

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.247 of 2020

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Matar Mahato @ Mahindra Singh S/o Late Punit Mahato, resident of village- Hirpur, P.s.- Jandaha, District- Vaishali

... .. Appellant/s

Versus

1. Umesh Singh s/o late Botal Singh resident of village- Hirpur, P.s.- Jandaha, District- Vaishali
2. Kameshwar Singh S/o Umesh Singh resident of village- Hirpur, P.s.- Jandaha, District- Vaishali
3. Upendra Chaudhary s/o ate Kishori Prasad Chaudhary N/A
4. Gopal Chaudhary s/o late Jagarnath Chaudhary n/a

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Chandra Kant, Advocate
For the Respondent/s : Mr. Bhubneshwar Prasad

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
ORAL JUDGMENT

Date : 18-01-2022

Heard the counsel for the parties.

This appeal has been filed against the judgment in Title Appeal No. 29/2018 by the learned District Judge, Vaishali at Hajipur, whereby the judgment and decree of the trial court dated 15.03.2018 and 27.03.2018 respectively in Title Suit No. 486/2007 has been set aside and on finding that there is complete lack of documentary evidence in support of the contentions raised by the plaintiff/appellant, the entire case has been remanded to the trial court under the provisions of Order 41 Rule 23-A of the Code of Civil Procedure for retrial and disposal.

The learned counsel for the appellant/plaintiff has raised a slender issue that in case of both the parties to



the suit claiming oral partition of ancestral land, there could be no documentary proof and if the appellate court was not in agreement with the findings of the trial court, the judgment of the trial court could have been reversed but the same ought not to have been remanded.

It was further contended that there is no finding of the appellate court that the trial court did not dispose of the suit as required under Order 20 Rule 3 or under Order 11 Rule 31 of the Code of Civil Procedure and therefore, it ought not to have remanded the case but should have decided the appeal. It has also been urged on behalf of the appellant/plaintiff that the appellate court should have disposed of the appeal in terms of Rule 25 of Order 41.

Alternatively, it was argued that if at all the appellate court was of the view that certain issues relevant for disposal of the suit were not framed and which was essential for the right decision in the suit on merits, the appellate court could have taken resort to the provisions contained in Rule 25 of Order 41 and should have framed issues and thereafter referred the same for trial to the trial court with a direction to take additional evidence as required.

Thus, the sum and substance of the argument on behalf of the appellant is that notwithstanding the findings of the trial court as well as the appellate court, the case of



remand under Order 41 Rule 23A had not been made out and therefore such an order cannot be sustained in the eyes of law.

As opposed to the aforesaid contention, learned counsel for the respondent/defendants has submitted that *prima facie*, the findings of the trial court in favour of the appellant/plaintiff has not found favour with the appellate court and therefore in its wisdom, the appellate court has remanded the entire case for retrial.

The case of the appellant/plaintiff before the trial court was that he had purchased the suit land from one Jagarnath Chaudhary (since deceased), son of Kishori Prasad and in support of such claim, he had brought on record the deed of agreement of sale dated 27.10.1998 (Ext.-1) and the sale deed dated 28.01.1999 with respect to 10 decimals of land lying towards the west of RS Plot No. 505 of Khata No. 77.

With respect to the line of succession and the title and ownership of the vendor, it was urged by the appellant/plaintiff that one Hirday Prasad Chaudhary had two sons *viz.* Jagdambi Prasad and Kishori Prasad, who, after the death of their father, had orally partitioned their landed properties. As per the family arrangement of partition, the entire RS Plot No. 505 of Khata No. 77



recording 19 decimals of land fell in the share of Kishori Prasad.

Kishori Prasad had two sons viz. Jagarnath Chaudhary (since deceased: vendor of the appellant/plaintiff) and Upendra Chaudhary (vendor of respondent no. 2) who also effected oral partition amongst themselves after the death of their father Kishori Prasad.

