

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.1362 of 2016

- 1.1. Kaushal Kishore S/o Late Ram Anurag Narayan Choudhary, resident of Sneh Niwas, Mirchai Gali, Chowk, Patna City, Patna.
2. Sri Parmatmanand Mishra S/o Sri Ramashish Mishra, residing at Mohalla Jhauganj, in the town of Patna City, P.S.- Chowk, District- Patna.

... .. Appellant/s

Versus

1. Sri Lav Kumar Agrawal S/o Late Laxman Prasad Agrawal. resident of C/o Govind Agrawal, Mohalla Jhauganj, P.S.- Chowk, Patnacity, District- Patna, at present resident of B-383 Road No. 4, Ashok Nagar Ranchi, District- Ranchi.
2. Dr. Kush Kumar Agrawal S/o Late Laxman Prasad Agrawal resident of C/o Govind Agrawal, Mohalla Jhauganj, P.S.- Chowk, Patnacity, District- Patna, at present resident of B-383 Road No. 4, Ashok Nagar Ranchi, District- Ranchi.
3. Smt. Geeta Agrawal W/o Sri Pradeep Kumar Agrawal, resident of Village and Post- Katari Hill Road, District- Gaya.
4. Smt. Mudita Gupta, W/o Sri Praveen Gupta, resident of Mohalla- 26 A Madhu Kunj, Indra Nagar, P.O.- Indra Nagar, Lucknow, U.P.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Ranjan Kumar Dubey, Advocate
For the Respondent/s : Mr.Sudhir Kumar Bijpuria, Advocate

CORAM: HONOURABLE MR. JUSTICE KHATIM REZA
ORAL ORDER

19 30-11-2023 This Miscellaneous Appeal is directed against the judgment and order of remand passed by the learned Additional District Judge-Ist, Patna City in Title Appeal No. 43 of 2007 whereby the judgment and decree dated 16.03.2000 passed by Sub-Judge-IV, Patna has been set aside directing the trial court to decide afresh after framing the three additional issues.

2. The Plaintiffs case, in brief, is that the original defendant Laxman Prasad Agarwal was the absolute owner of the suit property described in 'Schedule A' of the plaint and the suit property was allotted in his share in the family partition



with his brother, namely, Govind Prasad Agarwal. The original defendant Laxman Prasad Agarwal died during the pendency of suit.

3. Further case of the plaintiffs-appellants is that Laxman Prasad Agarwal was settled with his family at Ranchi and he also constructed his own house at Ranchi. Further case of the Plaintiffs is that defendant was not getting any income from the suit property and feeling difficulty and inconvenience in getting and maintaining the suit property, so, the original defendant expressed his desire and intention with several persons to dispose of the suit land. Plaintiffs-appellants having came to know about the same approached defendants and finally matter was finalized at the rate of Rs. 50,000/- per *kattha* and accordingly on 07.10.1990 an agreement to sale was executed at Ranchi and plaintiff-appellant paid Rs. 10,000/- as advance money to the defendant. Again on 06.08.1991 representatives of plaintiff no. 1 and plaintiff no. 2 went to Ranchi and on 07.08.1991 defendant signed the paper on affidavit agreeing to sale and conveyed the suit property in favour of the plaintiffs subject to measurement at the time of execution of sale deed. Further case of the plaintiffs, is that, it was agreed between the parties that sale deed will be executed on or before 05.12.1991.



It has further been stated that the original defendant informed the plaintiffs that his brother has raised some objection hence, he will come to Patna in November, 1991, to settle the disputes and thereafter the sale deed will be executed. Accordingly, he came to Patna and dispute was resolved with his brother. Thereafter measurement was done and accordingly, draft sale deed was prepared and handed over to the defendants on 19.11.1991 for his approval, who assured to return the same to the plaintiff on 20.11.1991 but the same was not returned and finally on 22.11.1991 defendant handed over a cheque dated 22.11.1991, amounting to Rs. 10,000/- refusing to execute the sale deed although defendant was ready and willing to get the sale deed executed after paying rest of the consideration money i.e. Rs. 90,000/-. Since, the original defendant died and as such in his place his heirs were made party. On summon, they appeared in the suit and filed their written statement and have raised the question of maintainability of the suit mainly on the ground that agreement for sale is forged and fabricated. According to them, the suit land is ancestral property of Laxman Prasad Agarwal, which was allotted in his share in partition suit with his brother as such, he has no right to sale the joint family property alone.



