

**IN THE HIGH COURT OF MADHYA PRADESH  
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AT INDORE  
BEFORE  
HON'BLE SHRI JUSTICE VIJAY KUMAR SHUKLA  
ON THE 5<sup>th</sup> OF JULY, 2023  
MISC. APPEAL No. 1434 of 2006**

**BETWEEN:-**

- 1. SMT. KAMLA BAI Wd/O GORI SHANKARJI  
(DELETED AS PER COURT ORDER)**
- 2. MAKHAN S/o JAGANNATHJU, AGED 55  
YEARS, OCCUPATION AGRICULTUR**
- 3. MADAN S/o JAGANNATHJI, AGED 45  
YEARS, OCCUPATION AGRICULTURE**
- 4. GHANSHYAM S/O RAMPRASADJI,  
AGED 45 YEARS, OCCUPATION  
AGRICULTURE,  
ALL R/o VILLAGE LEKODA, TAHSIL AND  
DISTRICT UJJAIN (MADHYA PRADESH)**

**...APPELLANTS/DEFENDANTS**

**(BY SHRI A.S. KUTUMBALE, SENIOR ADVOCATE WITH SHRI B.S.GANDHI -  
ADVOCATE).**

**AND**

- 1. BABULAL S/o KASTURJICHANDJI JAIN  
(DELETED AS PER COURT ORDER)**
- 2. CHANDRABAI W/o RAMPRASADJI,  
AGED 70 YEARS, OCCUPATION HOUSEHOLD**
- 3. OMPRAKASH S/O RAMPRASADJI,  
AGED 40 YEARS, OCCUPATION -  
AGRICULTURE**

**RESIDENT OF VILLAGE LEKODA, TAHSIL  
AND DISTRICT UJJAIN (MADHYA PRADESH)**

**.....RESPONDENTS/DEFENDANT NOS.4 & 6**

**(BY SHRI RASIK SUGANDHI - ADVOCATE)**

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

**ORDER**

The present appeal is filed under Order 41 Rule 23 of CPC against the order dated 31.3.2006 passed by I ADJ, Ujjain in Civil Appeal No.31A/2005 whereby the case has been remanded back to the trial court.

2. Facts of the case are that plaintiff/respondent filed a suit for declaration and permanent injunction stating that the plaintiff had a house in village Lekoda, district Ujjain. Adjacent to the house of the plaintiff, the house of the defendant-appellant No.1 is situated. On the right side of the plaintiff, the house of its open land (Bada) of the ownership of the plaintiff is situated. Size of that land is 45 x 22 ft. This disputed land has been shown in the map in red line. Boundaries of the land is described in para No.1 of the plaint. It is further pleaded that appellant/defendant Nos.1,2 and 3 tried to forcibly take possession of the land and the defendant/appellant Nos.4,5 and 6 opened a door and on raising objection by the plaintiff the door was closed but they are challenging the title of the plaintiff, hence they were made parties in the suit.

3. The plaintiff claimed that he has got this land from his father which he had purchased 40-45 years ago from Babulal Lohar in Rs.10/- and since then the plaintiff is in possession of the suit land. Earlier the plaintiff used that land for throwing garbage of the house. Later on father of the plaintiff was growing vegetables on it. Plaintiff got permission from Panchayat to construct a house and the defendants raised objection and the fact was admitted that the land was of the possession of the plaintiff but on lapse of time price of the land has been risen, therefore, the defendants are

trying to show that the land in dispute is of their ownership and attempting to use the same. The defendants are trying to take possession of the land on which proceedings under section 145 Cr.P.C. and case No. 1488/89 was registered. The court did not decide the dispute and dismissed the case. Taking advantage of the decision of the court the defendants are trying to take possession of the land in dispute and using the same, therefore the suit was filed

4. The defendant Nos.1 to 3/appellants and defendant Nos.4 to 6 filed their separate written statements.

5. The defendant Nos.1 to 3 denied the plaint allegations. Plaintiff filed an application for permission to construct the house. Ramprasad raised objection. Plaintiff had agreed to sell the land dispute in Rs.10,000/- with one Ambaram and when Ambaram tried to wire fencing the land in dispute the defendants raised objection and report was lodged. Upon this the police started proceedings under section 145 Cr.P.C.. Plaintiff did not make valuation of the suit and did not pay court fees.