The suit land was divided into two parts of 10 decimals each, the western side of which came in the share of Jagarnath Chaudhary and the rest in the share of Upendra Chaudhary. Since Jagarnath Chaudhary (deceased) was in urgent need of money, he sold the land to the appellant/plaintiff on 28.01.1999 with respect to 10 decimals of land from the west of RS Plot No. 505 of Khata No. 77 referred to above. However, the same could not be registered because of the non-availability of sufficient stamps in the registry office on the date when the parties had gone for registration of the sale deed.

Nonetheless, the appellant/plaintiff came in possession of the said land since the date of agreement to sale on 28.01.1999 with perfect right, title and interest over which he constructed two huts, cattle-shed etc.

A dispute was created by the respondent/defendants resulting in a proceeding being



initiated under Section 144 Cr.P.C. which was converted into one under Section 145 Cr.P.C.

The respondent/defendants, it was urged, claim their right, title and interest over the entire 20 decimals of land of the said RS Plot No. 505 by virtue of sale deed dated 08.12.1998 executed by Upendra Chaudhary.

The case of the respondent/defendant, on the contrary, was that after the partition between Jagarnath Chaudhary and Upendra Chaudhary, the entire plot of 1217 fell in share of Jagarnath Chaudhary and a total area of Plot No. 505 (suit land) fell in the share of Upendra Chaudhary. Since Jagarnath Chaudhary was in need of money, he sold the entire property coming in his share through his son Narendra Prasad Sharma to one Jagdeo Rai by a sale deed in which there was a clear recital that the land had come in his possession on partition.

However, subsequently, the same land was sold on 30.12.1997 (in Plot No. 1217) to one Nirmala Devi. The case of the respondent/defendant therefore was that the entire property which came in the share of Jagarnath Chaudhary was sold by him and his son. Upendra Chaudhary, who was in possession of complete 20 decimals of land in Plot No. 505 sold the same to respondent/defendant Umesh Singh and Kameshwar Singh by three sale deeds.



It was further contended by the respondent/defendants that the appellant/plaintiff (Matar Mahto) had fraudulently got the sale deed executed by late Jagarnath Chaudhary in respect of 10 decimals of land in Plot No. 505, which actually had come in share of Upendra Chaudhary as per the family arrangement of partition. Therefore, Jagarnath Chaudhary (vendor of the appellant/plaintiff) filed a complaint against him *vide* Complaint Case No. 2153/2000, before the learned Magistrate and that in 145 Cr.P.C. proceeding, the appellant/plaintiff (Matar Mahto) had conceded that he was not in possession of the land in dispute and Upendra Chaudhary was found to be in possession of the suit land.

The trial court came to the conclusion that the defendant could not bring any documentary evidence which would support their claim that Jagarnath Chaudhary or his son sold the property falling in Khesra No. 1217 or that the land falling in Khata No. 505 came exclusively in the share of Upendra Chaudhary.

Since only a criminal complaint was filed by Jagarnath Chaudhary that the appellant/plaintiff had wrongfully got the sale deed registered in his name but did not make any effort to get such sale deed cancelled, the trial court was of the view that the appellant/plaintiff was in possession of the suit land, as the son of his late vendor



had also testified that the land in question was sold by Jagarnath Chaudhary to Matar Mahto.

The trial court also came to a finding that the respondent/defendants dispossessed the appellant/plaintiffs from the land in question and only thereafter the title suit was filed.

The appellate court, on the contrary, after analyzing the various documentary evidence came to the finding that the deed of agreement of sale in favour of the plaintiff by Jagarnath Chaudhary was executed on 27.10.1998, but the sale deed was registered on 28.01.1999 but there had always been a dispute relating to the possession of the suit land since 22.06.1999, which is evident from the proceeding under Section 145 Cr.P.C., which was concluded on 27.08.2007 holding the possession in favour of the respondent/defendants.

In that background, the appellate court was of the view that there was no documentary evidence to support the mode and manner of partition of joint properties of the vendors of the appellant/plaintiffs and respondent/defendants. The appellate court also raised doubts on the correctness of the finding of the trial court, holding the possession of the suit land in favour of the appellant/plaintiffs on the ground that even though the deed of agreement of sale in favour of the



appellant/plaintiffs is earlier in point of time than the sale deed executed by Upendra Chaudhary in favour of the defendants but the actual sale deed in favour of the appellant/plaintiff is of later date than the sale executed by Upendra Chaudhary in favour of the defendant and that also without any proof of payment of the balance consideration amount.

