

**IN THE HIGH COURT OF MADHYA PRADESH****AT GWALIOR****BEFORE****HON'BLE SHRI JUSTICE RAJENDRA KUMAR VANI****ON THE 25th OF JULY, 2025****MISC. APPEAL No. 6439 of 2024*****SHASHI MANGAL******Versus******VASUNDHARA SHARMA AND OTHERS***

Appearance:

Shri Sameer Kumar Shrivastava – learned counsel for the petitioner.

Shri Anand Vinod Bhardwaj - learned counsel for the respondent

No.1.

Shri Prabhat Pateriya – learned Government Advocate for the respondent No2/State.

ORDER

With the consent of parties, the matter is finally heard.

This misc. appeal under Order 43 Rule 1(u) of Civil Procedure Code has been filed by the appellant/defendant against the impugned order dated 12.8.2024 passed by learned Third



District Judge, Shivpuri in Case No. RCA/65/2023 whereby judgment and decree dated 12.4.2023 passed by the learned Fourth Civil Judge, Junior Division, Shivpuri, District Shivpuri in civil Suit No. 24-A/2018 has been set aside and the matter has been remanded back to the trial Court after allowing the application under Order 41 Rule 27 and under Order 26 Rule 9 of C.P.C.

2. The facts giving rise to the present misc. appeal in brief are that respondent/plaintiff filed a civil suit for declaration of title, injunction and recovery of possession. The learned trial Court partly decreed the suit. Plaintiff filed an appeal before the learned First Appellate Court and Appellate Court allowed the appeal and remanded the matter back for adjudication.

3. It is submitted by the learned counsel for the appellant-/defendant No.1 that the plaintiff has purchased the land from Arjun Sharma vide sale deed dated 13.4.1998. Adjacent to which there are plots of Kailash Chand and Virendra of size 15x60 square feet each total area 30 x 60 square feet. Virendra has already constructed the house on the disputed property on area which is 25x60 square feet and therefore, Kailash Chand and Virendra had only 5x60 square feet of land vacant on spot. Then Kailash Chandra has sold entire share of 15x 60 square feet to defendant No.1 Shashi Mangal. The defendant No. 1 has filed an application under Order VI Rule 9 of C.P.C. for issuing a commission for demarcation of the land before the learned Trial Court but that application has been



rejected by the learned Trial Court vide order dated 24.1.2020. Thereafter, when the plaintiff has filed an application under Order 26 Rule 9 of C.P.C., learned trial Court has allowed the application vide order dated 10.5.2022 and commission has been issued accordingly. When a report of Commissioner has been received the parties have been given an opportunity to cross examine the Commissioner but plaintiff did not cross examine the Commissioner. Defendant No.1 has cross-examined Commissioner in detail. The learned trial Court has treated the Commissioner's report and his statement as part of the record. Thereafter, when the judgment passed by the trial Court vide order dated 12.4.2023, the report of commissioner has been considered and the report has been discarded inasmuch as Commissioner has not given report properly and the signature of the parties were not on the panchnama; therefore, learned Trial Court, while granting declaration, has dismissed the suit for other reliefs.

4. It is further submitted by the learned counsel for the appellant/defendant No.1 that being aggrieved by the said judgement of the Trial Court, the plaintiff has moved an appeal. The appellate court has remanded the matter back to the trial Court by allowing the application filed on behalf of plaintiff under Order 41 Rule 27 and under Order 26 Rule 9 of C.P.C. The impugned order of the appellate court is not tenable, as earlier application for the purpose filed by the plaintiff had already led to the issuance of a



commission. The plaintiff had consented to the report and therefore, did not cross-examine the Commissioner. Hence, once the application for issuing a commission was allowed, there was no occasion for the appellate court to allow the application again on the same ground. Moreover, the application under Order 41 Rule 27 of C.P.C. filed along with some approved layout of town and country planning but these documents could have been obtained and filed earlier by filing an application under Right To Information Act. Since these documents have not been obtained and submitted in evidence earlier during the trial and reasons for such lapse has not been explained therefore, under the provisions of Order 41 Rule 27-(a) and 27-(aa) this application ought not to be allowed by the Appellate Court. The exercise of appellate Court does not fall under the provisions of Order 41 Rule 27(b), it squarely falls under the provisions of (a) and (aa) of C.P.C. The appellate court relied on the judgment in the case of *Union of India v. Ibrahim Uddin & Others*, (2012) 8 SCC 148. However, the relevant paragraphs of *Ibrahim Uddin (supra)* make it clear that in the circumstances of the present case, no application under Order 41 Rule 27 CPC ought to have been allowed. The appellate Court has misread the law laid down in the aforesaid case, therefore, the impugned judgment and decree of the appellate Court is liable to be set aside.

