

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

BEFORE

HON'BLE SHRI JUSTICE PRANAY VERMA

SECOND APPEAL No. 204 of 2002

BETWEEN:-

GANPATLAL S/O HIRALAL BHAVSAR,

AGED ABOUT 44 YEARS, OCCUPATION:

**SERVICE KHANPURA DISTRICT MANDSAUR (MADHYA
PRADESH)**

.....APPELLANT

***(BY MR AK.SETHI, SENIOR COUNSEL WITH MR HARISH
JOSHI, ADVOCATE)***

AND

GANGA BAI W/O GORDHANLAL MAHAJAN,

AGED ABOUT 42 YEARS,

1. OCCUPATION: HOUSEHOLD WORK

**VILLAGE RICHHALAL MUHA TEHSIL AND DISTRICT
MANDSAUR (MADHYA PRADESH)**

SMT. DHAPURBAI W/O PREMSUKH PATIDAR,

AGED ABOUT 47 YEARS, OCCUPATION:

2. HOUSEHOLD VILLAGE RICHHALAL MUHA

TEHSIL AND DISTRICT MANDSAUR (MADHYA PRADESH)

3. NEMICHAND S/O AMARCHAND KOTHARI,

AGED ABOUT 52 YEARS, OCCUPATION:

BUSINESS JIVAJIGANJ, DISTRICT MANDSAUR (MADHYA PRADESH)

.....RESPONDENTS

(BY SHRI VK.JAIN-ADVOCATE)

Reserved on 27-06-2022

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

J U D G M E N T

(Delivered on 31-10-2022)

01. This appeal under Section 100 of the CPC has been preferred by plaintiff against the judgment and decree dated 01-02-2002 passed in Regular Civil Appeal No.26-A/2000 by the First Additional District Judge, Mandsaur affirming the judgment and decree dated 10-03-2000 passed in Civil Suit No. 70-A/1996 by the IIIrd Civil Judge, Class-I, Mandsaur, whereby his claim for declaration was dismissed.

02. The facts of the case in brief are that the plaintiff instituted an action before the trial Court submitting that he is the owner of the suit land bearing Survey No.79, Gram Kityani, Tehsil and District Mandsaur having purchased the same from its previous owner Prakash Chandra by registered sale deed dated 14-07-1992. The defendants 1 and 2 do not

have any concern with the suit land yet are contending that they have purchased the same from defendant No.3 and shall take possession of the same. Relief was claimed for declaration of his title to the suit land and for permanent injunction restraining the defendants from interfering with his possession over the suit land and from alienating the same.

03. The defendants 1 and 2 contested the plaintiff's claim by filing their written statement submitting that plaintiff is not the owner of the suit land instead defendant No.1 had purchased the same from its previous owner Nemichand in the year 1991 and had thereafter sold the same in favour of defendant No.2 by a registered sale deed dated 22-12-1989 followed by delivery of possession who is hence the owner thereof. Plaintiff is also not in possession of the suit land hence his claim for declaration of title and permanent injunction in absence of relief of possession is not maintainable.

04. The trial Court upheld plaintiff's title to the suit land. However, it further held that plaintiff was not in possession of the suit land on the date of filing of the suit and instead defendant No.2 was in possession thereof and since plaintiff has not sought relief of possession, the claim is hit by the proviso to Section 34 of the Specific Relief Act as plaintiff has

not claimed the further and better relief available to him. On such findings, plaintiff's claim was dismissed.

05. In appeal preferred by plaintiff, the only ground raised by him was that the trial Court ought to have afforded an opportunity to him for claiming relief of possession from the defendants and ought not to have straightaway dismissed the suit. The finding of plaintiff not being in possession of the suit land on the date of suit was not challenged by him. The lower appellate Court has dismissed the appeal observing that since plaintiff had himself not sought any amendment in the plaint either before the trial Court or at the appellate stage for claiming relief of possession, no such opportunity could have been given to him by either of the Courts. It is held that it is not for the Court to give such an opportunity prior to dismissing the suit.

06. By order dated 11-02-2003 the instant appeal was admitted for final hearing on the following substantial questions of law :-

- “1. Whether lower appellate Court was justified in confirming the decree passed by the trial Court which had dismissed the suit?
2. Having held the plaintiff to be the owner of the suit property in paragraph-4, whether lower appellate Court was justified in still dismissing the suit on the ground that possession of this suit property was not sought by way of relief in the plaint ?

