

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

**BEFORE**

**HON'BLE SHRI JUSTICE PRAKASH CHANDRA GUPTA**

**ON THE 5<sup>th</sup> OF APRIL 2022.**

**MISC. APPEAL NO. 120 of 2015.**

Between:-

1. SATISHCHANDRA, AGED ABOUT 60 YEARS, S/O LATE RATANCHAND JAIN.
2. CHAKRESH, AGED ABOUT 48 YEARS, S/O LATE RATANCHAND JAIN BOTH R/O SANJAY WARD NO. 11, NEAR SANJAY CHOURAHA TEHSIL-PATHARIYA, DISTRICT DAMOH (M.P.).

**(APPELLANTS)**

(BY SHRI (Dr.) ANUVAD SHRIVASTAVA, ADVOCATE)

AND

GUDDAN @ DASHRATH, AGED ABOUT 34 YEARS, S/O MAHADEV PRASAD CHOURASIYA, R/O SANJAY CHOURAHA, TEHSIL PATHARIA, DISTRICT DAMOH, (M.P.)

**(RESPONDENT)**

(BY SHRI SHASHANK PANDEY, ADVOCATE)

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

**-JUDGMENT-**

With the consent of both the parties, this case has been heard and decided finally.

1. Appellants/plaintiffs have filed this miscellaneous civil appeal under order 43 Rule 1(u) of the Code of Civil Procedure, 1908, being aggrieved and dissatisfied with the order dated 19/12/14 passed by the Additional District Judge to the court of First Additional District Judge, Damoh in civil Appeal no. 1-A/2014, whereby and whereunder the First Appellate Court set aside the judgment and decree dated 18/12/13 passed by Civil Judge Class 2, Pathariya, District- Damoh in civil suit no.32 A/2011 and remanded the matter back to the learned trial Judge.

2. The appellants /plaintiffs filed the suit before the trial court stating that they have purchased the land, survey number 6/1 area 0.14 dismil on 12/01/62 situated in Pathariya Distt. Damoh from Pt Santosh Kumar Hajari by a registered sale deed. Out of which plaintiff's house is built on 10 dismil land. 4x20 square feet out of remaining 04 dismil unoccupied land of the plaintiffs was taken by defendant on monthly rent of Rs 500 for the purpose of running a shop. The defendant is in default of payment of 27 months rent

from January 2006 to 31/03/2008. Total Rs. 15,500/- is to be paid by the respondent to the appellants.

3. Despite the registered notice dated 01/02/08 served by plaintiffs to the defendant to vacate the land and payment of the arrears of rent, the defendant neither made the payment of arrears nor did he pass the vacant possession of land to the plaintiffs, therefore plaintiffs brought the present suit against the defendant for his eviction and recovery of arrears of rent.

4. In written statement Respondent/defendant denied the facts of tenancy and alleged that there lies no relationship of landlord and tenant between him and the appellants with respect to the suit land. The notice dated 01/02/08 served by appellants to the respondent is illegal. Janpad panchayat is the owner of the suit land. Defendant has been regularly paying the rent to the Janpad panchayat, therefore respondent is the tenant of Janpad Panchayat. Appellants want to take possession of the suit land from the respondent forcefully. Appellants are not entitled to get possession of the suit land and the suit is liable to be dismissed.

5. The trial court framed five issues and after recording evidence of both the parties, reached to the conclusion that the relationship of landlord and tenant between the plaintiffs and defendant is not established but the trial court has found proved that the plaintiffs are the owner of the suit land and

the possession of the respondent on the suit land amounts to encroachment, therefore the plaintiffs are entitled to get vacant possession of suit land and directed to the respondent to deliver the possession of suit land to the appellants immediately, Accordingly the trial court has partly decreed the suit.

6. The respondent/ defendant has filed civil appeal before the appellate Court which was registered as Civil Appeal No. 1-A/2014 challenging the Judgment of the trial court on various grounds. The Lower Appellate Court vide order dated 19/12/14 has remanded the matter to the trial Court, inter alia with the following directions;

1. The trial court to direct the appellant/plaintiff to claim for declaration of title. After the proper valuation of the suit, court fee be paid accordingly.
2. Trial court also to direct that the Janpad Panchayat be made party to the suit for the more elucidation of the case.
3. Trial court to direct both the parties to get the spot inspection done for the clarity of location of the suit land.
4. For the above purposes the trial court to direct the parties to submit an application and after the completion of the above process, take the evidence of the parties interested to give the same and dispose the case on merit.

7. Learned counsel for the appellants submitted that the learned First Appellate Court has failed to appreciate that the trial court has not decided civil suit merely on preliminary issues but has decided the suit on all issues

after appreciation of entire evidence. The learned First Appellate Court has ignored the fact that the appellants are the owner of the suit land. Hence, appellants can not be directed to demand any particular relief. The suit has wrongly been remanded by directing the appellants to make Janpad Panchayat a party to the suit. Remand of the case for spot inspection is completely arbitrary and perverse. Therefore Appeal be allowed and impugned order be set aside.

8. On the other hand learned counsel for the respondent has supported the impugned order passed by the First appellate Court.

