

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.171 of 2013

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1. Union of India through the General Manager, N.E. Railway, Gorakhpur (U.P.).
2. Divisional Railway, Manager, E.C.R. Samastipur. Appellant/s
Versus

1. Chandreshwar Singh
2. Ram Chandra Pd. Singh
3. Jagarnath Pd. Singh
All sons of Late Sita Singh, resident of village - Bhabdepur Got, P.S. Riga, District
Sitamarhi. Respondent/s

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Appearance :

For the Appellant/s : Mr. Ashok Kumar Keshri
For the Respondent/s : Mr. Prasoon Sinha

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 28-08-2015

Heard the parties.

The counsel for the appellants submits that there is delay of eight months twenty three days in filing of the appeal which has been explained in the limitation petition stating that on account of movement of the file from table to table which led to delay in filing this appeal, makes a prayer for condonation of delay.

The counsel for the respondents has resisted the claim of condonation of delay.

Looking to the explanation submitted by the railway administration for condonation of delay in filing the appeal is accepted, accordingly, the delay is condoned.

In the present case, the appellant is challenging the judgment dated 29th February 2012 passed

by Additional District Judge, F.T.C.-I, Sitamarhi in Title Appeal No. 18 of 2007/ 4 of 2010 whereby and whereunder he has set aside the judgment and decree dated 20th January 2007 and 9th February 2007 passed by Subordinate Judge-IV, Sitamarhi in Title Appeal No. 67 of 1995 and remanded back the matter.

Defendants-respondents are the appellants before this Court. The plaintiffs-respondents have filed Title Suit No. 67 of 1995 in which the relief was sought for declaration of title and confirmation of possession over the schedule-I land of the plaint.

From the plaint of the title suit, the genealogical table appears to be as follows:-

Abhishek Singh has one son, namely, Govind Singh. Govind Singh left two sons, namely, Sita Singh and Rajdhari Singh. Rajdhari Singh died issueless and Sita Singh has four sons, namely, Chandreshwar Singh, Ram Chandra Pd. Singh, Jagarnath Pd. Singh and Lal Babu Singh. He has also two daughters. Sons of Sita Singh are plaintiffs. Lal Babu Singh died during the pendency of the suit and after his death, his wife was substituted as one of the plaintiffs.

The land in dispute is appertaining to cadastral survey Khata No. 207, C.S. Plot No. 778, Area 46 decimals. During the cadastral survey, the name of Govind Singh was

recorded and it has been claimed that after the death of Govind Singh, Sita Singh was in possession of the land who died in the year 1971 leaving behind four sons and widow and they have inherited all the properties of Sita Singh including the property in dispute.

It has been claimed that during the course of Cadastral Survey Operation during the year 1894-98, the plot in question was opened in the name of Govind Singh. The land was, for certain period, mortgaged to Girwar Mishra son of Adhin Mishra of village-Kachor, PS-Sonbarsa, District-Sitamarhi and later on, the mortgaged property was redeemed and Govind Singh came in possession over the said land. After the death of Govind Singh, Sita Singh came in possession and enjoyed the usufruct of the land and after the death of Sita Singh, the plaintiffs came in possession of the property.

Earlier the rent of the land was being paid to the ex-landlord and after vesting of the Estate, the rent is being paid to the State of Bihar. Accordingly, the jamabandi was opened in the name of Sita Singh.

The land has been shown to be culturable land and over the said land, they were growing paddy crops and other crops.

After the death of Sita Singh, the plaintiffs

excavated a tank and also construed certain construction for the purposes of letting out the same and the plaintiffs are realising rent from their tenants and the tank is being used by them for fishing purposes.

After the Cadastral Survey Operation, Municipal Board was established in Sitamarhi Town and certain portion of the village-Bhavdepur Got including the entire area of Cadastral Survey Plot No. 778 was amalgamated in Sitamarhi Municipality and became a part of Ward No. 12.

The Municipal Survey Operation was started in the town of Sitamarhi and during the course of town survey operation, the father of plaintiff nos. 1 to 4 died in the year 1971 and the plaintiffs were minors so they could not understand about the entry made in the Municipal Survey and due to their mistake, the said land has been recorded in the name of Government of India. But claim has been made that plaintiffs remained in possession as usual and the Government of India or the Railway Administration never came in possession over any portion of C.S.Plot No. 778. It has further been claimed that no portion of C.S.Plot no. 778 was ever acquired by the Government of India or the Railway Administration as well as no compensation was paid to the family members of the plaintiffs. When they attained



the majority, they could know about the wrong entry which has been made in the Municipal Survey record and instead of their names or their predecessors in-interest, the name of Union of India and the name of Railway Administration have been recorded and claimed that the land in question be declared to be their land, their right and title be declared and their possession should be confirmed.

