

HIGH COURT OF MADHYA PRADESH, JABALPUR**M.A.NO.3315/2010**

Veerendra Pratap Singh

-Versus-

Sanjaya Kumar Tibude

PRESENT: Hon'ble Shri Justice Vijay Kumar Shukla, Judge.

Shri Akhilesh Kumar Jain, Advocate for the appellant.

Shri R.P.Khare, Advocate for the respondents.

Whether approved for reporting ? Yes/No

Whether approved for reporting?	Yes
Law laid down	<p>1. Amendment application based on subsequent developments can be allowed at any stage of the trial or appeal, if the same does not cause prejudice to the other side.</p> <p>2. The cross objection in the appeal against appellate order can be made. In cross objection a decree can be passed. The cross objection takes the place of appeal after it is filed.</p> <p>3. Suit for declaration of title filed without claiming a alternative relief of possession, the suit would not be barred by virtue of Section 34 of the Specific Relief Act. Suit for permanent injunction simpliciter, plaintiff proving his ownership, sporadic act of trespass by the defendants to pull down existing structure and put up new structure cannot constitute possession of defendants. Suit filed for permanent injunction cannot be said to be not tenable for want of claiming relief of declaration of title and possession</p>

Significant paragraph Nos.	
-----------------------------------	--

J U D G M E N T

JABALPUR: (25/10/2018)

The present appeal is filed under Section 104 CPC read with Order 43 Rule 1(U) of the Code of Civil Procedure (in short 'CPC'), challenging the legality and validity of the order dated 21.5.2010 passed by 9th Upper District Judge, Jabalpur, in Miscellaneous Appeal No.24-A/2009 whereby the appeals filed by the defendants have been partially allowed and the judgment and decree dated 31.7.2007 passed in Civil Suit No.44-A/2004 by 3rd Civil Judge, Class I, Jabalpur has been set aside and after allowing the application under Order 6 Rule 7 CPC filed by the plaintiff, the case has been remanded back by imposing cost of Rs.2500/- on the plaintiff. The plaintiff has been permitted to amend the plaint and the present appellant/ defendants have been given liberty to incorporate necessary amendments in the written statement.

2. The brief facts, in short, are that the respondent/ Plaintiff Sanjay Kumar Tibude filed a suit against the appellant and other defendants seeking a relief of declaration that he is the owner in possession of the suit plot on the basis of sale deed executed by the defendant Cooperative Society in his favour and also prayed consequential relief of injunction restraining the respondent No.3/

present appellant from interfering from the possession of the plaintiff of the suit plot/ land. The appellant filed written statement and denied the claim and submitted that the plaintiff was not in possession of the suit plot and his title is also defective. It was stated that since the plaintiff could not carry out the construction as per the condition of the allotment within a stipulated period, therefore, the plot has been sold to him and he is a subsequent purchaser. He also claimed that he is in the possession of the plot. An application for amendment was filed by the plaintiff on the basis of subsequent development but the same was rejected by the Trial Court however, the suit was decreed in favour of the plaintiff for declaration.

3. The defendant No.3 and the other defendant Cooperative Society filed appeal against the judgment and decree. It is stated that a counter claim was also filed by the plaintiff but the same was rejected. In the appeal, the plaintiff filed an application for amendment under Order 6 Rule 17 CPC claiming a relief for restoration of his possession on the allegations of the subsequent events during pendency of appeal that the present appellant/ defendant No.3 has raised a construction.

4. Counsel for the appellant while assailing the aforesaid order of remand, raised following grounds :-

(1) That the order of remand is beyond the scope of the remand under the provisions of Order 43 Rule 23 CPC and Rule 23A of the CPC. In support of his contention he placed reliance on **AIR 2008 SC 2579 (Municipal Corporation, Hyderabad Vs. Sunder Singh)** and also on a judgment passed by this Court in the case of **Sunil Parashar Vs. Kapil Khanna & Others** reported in **2017(3) MPLJ 114;**

(2) That the lower Court has failed to appreciate that the application for amendment was barred by doctrine of *res judicata*. In support of his contention, he placed reliance on the judgment of the Apex Court in the case of **AIR 2008 SC 1272 (Barkat Ali and Anr. Vs. Badri Narain (D) by L.Rs.;**

(3) That after the amendment in the provisions of Order 6 Rule 17, in an application seeking amendment the applicant is under obligation to plead and prove due diligence, but the application has been erroneously allowed. He referred to the judgment passed by this Court in the case of **Sonu Dubey Vs. Virendra Kumar Rai and others** reported in **2014(2) MPLJ 433.** He also submitted that the order of allowing the application for amendment has caused seriously prejudice to the case of the defendant. The suit was filed for declaration without any relief of the possession whereas, the plaintiff was

not in the possession of the suit plot on the date of institution of the suit and therefore, the suit was not maintainable as per the provisions of Section 34 of the Specific Relief Act.