3. Was it not obligatory upon the Court to have granted opportunity to the appellant to seek relief for possession once it was held that defendant No.2 was in possession of the suit property ?”

07. During pendency of this appeal the plaintiff has filed an application under Order 6 Rule 17 of the CPC on 01-04-2002 to amend the plaint to claim relief of possession of the suit land. The said application has been straneously opposed by learned counsel for the defendants.

08. Learned Senior Counsel for the plaintiff/appellant submits that the trial Court committed a gross error of law as well as procedure in straightaway dismissing plaintiff's claim upon recording a finding that he is not in possession of the suit land and since such relief has not been sought for by him, his claim is hit by proviso to Section 34 of Specific Relief Act . It was incumbent upon the trial Court to have first afforded an opportunity to the plaintiff to amend his plaint to claim relief of possession and only upon his failure to avail such an opportunity, the claim could have been dismissed. This aspect of the matter has also not been adverted to in its proper prospective by lower appellate Court. In any case in this appeal plaintiff has filed an application seeking amendment of the plaint to claim relief of possession which deserves to

be allowed. The proviso to amended Order 6 Rule 17 of the CPC would not be applicable to the present case since the suit was instituted in the year 1994. It is hence submitted that the amendment application be allowed and the matter be remitted back to the trial Court for decision afresh. Reliance has been placed by him on the decision of this Court in Kalyansingh Vs. Vakilsingh and others, AIR 1990 M.P. 295, Shiv Kumar Vs. Ramkatori and others, 1977 JLJ 33, of the Hon'ble Apex Court in Sampath Kumar Vs. Ayyakannu and another AIR 2002 SC 3369 and Nanduri Yogananda Lakshminarasimhachari Vs. Sri Agastheswaraswamiyaru, AIR 1960 SCC 622.

09. Per contra learned counsel for the defendants/respondents has submitted that the Courts below have not committed any error in dismissing plaintiff's claim for not seeking relief of possession of the suit land despite not being in possession. On the contrary, plaintiff claimed to be in possession of the suit land which was categorically denied by the defendants who claimed possession since 1989. The plaintiff could have very well sought relief of possession but did not do so and took a chance in the matter and it is not open for him to contend at this stage that the trial Court should have afforded him opportunity to claim relief of

possession. Even before the lower Appellate Court no application for amendment of the plaint was filed by plaintiff which has been filed in this appeal which is admittedly barred by time and cannot be allowed at this stage. It was not the duty of the Courts below to have afforded opportunity to the plaintiff to amend the plaint ; rather it was the duty of plaintiff to claim relief as was necessary who hence now cannot turn around and blame the Court for him not seeking such relief.

10. I have heard the learned counsel for the parties and have perused the record.

11. The crucial question for determination in this appeal is whether upon recording a finding to the effect that plaintiff was not in possession of the suit land on the date of suit and had not sought relief of possession, his claim ought to have been straight away dismissed by the trial Court being hit by proviso to Section 34 of Specific Relief Act, 1963 or it was obligatory upon it to have granted an opportunity to the plaintiff to seek relief of possession before dismissing the suit.

12. In this regard the judgments of various Courts which have dealt with this issue need to be noticed. In **AIR 1990 MP 295, Kalyansingh Vs. Vakilsingh and others** this Court has held as under :-

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

(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”

21. 21. It has to be stated that during the course of the hearing, the learned counsel for the plaintiff/appellant did make a prayer for being afforded an opportunity to amend the plaint. In the opinion of this Court, such an opportunity ought not to be denied to the plaintiff. It is, therefore, directed that the plaintiff may move an appropriate application for necessary amendment in the plaint so as to seek the further relief as to possession. A fortnight's time is granted for the purpose. “

13. In **Ram Pramod Kacchi Vs. Gayadeen and others, (2004) 4 MPHT 493** this Court held as under :-

“In any case, as has been held in S. Bhagat Singh v. Satnam Transport Co. Ltd. and Ors., AIR 1961 Punjab 278, suit seeking declaration and injunction ought not to have been dismissed with reference to Section 34 of the Specific Relief Act. Instead, plaintiff/appellant should have been given opportunity to amend his plaint. “

