

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

BEFORE

HON'BLE SHRI JUSTICE PRANAY VERMA

MISC. APPEAL No. 2152 of 2021

BETWEEN:-

**OMPRAKASH S/O BALWANT SINGH,
AGED ABOUT 48 YEARS,
OCCUPATION: AGRICULTURIST, R/O
VILLAGE RATWA, TEHSIL AND DIST. DHAR
(MADHYA PRADESH)**

.....APPELLANT

(BY SHRI ABHIJEET SINGH CHOUHAN, ADVOCATE)

AND

- ASHOK S/O CHOKHELAL MALI,
AGED ABOUT 42 YEARS,**
- 1. OCCUPATION: AGRICULTURIST,
R/O VILLAGE NAUGAON,
DIST. DHAR (MADHYA PRADESH)**

**SHANKAR S/O NANDRAM MALI,
AGED ABOUT 40 YEARS,**

 - 2. OCCUPATION: AGRICULTURIST,
R/O VILLAGE MATLABPURA,
TEH. AND DISTT. DHAR
(MADHYA PRADESH)**

**RAMESH S/O SHANKARLAL MORE,
AGED ABOUT 38 YEARS,**

 - 3. OCCUPATION: AGRICULTURIST,
R/O VILLAGE MATLABPURA,
TEH. AND DISTT. DHAR (MADHYA PRADESH)**

- STATE OF M.P. THROUGH COLLECTOR,
4. COLLECTOR OFFICE DHAR
(MADHYA PRADESH)
UTTAMCHAND S/O SHIVNARAYAN KUMHAR,
5. AGED ABOUT 58 YEARS,
OCCUPATION: AGRICULTURIST,
R/O HARDA DISTT. HARDA (MADHYA PRADESH)
GOVIND S/O SHIVAJI VISHNOI,
6. AGED ABOUT 65 YEARS,
OCCUPATION: AGRICULTURIST,
R/O HARDA, DISTT. HARDA (MADHYA PRADESH)
RAJESH S/O LAKSHMINARAYAN KULMI,
AGED ABOUT 43 YEARS,
7. OCCUPATION: AGRICULTURIST,
R/O VILLAGE EKULDA (DIGTHAN),
TEH. AND DISTT. DHAR (MADHYA PRADESH)

.....RESPONDENTS

(RESPONDENTS NO.1, 5 TO 7 BY SHRI MOHAN SHARMA, ADVOCATE)

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

J U D G E M E N T
(Delivered on 31.10.2022)

1. This appeal has been preferred by the plaintiff being aggrieved by the order dated 04.03.2021 passed in Civil Appeal No.46/2019 by the IInd Additional District Judge, District Dhar whereby the judgment and decree dated 30.08.2019 passed in Civil Suit No.36-A/2016 by the Ist Civil Judge, Class-I, District Dhar has been set aside and the matter has

been remanded back to it with the directions as contained therein.

3. Facts in brief are that the plaintiff instituted an action against defendants for declaration that the sale deeds dated 28.01.2014 and 17.07.2015 executed with respect to the suit land are not binding upon him and for permanent injunction restraining the defendants from interfering with his possession over the suit land and from alienating the same in favour of any third person. The defendants 1 to 3 contested the claim by filing their written statement. The defendants 5 to 7 also contested the claim by filing their separate written statement. Upon framing of issues by the trial Court the parties led oral as well as documentary evidence in support of their respective contentions.

4. Upon conclusion of the trial, by judgment and decree dated 30.08.2019 the plaintiff's claim was decreed by the trial Court being aggrieved by which defendants 1, 5 to 7 preferred an appeal under Section 96 of the CPC before the lower appellate Court. During pendency of the appeal they filed an application under Order 41 Rule 27 of the CPC for taking additional documents on record filed along with the application. They also raised an objection as regards issues having been improperly framed by the trial Court submitting that due to the same trial has been vitiated.

5. By the impugned order the appellate Court has allowed the application under Order 41 Rule 27 of the CPC filed by defendants 1, 5 to 7 and has taken the documents filed along with the application on

record as additional evidence. It has further held that issue No.1 and 3 framed by the trial Court did not arise for determination and has deleted those issues and in their place has framed additional issues. Thereafter setting aside the judgment and decree passed by the trial Court it has remanded the matter back to it to permit the parties to lead evidence in respect of the additional documents taken on record and the newly framed issues and thereafter to decide the matter afresh.

