

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.436 of 2011

1. MOHAN YADAV son of Late Babulal Yadav resident of Village- Herudiyara, Police Station- Kotwali (Kasim Bazar), Post Office- Herudiyara, District- Munger.
2. Ratandeo Yadav son of Mohan Yadav resident of Village- Herudiyara, Police Station- Kotwali (Kasim Bazar), Post Office- Herudiyara, District- Munger.
3. Manoj Kumar son of Mohan Yadav resident of Village- Herudiyara, Police Station- Kotwali (Kasim Bazar), Post Office- Herudiyara, District- Munger.
4. Pankaj Kumar son of Mohan Yadav resident of Village- Herudiyara, Police Station- Kotwali (Kasim Bazar), Post Office- Herudiyara, District- Munger.

... .. Appellant/s

Versus

1. SHILA BHARTI Daughter of Late Suresh Yadav, wife of Nirmal Kishore Bharti resident of Village- Farda Prem Tola, Post Office- Farda, Police Station- Naya Ramnagar, District- Munger.
2. Rohit Kumar son of Late Suresh Yadav resident of Village- Herudiyara, Post Office- Herudiyara, Police Station- Kotwali (Kasim Bazar), District- Munger.
3. Bipin Kumar Son of Late Suresh Yadav resident of Village- Herudiyara, Post Office- Herudiyara, Police Station- Kotwali (Kasim Bazar), District- Munger.
4. Soni Kumari Daughter of Late Suresh Yadav resident of Village- Herudiyara, Post Office- Herudiyara, Police Station- Kotwali (Kasim Bazar), District- Munger.
5. Deval Kumar Minor Son of Late Suresh Yadav under the legal and natural guardianship of their mother Jaimala Devi, resident of Village- Herudiyara, Post Office- Herudiyara, Police Station- Kotwali (Kasim Bazar), District- Munger.
6. Kalu Kumar Minor Son of Late Suresh Yadav under the legal and natural guardianship of their mother Jaimala Devi, resident of Village- Herudiyara, Post Office- Herudiyara, Police Station- Kotwali (Kasim Bazar), District- Munger.
7. Dev Kumar Minor son of Late Suresh Yadav under the legal and natural guardianship of their mother Jaimala Devi, resident of Village- Herudiyara, Post Office- Herudiyara, Police Station- Kotwali (Kasim Bazar), District- Munger.
8. Satya Narayan Yadav son of Late Tetar Yadav resident of Village- Hazi Suzan, Police Station- Kotwali, Sub Division- Munger, Sub- Registry- Munger, District- Munger.



- 9.1. Meena Devi, Wife of Shivan Yadav, Resident of Village Hazi Suzan Krishnapuri, Post Office Munger, Police Station Kotwali, District-Munger.
- 9.2. Sunny Kumar, Son of Shivan Yadav, Resident of Village Hazi Suzan Krishnapuri, Post Office Munger, Police Station Kotwali, District-Munger.
- 9.3. Ravi Kumar, Son of Shivan Yadav, Resident of Village Hazi Suzan Krishnapuri, Post Office Munger, Police Station Kotwali, District-Munger.
10. Rajendra Yadav, Son of late Tetar Yadav, Resident of Village- Hazi Suzan, Police Station- Kotwali, Sub-Division-Munger, Sub- Registry-Munger.
11. Pawan Kumar, Son of late Tetar Yadav, Resident of Village- Hazi Suzan, Police Station- Kotwali, Sub-Division-Munger, Sub- Registry-Munger.
12. Mostt. Leela Devi, Widow of late Tetar Yadav, Resident of Village- Hazi Suzan, Police Station- Kotwali, Sub-Division-Munger, Sub- Registry-Munger.
13. Santosh Kumar, Son of Satya Narayan Yadav, Resident of Village- Hazi Suzan, Police Station- Kotwali, Sub-Division-Munger, Sub- Registry-Munger.
14. Mukesh Kumar, Son of Satya Narayan Yadav Resident of Village- Hazi Suzan, Police Station- Kotwali, Sub-Division-Munger, Sub- Registry-Munger.
15. Sonu Kumar, Son of Satya Narayan Yadav, Resident of Village- Hazi Suzan, Police Station- Kotwali, Sub-Division-Munger, Sub- Registry-Munger.
16. Kailash Yadav, Son of late Ayodhya Yadav, Resident of Village- Herudiyara, Police Station- Kotwali (kasim Bazar), Post Office- Herudiyara, District-Munger.
17. Dharmendra Yadav, Son of Kailash Yadav, Resident of Village- Herudiyara, Police Station- Kotwali (kasim Bazar), Post Office- Herudiyara, District-Munger.
18. Birendra Yadav, Son of Kailash Yadav, Resident of Village- Herudiyara, Police Station- Kotwali (kasim Bazar), Post Office- Herudiyara, District-Munger.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Harshwardhan Sahay
For the Respondent/s : Mr.Ashutosh Kumar Verma

CORAM: HONOURABLE MR. JUSTICE S. KUMAR

ORAL JUDGMENT

Date : 06-05-2019

Heard the parties.

