

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.616 of 2013

- =====
1. Gopal Mahto.
2. Deep Narayan Mahto.
3. Sanjay Kumar Mahto alias Sanjay Kumar Mehta.
All sons of Late Ram Lagan Mahto, resident of Mohalla-Musallahpur Akharah,
Mahabir Lane, P.S. Pirbahore, District-Patna.
.... (defendants-Respondents)...Appellants.
- Versus
1. Ramashankar Sharma, son of Sri Ramayan Sharma, Director, Laxmi Cold
Storage, Mohalla-Musallahpur, Police Station-Sultanganj, District-Patna.
.....(Plaintiff-appellant)
2. Jai Narayan Mahto, son of Late Jag Mohan, resident of Musallahpur,
Akharah, Police Station-Pirbahore, District-Patna.
.....(substituted heir of defendant-Respondent).
3. Yashoda Devi, wife of Late Ashok Kumar Mahto (substituted heir of
defendant no.3).
4. Guria Kumari, m/d/o Late Ashok Kumar Mahto.
5. Khushbu Kumari, m/d/o Late Ashok Kumar Mahto.
6. Deepak Kumar, m/s/o Late Ashok Kumar Mahto.
7. Chhotu Kumar, m/s/o Late Ashok Kumar Mahto.
Minors u/g/o their mother and next friend.
8. Jyotish Kumar Mahto alias Jyotish Kumar, son of Late Ram Lagan Mahto,
Respondent No.3f to 8 resident of Mohalla-Musallahpur Akharah, Mahabir
Lane, P.S. Pirbahore, District-Patna.....(Defendants-Respondents).
.... Respondents.
- =====

Appearance :

For the Appellants : M/s. Rajendra Narain, Senior Advocate &
Rabi Bhushan Prasad-1, Advocate.
For the Respondent No.1 : Mr. Sunil Singh, Advocate.
For the Respondent Nos. 2 & 8 : Mr. Pankaj Majwar, Advocate.
For the Respondent Nos.3 to 7 : Umesh Prasad, Advocate.

=====

CORAM: HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

Date: 24-04-2015

Learned counsel for the parties are ready to argue the case
on merit at the stage of hearing under Order 41 Rule 11 of the Code of
Civil Procedure, as such, I proceed to consider this Misc. Appeal on
its own merit and dispose of the same.

2. Heard learned counsel for the parties.

3. This Misc. Appeal has been preferred under Order 43 Rule 1(U) of the Code of Civil Procedure against the Judgment dated 05.03.2013 passed in Title Appeal No.70 of 2006, whereby the Additional District Judge-14, Patna, allowed the Title Appeal No.70 of 2006 setting aside the Judgment and Decree dated 28.01.1997 passed in Title Suit No.181 of 1990 by the Sub Judge-II, Patna City, Patna, and remitted the case back for passing the Judgment afresh after hearing the parties.

4. Learned counsel appearing on behalf of the defendants-Respondents-appellants submits that it would appear from the impugned Judgment that the learned lower appellate court remitted the case back to the learned court below for passing the Judgment afresh as per according to law after hearing the parties on the ground that the court below should have passed the reasons Judgment on issue no.5 and also on alternative relief, which is not permissible under Order 41 Rule 23 and 23(A) of the Code of Civil Procedure. It is further submitted that under Order 41 Rule 24 of the Code of Civil Procedure, 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 to pronounce the Judgment.

5. On the other hand, learned counsel appearing on behalf of the plaintiff-appellant/Respondent No.1 submits that there is no illegality in the impugned Judgment passed by the learned lower appellate court in remanding the case back to the trial court for passing the Judgment afresh as per according to law after hearing the parties by setting aside the impugned Judgment and Decree passed by the trial court as the findings of the trial court in respect of the issues framed were not clear.

