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Court : Kolkata

Decided On : Feb-21-1997

Reported in : (1997)2CALLT428(HC)

Judge : Sidheswar Narayan, J.

Acts : [Specific Relief Act, 1963](#) - Section 34; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Sections 105(2) and 151 - Order 6, Rule 14 - Order 41, Rules 23, 23A and 27

Appeal No. : C.O. No. 2818 of 1991

Appellant : Biswanath Digar and ors.

Respondent : Gopal Digar and ors.

Advocate for Def. : H.P. Roychowdhury, Adv.

Advocate for Pet/Ap. : Biman Kanti Bose and ;Gita Das, Adv.

Disposition : Petition dismissed

Judgement :

Sidheswar Narayan, J.

1. This revlsional petition by the defendants, is directed against the order dated June 22, 1991 passed by the Additional Munsif, Ghatal, District Midnapur in Title

Suit No. 46 of 1988, whereby their prayer for permission to adduce fresh evidence after remand of the suit was rejected. To be more specific, after the aforesaid suit was remanded by the appellate court to the trial court, the defendants-petitioners filed an application for inspection of the LTIs. said to have been given by the defendant O.P. No. 6 on summons/Wakalatnama/written statement with regard to an earlier snit being Title Suit No. 255 of 1970 as also to the subsequent one being Title Suit No. 46 of 1988 by a Finger Print/Hand writing Expert and for a report as such.

2. The factual score depicts that a Title Suit No. 46 of 1988, being one for declaration of Title and injunction was filed by the plaintiffs-O.P. Nos. 1 to 5 and the same was earlier dismissed on contest against the defendants-petitioners No. 1 to 5 and ex-parte against the defendants-O.P. Nos. 6 and 7 by the Judgment dated 18.5.1989. The plaintiffs-O.Ps. thereafter preferred an appeal being Title Appeal No. 47 of 1989 in the court of the Assistant District Judge, Ghatal. The appeal was however, allowed by the judgment dated 24.3.1990 of the Assistant District Judge, Ghatal, whereby the judgment of the trial court was set aside with a direction that an opportunity to the plaintiffs be given to amend the plaint and, thereupon, to give a judgment afresh. Such order of remand by the appellate court was subjected to a condition that no fresh evidence apart from the amended pleadings should be allowed by the trial court. The defendants-petitioners, thereupon, filed a petition before the trial court for obtaining report of an Hand-writing/Finger Print Expert with regard to the L.T.I, of the defendant O.P No. 6 as already referred to above. Obviously, the prayer as such made before the trial court was for adducing evidence afresh on behalf of the contending defendant i.e. the petitioners after the suit was remanded by the appellate court.

3. Learned counsel appearing on behalf of the petitioners urged that the order of remand by the appellate court would be deemed to have been passed under Order 41 Rule 23A of the Code of Civil Procedure and, accordingly, it was an open remand with entitlement to the defendants to adduce fresh evidence as referred to above. On the other side, the counsel for the O.P.,s urged that since no appeal had been preferred by the defendants-petitioners against the order of the remand, they would be precluded from disputing its correctness as provided under Section

105(2) of the Code of Civil Procedure.

4. In order to better appreciate the contention of the parties, it is deemed necessary to extract the relevant portion of the Judgment of the Assistant District Judge, Ghatal passed in Title Appeal No. 47 of 1989, whereby the suit had been remanded to the trial court.

'This court finds it just and convenience to send the appeal back on remand for trial afresh. Hence order that the appeal is allowed on contest with cost. The judgment of the learned Munsif passed in T.S No. 48 of 1988 is set aside. He is to give an opportunity to the plaintiffs-appellants to amend the plaint touching on the point discussed above. It is further ordered no new evidence apart from an amended pleadings should be allowed to be given'.

5. Obviously, the first appellate court set aside the judgment of the trial court and remanded the suit for a judgment afresh after giving an opportunity to the plaintiffs to amend the plaint. The amendment in the plaint as deemed necessary by the appellate court was with regard to the descriptions of the suit land which, according to him, was not identifiable and the plaintiffs were required to give the demarcated boundaries of the suit land measuring 4 decimal.

6. Since, admittedly, no appeal had been preferred against the aforesaid order of remand passed by the Assistant District Judge, Ghatal, I need not go into any further details as to the merit of the said order, but the fact remains that the Assistant District Judge, Ghatal, has in no uncertain terms made it clear in his judgment that no fresh evidence apart from what was required with regard to the amendment in the pleadings of the parties i.e. with regard to demarcated boundaries and identification of the suit land measuring 4 decimal should be allowed by the trial court. That being as such, it was but natural for the trial court, on a petition filed by the defendants-petitioners, to have passed the impugned order dated 22.6.1991, whereby their prayer for examination and comparison of the LTI of the defendant O.P. No. 6 and, naturally thereafter to provide an opportunity of adducing fresh evidence was refused.