9. For the proper disposal of this case it is important to consider the provisions of rule 23 23A and 25 of order 41 of Code of Civil Procedure.

**Order 41 Rule 23 of the Code of Civil Procedure,1908 runs as under;**

**" remand of case by appellate court-** where the court from whose decree, an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the appellate court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the court from whose decree the appeal is preferred, with direction to re-admit the suit under the original number in the register of civil suits, and proceed to determine all just exceptions, be evidence during the trial after remand."

**Order 41 rule 23A of the Code of Civil Procedure,1908 runs as under;**

"**remand in other cases**-where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point and the decree is reversed in appeal and retrial is considered necessary the appellate court shall have the same powers as it has under rule 23 of CPC."

**Similarly Order 41 Rule 25 of the Code of Civil Procedure 1908 runs as under;**

**“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 an 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 issue, 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 issue, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefore within such time as may be fixed by the appellate court or extended by it from time to time.

**10.** Counsel for the respondent relied on the judgment of **smt Teena Pandey and Anr. V/s Dr Kirnesh Pandey in M.P. No. 2406/2019**, order dated 08/07/19, in this case High court of Madhya Pradesh, Indore Bench ( vide para 8), it has been held that the court may, before passing judgment, suo moto issue a commission for more clarification and elucidation in the matter by appointing an employee of revenue department to get the land in dispute demarcated and for which no application is required .

11. Counsel for the respondent also relied on other case law, **Jaswant V/s Deendayal 2011 (2) MPLJ 576** wherein coordinate Bench of this Court has held that it is the duty of the Court to issue commission in the matters of dispute relating to demarcation of suit property, to appoint an employee of revenue department not below the rank of revenue inspector to get the suit land demarcated and for its identification. Neither party is required to make an application for this purpose.

12. Counsel for the defendants further relied on the case of **Prembai w/o Omkarlal and others V/s Ghanshyam s/o Vallabh Das and others 2010(3) MPLJ 345**, which relates to dispute as to encroachment, wherein the court held that it would be appropriate to appoint a competent Commissioner in such situation.

13. Learned counsel for the appellants relies on the case of **K Krishna Reddy & others versus The Special Dy. Collector ,Land Acquisition Unit 2,LMD Karimnagar, Andhra Pradesh 1988(3) SC 590** in which it was held that the appellate power of remand should not be exercised lightly. This power should not be resorted to unless the award is wholly unintelligible and there is lack of evidence.

14. It is pertinent to mention here the case of **Municipal Corporation Hydrabad V/s Sundar Singh (2008) 8 SCC 485** in which the Apex Court

has held that the court should be slow in exercising its discretionary power under Rule 23 and Rule 23A of Order 41 of Code of Civil Procedure, 1908. In the case of **P. Purushottam Reddy & Another versus Pratap Stills Ltd. (2002) 2 SCC 686**, the court has discussed the circumstances under which the power of remand should be exercised:

“firstly the trial Court disposed of the case otherwise than on a preliminary point

secondly the decree is reversed in appeal and a retrial is considered necessary. only then the power of remand should be exercised otherwise not. An unwarranted order of remand gives the litigation an undeserved extension therefore must be avoided.”

15. In the instant appeal before me, it was not the grievance raised by any of the parties before the first Appellate Court that there was any failure on the part of the trial Court in discharging its obligation with respect to the need of inclusion of necessary party or the necessity of relief of declaration of title or Demarcation of the suit land. It was nobody's case that any evidence, oral or documentary, was excluded or not allowed to be taken on record by the trial Court. The very fact that the appellants /plaintiffs have come up to this Court laying challenge to the order of remand shows that the appellants are not interested in remand and do not want any additional relief or in adding any additional party or demarcation of suit land or to adduce any further evidence.



16. Apart from the above, Order 41 Rule 23 of the Code of Civil Procedure, 1908 applies when the trial court disposes of the entire suit by recording its finding on a preliminary issue without deciding any other issues and the finding on preliminary is reversed in appeal. Rule 25 of Order 41 of Civil Procedure Code applies when the appellate Court notices an omission on the part of the trial Court to frame or try any issue or to determine any question of fact which in the opinion of the appellate Court essential to the right decision of the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand in as much as the subordinate court can try only such issues as are referred to it for trial and having done so, the evidence recorded together with finding and reasons thereof of the trial Court, are required to be returned to the appellate court. The Appellate Court can exercise the same power of remand under Rule 23A of Order 41 of CPC, as it is under Rule 23. Hence it is clear that the condition precedents for remanding a case as provided under Rules 23, 23A and 25 of Order 41 of the Code of Civil Procedure, 1908, is absent. It is also clear that the first appellate Court has erred in remanding the case for re-trial. Hence the impugned order is liable to be set aside and appeal is to be allowed.

17. For the above reasons the appeal is allowed and the impugned order of remand made by the First Appellate Court is set aside. The civil appeal shall stand restored to the file of the First Appellate Court and shall be decided

afresh after affording the parties an opportunity of hearing and consistently with the observation made herein above. No order as to cost.

**(PRAKASH CHANDRA GUPTA)**  
**JUDGE**

MISHRA