

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.380 of 2004

=====

Smt.Barhan Devi & Ors

.... Appellant/s

Versus

Keshwar Yadav & Ors

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Jitendra Prasad Singh

For the Respondent/s : Mr. Ashok Kumar

Mr. Rama Kant Sharma

=====

CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR

SAHOO

ORAL ORDER

29 13-01-2015 1. Heard the learned counsel, Mr. Jitendra Prasad Sinha, for the appellants and the learned counsel, Mr. Ajay Kumar Verma, for the respondents.

2. This Misc. Appeal has been filed by the plaintiff appellants against the Judgment and decree dated 15.07.2004 passed by learned VIIth Addl. District Judge, Gaya in Title Appeal No.8 of 2000 / 2 of 1999 whereby the lower appellate Court after setting aside the Judgment and Decree of the trial Court dated 21.11.98 in title suit No.10 of 1998 / 70 of 1988 remanded the

matter for fresh decision after recasting two additional issues mentioned in the Judgment.

3. The learned counsel for the appellant submitted that the Judgment of the lower appellate Court remanding the matter is against the provision of law. The evidences are available on record, therefore, the lower appellate Court has the same jurisdiction as that of the trial Court as mentioned in Section 107 of the Code of Civil Procedure, therefore, it is settled principle of law that First Appeal is a continuous of the suit, in such circumstances, the lower appellate Court instead of remanding the matter to the trial Court for decision of the issues, the appellate Court should have itself decided the issues on the basis of the evidences available on record. The learned counsel further submitted that the specific case of the plaintiff is that the suit property was gifted by Jaso in their favour by one registered gift deed dated 16.09.1995 and the property was the self acquired property of Jaso who was in railway service. After gift, the donee came in possession of the same. However, the property has been recently recorded in the revenue record of rights in the name of brothers which compelled the plaintiff to file the suit. The lower appellate Court did not consider these facts that the trial Court on the basis of the evidences available on record clearly came to the

conclusion that the property was the self acquired property of Jaso and remanded the matter for decision of the two additional issues which are not relevant for decision as to whether the properties is the self acquired property of Jaso or not.

4. On the other hand, the learned counsel, Mr. Verma, appearing on behalf of the respondent submitted that it is the bounden duty of the trial Court to frame proper issues but in the case although the defendants clearly pleaded that there had been no partition and the suit property is a joint family property, the trial Court did not frame any issue, therefore, the learned lower appellate Court has rightly remanded the matter after recasting the two issues. In support of his contention the learned counsel relied upon *AIR 1950 Patna 356 Division Bench and 2012 (3) BBCJ 221 SC and 1986 BLJ 244.*

5. Perused the Judgment and Decree of the trial Court as well as the lower appellate Court.

6. Admittedly, the parties knew the case of each party and they entered into trial knowing the case of each other. The parties adduced their respective evidences. It is also admitted fact that the evidences are already on record in support of their respective case. From perusal of the Judgment of the lower appellate Court also, I

find that the lower appellate Court nowhere has held that further evidences is necessary. According to the learned counsel for the respondent, the trial Court has not properly re-casted the issues, and therefore, the Judgment is wrong.

7. It is settled principle of law that when there is specific pleadings regarding particular fact, the particular issue is not framed but the parties having full knowledge of the issue in controversy lead the evidence and the Courts records a finding on it no party shall be said to have prejudiced. The Hon'ble Supreme Court in the case of *Nedunuri Kameswaramma Vs. Sampati Subba Rao AIR 1963 SC 884* has held that **'where the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case.'**

8. The Hon'ble Supreme Court in the case of *Ashwinkumar K. Patel Vs. Upendra J. Patel AIR 1999 SC 1125* has held that **'the High Court should not ordinarily remand a case under O. 41, R. 23, C.P.C. to the lower Court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead**



to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the trial Court and considered whether the order of the trial Court ought to be confirmed or reversed or modified. It could have easily considered the documents and affidavits and decided about the prima-facie case on the material available. In matters involving agreements of 1980 (and 1996) on the one hand and an agreement of 1991 on the other, as in this case, such remand orders would lead to further delay and uncertainty. Thus the remand by the High Court was not necessary.'

9. So far the decision relied upon by learned counsel for the respondent are concerned, those are not applicable in the present facts and circumstances of the case. It speaks about the jurisdiction and duty of the trial Court and in particular facts of that case, the High Court held that the order of remand is correct. That is not the case of universal law. The facts of each case has to be examined. In the present case as stated above, there is evidence available on record. The parties went to trial knowing the case of each other. Therefore, in view of the settled proposition of law

laid down by the Supreme Court, the lower appellate Court should not have remanded the matter. Accordingly, I find that the Judgment of the lower appellate Court is not sustainable in the eye of law.

10. In the result, this Misc. Appeal is allowed. The impugned Judgment passed by the lower appellate Court dated 15th July, 2004 in Title Appeal No.8 of 2000 / 2 of 1999 passed by VIIth Addl. District Judge, Gaya hereby set aside. The Title Appeal is remanded back to the lower appellate Court for a fresh decision of the lower appellate Court according to law. Considering the age of Title Appeal, the lower appellate Court shall dispose of the case as early as possible.

(Mungeshwar Sahoo, J)

Sanjeev/-

U			
---	--	--	--