

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

BEFORE

HON'BLE SHRI JUSTICE AMAR NATH (KESHARWANI)

MISCELLANEOUS APPEAL NO. 566 OF 2015

BETWEEN:-

**SUNEEL KUMAR S/O CHIRONJILAL, AGED
ABOUT 46 YEARS, R/O NARSINGH WARD, NADI
MOHALLA, TAHSIL GADARWARA, DISTRICT
NARSINGHPUR (MADHYA PRADESH)**

.....APPELLANT

(SHRI MANOJ KUMAR MISHRA – ADVOCATE FOR APPELLANT)

AND

**1. GHANSHYAM S/O MOHANLAL SONI, AGED
ABOUT 45 YEARS, R/O NARSINGH WARD,
GADARWARA, TAHSIL GADARWARA, DISTRICT
NARSINGHPUR (MADHYA PRADESH)**

**2. THE STATE OF MADHYA PRADESH
THROUGH COLLECTOR, NARSINGHPUR
(MADHYA PRADESH)**

.....RESPONDENTS

(SHRI G.S. BAGHEL – ADVOCATE FOR RESPONDENT NO.1)

(SHRI ANOOP SONKAR – PANEL LAWYER FOR RESPONDENT NO.2/STATE.)

Reserved on : 02/02/2024

Passed on : 21/02/2024

*This Miscellaneous Appeal having been heard and reserved for order, coming on for pronouncement on this day, **Justice Amar Nath (Kesharwani)** pronounced the following:*

ORDER

This Miscellaneous Appeal under Section 43 Rule 1(u) of the Code of Civil Procedure, 1908, which shall be referred here-in-after as "CPC", has been filed against the judgment dated 05/02/2015 passed by II Additional District Judge, Gadarwara, District Narsinghpur (M.P.) in Regular Civil Appeal No.29-A/2014, whereby learned Appellate Court has interfered with the judgment and decree dated 31/10/2012 passed by IInd Civil Judge Class-II, Gadarwara, District Narsinghpur (M.P.) in Civil Suit No.58-A/2010 and remitted the matter back to the trial Court for retrial with certain directions under Order 41 Rule 23 of the CPC.

2. Brief facts of the case are that the appellant/plaintiff filed a Civil Suit against respondents for declaration of title and permanent injunction in respect of land bearing Khasra No.90/5 area 0.025 Aare, Patwari Halka No.18/1 situated at Mauja Gadarwara, Tahsil Gadarwara, District Narsinghpur (M.P.). Respondent No.1 / defendant No.1 has filed his written statement. Considering the pleadings of the parties, learned trial Court has framed the issues and after recording the evidence as adduced by the parties and after hearing the arguments of learned counsel for the parties, passed the judgment and decree dated 31/10/2012 in favour of appellant/plaintiff as title holder of the suit property and issued permanent injunction against respondent No.1 directing him not to create any interference in the suit property and shall not raise any construction on suit property. Being aggrieved with the

judgment of trial Court respondent No.1/defendant No.1 filed an Appeal under Section 96 of the CPC before the Second Additional District Judge, Gadarwara, District Narsinghpur (M.P.), which was registered as Regular Civil Appeal No.29-A/2014 and was disposed of by the impugned judgment dated 05/02/2015 by remitting back the matter to the trial Court for fresh adjudication. Being aggrieved by the impugned judgment, this appeal has been filed.

3. Learned counsel for the appellant submitted that the impugned judgment is bad in law and perverse to the evidence and the other material substance gathered with the case. Learned Appellate Court has not applied proper application of mind in not going through the evidence and other material available on record. Learned Appellate Court has failed to take into consideration the pleadings made by appellant in the case. Learned Appellate Court has ignored the settled principle of law in remitting the case to the trial Court for fresh adjudication. Hence, prayed to set aside the impugned judgment and to affirm the judgment and decree passed by learned trial Court or send the matter back to the Appellate Court to decide the appeal on merit. In support of his arguments learned counsel placed reliance on the judgment in the case of *Vipin Kumar & Others Vs. Sarojani, 2013 (1) MPLJ 480*, judgment dated 07/03/2019 passed by coordinate Bench of this Court in *M.A.No.3336/2017 (Ratanlal Chandani Vs. State of M.P. & Another)* and order dated 18/12/2023 passed in *M.A.No.2421/2017 (Akhilesh (Dead) through His Legal Representatives Vs. Smt. Madhuri & Others)*.

4. *Per contra*, learned counsel for the respondent No.1 opposed the prayer and submitted that the learned Appellate Court after due appreciation of evidence available on record, has passed the impugned

judgment, which requires no interference. It is prayed that the appeal be dismissed.

5. I have heard the arguments advanced by the learned counsel for the parties, perused the record and gone through the citations upon which reliance is placed by learned counsel for the appellant.