5. Per contra, learned counsel for the respondent has opposed the prayer on the ground that learned Appellate Court has rightly



exercised the power under Order 41 Rule 27(b). He relied upon the judgment passed by the Hon'ble Supreme Court in the case of ***Surjeet Singh & Others vs. Gurwant Kaur & Others, (2015) 1 SCC 665*** and in the case of ***Wadi vs. Amilal and others (2015) 1 SCC 677***, and submitted that the appellate Court can exercise the powers under Order 41 Rule 27 (b) of the C.P.C. even if there is an application on behalf of party or in absence of it. Since, the learned Trial Court has not passed any order on Commissioner report, after cross-examining the Commissioner; therefore, plaintiff had no opportunity to challenge the verdict on it. When the trial Court has disbelieved the report of Commissioner in final judgment, he has filed an appeal against the observation of the trial Court. The learned appellate Court has rightly exercise the powers and remanded the case back to the trial Court by allowing the application under Order 41 Rule 27 and under Order 26 Rule 9 of C.P.C.

6. It is further submitted by the learned counsel for the respondent that actual dispute between the parties is related to the demarcation of the land that cannot be resolved without their being proper commissioner report. Before the trial Court no admitted layout of town and country planning could have been filed therefore, appellate Court has rightly observed that issue can be resolved by appointing the Commissioner for demarcation of suit land in the light of said layout. The appellate Court has rightly



allowed the applications.

7. Heard the learned counsel for the parties and perused the record.

8. It revealed from the material of record that the plaintiff has purchased the disputed plot 13 x60 feet from Arjunlal Sharma by sale deed dated 13.4.1998 which was purchased by the Arjunlal Sharma from Anupam Shukla. The plot purchased by defendant No.1 admeasuring 18 by 60 feet vide order dated 24.7.2017 from his father-in-law Kailashchandra and Kailashchandra has also purchased this plot of Anupam Shukla. Virendra Kumar is the nephew of the Kailashchandra and he has a plot adjacent to the plot of Kailashchandra. Admittedly, Virendra Kumar has constructed the house on his plot and as per allegation in the plaint he encroached plot of Kailashchandra admeasuring 10x60 feet; therefore, the land which have been sold by Kailashchandra in favour of defendant No.1 remains vacant only upto 5 x 60 feet.

9. While as per the averments of defendant No.1, she has purchased the entire land admeasuring 15x60 feet from Kailash Chandra and she is carrying construction over this land only but plaintiff is claiming area measuring 10x 60 feet as the plot purchased by her from Arjunlal Sharma.

10. The averments clearly denotes that this is a case in which the dispute can only be resolved by issuing a commission and getting the measurement of the plots. Without such measurement of the



plots, this issue cannot be resolved between the parties; therefore, learned Trial Court has rightly issued the commission. The learned Trial court has appointed Tehsildar as a Commissioner who has given a report in favour of the plaintiff, therefore, plaintiff has not raised any objection over the report of the Commissioner and also not cross-examined the Commissioner. The trial court has not given any verdict on the Commissioner report. After cross examination of the commissioner by the parties, the Trial Court has disbelieved this report in the judgment dated 12.4.2023 which clearly indicates that there is no opportunity for the parties for seeking remedy against the order of the trial Court on Commissioner's report before passing the final judgment.

11. In the considered opinion of this Court, learned Trial Court, after cross-examination of Commissioner ought to have considered the commissioner report and passed an order with regard to the admissibility of report of Commissioner. In that condition, the parties to the *lis* would have an opportunity to challenge the order of trial Court. The trial Court might have proceeded with to take steps under the provision of Order 26 Rule 10(3) of C.P.C.

12. The provisions of Order 26 Rule 10 of C.P.C. reads as under:

Procedure of Commissioner :- (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence together with his report in writing signed by him.



(2) Report and depositions to be evidence in suit:-
The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

3. Commissioner may be examined in person :- *Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.*

13. The provisions under Order 26 Rule 10(3) of the CPC make it clear that if the court is dissatisfied with the commissioner's proceedings, it may direct further inquiry as it deems fit. In this case, since the commissioner's report was considered not before the final judgment, therefore, there was no occasion for the trial court to exercise its power under Order 26 Rule 10(3) of the CPC.

14. In the case of ***Union of India vs. Ibrahim Uddin and another (2012) 8 SCC 148*** the relevant para Nos. 36 to 42 of the said judgment reads as under:

36. The general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the



conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. (Vide **K. Venkataramiah v.A. Seetharama Reddy** [AIR 1963 SC 1526] , **Municipal Corpn. of Greater Bombay v. Lala Pancham** [AIR 1965 SC 1008] , **Soonda Ram v. Rameshwarlal** [(1975) 3 SCC 698 : AIR 1975 SC 479] and **Syed Abdul Khader v. Rami Reddy** [(1979) 2 SCC 601 : AIR 1979 SC 553] .

37. The appellate court should not ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide **Haji Mohammed Ishaq v. Mohd. Iqbal and Mohd. Ali and Co.** [(1978) 2 SCC 493 : AIR 1978 SC 798])

38. Under Order 41 Rule 27 CPC, the appellate court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it



can pronounce judgment in a case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. (Vide *Lala Pancham* [AIR 1965 SC 1008] .)