6. It appears that the plaintiff-appellant/Respondent no.1 filed the suit for specific performance of contract with alternative relief of decree of Rs.20,000/- with interest pendente lite against the defendant no.1, Badri Mahto, the ancestor of Respondent No.2, with the contention that Badri Mahto was in the need of money and, as such, he negotiated to sale the suit premises with plaintiff for consideration of Rs.85,000/-. Badri Mahto took a sum of Rs.4000/- on 22.03.1998 and Rs.5000/- on 25.09.1988 from the plaintiff after making the receipt. Lastly when the contract was finalized on 05.10.1989, the plaintiff further paid Rs.11000/- to Badri Mahto. Thus, Badri Mahto took total Rs.20,000/- against the consideration



and executed a bai Beyana on 05.10.1989 to the effect that he will execute the sale deed within six months from the date of agreement after receiving the balance consideration amount of Rs.65,000/-. Since the date of agreement while the plaintiff was always willing and ready to pay the balance consideration amount and to get the sale deed executed but Badri Mahto always avoided the matter. The plaintiff sent legal notice dated 03.03.1990 through registered post but Badri Mahto refused to accept the same and he sold part of the suit land to Gopal Mahto by two registered sale deeds dated 21.12.1989 and 25.04.1990, which is illegal and not binding upon the plaintiff as purchasers had knowledge of agreement for sale executed by Bardri Mahto in favour of plaintiff.

7. The original defendant no.1, Badri Mahto, filed the written statement with the contention that he has never executed agreement for sale dated 05.10.1989 in favour of plaintiff nor he received any money against the consideration amount. As such, the alleged agreement for sale is forged, fabricated and his signature has been obtained fraudulently. The further case is that the total land is 2 Katha 6 dhoor 10 dhoorki, out of which by executing two separate sale deeds he sold 1 Katha 10 dhoor land. The first sale deed is dated 21.12.1989 with respect to 6 dhoors of land and structure in favour of Gopal Mahto and another sale deed is dated 25.04.1990 with respect



to 1 Katha 4 dhoor land and structure in favour of Gopal Mahto and others for consideration of Rs.1,58,000/- and both the sale deeds are legal, valid, genuine and operative documents. The defendant nos.2 to 6, the purchasers of the sale deed have also filed their written statement with the contention that they had no knowledge about the alleged agreement for sale dated 05.10.1980 and the same is forged, fabricated and created document by plaintiff and he is not entitled to the relief as claimed.

8. The learned trial court on the basis of the pleadings of the parties, framed altogether 7 issues and after hearing the parties dismissed the Title Suit No.181 of 1990 vide Judgment and Decree dated 28.01.1997. Being aggrieved and dissatisfied with the Judgment and Decree dated 28.01.1997 passed by the trial court, the plaintiff-appellant filed Title Appeal No.70 of 2006 which was allowed by the Additional District Judge-14, Patna, through the impugned Judgment dated 28.01.1997 remanding the matter to the trial court to pass a fresh Judgment after hearing the parties.

9. From perusal of the impugned Judgment, it appears that the learned Appellate court while discussing the evidence and material available on the record arrived at the conclusion that the record shows that the learned trial court while deciding the issue has not properly answered on the basic issues raised by the parties and, accordingly, set



aside the Judgment and Decree dated 28.01.1997 passed in Title Suit No.181 of 1990 by the Sub Judge-II, Patna City, and remitted the case back to the learned court below for passing the Judgment afresh as per according to law after hearing the parties. There is no finding of the lower appellate court in the impugned Judgment to the effect that there is lack of evidence to decide the relevant issues.

It is the cardinal principle of remand that whenever it is found for something which is vital had not been decided by the trial court and the same cannot be decided by the Appellate court because of lack of proper materials on record, then only remand can be made. The present appeal does not confirm to any of the provisions of Order 41, Rule 23 and 23(A) of the code of Civil Procedure. Rather provision of Order 41, Rule 24 of the Code of Civil Procedure is applicable in the present case when it is admitted that there is already evidence and documents filed by the parties in the case, then it is incumbent on the Appellate court to decide the appeal on merit. The impugned Judgment of the Appellate court only disclosed that case has been remanded to the trial court to pass fresh Judgment appreciating the material and evidence available on record after hearing the parties.

10. In this view of the matter, this Misc. Appeal is allowed and the impugned Judgment passed in Title Appeal No.70 of 2006 is

set aside with direction to the appellate court to decide the Title Appeal No.70 of 2006 on merit after hearing the learned counsel for both the parties within a period of one year positively from the date of receipt or production of a copy of this Judgment.

(Rajendra Kumar Mishra, J)

P.S./-

U			
---	--	--	--