6. It reveals from the record that the learned First Appellate Court while deciding the appeal has not considered the evidence available on record and simply allowed the application filed under Order 41 Rule 27 of the CPC on behalf of respondent and remitted the matter back to the trial Court for fresh adjudication. While allowing the application under Order 41 Rule 27 of the CPC the learned First Appellate Court has not considered the provisions of order 41 Rule 27 of the CPC. Learned First Appellate Court has ordered the trial Court to give the findings on issue Nos.4, 5, 6, 7 & 8, which were considered by the trial Court as not necessary while passing the judgment. In that respect, learned First Appellate Court has not considered the issues, which have to be adjudicated in the matter.

7. Learned First Appellate Court has remitted the matter to the trial Court with certain conditions, which is mentioned in Para-22 of the impugned judgment. Para-22 of the impugned judgment is reproduced as below :-

22. प्रकरण आदेश 41 नियम 23 सी. पी. सी. के अन्तर्गत निम्नलिखित निर्देशों के साथ पुनः विचारण हेतु विचारण न्यायालय को प्रतिप्रेषित किया जाता है :-
 1. यह कि विचारण न्यायालय के द्वारा वाद को पुनः रजिस्टर में मूल नंबर पर कायम किया जायेगा।
 2. यह कि अपीलार्थी के द्वारा प्रस्तुत दस्तावेज जो अभिलेख में शामिल किये गये हैं उनके अनुसार उसे और उत्तरवादी को खण्डन में एक अवसर दस्तावेज प्रस्तुत किये जाने हेतु प्रदान कर केवल एक-एक अवसर साक्ष्य हेतु उन दस्तावेजों के सम्बन्ध में दिया जायेगा।
 3. यह कि विचारण न्यायालय द्वारा जो साक्ष्य मूल विचारण में अभिलिखित की गई है उसी के बाद आगे साक्ष्य लेते हुये सम्पूर्ण साक्ष्य के आधार पर पुनः निर्णय 06 माह के अन्दर पारित किया जायेगा।

4. यह कि विचारण न्यायालय द्वारा वाद विषय क्रमांक 4, 5, 6, 7 व 8 पर साक्ष्य विश्लेषण कर उचित निष्कर्ष आवश्यक रूप से अभिलिखित किये जाएंगे।
5. यह कि उभयपक्षकार दिनांक 03.03.15 को विचारण न्यायालय के समक्ष अग्रिम कार्यवाही हेतु उपस्थित रहेंगे और उसके 06 माह के अन्दर निर्णय पारित किया जायेगा।

8. It is not disputed in the case that previous owner of the suit property Gaya Prasad had executed a sale-deed (Ex.P-1) dated 04/02/1993 for the land admeasuring 40 X 60 sq. feet out of the land bearing Khasra No.90/7 admeasuring 0.246 Aare in favour of appellant. It is also not disputed in the case that Ramwati Bai executed a sale-deed (Ex.D-21) on 04/11/1999 in favour of respondent No.1 for the land admeasuring 1500 sq. feet out of land bearing Khasra No.90/18 and Ramrati Bai also executed a sale deed (Ex.D-6) on 02/08/1999 in favour of wife of respondent No.1 for the land admeasuring 1500 sq. feet out of the land bearing Khasra No.90/18.

9. As per pleadings of respondent No.1, the land which was purchased by the respondent No.1 and his wife from Ramwati Bai, was purchased by Ramwati Bai from Gaya Prasad vide registered sale-deed (Ex.D-1) dated 28/11/1985. Hence, it is clear that the land which was purchased by the appellant by registered sale deed Ex.P-1 is the part of Khasra No.90/7, which was changed into Khasra No.90/25 and the land which was purchased by respondent No.1 is the part of Khasra No.90/18, therefore, Khasra numbers of the land belonging respondent No.1 and his wife are different and boundaries were also mentioned in the respective sale-deeds.

10. Issues Nos.4 to 8, which were framed by the learned Trial Court are reproduced as below :-

4. क्या वादी का विक्रय पत्र दिनांक 04.02.93 कलेक्टर आफ स्टाम्प नरसिंहपुर के न्यायालय में दिनांक 23.07.10 तक पंजियन के लिये जप्त रहा ?

5. क्या प्रतिवादी क.1 ने ख. नं. 90/18 में से 1500 वर्गफुट का भूखंड पंजीकृत बैनामा दिनांक 02.08.99 रामवती राय से क्रय किया था एवं रामवती राय से ही शेष रकवे का भूखंड भारती सोनी ने क्रय किया था ?
6. क्या भारती सोनी ने मौजा गाडरवारा में स्थित ख. नं. 90/18 रकबा 3000 वर्गफुट में से 1500 वर्गफुट पंजीकृत बैनामा दिनांक 02.08.99 के माध्यम से क्रय किया था एवं उक्त रकवे का शेष रकबा प्रतिवादी क.1 ने पंजीकृत बैनामा दिनांक 04.11.99 से क्रय किया था ?
7. क्या रामवती राय ने ख.नं. 90/7 में से 0.027 हेक्टे. अर्थात 300 वर्गफुट भूमि रामवती राय ने प्रजीकृत बैनामा दिनांक 24.11.85 के माध्यम से क्रय की थी ?
8. क्या प्रतिवादी क.1 रामवती राय के द्वारा क्रय किए गए भूखंड पर काबिज है ?

