for ready reference:

“15. So far as maintainability of cross-objections is concerned, it is true that cross-objections can be filed

in appeal against impugned judgment/order under Order XLI, Rule 22, Civil Procedure Code. Section 108 makes Chapter VII apply to all appeals, irrespective of whether they arise from decrees or orders. Order XLIII, Rule 2, clearly lays down that the rules of Order XLI shall apply, so far as may be, to appeals from orders. It appears from this that the intention is to allow all matters covered by Order XLI so far as they can be made applicable to appellate orders and appeals therefrom as well. It is quite clear therefore that a cross-objection in an appeal against an order appealable under Order XLIII. Rule 1, Civil Procedure Code can be made. This aspect of the case has been taken into consideration by this Court in the matter of Beniprasad Agarwal v. Hindustan Lever Ltd., Bombay, 1957 MPLJ 676 = AIR 1958 Madhya Pradesh 348, wherein this Court held that cross-objections in appeal against such order can be made and the cross-objections be placed as an appeal after it is filed.”

19. Although miscellaneous appeal against the order of remand can only be preferred on substantial questions of law {See: **Narayanan Vs. Kumaran and others, (2004) 4 SCC 26**}. However petitioners (earlier appellants) filed miscellaneous appeal under Order XLIII Rule 1 purportedly under Order XLIII rule 1(u) of CPC but later on converted this miscellaneous appeal into miscellaneous petition under Article 227 of the Constitution, therefore, now that point does not exist.

20. Therefore, considering the provisions of Orders XLI, XLIII and Section 108 of CPC as well as different pronouncements made in this regard, it appears that the provision of Order XLI of CPC would apply in Order XLIII of CPC also to the extent where remand is made.
21. Even otherwise, this Court under the power of superintendence and to further the cause of justice can pass the order in which it can hold that both the applications for temporary injunction can be heard analogously. Reason being, if the impugned order of miscellaneous appellate Court is set aside on alleged technical ground then it would amount to restoration of illegal order and same is not maintainable {See: **Managing Director, ECIL and others Vs. B. Karunakar, (1993) 4 SCC 727, Munna Lal Yadav Vs. Dr. Hari Singh Gour and another, 2006(3) MPHT 39** and recently in **Dakkho Bai Vs. State of M.P. And others, 2015 (3) MPLJ 202**}. Therefore, on this count also to further the cause of justice, it is imperative that order of miscellaneous appellate Court be maintained.
22. Perusal of impugned order reveals that matter has been remanded back mainly on the ground that two applications for temporary injunction were not heard analogously. One application was decided on 27-06-2022 and another was decided on 13-09-2022. This created anomalous situation. It is required that both the applications ought to be heard analogously and then would be decided accordingly by the trial Court.
23. So far as interest of plaintiffs is concerned, that has been protected by the remand order whereby for the time being alienation, transfer, sale have been injuncted till applications of both the rival parties are decided. Therefore, it is not a case where petitioners/plaintiffs are

prejudiced in any manner.

24. In the cumulative analysis, no case for interference is made out. Parties are directed to appear before the trial Court by next date of hearing and trial Court shall decide the applications preferred by the plaintiffs and defendant No.2(a) analogously in accordance with law. Impugned order passed by the miscellaneous appellate Court is hereby affirmed.
25. Petition stands disposed of in above terms.

(ANAND PATHAK)
JUDGE

Anil*