39. It is not the business of the appellate court to supplement the evidence adduced by one party or the other in the lower court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide *State of U.P. v. Manbodhan Lal Srivastava* [AIR 1957 SC 912] and *S. Rajagopal v. C.M. Armugam* [AIR 1969 SC 101].)

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a “substantial cause” within the meaning of this Rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. The words “for any other substantial cause” must be read with the word “requires” in the beginning of the sentence, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this Rule will apply e.g. when evidence has been taken by the lower court so



imperfectly that the appellate court cannot pass a satisfactory judgment.

42. Whenever the appellate court admits additional evidence it should record its reasons for doing so (sub-rule (2)). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the court of further appeal to see, if the discretion under this Rule has been properly exercised by the court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the Rule.

43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough compliance with the requirement as to recording of reasons.

15. Learned counsel for the plaintiff has also relied on the judgment of the Supreme Court in case of *Surjeet Singh (supra)* The relevant Paragraph 21 of the said judgment is reproduced below:-

21. At this juncture, it is necessary to clarify that sub-rule (1) (a) of Rule 27 of Order 41 is not attracted to the case at hand



inasmuch as the documents were not taken on record by the trial court and error, if any, in the said order does not survive for reconsideration after the High Court has given the stamp of approval to the same in civil revision. Similarly, sub-rule (1)(aa) would not be applicable as the party seeking to produce an additional evidence on the foundation that despite exercise of due diligence, such evidence was not within his knowledge or could not, after exercise of due diligence, be produced by him at the time when the decree appealed against was passed does not arise, for the documents were sought to be produced before the trial court. Cases may arise under sub-rule (1)(b) where the appellate court may require any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. However, exercise of the said power is circumscribed by the limitations specified in the language of the Rule. It is the duty of the court to come to a definite conclusion that it is really necessary to accept the documents as additional evidence to enable it to pronounce the judgment. The true test is, as has been held in ***Parsotim v. Lal Mohar*** [(1930-31) 58 IA 254 : (1931) 34 LW 76 : AIR 1931 PC 143], whether the appellate court was able to pronounce the judgment from the materials before it without taking into consideration the additional evidence sought to be adduced. The same principle has been accepted by a three-Judge Bench in ***Arjan Singh v. Kartar Singh*** [1951 SCC 178 : AIR 1951 SC 193].

16. Learned counsel for the plaintiff has also relied upon the judgment passed by the Supreme Court in case of ***Wadi (supra)*** The relevant paragraph 5 of the said judgment is reproduced as under:

5. The learned trial Judge framed as many as six issues, recorded the evidence and, eventually, dismissed the suit filed by the plaintiff. It is apt to mention here that during the pendency of the suit the plaintiff had filed an application



under Section 151 of the Code of Civil Procedure (CPC) for filing of additional documents with the prayer that the said documents should be accepted as additional evidence. It was stated in the application that in her evidence she had already deposed that she had got Rs 9,00,000 from her husband's brother, Gian Singh, and he was having Rs 1,00,000 in her account bearing No. 1313. It was also averred that she was under the impression that her father was prosecuting the case and had filed the statement of accounts bearing No. 1-29 of Gian Singh and of the plaintiff's bearing No. SB/17274 but inadvertently her father could not produce the said statement of accounts and passbooks, and she had no knowledge about the same. In the said backdrop a prayer was made for acceptance of the documents.

17. In this respect the provisions of under Order 41 Rule 27 is pertinent which reads as under:

27. Production of additional evidence in Appellate Court:

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if —

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to



pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

18. Keeping in view the law laid down in aforesaid cases, the perusal of the judgment of the appellate Court shows that it has exercised the power under Order 41 Rule 27(b) while allowing these applications as reflected from para-27 to 31 of the impugned judgement. Rule 27 (1) (b) of Order 41 of C.P.C. clearly laid down that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate Court but if appellate Court requires in a document to be produced or any witness to enable it to pronounce judgment or for any substantial cause then appellate Court may allow such evidence or document to be produced or witness to be examined.

19 Since the dispute between the parties pertains to the measurement of plots situated in the colony, hence, the approved layouts of the Town and Country Planning Department is a relevant document. In the considered opinion of this Court, issuance of a commission for measurement with reference to the said approved map is sine qua non to effectively resolve the issue between the parties. Therefore, the observation of the appellate Court in this regard is well-grounded and lawful. For exercising the power under



Order 41 of Rule 27(b) of C.P.C. it is not necessary that the Court to pass a *suo motu* order, the exercise of such power may even be sought by way of an application. What is important is that the appellate Court has satisfied and convinced to exercise such power under the said provisions.

20. Hence, having regard to the law laid down in the aforesaid cases and in the attending facts and circumstances of the case and nature of the dispute, learned appellate Court had rightly exercise the power under Order 41 Rule 27(1)(b) of C.P.C. and remanded back the matter after allowing the application under Order 41 Rule 27 and 26 Rule 9 of C.P.C. No ground is made out for interference with the findings of the appellate Court.

21. Hence, the appeal, being devoid of merit, is hereby dismissed.

(RAJENDRA KUMAR VANI)
JUDGE

Ahmad/-