5. Per contra, counsel for the respondents supported the order impugned and submitted that the order of remand is very much within the scope of the provisions of Order 43 of the CPC. He submitted that the doctrine of *res judicata* would also not apply in the present case because the first application for amendment was in respect of the mandatory injunction to demolish the illegal construction raised by the present appellant/ defendant No.3 during the pendency of the suit, whereas, the subsequent application for amendment in the appeal was filed for restoration of the possession after removal of the illegal construction raised during the pendency of the appeal.

6. Further, it is contended that the plaintiff was very much in the possession of the plot on the date of filing of the suit but during the pendency of the suit, some construction was raised by the present appellant/ defendant No.3, therefore, first amendment application was filed for mandatory injunction restraining the defendants from interfering with the possession. However, during the pendency of appeal, the appellant/ defendant No.3 encroached the plot in question and raised illegal construction and therefore, the amendment

application was filed for restoration of peaceful possession after removal of the encroachment. The same was based on subsequent developments and therefore, the lower Appellate Court has not committed any error in allowing the application for amendment and remanding the matter. In addition to the aforesaid submissions, he also submitted that even after the rejection of the Cross Objection, the plaintiff's right to seek relief for restoration of the possession is not barred. To bolster his submissions, he relied on the judgment passed by this Court in the case of **AIR 1958 MP 348 (Beniprasad Agarwal Vs. Hindustan Lever Ltd.; 2016(3) MPLJ 507 (Mohanlal and Ors. vs. Shravan Kumar and Ors.); 2007(4) MPLJ 200 (Mangilal s/o Ratanlal Patidar and others v. Dambarlal s/o Ratanlal Patidar and another)** and the judgment passed by the Apex Court in the case of **Vishram alias Prasad Govekar and Ors. Vs. Sudesh Govekar (D) by Lrs. And Ors.** reported in **AIR 2017 SC 583**

7. The first argument is that the order of remand is beyond the scope of the provisions of Order 41 Rule 23 of the Code of Civil Procedure. In support of his contention, learned counsel for the appellant relied on the judgment **Municipal Corporation Hyderabad Vs. Sunder Singh (supra)**. In the said case, challenge was made to the judgment and order whereby the High Court has set

aside the order passed by the Civil Judge, who remanded the matter to the learned trial court. One of the party Devi Singh died and his legal heirs and representatives were brought on record but no amendment was sought pursuant to or in furtherance of the observations made by the Court. Parties adduced additional oral and documentary evidence without there being any pleading to that effect. It was held that the order of remand should not be passed in a routine manner and the court should loathe in exercise of the said power. While remanding the case, the appellate court must disagree with the finding of the trial court on the said issue. That was a case relating adduction of secondary evidence. So far the proposition of law cannot be disputed that the order of remand cannot be passed in a routine manner. In that case it was not clear that on what basis the secondary evidence was allowed to be led and further the High Court did not set aside the order refusing to adduce the secondary evidence. In the facts of that case the court held that the order of remand was not proper. In the facts of the present case, the said judgment would not render any assistance to the appellant. In the present case a decree was already passed in favour of the plaintiff regarding declaration and the possession. In fact the plaintiff sought consequential relief of restoration of the possession as he was dispossessed during the pendency of the appeal.

8. The other contention of the appellant that the application for amendment was barred by doctrine of res judicata can also not be appreciated. The earlier application for amendment which was filed during the pendency of the said was in respect of mandatory injunction. During the pendency of the appeal another application was filed on the ground that the appellant/ defendant no.3 has encroached the plot in question and also raised illegal construction. On the said allegation he made prayer for restoration of the peaceful possession after removal of encroachment. The Court found that the amendment was based on subsequent developments which took place during the pendency of the appeal. The doctrine of *res-judicata* would not apply in the present case as the application was based on subsequent developments during the pendency of the appeal.

