

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.558 of 2017

1. Ravindra Prasad Gupta, Son of Sheo Nandan Prasad Gupta, resident of Mohalla- Chawal Bazar, Daudnagar, Ward No. 8, P.O./P.S.- Daudnagar, District- Aurangabad.
2. Arun Kumar Gupta @ Arun Prasad Gupta, S/o Late Rajendra Prasad, Resident of Mohalla- Bajaja Road, Daudnagar, Ward No. 14, P.O. and P.S.- Daudnagar, District- Aurangabad.
3. Brajesh Kumar Gupta,
4. Gupteshwar Prasad @ Gupteshwar Prasad Gupta,

Both sons of late Chhote Lal Gupta, resident of Mohalla- Ward no. 7, Daudnagar, P.O. P.S.- Daudnagar, District-Aurangabad.
5. Satyanarain Prasad Gupta @ Munna Babu, S/o Jagdish Lal, R/o Mohalla- Ward No. 7, Daudnagar, P.O. and P.S.- Daudnagar, District- Aurangabad.

.....Defendants/Respondents in the court below

... .. Appellant/s

Versus

1. Bageshwari Prasad, Son of Late Kuldiplal, R/o Mohalla- Ward No. 14, Daudnagar.
2. Asha Devi, W/o Pradeep Kumar,
3. Amit Kumar, S/o Pradeep Kumar,

Both R/o Mohalla- Wad no. 9, Daudnagar.
4. Dharmawati Devi, W/o Ram Dutt Pathak, R/o Mohalla- Ward No.- 9, Daudnagar.
5. Ashok Kumar Gupta, S/o Bindeshwari Prasad Gupta,

R/o Mohalla- Ward No.- 8, Daudnagar.
6. Anil Kumar, S/o Late Jagdish Lal Gupta, R/o Mohalla- Ward No.- 8, Daudnagar,

All resident of Village- Daudnagar, Mohalla- Chawal Bazar, Main Road,
P.O. and P.S.- Daudnagar, District- Aurangabad.



.....plaintiffs/appellants in the court below

7. Nutan Prasad Gupta,
8. Tridesh Prasad Gupta,

Both sons of Late Chhotelal Gupta, resident of Ward No. 7, Daudnagar, P.O.
and P.S.- Daudnagar, District- Aurangabad.

.....Defendants / Respondents in the court below

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Bishwa Nath Chaudhary Mr. Prem Kumar, Advocates
For the Respondent/s	:	Mr. Anil Kr. Singh No.6, Mr. Ranjit Kumar, Advocates

CORAM: HONOURABLE MR. JUSTICE S. KUMAR
ORAL JUDGMENT

Date : 09-01-2020

Heard parties.

2. This miscellaneous appeal has been filed on behalf of defendants-appellants for setting aside the judgment and order dated 25.3.2017 passed by learned 4th Additional District Judge, Aurangabad in Title Appeal No.41 of 2008 / 112 of 2009 whereby and whereunder the learned appellate court has set aside the judgment and decree dated 28.8.2008 / 9.9.2008 passed by learned Munsif, Daudnagar in title suit no.189/2002 105/2008 and remanded the matter back to the trial court.

3. Title suit no.189/2002 was filed on behalf of plaintiffs to declare the Dharmshala of Aurangabad as public Dharmhala., It is stated in the plaint that the name of Dharamshalla is Sumiran Sao Dharamshalla in which every



year the idol of Maa Durga is installed for which permission is granted by Sumiran Sao Dharamshalla Committee.

4. Ram Sewak Lal son of late Sumiran Sao was a religious minded person and he established Dharamshalla in memory of his late father Sumiran Sao by a written deed and appointed Anant Prasad, Deep Chand Jain, Suraj Pd. Agarwal and Balram Pathak to manage the affairs of the Dharmshalla and for which in the year 1959, permission was granted by the Municipality for construction of said Dharamshalla in which two shops were constructed to meet the expenses of Dharamshalla and same is looked after by a Managing Committee and its first secretary was Anant Prasad and thereafter Ram Pd. Lal, Surendra Kr. Jain and Kedarnath Gupta (plaintiff no.1) were secretaries of managing committee.

