

THE HIGH COURT OF TRIPURA
_A_G_A_R_T_A_L_A_

SAO No.5 of 2013

Shri Jitendra Chandra Biswas,
S/o Late Bipen Chandra Biswas,
Resident of Khowai Town, Ganki (B.P.C.Para),
P.O. P.S, Sub-Division & District - Khowai, Tripura.

..... *Appellant.*

- V e r s u s -

Smti Usha Rani Biswas,
Wife of late Rabindra Chandra Biswas,
Resident of Khowai Town, Ganki (B.P.C.Para),
P.O. P.S, Sub-Division & District - Khowai, Tripura.

Presently residing at :-

Sukanta Palli, East side of Basic Training College,
Jagatpur - Kalibari Road, P.O - Abhyonagar,
P.S - East Agartala, Sub-Division - Agartala,
District - West Tripura.

..... *Respondent.*

_B_E_F_O_R_E_

THE HON'BLE CHIEF JUSTICE MR. DEEPAK GUPTA

For the appellant : Mr. S Lodh, Advocate.

For the respondent : Mr. D Chakraborty, Sr. Advocate,
Mr. H Laskar, Advocate.

Date of hearing and : 10.8.2015.
delivery of judgment.

Whether fit for reporting

Yes	No
✓	

JUDGMENT & ORDER (ORAL)

This second appeal under Order XLIII of the CPC is directed against the judgment & order, dated 12th September, 2013 passed by the learned lower appellate Court i.e. Additional District Judge, Khowai, West Tripura in Title Appeal No.2 of 2010 whereby he remanded the case back to the trial Court.

2. Briefly stated, the facts of the case are that the plaintiff(*respondent herein*) filed a suit(TS No.21 of 2009) in which it was claimed that by virtue of sale deed No.I-592 dated 20th February, 1983 the plaintiff had purchased land from the defendant but due to the resistance of the defendant(*petitioner herein*) the plaintiff could not get mutation of the land effected in her favour in the Revenue record. By means of the suit, the plaintiff sought declaration of her right, title and interest and confirmation of possession over the suit land with consequential relief of perpetual injunction restraining the defendant or his agents from interfering in the possession of the plaintiff.

3. The learned trial Court found that the plaintiff was not in possession of the suit land. He, therefore, dismissed the suit holding that since the plaintiff was not in possession of the suit land she is not entitled to any decree for injunction. As far as the question of title is concerned, the learned trial Court held that though the defendant had admitted to have executed sale deed in favour of the plaintiff there is not an iota of evidence to show that the plaintiff had ever possessed the suit land and, therefore, held that the defendant is the permissive possessor of the suit land which stands good in comparison to the alleged title of the possession and ownership of the plaintiff. I am not commenting on the correctness of this finding of the trial Court because of the final order which I propose to pass.

4. The learned trial Court has not given any clear cut finding as to who is the true owner of the land. However, the learned trial Court has given a clear cut finding that the plaintiff is not in possession of the suit land and the defendant is in possession of the suit land. In such circumstances the learned trial Court may be right that a decree for injunction against the defendant may not lie. No decree for possession of land has been prayed for by the plaintiff but the learned trial Court will have to decide whether the plaintiff is the rightful owner of the land or not. The plaintiff may or may not be in possession but the Court can hold whether the plaintiff is actually owner of the land or not. It is one aspect of the matter to confirm the title of a party to the suit property. Even after confirming the title it can be held that the party is not in possession of the suit land and what are the consequences that will have to follow. The defendant has also taken a plea of adverse possession which has also not been decided by the trial Court.

5. After the appeal was filed an application for amendment was filed by the plaintiff to change the date of the sale deed as mentioned in the plaint from 20th February, 1983 to 21st February, 1983. This application was contested by the defendant on the ground that the plaintiff had not exercised due diligence. Thereafter, the plaintiff moved an application for withdrawing the appeal with permission to file a fresh suit. This application was also opposed and was rejected. Thereafter the appeal was dismissed in default. The

plaintiff approached this Court and that order was set aside and the appeal was restored. The learned lower appellate Court without deciding the application for amendment has just remanded the case taking recourse to Order XLI Rule 23A of CPC.

6. I am constrained to observe that the learned lower appellate Court has not appreciated the provisions of the Code of Civil Procedure. Remand of cases should be done as a last resort and should not be used as a shortcut to dispose of cases. Order XLI Rule 23 permits an appellate Court to remand a case where the trial Court has disposed of the suit upon a preliminary point and the decree is reversed in appeal. In that eventuality, the appellate Court may, if it thinks fit, remand the case and point out what issue or issues should now be decided after remand. In the present case, the lower appellate Court did not at all go into the question whether the findings of the trial Court were correct or not. Without setting aside the findings of the trial Court he could not have remanded the suit. First of all, the learned lower appellate Court had to decide whether the findings given by the trial Court were right or wrong and then only could he have remanded the suit.

7. Order XLI Rule 23A deals with remand in cases other than those where the trial Court has disposed of the case on a preliminary point. In such eventuality, the appellate Court has the power to remand the suit only if a re-trial is considered necessary. Therefore,

the appellate Court before ordering remand must come to a clear conclusion that the re-trial of the suit is necessary. Unless he gives such finding that it is not possible to decide the suit on the material on record and retrial is necessary, he cannot remand the case.

8. Order XLI Rule 24 is extremely important. It lays an embargo against remand by the appellate Court, if the evidence on record is sufficient to enable the appellate Court to pronounce judgment. In the present case, the appellate Court did not frame any new issues. He did not consider it necessary to frame any other issues. The parties had led evidence on all issues before the trial Court. The entire evidence was on record and the lower appellate Court without remanding the case could have decided the issues which had not been decided by the trial Court and it was not necessary to remand the case on this ground.

