

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Jurisdiction Case No.871 of 2018

In
Miscellaneous Appeal No.61 of 2015

1. Geeta Devi, D/o Krith Nath Jha.
2. Arun Kumar Choudhary.
3. Rajendra Choudhary.
Both sons of Umesh Chandra Choudhary.
All R/o mohalla Sahebganj, (Church Road), P.O. Champanagar, P.S.
Vishwavidyalaya, District-Bhagalpur.

... .. Petitioners-Plaintiffs/Appellants/Respondents.

Versus

1. Radhey Yadav @ Raj Kishore Yadav, S/o Late Chandradeo Yadav.
2. Bimla Devi, W/o Radhey Yadav @ Raj Kishore Yadav.
Both R/o mohalla Sahebganj (Near Bajrangwali Mandir), P.S.
Vishwavidyalaya, District-Bhagalpur.

... .. Defendants/Respondents/Appellants.

3. Smt. Mohwa Devi, W/o Mahadeo Yadav, R/o of mohalla Sahebganj, (Near
Bajrangwali Mandir), P.S. Vishwavidyalaya, District-Bhagalpur.

..... Opposite Parties-Defendants/Respondents/Respondents 2nd Set

Appearance :

For the Petitioner/s	:	Mr. Nagendra Rai, Advocate Mr. Rajiv Kumar Singh, Advocate
For the O.P.	:	Mr. Ganpati Trivedi, Sr. Advocate Mr. Manoj Kumar Jha, Advocate Mr. Madan Mohan, Advocate Mrs. Pallavi Pandey.

CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

ORAL ORDER

4 16-05-2018 Heard learned counsel for the petitioners and learned
counsel for the opposite parties on this MJC petition.

2. This MJC petition has been filed by the petitioners
to modify the order of this Court dated 18.08.2017 passed in
M.A. no. 61 of 2015 by giving direction to the learned Appellate
Court to hear Title Appeal no. 144 of 2013 and pass fresh order.



3. Factual matrix of the case is that the petitioners had filed Title Suit no. 228 of 1983 which was dismissed by Sub-Judge-II-cum-CJM, Bhagalpur. Against the said dismissal order, the petitioners had filed Title Appeal no. 144 of 2013 whereby learned 3rd Addl. District Judge, Bhagalpur set aside the judgment dated 10.09.2013 passed by learned Sub-Judge-II-cum-CJM, Bhagalpur and remitted the matter back to the learned trial court for framing issue on the point of adverse possession and decide the said issue after taking evidence on the same. Against the aforesaid Appellate judgment, the opposite parties Radhey Yadav and Bimla Devi had filed Miscellaneous Appeal no. 61 of 2015 in this Court, which was allowed and the aforesaid judgment of the Appellate Court was set aside vide order dated 18.08.2017. To modify the aforesaid order by giving direction to the learned Appellate Court to hear the appeal and pass fresh order, the petitioners have filed this MJC petition.

4. It is submitted by learned counsel for the petitioners that as the judgment of learned Appellate Court remanding the case back to the trial court for framing issue on the point of adverse possession and decide the said issue after taking evidence on the same, has been set aside by the aforesaid order



of this Court and as there is no direction to the Appellate Court to decide the appeal considering all facts and law involved in the case, the Appellate Court is not deciding the appeal submitting that there is no direction in this regard of this Court. Hence, necessary direction in this regard is required to be given.

5. On the other hand, it is submitted by learned counsel for the opposite parties that the aforesaid order of this Court has become final and this Court has become *functus officio* and no order can be passed by this Court in modification of the said order rather the petitioners may file second appeal, if aggrieved by the same.

6. From perusal of record, it appears that as as per Order 41 Rule 24 CPC, wherever 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 and as per Order 41 Rule 25 CPC, 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 the learned lower court has not discussed about non-availability of evidence regarding adverse possession on record and instead of itself framing issue on the point of adverse possession and deciding the case, has remitted it back to the trial court for framing issue on the adverse possession and decide the case taking evidence thereon. Learned Appellate Court has also not discussed the finding of the trial court on all the issues framed and discussed by the trial court warranting setting aside the entire findings of the trial court and considering the aforesaid facts and material available on record, this Court vide order dated 18.08.2017 passed in M.A. no. 61 of 2017, has set aside the aforesaid judgment of the Appellate Court.

7. As the judgment of the Appellate Court remanding the case back to the learned trial court for framing issue on the point of adverse possession and decide the said issue after taking evidence, has been set aside by this Court with observation that the Appellate Court is required to frame



additional issue on the said point and decide the case, if there is sufficient evidence on record, there is clear cut observation of this Court in this regard, and in my considered opinion, it does not require any modification in the aforesaid order. Accordingly, this MJC petition is disposed of.

(Prakash Chandra Jaiswal, J)

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