5. In the register of municipality, name of Ram Sevak Lal was recorded and nature of Dharamshalla was public as such, it is free from municipal taxes. In the municipal survey khatian, secretaries of the Dharamshalla are Narendra Kumar Jain and others.

6. Defendants have started claiming Dharamshalla as their private property although they have accepted it as a public Dharamshalla in all meetings which were attended by



them which has been recorded in the register. According to the defendants, the Dharamshalla belongs to Sauniar Baniya community. Defendants want to construct a new Dharamshalla after demolishing the present one as such, present suit was filed for a declaration that the Dharamshalla is a public Dharamshalla.

7. Defendants in their written statement have stated that Dharamshalla was house of Sumrian Sao and after his death, his three sons Ram Sevak Sao, Janardan Sao and Shivilala Sao had title and possession over the same. However, subsequently, all the three brothers shifted to Ranchi and they converted their residence in memory of their father as Sumiran Sao Dharamshalla and for which two shops were also constructed for upkeep of the Dharamshalla from its income. They had given the responsibility of upkeep of Dharamshalla to Narendra Kr. Jain and thereafter it was given to Janardan Pd. Sao and their brothers.

8. Ram Sevak Sao died issueless. His brother Janardan Pd. started looking after the Dharamshalla from time to time and he permitted Narendra Kr. Jain to install idol of Durga on the verandah of Dharamshalla during Durga Puja.

9. Dharamshalla has become very old and is in a



dilapidated condition as such son of late Janardan Pd. Sao and son of late Shivr lal Sao, namely, Madan Gupta and Baijnath Gupta by a registered power of attorney dated 1.8.1995 executed in favour of Sauniar Baishya Samiti and appointed Ravindra Pd. Gupta as President and Arun Kr. Gupta as its Secretary and Chhote Lal Gupta, Radhamohan Pd., Yugal Pd. Gupta, Naresh Pd. And Shivshankar Pd. as members and since then defendants are looking after the Dharamshalla and its management. They applied to municipality to permit fresh construction of Dharamshalla as it was in a dilapidated condition then plaintiffs got instituted 144 Cr.P.C. proceeding against defendants. Plaintiffs have no right, interest or title in Dharamshalla.

10. On the basis of rival pleadings, the trial court framed ten issues. Issue nos.6 and 7 were the core issues which were whether in view of Order 1 Rule 8 of CPC the present title suit is maintainable without taking leave of the court to file suit in representative capacity and whether the suit is bad for non-joinder of necessary parties.

11. The trial court has held that it is an admitted fact that the premises belonged to Sumiran Sao who had three sons and their grandsons were alive as such, the descendants of



Sumiran Sao were a necessary party and as such the suit is bad for non-joinder of necessary party and decided issue no. 7 against the plaintiffs. Plaintiffs have filed the suit in representative capacity and for which permission of the court is mandatory but plaintiffs have not complied with any provision of Order 1 Rule 8 of CPC as such suit was not maintainable and decided issue no. 6 against the plaintiffs.

12. The trial court while considering issue nos.8 and 9 has found that the disputed property belonged to Sumiran Sao and present structure was constructed by his son Ram Sevak Lal who also executed a deed which has been marked as Ext. 2, however, same was not a registered document and neither it can be treated as gift deed or trust deed. However, none of the essential conditions of gift deed has been followed as such, the deed will be treated as a trust deed and it should be a registered deed.

13. The trial court after considering the oral and documentary evidence led by parties dismissed the suit against which the plaintiffs preferred title appeal No.41 of 2008/112 of 2009. The title suit was originally filed for a decree of permanent injunction restraining the defendants from making any construction over the suit land, however, in appeal by way



of amendment, further declaration was sought that the Dharamshalla in the name and style Sumiran Sao Dharamshalla is a public Dharamshalla being used by general public and managed by the plaintiffs and defendants have no right to interfere in the management.