9. One may also make reference to Order XLI Rule 25 which lays down that even where additional issues are framed or where the trial Court has failed to give its findings on any issue and the appellate Court feels that findings on such issue are necessary, then the first course which the appellate Court should follow is to frame/point out such issues and then refer the same to the trial Court and call for the findings of the trial Court on such issues. If necessary, the trial Court can be permitted to record additional evidence on these issues. The trial Court in such eventuality tries those issues and returns the

evidence recorded by it along with its findings on such issues and the parties have a right to file objection to those findings and the appellate Court then decides the entire case on merits.

10. A reading of Order XLI Rule 23 to Order XLI Rule 25 makes it amply clear that the legislature in its wisdom thought it fit to curtail the powers of remand and clearly laid down the parameters when the appellate Court should remand the cases and when the appellate Court should itself decide the issues. The Apex Court in a catena of decisions has held that the power of remand should be exercised sparingly and should be exercised only in cases where it is imperative so to do. It has also been laid down that wholesale remand of the case for fresh trial should not be resorted to unless the trial Court has totally failed in the performance of its duties and not framed many important issues and re-trial is absolutely necessary. The rationale behind this provision is that cases should not be unduly delayed by remand time and again.

11. The principles relating to remand have been enunciated in a catena of judgments by the Apex Court. Reference need not be made to all the judgments, but only to the judgment of the Apex Court in ***Municipal Corporation, Hyderabad vs. Sunder Singh, [AIR 2008 SC 2579]***, wherein the Apex Court held as follows :-

“32. A distinction must be borne in mind between diverse powers of the appellate court to pass an order of remand. The scope of remand in terms of Order XLI Rule 23 is extremely limited. The suit was not decided on a preliminary issue. Order

XLI Rule 23 was therefore not available. On what basis, the secondary evidence was allowed to be led is not clear. The High Court did not set aside the orders refusing to adduce secondary evidence.

33. Order XLI Rule 23A of the Code of Civil Procedure is also not attracted. The High Court had not arrived at a finding that a re-trial was necessary. The High Court again has not arrived at a finding that the decree is liable to be reversed. No case has been made out for invoking the jurisdiction of the Court under Order XLI Rule 23 of the Code.

*34. An order of remand cannot be passed on ipse dixit of the court. The provisions of Order II Rule 2 of the Code of Civil Procedure as also Section 11 thereof could be invoked, provided of course the conditions precedent therefor were satisfied. We may not have to deal with the legal position obtaining in this behalf as the question has recently been dealt with by this Court in *Dadu Dayalu Mahasabha, Jaipur (Trust) v. Mahant Ram Niwas & anr.* (Civil Appeal No.3495 of 2008) disposed of on 12.5.2008.”*

12. It is clear that the Courts have always frowned upon wholesale remand of cases unless it is imperative and totally unavoidable. The power of remanding a case wholesale under Order XLI Rule 23A is to be exercised very sparingly where the appellate Court cannot decide the matter without remanding the case. It is not to be used where the appellate Court can either itself record the evidence or even when it frames issues it can call for findings of the trial Court on certain issues.

13. As far as the present case is concerned, the approach of the learned lower appellate Court, to say the least, is totally against

law. He has also dismissed the two applications; (i) the application for amendment exhibiting the sale deed and (ii) the application for production of additional evidence. As far as the application for amendment is concerned, I am clearly of the view that the same should have been allowed. Even if there is lack of diligence it is not of the party. It is of the counsel. The party has handed over the sale deed to the counsel, who has noted the correct number of the sale deed but in the date of execution it has wrongly mentioned as 20th February, 1983 instead of 21st February, 1983. The defendant in his written statement has not denied the execution of this sale deed by him in favour of the plaintiff. In such an eventuality I see no purpose of just taking shelter behind hyper-technicalities to thwart the cause of justice.

14. The endeavour of the Courts should always be to unravel the truth and not to just dispose of cases. We must remember that Courts have been established to decide disputes between persons juristic or otherwise. Behind every docket there is a face. A file is not a mere number. It is an expression of the expectations of a litigant who has approached the Court. Shutting out true facts only on the basis of technicalities is not the proper way of approaching matters. In the present case the defendant had admitted that he had executed the sale deed in favour of the plaintiff and only the date of the sale deed has wrongly mentioned, I feel no reason why this application for amendment should not have been allowed. The same is, accordingly, allowed. Since the defendant has admitted the execution of the sale

deed on the plaintiff, producing a certified copy of the same and showing the original to the Court the certified copy shall be exhibited in evidence.

15. The sale deed which the plaintiff wants to produce will be exhibited. The learned lower appellate Court will thereafter decide whether the plaintiff has title to the suit land and even if the plaintiff has title to the suit land, whether she is entitled to the decree for injunction since the learned trial Court has held that she is not in possession of the suit land. All these matters are required to be decided by the learned lower appellate Court.

16. In this view of the matter the appeal is allowed. The judgment & order of the learned lower appellate Court dated 12th September, 2013 passed in Title Appeal No.2 of 2010 is set aside and the matter is remanded back to the learned Additional District Judge, Khowai, West Tripura. The parties through their counsel are directed to appear before the learned Additional District Judge, Khowai, West Tripura on **23rd September, 2015**. The appeal shall be heard and disposed of by the learned Additional District Judge on or before 31st December, 2015. It is made clear that this Court has expressed no opinion on the merits of the case and it is for the learned lower appellate Court on appreciation of evidence including the sale deed, if exhibited, to decide whether the plaintiff was the title holder and

whether the defendant is in adverse possession and whether his adverse possession has matured into title as claimed by him.

Send down the records of the lower Court forthwith.

CHIEF JUSTICE

Sukhendu