The plaintiffs sent a notice under Section 80 Cr.P.C. to the defendant through his advocate on 21st October 1994 by registered cover with A/D which was received by defendant. Daughters of Sita Singh also participated in the suit.

The Union of India has contested and has disputed the claim of the plaintiffs on the plea that the land in question was acquired by the Union of India, vide Gazette Notification No. 648R dated 10th June 1903, for the construction of Indian Railway.

It has been claimed that the Railway is using the lands since the acquisition and the right of fishing has been given to the highest bidder by issuing license. It has further been claimed that the tank and the ditches have come up on account of excavation of the earth for the purposes of the construction of Railways track. Further alleged that the plaintiffs do not have a right and interest

and possession over the land in question.

The Trial Court has framed altogether six issues, one of the issues was "whether the portion of C.S.Plot no. 778 was acquired by the Government for the use of Railway and compensation has been paid to the family members of the plaintiffs."

The Appellate Court in paragraph 9, has quoted the issue in verbatim and has recorded that the Trial Court has not given any specific finding that the suit land was acquired by the Government for the use of Railway and compensation has been paid to the family members of the plaintiffs, although this issue was framed by the Trial Court. The appellate Court recorded, the Trial court has also failed to consider the documents filed by the plaintiffs/appellants, on the ground of non-consideration of the documents filed by the parties i.e. Ext.7 to 7/b, 10 and 10/a and Ext. A and B, judgment was declared to be vitiated and the court has recorded that the court felt handicapped in recording the finding because, it amounts to going into facts which must be done by the Trial Court.

The counsel for the appellants submits that Appellate Court had done wrong in remanding the case to the trial court when material was available before the appellate Court to decide the issue, as the court below has

overlooked the provisions of Order-41, Rule 24 which specifically deals with such situation providing, where evidences are available to adjudicate the issue the Appellate Court instead of remanding the case may determine case finally. It will be relevant to quote Order-41, Rule 24 which is as follows:-

“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. ”

On reading of the aforesaid provisions, it is apparently clear that the Appellate Court has ample power, if the materials are available then instead of remanding back the matter, the court will be obliged to consider, even re-settle the issues and determine the suit. This issue has been decided by the Hon’ble Supreme Court and the High Court, First in **AIR 1963 SC 884** (Nedunuri Kameswaramma v. Sampati Subba Rao. It will be relevant to rely upon judgment, reported in **AIR 1980 Patna 111** (Kailashpati Narain Singh v, Bhola Sanani), **2003 (4) PLJR 810** (Jai Kishore Singh v. State of Bihar) where in paragraph 6, the Court has said that whenever it is found that for something



which is vital had not been decided by trial court and the same cannot be decided by the Appellate court because of lack of proper material on record, the Court will remand the case but if the materials are available then the provision of Order-41, Rule 24 CPC will be applicable, appellate Court is obliged to decide the issue. In the present case, when it is admitted that documentary evidence and oral evidence are available on record, it is incumbent on the Appellant Court to decide the appeal itself on merit and the Appellate Court should not shirk its responsibility and relegate the same to court below. It will be relevant to quote paragraph 6 of the aforesaid judgment, is as follows:-

“It is the cardinal principle of remand that whenever it is found that for something which is vital had not been decided by trial court and the same can not be decided by the Appellate court because of lack of proper material on record, then only remand can be made. But the present appeal does not conform to any of the provisions of Order-41, Rules 23 to 26 C.P.C. Rather provision of Order-41, Rule 24 C.P.C. is applicable in the present case when it is admitted that there is already oral 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 judgment of the Appellate court only disclosed the shirking mentality of the Appellate court in deciding the appeal on merit.”

From the order of the Appellate Court it appears that the court itself says about the availability of material and the court only says that it is the duty of the Trial court to marshal the fact and decide the issue, in its finding, the court does not say that materials are not available for deciding the issue discussed in paragraph 9 of the judgment.

This Court is of the view that the Appellate Court has misdirected himself in remanding back the matter to the court below instead, he himself ought to have looked into the material and decide the case on its own merit.

Accordingly, the order of appellate Court is set aside and the case is remanded back with direction to the Appellate Court to decide the matter on its own merit.

Accordingly, this appeal is allowed.

(Shivaji Pandey, J)

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