14. The appellate court on re-appreciation of oral and documentary evidences has reversed the finding recorded by the trial court on issue nos.8 and 9. The appellate court has also reversed the finding of trial court on issue no.7 and has further held with respect to issue no.6 that the suit is bad as plaintiffs have failed to comply the provision of Order 1 Rule 8 with respect to prior permission of the court as notice of institution of suit to all persons so interested either by personal service or by public assignment has not been done by plaintiffs as such, the suit cannot proceed without permission of the court in absence of general notice under order 1 Rule 8 (2) of CPC and has set aside the judgment and decree of the trial court and remanded the matter from the stage of filing of the plaint and to seek permission under Order 1 Rule 8 within two months.

15. Defendants / respondents have filed this appeal against order of remand passed by the first appellate court. In an appeal filed against order of remand, this Court cannot consider



the merit of the case and jurisdiction is confined to the legality and validity of order of remand.

16. Section 107 of CPC deals with powers of Appellate Court by virtue of which first appellate court shall have same power and same duties as that of the courts of original jurisdiction:-

"107. Powers of Appellate Court.--(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power--
(a) to determine a case finally
(b) to remand a case
(c) to frame issues and refer them for trial;
(d) to take additional evidence or to require such evidence to be taken
(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."

17. There are three provisions in the Code of Civil Procedure which deals with the power of the Appellate Court to remand the case to the Trial Court. These provisions are Order 41 Rules 23, 23-A, and 25.

18. So far as Order 41 Rule 23 is concerned, it enables the Appellate Court to remand the case to the Trial Court when it finds that the Trial Court has disposed of the suit upon a preliminary point. The Appellate Court in such cases is empowered to direct the Trial Court to decide all the issues on evidence on record.



19. So far as Rule 23-A is concerned, it enables the Appellate Court to remand the case to the Trial Court when it finds that though the Trial Court has disposed of the suit on all the issues but on reversal of the decree in appeal, a re-trial is considered necessary by the Appellate Court.

20. So far as Rule 25 is concerned, it enables the Appellate Court to frame or try the issue if it finds that it is essential to the right decision of the suit and was not framed by the Trial Court. The Appellate Court in such case may, accordingly, frame the issues and refer the same to the Trial Court to take the evidence and record the findings on such issues and return to the Appellate Court for deciding the appeal. In such cases, the Appellate Court retains the appeal to itself.

21. The Apex Court in the case of **J. Balaji Singh Vs. Diwakar Cole & Ors** since reported in **AIR 2017 SC 2402**, while dealing with issue of remand by Appellate Court in paragraph nos. 22, 23 and 24 has held as follows:-

“22. In our considered view, the only error which the first Appellate Court committed was that it went on to record the findings on merits. In our view, it was not necessary to do so while passing the order of remand. The reason is that once the first Appellate Court formed an opinion to remand the case, it was required to give reasons in support of the remand order as to why the remand is called for in the case. Indeed, the remand was made only to enable the Trial Court to decide the case on merits. Therefore, there was no need to discuss much less record findings on several issues on merits. It was totally uncalled



for.

23. So far as the impugned order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the judgment of the first Appellate Court and restored the judgment of the Trial Court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the remand order in an appeal filed under Order 43 Rule 1(u) of the Code. Indeed, once the High Court came to a conclusion that the remand order was bad in law then it could only remand the case to the first Appellate Court with a direction to decide the first appeal on merits.

24. The High Court failed to see that when the first Appellate Court itself did not decide the appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the appeal on merits. Moreover, Order 43 Rule 1(u) confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43 Rule 1(u) gives a limited power to examine the issue relating to legality of remand order, as is clear from Order 43 Rule 1(u) which reads thus:

1(u) an order under Rule 23 or Rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court.”