The recital of the sale deed of the appellant/plaintiff, if read in conjunction with the averments made in the complaint filed by his vendor dated 23.10.2000 (Ext.- E and F), raises doubt whether the sale deed with respect to RS Plot No. 505 Khata No. 77 was genuine.

On these grounds, it was held by the appellate court that the judgment and decree of the trial court was not sustainable in the eyes of law and he therefore reversed the same. However, in his view of there being complete lack of documentary evidence in support of the claim of the appellant/plaintiff, he exercised his powers under Order 41 Rule 23-A of the Code of Civil Procedure to remand the case to the trial court for retrial and disposal.

After having perused the judgments of the courts below, this Court finds that neither of the parties offered any evidence, documentary or oral, to support the claim of



partition and allotment of respective shares in ancestral property in their favour. If the appellant/plaintiff had not done so, similar was the case with the respondent/defendants.

Apart from this, if the case of the parties is based totally on oral evidence with respect to partition, there was no necessity of looking for any documentary evidence with respect to partition simplicitor and the issue could have been decided by the appellate court on the basis of evidence already adduced before the trial court.

Rule 23-A of Order 41 gives the powers to the appellate court to remand the case to the trial court, if the suit has been disposed of otherwise than on a preliminary point and the decree is reversed in appeal and a retrial is considered necessary.

Order 41 Rule 23-A extends the ambit of power of the appellate court to remand a case for retrial. Rule 23-A was introduced in the Code of Civil Procedure in 1976, by which a case could be remanded by the appellate court when the conditions *viz.* (I) that the trial court has disposed of the case otherwise than on a preliminary point; (II) the decree of the trial court is reversed and (III) a retrial is considered necessary, are satisfied.

Under the aforesaid circumstances, the appellate court could exercise the same powers of remand under 23-



A, as it can do under Rule 23. However, the appellate court ought to be circumspect in ordering a remand as an uncalled for and unwarranted order of remand only gives the litigation an unnecessary and undeserved long rope which is highly avoidable.

In the present case, since neither of the parties have brought documentary evidence with respect to partition in the family property, there was no occasion for the appellate court to have remanded the case for a retrial when the appellate court was not at all in agreement with the findings of the trial court on other grounds.

If at all the appellate court was of the view that the documentary evidence with respect to partition was necessary for a just disposal of the case, it could have exercised its power under Rule 25 and would have framed issues and referred the same to the trial court with a direction to take additional evidence as required and the trial court would have been under an obligation to take such evidence, try such issues and return the evidence to the appellate court together with its findings and reasons for the appellate court to finally pronounce the judgment. Otherwise it was only incumbent upon the appellate court, to have decided the appeal in terms of Rule 21 of Order 41, which mandates that if the evidence upon 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.

It is also noticed that the order of remand passed by the appellate court suffers from another defect.

Whenever an appellate court remands a case either under Rule 23 or Rule 23-A or frames issues and refers them for trial under Rule 25, it must, as mandated under Rule 26-A, fix a date for the appearance of the parties before the trial court for the purposes of receiving directions of the trial court as to further proceedings in the suit.

This provision has been inserted in the Code for the purposes of avoiding delay that may be caused by the issue of further notice.

This Court refrains from expressing any view with respect to the correctness of either the judgment and decree of the trial court or of the appellate court in reversing the same but has only addressed itself to the order of remand under Rule 23-A of Order 41.

The order of remand is not sustainable therefore, is set aside.



The case is remitted to the appellate court for writing out a fresh judgment in accordance with law either in terms of Rule-24 of Order 41 or if necessary under Rule-25 of Order 41.

It is expected that the appellate court shall show urgent dispatch in concluding this case.

The appeal stands allowed accordingly.

(Ashutosh Kumar, J)

krishna/-

AFR/NAFR	AFR
CAV DATE	NA
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