6. In both the written statements it is pleaded that their ancestor Chhiterji had two sons – Jagannath and Kashiram. Jagannath had two sons defendant Nos. 2 and 3 and Ramprasad was son of Jagannath and defendant Nos. 4 to 6 are their heirs. There was a partition between Jagannath and Ramprasad, according to which the defendants are using and enjoying the land. Ramprasad was ordered by Panchayat to close the door, against which an appeal was preferred before the SDO, Ujjain which was decided on 31.12.1975 and matter was remanded back to Panchayat for decision on merits which has not been heard till date. Against the order of SDO, a revision was filed by the Gram Panchayat which has also been dismissed. The land in dispute is in possession and ownership of the defendants. The defendants are in possession of the land since more than 50 years in the knowledge of the plaintiff, hence on the basis of adverse possession also the defendants have perfected their title. Suit is time barred and prayed to

dismiss the suit. Learned trial court after recording the evidence of the parties dismissed the suit, against which plaintiff preferred an appeal which was allowed and the case has been remanded for fresh decision.

7. Counsel for the appellants submits that the suit was dismissed mainly on the ground that plaintiff/respondent has failed to prove his title over the suit land and the suit was barred by limitation. The appellate court has remanded the case for fresh decision mainly on the ground that plaintiff's application under Order 16 Rule 1 CPC was not considered properly by which the respondent-plaintiff has sought to produce documentary evidence to prove his ownership. The appellate court did not consider the issue of limitation. It is further argued that appellate court has failed to consider that the issues were framed in the year 1993 and plaintiff filed application under Order 16 Rule 1 CPC after 7 years and the plaintiff has made an attempt to fill up the lacunas by the said application as he has no evidence to prove his title over the suit land. Counsel for the appellant further argued that application filed by the respondent-plaintiff under Order 16 Rule 1 CPC was rejected by order dated 16.8.2000. Against the said order, the plaintiff preferred revision before this Court which was registered as Civil Revision No. 952/2000 and the same was not entertained on the ground that same was filed against an interlocutory order and plaintiff was granted liberty to file review application by order dated 16.8.2000. Thereafter the plaintiff/respondent filed a review application before the trial court which was dismissed. The same was not challenged by the plaintiff and the said order attained finality. Thereafter the plaintiff also filed an application under section 65 of the Evidence Act for leading secondary evidence which was also rejected and the said order attained finality. On the basis of aforesaid submission, it is argued that by the impugned order, the appellate court has erred in directing for remanding of the case by allowing the application under Order 16 Rule 1 CPC with the cost of Rs.500/- and giving him opportunity to summon the

documents from Gram Panchayat and the trial court has been directed to give opportunity to adduce evidence and thereafter to decide the suit. The impugned order of remand is nothing but an order to fill up the lacuna of the plaintiff. The plaintiff has not filed any document to show ownership of his ancestors. Even Exhibit P/1 to P/18 filed by the plaintiff donot indicate the title over the land in question. They are the documents which simply indicate filing of the application for permission to construct the house which is not in dispute and the same does not relate to the disputed vacant portion of the land. Apart from that, no revenue record has been filed to show the name of ancestors recorded in the revenue record or their possession on the vacant land.

8. The trial court has framed as many as 10 issues and the issue No.4 was relating to the issue that whether the plaintiff had inherited the land in question from his ancestors and after appreciation of evidence the trial court recorded a finding that the same was not proved by the plaintiff and the issue No.7 was relating to the limitation and same was considered in para-33 of the order of the trial court that according to the plaintiff, the dispute had arisen in the year 1976 and therefore, the suit was barred by limitation. The appellate court has not dealt with second issue of limitation and therefore, the order of remand is bad in law. In support of his submission, he has placed reliance on the judgment passed by the Apex Court in the case of **Municipal Corporation, Hyderabad VS. Sunder Singh, AIR 2008 SC 2579**. In the said case, the application for adducing secondary evidence was rejected. The appeal was allowed and the matter was remanded back to the trial court by High Court, suit not decided on preliminary issue, the Apex Court held that order 41 Rule 23A in such cases is not available. He also referred to the judgment passed by the Apex Court in the case of **Shivkumar and others VS. Sharanabasappa and others, AIR 2020 SC 3102**. In the said case also the Apex Court held that where the parties had adduced all their evidence, whatever they wished to;

and it had not been the case of the plaintiffs-appellants that they were denied any opportunity to produce any particular evidence or if the trial was vitiated because of any alike reason. The High Court has meticulously examined the same evidence and the same circumstances and has come to a different conclusion that appears to be sound and plausible, and does not appear suffering from any infirmity. There was no reason or occasion for the High Court to consider remanding the case to the trial court.