2. This miscellaneous appeal has been filed against the judgment and order dated 31.03.2011 passed in Title Appeal



No. 28 of 2006, by which the learned appellate court of Additional District Judge-IIInd, Munger, has remanded the case to the trial court after framing of three issues which were not framed by the trial court resulting in miscarriage of justice.

3. The appellant had filed title suit for partition of joint family property and also for setting aside the sale deed executed by O.P. No. 1 in favour of O.P. No. 3.

4. The case of plaintiff is that common ancestors, Ram Lal Mahto had three sons Firangi Mahato, Saukhi Mahto and Rebat Mahto. Rebat Mahto died issueless in 1925 and there was partition of the khatiyani land between Firangi Mahto and Saukhi Mahto and as per their partition they came in possession of their respective shares. The suit land came in the share and possession of Firangi Mahto. The plaintiff had prayed relief in the suit for declaration of their title over the suit land and also if they are dispossessed during pendency of suit they be granted recovery of possession.

5. It was further prayed that sale deed executed by defendant 1st party in favour of defendant 3rd party dated 04.08.1998 be declared as void and non-operational

6. Defendants had appeared and filed their written statement and have denied any partition among the Firangi



Mahto and Saukhi Mahto prior to 1925 but as a matter of fact Firangi Mahto and Saukhi Mahto partitioned joint family property in 1955 and the suit land came in the share of both co-sharers half and half and thereafter they are in peaceful possession of the shares allotted in the said partition.

7. The appellate court has held in para 24 of the judgment as impugned that there is finding of trial court that there has been partition between Firangi Mahto and Saukhi Mahto prior to 1925 in which the suit land has been allotted in the share of Firangi Mahto, however, no such issue was framed by the trial court upon which the said finding could have been recorded by it. No issue was framed by the trial court whether there was any partition between the descendants of Ramlal Mahto or not and when was partition was made in the year 1925 or in year 1955, as such the matter was remanded to the trial court after framing the three issues that (i) whether there had been partition between the descendants of Ram Lal Mahto and if there was partition whether the same took place in the year 1925 or 1955 and remanded the matter on limited issued as framed by the appellate court with a direction that the issue as framed by the appellate court may be decided by the trial court within three months from the date of order and thereafter remit its finding to



the appellate court and kept the appeal pending in the appellate court awaiting findings of trial court on the issues as framed by Appellate Court.

8. It has been further submitted on behalf of appellant that the appeal was remanded by the 1st Appellate Court under Order 41 Rule 25 after re-settling the issues, which were essential but omitted by the trial court. However, it has been submitted that since the parties had pleaded their case and were aware of case of each other and the pleadings of parties on partition was known to each other and they had also led evidence on that issue but since issue of partition was not framed by the trial court, as such, under Order 41 Rule 24 the appellate court was empowered to re-settle and re-frame the issue and decide the matter on the basis of evidences adduced before the trial court.

9. Order 41 Rule 24 CPC postulates that where the evidence upon the record is sufficient to enable the Appellate Court to pronounce the 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. Rule 25 postulates that 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; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons thereof.

10. Thus, the co-joint reading of these provisions would reveal, that the first appellate Court can remand the case to the trial Court only in the event, if it falls within the ambit of Order 41 Rule 25 CPC. If there is sufficient evidence on record, then it was for the appellate Court to decide the case on merits, as contemplated under Rule 24 CPC. It cannot resort to Rule 25 CPC to make an order of remand. The order of remand can only be made, where the trial Court has omitted to frame or try any issue, or to determine any question of fact essential to right decision of the suit. Rule 25 CPC is only to be invoked, where an issue should be framed for proper decision of the suit, but



has not been framed by the trial Court. The provisions of remand cannot be invoked to enable the parties to fill-up the lacuna in the pleadings or evidence, as the case may be. The appellate Court having found all the facts, should work out the legal consequences and ought to have decided the matter itself, instead of sending the case back to the trial Court. There is no bar in deciding the issues on merits raised in the first appeal by the appellate court itself.

11. The impugned judgment of remand is not in consonance with the statutory provisions of Order 41 Rule 25 CPC. Since, there was sufficient evidence on record to decide the real controversy between the parties, so, the appellate Court ought to have decided the matter itself, as contemplated under Order 41 Rule 24 CPC, instead of remitting the matter back to the trial Court. The impugned judgment of the first appellate Court cannot legally be sustained either in law or on facts.

12. In the facts and circumstances of present case, the order of remand passed by the 1st appellate court is set aside and the 1st appellate court is directed to decide the issues as re-framed by it on the basis of pleadings and evidences of parties available on the record and there was no requirement of remanding the appeal as no fresh evidence is required since all



the evidences with respect to issues re-framed are already on record and parties do not want to lead any further evidence after re-settlement and re-framing the issues, the appellate court may decide the appeal within three months from receipt/ production of a copy of order passed by this Court.

The miscellaneous appeal stands allowed.

(S. Kumar, J)

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AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	
Transmission Date	NA