6. Learned counsel for plaintiff submits that the impugned remand order is wholly unjustified. Merely for the reason that the appellate Court felt it necessary to reframe certain issues, the matter could not have been remanded back solely on that ground. The provisions of Order 41 of the CPC have totally been ignored by the appellate Court. As per Order 41 Rule 24 the appellate Court ought to have decided the appeal itself finally on merits instead of directing for remand. Alternately in terms of Order 41 Rule 25 the appellate Court could have directed for a limited remand for consideration of newly framed issues. Wholesale remand is wholly unjustified. The procedure as provided under Order 41 Rule 28 and 29 pursuant to additional documents being taken on record has also been wholly omitted to be followed. It is hence submitted that the impugned order cannot be sustained.

7. Per contra learned counsel for defendants No.1, 5 to 7 has submitted that the impugned remand order is perfectly justified. The issues which had been framed by the trial Court did not at all arise for

consideration which resulted in mistrial. The fresh issues which have been framed by the appellate Court require fresh evidence by both the parties and reconsideration denovo hence it has rightly remanded the matter back to the trial Court for permitting the parties to lead evidence. Since additional documents have been taken on record, defendants 1, 5 to 7 have rightly been afforded opportunity to lead evidence in that regard. Plaintiff has also been extended the liberty to lead evidence hence no prejudice is caused to him. The remand has been made in accordance with the relevant provisions of Order 41 hence requires no interference.

8. By order dated 02.09.2022 the appeal was admitted for hearing on the following substantial questions of law :-

“(a) Whether the remand directed by the lower appellate Court upon deleting the issues framed by the trial Court and framing new issues is in derogation to the provisions of Order 41 Rule 24 and 25 of the CPC hence cannot be sustained?

(b) Whether the lower appellate Court has committed an error of law and procedure in remanding the matter back to the Trial Court upon allowing of application under Order 41 Rule 27 of the CPC filed by defendants No.1, 5 to 7 by ignoring the provisions of Order 41 Rule 28 and 29 of the CPC?”

9. As far as the question regarding resettlement of issues by the appellate Court is concerned, the same would be governed by the provisions of Order 41 Rule 24, 25 and 26 of the CPC which are as under :-

“24. Where evidence on record sufficient, Appellate Court may determine case finally.—Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.—Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor within such time as may be fixed by the Appellate Court or extended by it from time to time

26. Findings and evidence to be put on record : Objections to finding.— (1) Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to any finding.

(2) **Determination of appeal.**—After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.

10. In the present case Rule 24 would not be applicable since it is not a case of mere resettling of the issues and a case where the appellate Court has felt it necessary to proceed on some ground other than the ground on which the trial Court had proceeded. The appellate Court has not felt that the evidence on record is sufficient to enable it to pronounce the judgment. Rather the matter is governed by Rule 25 as the appellate Court has recorded a finding that the trial Court has omitted to frame and try issues which were essential to the right decision of the suit upon merits. It is for that reason the appellate Court has framed fresh issues and has deleted issues which it felt had wrongly been framed by the trial Court and which did not arise for determination from pleadings of the parties.

11. However, the appellate Court has not complied with the procedure prescribed under Rule 25. It ought to have referred the matter to the trial Court with a direction for it to take additional evidence on the issues newly framed and to try such issues and return the evidence to it together with findings thereon and the reasons therefore. It should have thereafter proceeded in terms of Rule 26 and determined the appeal finally. The appellate Court merely for the reason for reframing of new issues was not justified in setting aside the judgment and decree passed by the trial Court and remanding the matter back to it.

12. So far as the procedure adopted by the appellate Court in receiving additional evidence is concerned the same would be governed

by Rule 28 and 29 of Order 41 of the CPC which are as under :-

28. Mode of taking additional evidence.—Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it when taken to the Appellate Court.

29. Points to be defined and recorded.—Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

13. As per Rule 28 the appellate Court could have taken the additional evidence on record or directed the Trial Court to take such evidence and to send it when taken to it. It could have specified the points to which the additional evidence was to be confined. Only for the reason that additional documents had been taken on record, it did not necessitate setting aside the judgment and decree passed by the trial Court and remanding the matter back to it with liberty to both the parties to adduce additional evidence and also to lead oral evidence in that regard. The provisions of Rule 28 and 29 have wholly been omitted to be taken into consideration by the appellate Court. Merely because additional documents had been taken on record, wholesale remand to the trial Court after setting aside its judgment and decree was wholly unwarranted.

14. Thus, the substantial questions of law as framed are answered in favour of the appellant. The impugned order passed by the appellate

Court is set aside. Though the order deleting issue No.1 and 3 framed by the trial Court and reframing new issues is maintained, it is directed to proceed in terms of Rule 25 and 26 of Order 41 of the CPC in view of framing of such issues. The order in so far as it has directed for additional documents to be taken on record is maintained but the appellate Court is directed to proceed in terms of Rule 28 and Rule 29 of Order 41 of the CPC pursuant thereto.

15. With the aforesaid directions, the appeal stands partly allowed.
16. No costs.

ns

(PRANAY VERMA)
JUDGE