9. Counsel for the respondents supported the order of remand and submitted that court has rightly remanded the matter as the plaintiff's application under Order 16 Rule 1 CPC to summon the record from Panchayat regarding title was wrongly denied. He submits that plaintiff could prove his title through the documents which were sought to be summoned from the Panchayat.

10. I have heard learned counsel for the parties at length.

11. I find that the order of remand passed by the appellate court is erroneous and not justified. The order of remand cannot be passed to fill up the lacuna. The plaintiff has filed a suit for declaration of title and permanent injunction but he has failed to adduce any evidence to prove his title. The documents exhibited from Annx.P/1 to P/18 do not indicate any title of his ancestors. The plaintiff's application under Order 16 Rule 1 CPC was dismissed. Against the said order, the review was also dismissed, which was not challenged and the same attained finality. From going through the application under Order 16 Rule 1 CPC, this Court does not find any averment that what type of record of title of plaintiff's ancestors are available with the Panchayat. The documents only indicate that application was filed before Panchayat for permission to construct the house which is not in dispute. The dispute is in relation to adjacent land for which no document was exhibited. The Apex Court in the case of Shivkumar (supra) in para No.25.4 has held as under :-

25.4. A conjoint reading of Rules 23, 23A and 24 of Order XLI brings forth the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an Appellate Court is to follow the mandate of Rule 24 of Order XLI CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a re-trial is considered necessary that the Appellate Court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates the life of the litigation without serving the cause of justice. An order of remand only on the ground that the points touching the appreciation of evidence were not dealt with by the Trial Court may not be considered proper in a given case because the First Appellate Court itself is possessed of jurisdiction to enter into facts and appreciate the evidence. There could, of course, be several eventualities which may justify an order of remand or where remand would be rather necessary depending on the facts and the given set of circumstances of a case.

25.4.1. The decision cited by the learned Counsel for the appellants in the case of Mohan Kumar (*supra*) is an apt illustration as to when the Appellate Court ought to exercise the power of remand. In the said case, the appellant and his mother had filed the civil suit against the Government and local body seeking declaration of title, perpetual injunction and for recovery of possession in respect of the land in question. The Trial Court partly decreed the suit while holding that the plaintiffs were the owners of the land in dispute on which trespass was committed by the respondents and they were entitled to get the encroachment removed; and it was also held that the Government should acquire the land and pay the market value of the land to the appellant. Such part of the decree of the Trial Court was not challenged by the defendants but as against the part of the decision of the Trial Court which resulted in rejection of the claim of the appellant for allotment of an alternative land, the appellant preferred an appeal before the High Court. The High Court not only dismissed the appeal so filed by the appellant but proceeded to dismiss the entire suit with the finding that the plaintiff-appellant had failed to prove his ownership over the suit land inasmuch as he did not examine the vendor of his sale deed. In the given circumstances, this Court observed

that when the High Court held that the appellant was not able to prove his title to the suit land due to non- examination of his vendor, the proper course for the High Court was to remand the case to the Trial Court by affording an opportunity to the appellant to prove his title by adducing proper evidence in addition to what had already been adduced. Obviously, this Court found that for the conclusion reached by the High Court, a case for re-trial was made out particularly when the Trial Court had otherwise held that the appellant was owner of the land in dispute and was entitled to get the encroachment removed as also to get the market value of the land. Such cases where re- trial is considered necessary because of any particular reason and more particularly for the reason that adequate opportunity of leading sufficient evidence to a party is requisite, stand at entirely different footings than the cases where evidence has already been adduced and decision is to be rendered on appreciation of evidence. It also remains trite that an order of remand is not to be passed merely for the purpose of allowing a party to fill- up the lacuna in its case.

11. In the light of the aforesaid facts and the law laid down by the Apex Court, the order of remand cannot be sustained. The order of remand cannot be passed merely for the purpose of allowing a party to fil up lacuna in the case and further, the appellate court while remanding the case did not decide the issue relating to limitation. In view of aforesaid, the appeal is allowed and impugned order is set aside.

**(VIJAY KUMAR SHUKLA)**  
**JUDGE**