7. The legal proposition on the point-in-controversy was as clear as that could be found in Section 105(2) of the Code of Civil Procedure which speaks that where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter to be precluded from disputing its correctness. Be it recorded here that the whole purpose of the defendants-petitioners behind the prayer for examination of LTIs by an Hand-writing/Finger Print Expert is to circumvent the specific condition put in the order of remand by the first appellate court, whereby the trial court had been prohibited to allow either of the parties to adduce evidence afresh on any point apart from the fact of amendments introduced in the pleadings. In view of the provision under Section 105(2) of the Code of Civil Procedure, I cannot but hold that no part of the order of remand can be allowed to be disturbed or circumvent and, it would be rather most appropriate to obtain finality of the said order.

8. Once again going behind the purpose of adducing fresh evidence it would be relevant to point out that the defendants-petitioner had taken a point at the trial in the suit that the judgment and decree passed in an earlier Suit No. 255 of 1970 had been obtained against their predecessor-in-interest i.e. the defendant O.P. No. 6 by way of false personation and, accordingly, the decree passed therein against their predecessor-in-interest i.e. O.P. No. 6 was not binding upon them. In this context, I find that the trial court as well as the first appellate court had expressed their concurrent finding that the decree passed in the aforesaid suit was binding on the defendant-O.Ps. It was because of this finding that the defendants-O.Ps. have resorted to re-open the issue and to adduce fresh evidence of an expert taking advantage of the order of remand. In the fitness of things, it was, however, very difficult to concur with the submission made on behalf of the petitioners that any such legal right was available to them only because of the order of remand, more so in face of the specific condition laid down in the order of remand.

9. There was yet another approach to look into the matter. This is that while the appellate court was hearing the appeal on merit, it was certainly open for the defendants-petitioners to have moved for adducing additional evidence under Order 41 Rule 27 of the Code of Civil Procedure, if at all that was so required by

them and permissible in law for a decision on the point whether the earlier Title Suit No. 255 of 1970 was binding upon them. Admittedly, no such option was exercised by the defendants- petitioners during the pendency of the appeal. That being as such, it does not stand to reason as to why such opportunity should be provided to them after the appeal has been allowed and the suit has been remanded with a specific rider that no fresh evidence should be allowed at the trial apart from what may be required as a result of the amendment in the pleadings. The defendants petitioners, prayer for examination of the LTIs of defendant-O.P. No. 6 was of course, not connected with the proposed amendment in the pleadings. That relates to the controversy between the parties with regard to which both the courts have come to a finding on the evidence available on the record. Hence, in this view of the matter as well, the defendants-petitioners are not entitled to any concession with regard to the impugned order.

10. As a last resort, the learned counsel for the defendants-petitioners has placed reliance on the decision of the Supreme Court in the case of Khritish Chandra Bose, v. Commissioner of Ranchi, reported in : [1981]2SCR764 and has urged that the order of remand can be re-agitated even at the present stage and that the provision under Section 105 of the Code of Civil Procedure would not stand in the way. It is true that in the aforesaid case such advantage was made available by the Supreme Court to assail the earlier order of remand but that was for the simple reason that the judgment just preceding the order of remand was found to be legality erroneous and without jurisdiction. It so happened in that case that the High Court reversed the concurrence finding of fact of the court below in the course of a second appeal, which was determined to be a jurisdictional error and, in that view of the matter, the subsequent order of remand also vitiated. Here, in the instant case, the facts are otherwise. The judgment and order passed in the Title appeal bearing No. 47 of 1989 as referred to above has not been assailed on any ground of legality. The defendants-petitioner was rather desirous of taking advantage of the order of remand so as to enable himself to make prayer for adducing fresh evidence which, in fact, was refused. What they simply wanted to avoid is the rider or the condition imposed in the order of remand, that is say, the prohibitive part of the remand order not to permit fresh evidence apart from what was needed with regard to the amendment in the pleadings. Such conditional

order of remand was well within the Jurisdiction of the appellate court as it would be borne out the provision of law under Order 41 Rule 23 and 23A of the Code of Civil Procedure read together. Hence, in my considered opinion, the authority as relied upon by the counsel for the petitioners was of no help in the instant case.

11. In the premises, I come to a conclusion that the instant revisional petition has no merit and, accordingly, the same is dismissed. There shall be, however, no order as to costs. The trial court is requested to dispose of the suit with utmost expedition.

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