4. Learned trial court after going through the materials available on record and after hearing the parties, in details, and going through the evidence oral as well as documentary, decreed the Title Suit on 16.03.2000.

5. The respondents preferred appeal against the judgment and decree passed in Title Suit No. 574 of 1991 on 16.03.2000 which was registered as Title Appeal No. 43 of 2007 in which after notice plaintiff-appellant appeared and contested the said appeal. Defendants-respondents have taken plea that Laxman Prasad Agarwal had no right to execute agreement for sale in view of Section 17 of the Specific Relief Act and according to Section 223 of the Hindu Law since, the property, in question, is not self-acquired property, rather, it is an ancestral property.

6. Considering the facts and law, the learned appellate court *vide* its judgment dated 29.09.2006 passed in Title Appeal No. 43 of 2007 allowed the appeal by setting aside the judgment and decree passed in the aforesaid suit and remanded the suit to the learned trial court after framing additional three issues and also directed to decide the suit afresh. The three additional issues framed by the appellate court is as follows:-

(1). Whether land in dispute is joint Hindu property of



Laxman Prasad Agarwal?

(2). Whether Late Laxman Prasad Agarwal was absolute owner of the land in question and Laxman Prasad Agarwal had alone right to sell the land in question?

(3). Whether plaintiff is ready and willing to purchase the suit property?

7. The present appellants have assailed the said judgment and order of remand passed by the learned appellate court in the present appeal.

8. Learned counsel for the appellants submits that the appellate court has failed to discharge its duties in accordance with law as provided under Order 41 Rule 24 of the Code of Civil Procedure. It is settled principle of law that the appellate court is duty bound to first try to get the appeal finally decided on the materials available on record and only in the event of insufficiency of evidence or possibility of any more evidence which are only possible to be adduced in the trial court may in its option to get the matter remitted to the trial court either under Rule 23 or Rule 23A or Rule 25 of Order 41 of the Code of Civil Procedure. It is submitted that the appellate court has violated the provisions of Order 41 Rule 24 of the Civil Procedure Code which provides that where evidence on record



is sufficient, it was incumbent upon the appellate court to finally determine the suit and hence the appellate court has travelled beyond the jurisdiction to remand the case and this view is supported by a decision in case of ***Ram Vinod Roy and anoher vs. Mostt. Ram Sumari Devi and ors.*** reported in ***(2004) 2 PLJR 755***. It is submitted that the appellate court being court of facts is duty bound to appraise the entire evidence available on record and come to its independent finding.

9. Learned counsel for the appellants has relied upon a decision in case of ***P. Purushottam Reddy and anr. vs M/s. Pratap Steels Ltd.*** reported in ***AIR 2002 SC 771***, which reads as follows:-

“The High Court was to examine whether such finding of the trial court was sustainable or not in law and on facts. Even otherwise the question could have been gone into by the High Court and finding could have been recorded on the available material in as much as the High Court being the Court of First Appeal, all the questions of fact and law arising in the case were open before it for consideration and decision.”

10. It is only in exceptional cases where the court may in exercising the power of remand *dehors* Rule 23 and Rule 23A of Order XLI is attracted. To wit Superior Court, if it finds that



the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3, Order XLI Rule 31 of the Civil Procedure Code and hence it is not judgment in the eye of law. It may set aside the same and send the matter back for re-writing the judgment so as to protect valuable rights of the parties. The appellate court should be circumspect in ordering the remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 of the Civil Procedure Code. An unwarranted order of remand gives the litigation an undeserved lease of life and therefore must be avoided. This view is expressed in case of ***Mahendra Manilal Nanavati vs. Sushila Mahendra Nanavati*** reported in ***AIR 1965 SC 364***.

11. Learned counsel for the appellants vehemently submits that the scope of remand in terms of Order 41 Rule 23 is extremely limited. The suit was not decided on preliminary issue. Order XLI Rule 23 was, therefore, not available. On what basis the secondary evidence was allowed to be led is not clear. The High Court didn't set aside the order refusing to adduce secondary evidence. Order 21 Rule 23A of the Code of Civil Procedure is also not attracted. The High Court had not arrived at findings that a re-trial was necessary. The High Court again



has to arrive at a finding that the decree is liable to be reversed. No case has been made out for invoking the jurisdiction of the court under Order 41 Rule 23 of the Code. This view has been taken in the case of ***Municipal Corporation, Hyderabad vs. Sunder Singh*** reported in ***AIR 2008 SC 2579***.