9. The other contention of the learned counsel for the appellant that since the cross-objection of the plaintiff was dismissed, therefore, the amendment application could not have been allowed by appellate Court, can also not be appreciated. In the case of **Beni Prasad Agrawal Vs, Hindustan Lever Ltd. Bombay, AIR 1958 M.P. 348**, Hon'ble Justice Hidayatullah (as His Lordship then was) considered the provisions of Order 41 Rule 22 relating to cross-objection at appellate stage and held as under :

"A cross-objection in an appeal against an appellate order can be made. In cross-objection a decree can be

passed. The cross objection takes the place of an appeal after it is filed and a decree from an order can be made, just as in an appeal."

10. It is further contended by the appellant that the respondents have failed to show the *due diligence* as required under *proviso* to Order 6 Rule 17 CPC and therefore, the Trial Court has erroneously allowed the application for amendment. He referred to the judgment passed by this Court in the case of **Sonu Dubey Vs. Virendra Kumar Rai & Others** reported in **2014(2) MPLJ 433**.

11. There is no dispute to the preposition of the law that the authority has to prove the *due diligence* for filing an application for amendment. As we have discussed in the presiding paragraph that the amendment was based on the subsequent developments. Further the Trial Court has taken note of the fact that the suit for declaration was already decreed and the plaintiff has alleged that the present appellant has forcibly entered into the suit land and has raised construction. Since the application for amendment was based on subsequent developments, I do not find that the Appellate Court has committed any error in allowing the application. In the case of **Mohinder Kumar Mehra vs Roop Rani Mehra – ((2018)2 SCC 132)**, the Apex Court has considered the provisions of Order 6 Rule 17 CPC that "*even after commencement of trial, the application can be allowed in case if it does not causes any serious prejudice to the other side*". In the present case, if the application for amendment is

not allowed, the suit which has already been decreed in favour of the respondent/ plaintiff would not be executable in absence for decree for possession as the plaintiff has been dispossessed during the pendency of the appeal.

12. The other argument of the learned counsel for the appellant regarding the prejudice caused to him on the ground that the plaintiff has not claimed any relief for possession, though he was not in possession of the suit property on the date of institution of the suit. Therefore, the suit was barred by the provisions of Section 34 of the Specific Relief Act. The said argument can also not be accepted because in the present case, the finding of the Court below is that the plaintiff was dispossessed during the pendency of the appeal and therefore, the relief for restoration of possession would be necessary. The scope of proviso to Section 34 is considered by this Court in the case of **Kalyan Singh Vs. Vakilsingh and other (AIR 1990 MP 295)**, wherein it was held that where a suit for declaration of title was filed without claiming possession, the suit would not be barred by virtue of Section 34 of the Specific Relief Act. In para 16 of the said judgment, it has been held as under :-

“16. In so far as the scope of the proviso to Section 34 is concerned, it has been consistently the view of all the courts ever since the decision of Privy Council in *Humayun Begum v. Shah Mohd. Khan*,

AIR 1943 PC 94 that the further relief contemplated by the proviso to Section 42 of the Specific Relief Act is relief against the defendant only in *Sunderesa Iyer v. S.S. V. Nidhi Ltd.*, AIR 1939 Mad 853 it was held :

"A suit for mere declaration that the plaintiff is the owner of certain property without consequential relief for possession is maintainable if at the time of the institution of suit the property is in possession of the Court pending the decision of the suit and not in the possession of the person against whom the relief is sought."

The Madras view was cited with approval before their Lordships of the Supreme Court in *Deo Kuer v. Sheo Prasad*, AIR 1966 SC 359."

13. In the case of **Vishram alias Prasad Govekar and others Vs. Sudesh Govekar (D) by Lrs. (AIR 2017 SC 583)**, it has been held where the suit for permanent injunction simpliciter without any relief of declaration of title and possession, sporadic act of trespass by the defendants to pull-down existing structure and put up new structure cannot constitute possession of defendants. Therefore, suit filed for permanent injunction cannot be said to be not tenable for want of claiming relief of declaration of title and possession.

14. In view of the aforesaid facts and enunciation of law, I do not find any illegality in the order of remand. Accordingly, the appeal is **dismissed.**

15. Since the proceedings remain stayed since 2010 because of the interim order passed by this Court in the present appeal, it is expected that the Trial Court will make all endeavour to expedite the hearing of the suit, as early as possible within a period of six months from the date of filing the copy of this order.

16. *Ex consequenti*, the appeal is **dismissed**.

(VIJAY KUMAR SHUKLA)
JUDGE