

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.4088 of 2012

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Jahida Khatoon & Ors

.... Petitioner/s

Versus

Md. Ali & Ors

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Ratanakar Jha

For the Respondent/s :

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER

9 03-10-2017 The learned counsel Mr. Roy Saurabh Nath appearing on behalf of the petitioners submitted that the impugned order passed by Additional District Judge, F.T.C. III, Madhubani in Title Appeal No.24 of 2005 dated 12.01.2012 is without jurisdiction. The trial court without considering the amendment application filed by the petitioners during the trial of the suit dismissed the suit filed by the plaintiffs-petitioners. Therefore, the plaintiffs-petitioners filed title appeal and in that title appeal the petitioners filed application under Section 107 of the Code of Civil Procedure and prayed for remand of the appeal to the learned trial court for passing a fresh judgment after considering the amendment application filed by the plaintiffs-petitioners.

2. Section 107 of the Code of Civil Procedure provides powers of appellate court and so far remand is concerned, it is to be exercised as provided under Order 41 Rule 23, 23A and



25 of the Code of Civil Procedure. This can be done by the appellate court at the time of hearing of the appeal only and, therefore, no separate application under Section 107 of the Code of Civil Procedure is maintainable. Order 41 Rule 24 of the Code of Civil Procedure provides that if the evidence available on record is sufficient, the appellate court, instead of remand the matter to the trial court, can dispose of the appeal.

3. Section 107 (2) of the Code of Civil Procedure confers all powers of the trial court on the appellate court. The appellate court has also all powers of the trial court and can pass any such decree or order which could have been passed by the trial court, according to the provision as contained in Order 41 Rule 33 of the Code of Civil Procedure. Therefore, in the present case, the application filed under Section 107 of the Code of Civil Procedure itself was misconceived. The lower appellate court without considering this aspect of the matter has passed the impugned order on the merit of the amendment filed by the present petitioners, therefore, the order itself is without jurisdiction. Since the application filed by the plaintiffs-petitioners which is not maintainable, subsequently the order passed by the court below is without jurisdiction, as such no notice is required to be issued on the respondents. The application filed by the plaintiffs-petitioners



under Section 107 of the Code of Civil Procedure itself is rejected and consequently the impugned order is hereby set aside. However, this ground raised before this Court is a ground which can be raised by the petitioners at the time of hearing of title appeal on merit and the lower appellate court shall consider this ground also in the judgment.

4. Thus, this writ application is dismissed with the aforesaid observation.

(Mungeshwar Sahoo, J)

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