14. The Division Bench of **Punjab & Haryana High Court in Bhagatsingh Vs. The Satnam Transport Company Ltd., AIR 1961 P& H 278** held as under :-

“17. However, as I look at the matter, in a case where the plaintiff who is able to sue for further relief, omits to do so and sues for a declaration alone, and the proviso to Section 42 of the Specific Relief Act is attracted, the Court should not dismiss the suit but should give the plaintiff an opportunity to amend his plaint so as to include a prayer for consequential relief. It is then for the plaintiff either to amend the plaint and include the prayer for consequential relief, or face the possibility of the suit being dismissed. But if

after an opportunity to amend the plaint has been given to the plaintiff, he fails to avail of that opportunity, then there is no alternative but to dismiss the suit. This view finds support from Ham Sadan Biswas v. Mathura Mohan Hazra, AIR 1925 Cal 233; Annapurna Dasi v. Sarat Chandra, AIR 1942 Cal 394; Sabdarsinghji v. Ganpatsingji, ILR 14 Bom 395; Manohar Singh v. Parmeshari, AIR 1949 Nag 211; and Mohammad Ismail v. Liyaqat Hussain, AIR 1932 All 316. “

15. The aforesaid decision was followed by the Punjab and Haryana High Court in **D.A.V College Hoshiarpur Society Vs. Sarvada Nand Anglo Sanskrit Higher Secondary School, Managing Committee, Bassi Kallan, AIR 1967 Punjab & Haryana 501** in which it was held as under :-

“6. The learned counsel for the appellant finally urged that the learned Additional District Judge should not have dismissed the suit after coming to the conclusion that it was not maintainable in the present form but should have remanded the same to the trial Court with a direction that the plaintiff should be given an opportunity to amend the plaint so as to bring it in the proper form. In this connection he relied on the cases of Mst. Rukhmabai v. Laxminarayan, AIR 1960 SC 835 and Bhagat Singh v. Stanam Transport Co., Ltd., 1960-82 Pun LR 924 = (AIR 1961 Punj 278), which no doubt support his view point. The learned counsel For the respondent and nothing to urge against this part of his prayer. I also feel that the learned Additional District Judge instead of dismissing the plaintiffs suit straight-away should have remanded it to the trial Judge with the necessary directions. “

16. In **Lachhman Das and others Vs. Arjan Singh, 1962 SCC Online Punjab 190**, also it was held as under :-

"8. The next question which arises for consideration is as to whether the plaintiff's suit should be dismissed because of his failure to ask for further relief in the shape of cancellation of rent note or whether the suit should be remanded, as prayed for in the alternative by the learned counsel for the respondents, for allowing an opportunity to the plaintiff to amend his plaint so as to include a prayer for a consequential relief. This matter has been dealt with in a Division Bench case *S. Bhagat Singh v. Santam Transport Co. Ltd. and others*, (supra) referred to above. The headnote, which has bearing on this case, reads as under :- "In a case where the plaintiff who is able to sue for further relief, omits to do so and sues for a declaration alone and the proviso to Section 42 is attracted, the Court should not dismiss the suit but should give the plaintiff an opportunity to amend his plaint so as to include a prayer for consequential relief. It is then for the plaintiff either to amend the plaint and include the prayer for consequential relief, or face the possibility of the suit being dismissed. But if after an opportunity to amend the plaint has been given to the plaintiff, he fails to avail of that opportunity, then there is no alternative but to dismiss the suit."

9. Following the above authority, I am of the view that an opportunity should be given to the plaintiff to amend his plaint so as to include a prayer for consequential relief. It is then for the plaintiff either to amend the plaint and to include the prayer for consequential relief or face the possibility of the suit being dismissed. But if after an opportunity, then there is no alternative but to dismiss the suit."

