

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.574 of 2013

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Bhim Gosain, son of Late Bishnu Gosai, R/o – Village – Jamui Gosai Tola, P.O. + P.S. – Jamui, District – Jamui.

.... Appellant

Versus

1. Shankar Gosain, son of Late Bindeshwar Gosain
2. Aklu Gosain, son of Late Bindeshwar Gosain
Both R/o – Village – Ghanberia, Gosain Tola, P.S. Khaira, District – Jamui, at present village More English, P.S. – Makama, District – Patna.
3. Siya Devi, widow of Late Arjun Gosain
4. Dinesh Gosain, son of Late Arjun Gosain
5. Suresh Gosain
All are resident or village – Jamui, Gosain Tola, P.O. + P.S. – Jamui, District – Jamui.

-----Respondents

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Appearance :

For the Appellants : Mr. Kumar Kamal Nayan, Advocate

For the Respondent No. 1&2 : Mr. Rajesh Kr. Sinha, Advocate

For the Respondent No. 3, 4 & 5: Mr. Rakesh Kr. Sinha, Advocate

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CORAM: HONOURABLE MR. JUSTICE AKHILESH CHANDRA
C.A.V. JUDGMENT

Date: 10-02-2015

This is an appeal preferred by defendant appellant against order dated 28.05.2013 passed by 1st Additional District Judge, Jamui, remanding Title Appeal No. 36/2009 arising out of Judgment dated 04.07.2009 passed by Sub-Judge – 1st, Jamui, in Title Suit No. 36/2004.

2. The relevant facts in short is that plaintiff respondent had filed the suit for declaration of Title denying any right, title and interest of defendant appellant over the suit property.

3. The defendant appellant by filing written

statement contested the suit on various grounds including non-joinder of necessary parties.

4. The original Court on the basis of rival pleadings and other materials on record framed as many as following issues for determination which reads as such : -

- (1) Whether the suit as framed is maintainable ?
- (2) Whether the suit is barred by law of Limitation, estoppel, waiver and acquiescence ?
- (3) Whether the suit is bad for non-joinder of necessary parties ?
- (4) Whether the suit is barred by provisions of special Relief Act ?
- (5) Whether the suit is barred by the principles of resjudicata ?
- (6) Whether the plaintiff has valid cause of action for the suit ?
- (7) Whether the suit has properly valued and court fee paid thereof is sufficient ?
- (8) Whether the plaintiff have title over the suit land ?
- (9) Whether the plaintiffs are descendant of the recorded tenant of Khemajeet Gosai ?
- (10) Whether Jagarnath Gosai died issueless ?
- (11) Whether Bhim Gosai and Arjun Gosai were the legal heirs and rightful successors of Khemajeet



Gosai, the recorded tenant ?

- (12) Whether the plaintiffs are entitled to get any other relief or reliefs ?”

And after due consideration of oral and documentary evidence adduced by the parties, apart from others, finding the suit bad for non-joinder of necessary parties (issue no. 3), dismissed the suit, of course, without cost.

5. The plaintiff respondent preferred appeal against judgment of the trial court and the Lower Appellate Court after full fledged hearing concluded that “----- **suit suffers with defect for not impleading necessary parties the vendors of the plaintiff and if any final adjudication is done would be of no avail and may create several complications -----**” remitted the suit to the original Court with a direction to implead such necessary parties and after fresh hearing re-decide the matter giving rise to present appeal.

6. It is contended by learned counsel for the appellant here that Lower Appellate Court has, instead of affirming decree of the trial court without any reasonable cause contrary to law, remanded the appeal causing undue harassment to the parties concerned. On the other hand, contention of learned



counsel for the plaintiff respondent is that Lower Appellate Court has exercised its jurisdiction as contemplated under Order XLI Rule 23 & 25 of the Code of Civil Procedure. There appears no reason for any interference.

7. True it is, the law makers have authorized the Appellate Court to pass order of remand also by enacting Rule 23, 23(A) and 25 of the Code of Civil Procedure which reads as such:

“23. 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 directions to re-admit the suit under its original number in the register of Civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

23-A. 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 a re-trial is considered necessary, the Appellate Court shall have the same power as it has under rule 23.

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.”

But, none of the ingredients as required under law appears satisfied in the present appeal.

8. The defendant appellant at very initial stage by filing written statement has raised objection of non-joinder of necessary parties. The plaintiff respondent did not paid any heed, opted at his own risk to proceed with the suit without impleading them. The trial court

after hearing framed issues, including issue no. 3 i.e. non-joinder of necessary parties, provided full opportunity to the plaintiff but, all in vain. The plaintiff respondent proceeded with the trial without making defects, as pointed out by the defendant appellant, good. Ultimately, after full fledged trial the original Court not only decided the said issue against the plaintiff, but, all other issues went against him.

9. For the Courts in appeal, there is also a provision in the Code of Civil Procedure by Rule 24 of Order XLI which reads as such:

24. Where evidence on record sufficient, Appellate Court may determine case finally – 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”.

The above provision makes it mandatory to the appellate court to make endeavour to decide the appeal on the materials available.



10. The Lower Appellate Court in the appeal after full fledged hearing in appeal also appears arriving at conclusion that suit is bad for non-joinder of necessary parties, but at this belated stage, chosen to provide an uncalled for opportunity to the plaintiff respondent to fill up the lacuna/latches which did not come as a surprise, rather, attempts have been made by defendant appellant to point it out at the initial stage of the suit at the time of filing the written statement, but, instead deciding the appeal on other issues, remitted it to the original Court without assigning any reason for not deciding the appeal on other issues and disposing it of as a whole.

11. In the event, such order is permitted to continue, it tantamounts to give undue favour to the plaintiff respondent to fill up the latches committed by him, since beginning in spite of repeatedly being brought into notice. The law does not permit to do so, consequently, impugned order is not sustainable, accordingly, it is set aside. The appeal is hereby allowed with a direction to the Lower Appellate Court to decide the appeal afresh on all issues, and further directed to dispose of the appeal within three months on receipt of the record.

12. Learned counsel for the parties are

directed to appear before the Lower Appellate Court or its successor in office on 9th March, 2015. Meanwhile, Registry of the Court is directed to ensure receipt of copy of this judgment.

Rajeev/-

(Akhilesh Chandra, J.)

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