11. It reveals from the pleadings of the parties that issue Nos. 4 to 8 which were earlier framed by the trial Court are not necessary for adjudicating the dispute involved between the parties of the case, hence trial Court has rightly given the finding that the finding of issue Nos. 4 to 8 are not required to be considered and First Appellate Court has wrongly remitted the matter back to the trial Court for giving findings on issue Nos. 4 to 8, which should not be sustained.

12. Learned First Appellate Court has not even considered the necessity of documents filed alongwith application under Order 41 Rule 27 of the CPC for adjudication of appeal pending before him and has not considered the evidence available on record.

13. In the case of *Vipin Kumar & Others (Supra)* coordinate Bench of this Court has laid down the following principle of law :-

17. It is made clear here that for future while directing remand by the lower Appellate Court certain guidelines are required to be observed while passing judgment and order directing remand. It is directed that the lower Appellate Courts in the State shall observe the contingencies in which remand is permissible otherwise the appeals be decided on merit. The contingencies wherein remand can be directed is observed as thus :

- (1) If the suit has been decided on a preliminary issue and the decree is reversed by Appellate Court then while passing the order of remand the Appellate Court may direct to try the issue or issues after taking the evidence already on record or

after the remand, if any, on restoring the suit to its original number.

- (2) If an appeal is preferred against the judgment and decree passed by the trial Court other than the preliminary issue and Appellate Court reversed such finding in appeal and further found that re-trial is necessary then by recording such finding the power as specified in clause (1) may be exercised by the Court directing wholesale remand.
- (3) If the Appellate Court found from the decree against which an appeal is preferred the trial Court has omitted to frame or try any issue or to determine the question of fact which appears essential to right decision of the suit on merit, then the Appellate Court may frame issues and refer the same for trial to the Court from whose decree the appeal is preferred directing to take additional evidence if required. The Appellate Court shall further direct that after trying the said issue the evidence be returned to it with a finding and reasons therefor. In such contingencies the time to return back the evidence and the finding ought to be fixed by the Appellate Court. Thereafter the Appellate Court after inviting objections may determine the appeal on merit.
- (4) On production of the additional evidence and after taking them on record, if the Appellate Court is satisfied to take some witness to prove the document then the remand may be directed for taking such evidence or witness on record specifying the points for it. On taking additional evidence on record by all the times the remand is not necessary if the document is admissible in evidence and not objected by other side, the Court may pass the order on merit deciding the appeal.
- (5) It is to be made clear here that if the evidence on record is sufficient to enable the Court to pronounce the judgment after re-settling the issue, the Appellate Court should not remand in routine and the appeals must be decided on merit.
- (6) If the Appellate Court is of the opinion to direct for remand in any of the contingencies as specified hereinabove under clause (1) to (4), it is the duty of the Court to fix the date for appearance of the parties before the trial Court with a view to curtail the delay on directing such remand and if the remand in the above clause (3) findings be also called within the time specified.

14. Thus, in absence of fulfillment of requirement of remand as held in the case of *Vipin Kumar & Others (supra)* the impugned order

cannot be sustained in the eye of law because First Appellate Court itself firstly has to consider the evidence already available on record. The documents which were filed alongwith the application under order Order 41 Rule 27 of the CPC should have been considered at the time of final hearing of the case and not at preliminary stage and if then the First Appellate Court feels that retrial is necessary, then by recording such finding, the power as specified in the judgment of *Vipin Kumar & Others (Supra)* may be exercised by directing the remand of the case as per provisions of Order 41 Rule 23-A, 24 and 25 of the C.P.C.

15. Therefore, as discussed above, impugned judgment passed by learned II Additional District Judge, Gadarwara, District Narsinghpur (M.P.) is hereby set aside and the matter is remanded back to the First Appellate Court to decide the appeal on its own merits confining itself to the issues and evidence before the trial Court preferably within 180 days from the date of receipt of copy of this order and record.

16. Parties are directed to remain present in person before the learned First Appellate Court on 18/03/2024.

17. With the aforesaid observation, appeal stands disposed of.

18. Let the record of the trial Court as well as First Appellate Court be sent back to the concerned Court alongwith copy of this order for information and necessary action.

**(AMAR NATH (KESHARWANI))
JUDGE**

as