17. The **Orissa High Court in Mohd.Aftabuddin Khan and others**

Vs, Smt Chandan Bilasini and another, AIR 1977 Orissa, 69 held as

under :-

"15. Finding this defect and relying upon the general prayer in the plaint and keeping in view the power of the Court to grant such reliefs as a party before it may be found entitled to, the Court directed the plaintiffs to recover possession on payment of the requisite court-fees. We agree with Mr. Dutta that if an amendment of the plaint had been asked for, it would have been more appropriate than the Court exercising suo motu jurisdiction. But we

are not inclined to agree that the Court had no jurisdiction to do what has been done. Mr. Dutta was not in a position to indicate to us what prejudice has been caused to the defendants by not requiring the plaintiffs to make a formal application for amendment for addition of the relief of recovery of possession and in not giving an opportunity to the defendants to file a counter, In this view of the matter, we are not inclined to accept the contention of Mr. Dutta that the learned Single Judge committed an error of jurisdiction in allowing the relief of recovery of possession."

18. In **Rama Chandra Mohapatra Vs. Narayan Chandra Pradhan and others, 2011 AIR CC 844** it was held by the Orissa High Court as under :-

“8. The learned Trial Court has also referred to the decision of this Court in the case of Kishroe Chandra Pati Vs. The Orissa Road Transport Com.Ltd., (1989) 31 OJD 8 (Civil) and in the said judgment, this Court came to hold that instead of directing dismissal of the suit in the first instance for not seeking relief of declaration of title, the plaintiff should be called upon to pay the necessary Court fee for making necessary amendment in the plaint seeking relief of declaration of title.

9. In view of the aforesaid judgment, the Trial Court instead of dismissing the suit, granted the plaintiff an opportunity to make necessary amendment in the prayer and consequently to pay the necessary Court fee thereof.”

18. The Hon’ble Supreme Court in **Mst. Rukhmabai Vs. Lala Laxminnarayan and others, AIR 1960 SC 335** observed as under :-

“30. It is a well-settled rule of practice not to dismiss suits automatically but to allow the plaintiff to make necessary amendment if he seeks to do so.”

19. The Lahore High Court also in **Bua Ditta Vs. Ladha Mal, AIR 1919 Lahore 63** in similar circumstances directed the trial Court to allow the plaintiff an opportunity to amend his plaint so as to include the necessary prayer for consequential relief against the defendant and to value his relief and to pay Court fees on his valuation.

20. The Delhi High Court in **M/s Maharaji Educational Trust and another Vs. Punjab and Sind Bank and another, AIR 2006 Delhi 226**

also adopted a similar course while observing as under :-

"35. The plaintiffs have failed to comply with the provisions of Section 34 of the Act and have failed to ask for a further and necessary relief. The suit normally would be liable to be dismissed. However, in the interest of justice an opportunity is granted to the plaintiffs to amend the suit within two weeks from today. In the event the plaintiff fails to take such appropriate steps, the suit of the plaintiffs shall be liable to be dismissed."

21. Thus, it has been the consistent view that where plaintiff who is able to sue for further relief omits to do so and proviso to Section 42 of the Specific Relief Act, 1963 becomes applicable, the Court should not dismiss the suit straight-away but should afford an opportunity to the plaintiff to amend his plaint to claim the consequential relief. It is then for the plaintiff to amend the plaint and claim the consequential relief or to face the possibility of the suit being dismissed. Even if after being

afforded such an opportunity the plaintiff fails to avail the same then his suit has to be dismissed. In any case the suit should not be dismissed immediately upon recording of finding that the same is barred by the proviso to Section 34 of the Specific Relief Act.

22. The trial Court has hence committed gross illegality in dismissing the claim of plaintiff upon holding that the same is barred by proviso to Section 34 of the Specific Relief Act, 1963 as he has not claimed relief of possession despite not being in possession. The appellate Court has also failed to consider this aspect of the matter in its true perspective. Thus, I am of the opinion that plaintiff ought to be afforded an opportunity to amend his plaint to claim the consequential relief. As a result the substantial question of law No.3 is answered in favour of the plaintiff and against the defendants in view of which substantial question of law No.1 and 2 need not be answered.

23. Consequently, the appeal is allowed. The judgment and decree passed by both the Courts below are set aside and the matter is remanded back to the trial Court. The application under Order 6 Rule 17 of the CPC filed by plaintiff in this appeal be also sent to the trial Court

alongwith its record who shall decide the same in accordance with law and shall proceed further accordingly.

There shall be no order as to costs.

(PRANAY VERMA)
JUDGE

RASHMI