

Court No. - 7

Case :- MATTERS UNDER ARTICLE 227 No. - 3168 of 2004

Petitioner :- Smt.Geeta Pandey And 3 Ors.

Respondent :- Additional Distt. Judge Lucknow And 5 Ors.

Counsel for Petitioner :- Virendra Misra,Pritish Kumar

Counsel for Respondent :- C.S.C.,A.P. Singh

Gaur,Agendra Sinha,Ajai Kumar Rai,Anant Tewari,Girija

Shankar Tripathi,Harshita Awasthi,Jeya Rai,Mohd.

Shakeel,Prashant Singh Gaur,Rakesh Kumar,Ranjana

Agnihotri

Hon'ble Pankaj Bhatia,J.

1. Present petition has been filed challenging the order dated 01.05.2004 (Annexure - 13) whereby the appellate Court has remanded the matter in exercise of powers under Order 41 Rule 25 of CPC.

2. The facts, in brief, leading to the filing of the present petition are that one Shri M.N. Lehri, owner of the premises in question, gifted the disputed premises to his grandson Shri D.K. Lahiri, original defendant no.1 in the suit and the respondent no.4 herein. It is claimed that Shri D.K. Lahiri executed a registered sale deed and transferred the said house to one Shri Deen Dayal Pandey, father-in-law of petitioner no.1 and grandfather of petitioner nos.2 to 4. It is stated that on the same day i.e. 13.10.1971, the said executant of the sale deed Shri D.K. Lahiri was given the entire premises on rent at the rate of Rs.290/- per month. As he stopped paying rent, a notice was served and a suit for arrears of rent was filed. Subsequently, on account of a title dispute raised, the matter was relegated for trial before the trial Court. The trial Court decreed the suit and directed the respondents to vacate the premises within two months. Aggrieved against the said judgment passed in the suit, three appeals were filed which were decided by means of a common judgment dated 01.05.2004. Learned appellate Court in exercise of powers under Order 41 Rule 25 of CPC set aside the decree and remanded the matter for deciding issue nos. 2, 3 & 8 afresh.

3. Shri Pritish Kumar, learned counsel for the petitioners stresses that power under Order 41 Rule 25 of CPC was wrongly exercised as it is essential to frame an issue for being decided afresh in terms of mandate of Order 41 Rule 25 of CPC, whereas no such issue has been framed by the appellate Court and the matter has been simply remanded for adjudication of three issues afresh. He further argues that during the pendency of the suit, the gift deed executed in favour of the seller through Shri D.K. Lahiri was challenged mainly on the ground that he was three years' old when the gift deed was executed by the donor and as there was no acceptance of the gift, the gift was bad in law and the father of the said Shri D.K. Lahiri was residing in a foreign country, as such, there was no evidence to establish that there was any acceptance of donation. The appellate Court after recording submissions held that it was essential that there should be an acceptance of gift in terms of Section 122 of the Transfer of Property Act and as there was no evidence led to that extent, the matter deserves to be remanded. He further recorded that the evidence that evidence of Smt. Priya Mukherjee ought to have been examined by the trial court before decreeing the suit and as her evidence was not on record, the same deserves to be remanded for fresh adjudication on the three issues.

4. Apart from the contention of learned counsel for the petitioner that the remand cannot be made in terms of Order 41 Rule 25 of CPC without framing an issue, it is argued that the said Smt. Priya Mukherjee whose evidence was sought to be relevant is also no more and thus, the entire purpose of remand stands frustrated.

5. It is argued that since the said two persons namely Smt. Amita Lahiri who had died during the pendency of the suit as well as Smt. Priya Mukherjee who could have deposed as to whether there was acceptance of the gift or not, have died, the order deserves to be set aside.

6. Learned counsel for the respondents, on the other hand, argues that the gift allegedly executed in favour of Shri D.K. Lahiri when he was three

years' old was not accepted by his parents (natural guardian) and this fact was confirmed by mother Smt. Amita Lahiri herself, and in view of the overwhelming evidence of denial of landlord and tenant relationship in between Late D.K. Lahiri and Shri Deen Dayal Pandey, there was a doubt created with regard to execution of the sale deed. It is further argued that after the death of the donor, the property in question was mutated in the name of Shri Sudhir Lahiri, the father of the donee, who expired on 13.10.1964 and as such, if the version of the plaintiff is accepted, the mutation could not have happened.

7. In the light of the said, it is further argued that in terms of the appellate order sought to be impugned herein, the appellate Court had fixed six months' time, as such, no prejudice was likely to be caused to the petitioners. It is further argued that the mother of the donee herself admitted that they did not have any title to the house. In the light of the said, it is argued that the petition deserves to be dismissed and the order impugned should be upheld.

8. In the light of the said submission, it is essential to notice the provisions of Order 41 rule 25 of CPC, which are as under:

"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."

9. On a plain reading of the said provision, it is clear that the power under Order 41 Rule 25 of CPC can be exercised if the trial Court 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, and the appellate Court can frame issues and refer the same for trial. The appellate Court is also empowered to direct that additional evidence be led to try the said issue.

10. Admittedly, by means of the impugned order, no fresh issue has been framed. Even the reasoning given in the said order for recording fresh finding on issue nos.2, 3 & 8 is not possible as the fact whether there was any acceptance of donation by the natural guardian of donee or not, could have been established only by the mother of the donee or the sister who are unfortunately no more.

11. In view of the facts as recorded above and finding that no issue was framed by the appellate Court, I am of the view that the appellate Court could exercise the power under Order 41 Rule 33 of CPC and decide the appeal on merits based upon the evidence that is available.

12. Finding the impugned order dated 01.05.2004 to be short of requirement for exercise of powers under Order 41 Rule 25 of CPC, the same is set aside.

13. Matter is remanded to the appellate Court to decide the appeals in accordance with law.

14. As the matter is very old, it is directed that all the appeals connected shall be decided expeditiously without giving any unnecessary adjournment to any of the parties.

15. Present petition stands ***allowed*** in above terms.

Order Date :- 19.12.2024
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