22. The trial court as Appellate Court has held that suit to be not maintainable as permission of the Court under Order 1 Rule 8, for filing suit under representative capacity was not obtained by the plaintiff and accordingly, the Appellate Court remanded the matter to trial court with a direction that the same be re-admitted in its original number and be taken up at the stage when the plaint had been filed and the plaintiffs should seek permission under Order 1 Rule 8 within two months from



the date of the judgment and if they fail to do so the suit shall stand dismissed.

23. The question to be determined in this appeal is whether on said ground the case could have been remanded by the Appellate Court to the trial court to seek permission under Order 1 Rule 8 when same was not obtained by the plaintiff in the trial court.

24. The Apex Court in the case of **Hariram Vs. Jyoti Prasad and Ors** since reported in **AIR 2011 SC 952**, while dealing with requirement of permission of trial court under Order 1 Rule 8 when the suit is filed by the plaintiff in representative capacity in para no. 20, 21, 22 has held as follows:-

“20. The next plea which was raised and argued vehemently by the learned senior counsel appearing for the Appellant was that the suit was bad for non-compliance of the provisions of Order I Rule 8 of the CPC. The said submission is also found to be without any merit as apart from being a representative suit, the suit was filed by an aggrieved person whose right to use public street of 10 feet width was prejudicially affected. Since affected person himself has filed a suit, therefore, the suit cannot be dismissed on the ground of alleged non-compliance of the provisions of Order I Rule 8 of the CPC.

21. In this connection, we may appropriately refer to a judgment of the Supreme in *Kalyan Singh, London Trained Cutter, Johri Bazar, Jaipur v. Smt. Chhoti*



and Ors. reported in AIR 1990 SC 396. In paragraph 13 of the said judgment, this Court has held that suit could be instituted by representative of a particular community but that by itself was not sufficient to constitute the suit as representative suit inasmuch as for a representative suit, the permission of Court under Order I Rule 8 of the Code of Civil Procedure is mandatory.

22. In paragraph 14 of the said judgment, it was also held that any member of a community may successfully bring a suit to assert his right in the community property or for protecting such property by seeking removal of encroachment therefrom and that in such a suit he need not comply with the requirements of Order I Rule 8 CPC. It was further held in the said case that the suit against alleged trespass even if it was not a representative suit on behalf of the community could be a suit of this category.”

25. For the reasons as stated above, the judgment and order of the Appellate Court by which it has set aside the findings of the trial Court on all issues as framed by the trial court as well as remanding the matter to the trial court on the ground that in absence of permission of the trial court for filing suit under representative capacity, when plaintiffs themselves are aggrieved party, cannot be sustained either in law or on fact and accordingly, is set aside.

26. The Appellate Court is directed to decide the appeal on merit in confirmity with Order 41 Rule 31 of CPC. The Apex Court in its judgment in case of **B.V. Nagesh and**



Ors Vs. H.V. Sreenivasa Murthy since reported in **(2010) 13 SCC 530**, has considered the manner in which the first Appellate Court is to decide in accordance with Order 41 Rule 31 of CPC. The Apex Court in paragraph nos. 4 has held as following:-

“4. How regular first appeal is to be disposed of by the appellate Court/High Court has been considered by this Court in various decisions. Order XLI of C.P.C. deals with appeals from original decrees.

Among the various rules, Rule 31 mandates that the judgment of the appellate Court shall state:

(a) the points for determination;

(b) the decision thereon;

(c) reasons for the decision;

and-

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for re-hearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put-forth and pressed by the parties for decision of the appellate Court. Sitting as a court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of



law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. [Vide Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179 : : JT (2001) 2 SC 407 and Madhukar and Ors. v. Sangram and Ors. (2001) 4 SCC 756].”

27. With aforesaid observation, the Miscellaneous Appeal is disposed of.

Let the LCR be returned forthwith to the court concerned.

(S. Kumar, J)

Sanjay/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	28.01.2020
Transmission Date	NA