12. The trial court mis-directed itself that whether the title of the property is a joint or exclusive property of Laxman Prasad Agarwal. The omission to frame an issue as required under Order XIV Rule 1 of the Civil Procedure Code doesn't vitiate the trial whether the party go to trial fully knowing the rival case and lead evidence in support of their respective contentions and to refute contentions of the other side, this aspect of the matter has been dealt in the case of ***(Kannan (Dead) by Lrs. and Others vs. V.S. Pandurangam (Dead) by Lrs. and Others and Nedunuri Kameswaramma vs. Sampati Subba Rao*** reported in ***AIR 1963 SC 884***.

13. Learned counsel for the appellants further submits that the lower appellate court has wrongly re-framed the issue whether land in dispute is a joint Hindu property or not. Learned counsel for the appellants relied upon a Division Bench decision of this Hon'ble Court in case of ***Diwali Lal and others vs. Sardar Baldev Singh and another*** reported in ***AIR 1985 Patna***



344 in which in paragraph 9 it has been held as follows:-

The contract, if any, can be enforced only against a person who is a party to it and not against a person who is not a party to it; but the person who is a party to the contract for sale is bound to execute the sale deed if other terms are fulfilled by the purchaser, even though the property in question might not be belonging to him, as in that case the purchaser would take the risk of purchasing from him with his open eyes. It is obvious that the person to whom the property might legally belong cannot be bound by that sale, but all the same the parties to the contract would be bound by the contract to sell and the purchaser under the contract can enforce the vendor under the contract to perform his part of the contract. In such circumstances, I leave the question of title over the suit property open to be decided in a properly framed suit.

14. It is submitted that in the case of specific performance of contract the question of title to property cannot be decided in such a suit.

15. On the other hand learned counsel for the defendants-respondents have denied the execution of the sale deed dated 07.10.1990 and had alleged that this is a forged



document. It is submitted that the suit property is the joint family property of Late Laxman Prasad Agarwal, who got the suit property in the family partition with his brothers, Shri Govind Prasad Agarwal, as such, Late Laxman Pd. Agarwal had no right to sell the joint family property alone. It is also wrong to submit that Late Laxman Pd. Agarwal was the absolute owner of the suit property. Respondent nos. 1 and 2 are the sons of Late Laxman Pd. Agarwal. It is submitted that learned trial court has not given any finding with regard to readiness and willingness of the plaintiffs with regard to purchase of the suit land in the case of Specific Performance of Contract. It is vehemently submitted that in view of Section 17, the agreement for sale is not enforceable as the agreement for sale executed by persons who have no absolute right to property, cannot confer any right upon the plaintiffs for grant of decree of Specific Performance of agreement for sale in his favour. He relied upon a decision in case of ***Pemmada Prabhakar vs. Youngmens Vysya Association*** reported in (2014) 4 PLJR SC 245. Learned counsel refers paragraph 29 and 30 of the judgment which reads as follows:-

(29.) It is an undisputed fact that the suit schedule property is self acquired property by late Per 1970 Venkateswara Rao as he



had purchased the said property vide Sale-Deed Document No. 5174 of 1970 dated 24.11.1970 from his vendors. It is also an undisputed fact that the said property is intestate property He is survived by his wife, 3 sons and 3 daughters. The said property devolved upon them in view of Section 8 of Chapter 2 of the Hindu Succession Act as the defendants are class I legal heirs in the suit schedule property. Undisputedly, the Agreement of Sale- Ex-A1 is executed only by defendant Nos. 1 and 2. The 3rd son, mother and 3 sisters who have got equal shares in the property have not executed the Agreement of Sale. In view of the matter, the Agreement of Sale executed by defendant Nos. 1 and 2 who have no absolute right to property in question cannot confer any right whatsoever upon the plaintiffs for grant of decree of specific performance of Agreement of Sale in their favour. The said agreement is not enforceable in law in view of Section 17 of the Specific Relief Act in view of right accrued in favour of defendant Nos. 3 to 6 under Section 8 of the Hindu Succession Act. The provisions of Section 17 of the Specific Relief Act in categorical term expressly state that a Contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor who does not



*have absolute title and right upon the party.
It is worthwhile to extract Section 17 of the
Specific Relief Act, 1963 here:-*

*"17.-Contract to sell or let property by one
who has no title, not specifically
enforceable. A contract to sell or let any
immovable property cannot be specifically
enforced in favour of a vendor or lessor:*

*(a) who, knowing not to have any title to the
property, has contracted to sell or let the
property*

*(b) who, though he entered into the contract
believing that he had a good title to the
property, cannot at the time fixed by the
parties or by the court for the completion of
the sale or letting, give the purchaser or
lessee a title free from reasonable doubt."*

*In view of the aforesaid provisions of the
Specific Relief Act, the Agreement of Sale
entered between the plaintiff's and some of
the co-sharers who do not have the absolute
title to the suit schedule property is not
enforceable in law. This aspect of the matter
has not been proper appreciated and
considered by both the First Appellate Court
and the Second Appellate Court. Therefore,*



the impugned judgment is vitiated in law.

30.) Even assuming for the sake of argument that the agreement is valid, the names of three sons mentioned in Agreement of Sale, out of whom the agreement is executed by defendant Nos. 1 and 2 and they assured that they would get the signatures of the 3rd brother namely, Srinivasa Rao and also remaining 3 sisters. At the time of execution of this agreement signatures were not obtained. Therefor the agreement is not executed by all the co-sharers of the property which fact is evident from the recitals of the document itself. Hence, the plaintiffs are not entitled for specific performance decree. This v factual and legal aspect has been ignored by both the First Appellate Court and the Second Appellate Court. Therefore, the impugned judgment is vitiated both on facts and law. Accordingly, the point No. 1 answered in favour of the defendants.

16. Learned counsel for the respondents has relied upon a decision in case of **Shiva Kumar vs. Sharana Basppa** reported in **AIR Online 2020 SC 530**, wherein, the Hon'ble Supreme Court has held that the High Court ought to have considered remanding the case by taking recourse to provision contained in Order XLI Rule 23A of Civil Procedure Code. Rule



23A came to be inserted in Order XLI of Civil Procedure Code by way of Code of Civil Procedure (Amendment) Act, 1976. Prior to this amendment, it was generally accepted by the Courts that although under Rule 23, an order of remand could be made only on reversal of a decree disposing of suit on a preliminary point but, the Appellate Court has the inherent power of remanding a case where it was considered necessary to do so in the interest of justice. It is submitted that the provision in Rule 23 and Rule 23A of Order XLI, are different than the power of Appellate Court to remit an issue for findings under Rule 25. The power of remitting is ordinarily to be resorted to when the Trial Court has omitted to try any material issue or to determine any question of fact.

17. In other words, the proper procedure in cases where the trial court, while disposing of the suit on merits, had failed to determine one or more of the material issues/questions, is to remit the issues/questions under Order 25 and not to remand the whole case for the re-trial.

18. Learned counsel for the respondents further submits that the said alleged agreement for sale itself could not have been enforced since the defendant was also devoid of title. In support of his submission, the learned counsel has relied



upon a decision in case of *Maya Devi vs. Lalta Prasad* reported in **(2015) 5 SCC 588**.

19. It is submitted that learned lower appellate court has rightly set aside the impugned judgment and remitted the matter to the trial court with a specific direction that the trial court would frame additional issues in so far as the status of the property is concerned.

20. After analyzing the judgment and materials on record as well as the provision of Specific Performance of Contract involved in this case as well as in view of the decision of the Hon'ble Supreme Court that if defendants have no absolute title over the suit land, the provision of Section 17 of the Specific Relief Act cannot be enforced in favour of the proposed vendor, this Court is of the view that this aspect of the matter has not been decided by the trial court whether the property in suit is joint property of Laxman Prasad Agarwal or not. This issue is very crucial in order to decide the right of the parties. In my view only this issue has to be decided by the trial court and after deciding the same giving finding on the said issue the trial court shall return the evidence to the appellate court to gather its finding thereon. After receiving the said findings from the trial court, the lower appellate court is



directed to decide the appeal on all the question of facts and laws arising in the case.

21. It is further directed that the trial court shall decide the issue whether the land, in dispute, is joint Hindu property and Late Laxman Pd. Agarwal is alone absolute owner of the suit property or not preferably within a period of six months from the date of receipt/production of the copy of the judgment and return the findings on the aforesaid issues to the concerned lower appellate court.

22. Accordingly, the judgment and order of the lower appellate court dated 29.09.2006 passed in Title Appeal No. 43 of 2007 stands modified to the extent mentioned above.

23. Accordingly, the Miscellaneous Appeal is disposed of.

(Khatim Reza, J)

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