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Court : Patna

Decided On : Mar-04-2011

Judge : Sahoo, J.

Acts : Transfer of Property (T.P) Act - Section 106

Appeal No. : MISCELLANEOUS APPEAL No. 61 OF 2001

Appellant : Abdul Moid and ors

Respondent : Maha Sundari Devi and ors

Advocate for Def. : Mr. Sukumar Sinha, And ors Advs

Advocate for Pet/Ap. : Mr. S.K.Verma, And ors Advs

Judgement :

Mungeshwar the defendants-respondents-appellants have filed this Sahoo, J.

Miscellaneous Appeal against the impugned judgment and order of remand dated 21.11.2000 passed by Sri Arun Kumar Srivastava, the learned 2nd Additional District Judge, Buxar in title appeal no.11 of 1985 whereby the learned 2nd Additional District Judge set aside the judgment and decree dated 09.01.1985 passed by Sri R.K.Mishra, 2nd Munsif, Buxar in title suit no.17 of 1972 and remanded the matter for a fresh decision on the basis of evidence available on the

record.

(2) The brief facts for the purpose of deciding this Miscellaneous Appeal is that the plaintiff-respondent filed title suit no.17 of 1972 for declaration of title and confirmation of possession on the suit properties and also prayed for permanent injunction. The plaintiff claimed the aforesaid relief alleging that the parties are Hindus governed by Mitakshara School of Hindu Law. By a private partition which took place 30-34 years ago, the parties were separated and plaintiff after separation acquired the suit property out of his own income and saving and is in exclusive possession thereof. It appears that initially the said suit was decided ex-parte but subsequently, at the instance of defendants, second set, the ex-parte judgment was set aside. According to the contesting defendants, second set, the father of the plaintiff had taken the disputed land on monthly rent of 12 Anna. When father of the plaintiff defaulted in payment of rent, Eviction Suit No.111 of 1959 was filed which was decided on 26.02.1962. However, no order of eviction was passed as there was no notice under Section 106 of T.P. Act. When the father of the plaintiff failed in his gain, he set up the plaintiff and this suit has been filed. In fact, no settlement has been made by the ancestors of these defendants and the plaintiffs never came in exclusive possession of the land as owner.

(3) After trial, the learned Court below considering oral as well as documentary evidences came to the conclusion that the plaintiff has miserably failed to prove subsisting title and possession over the suit land. The learned Court below also found that the plaintiff failed to prove adverse possession. The learned Court found that the plaintiff had sufficient means to pay the Court fee and therefore, steps be taken to realize Court fee from him. On the basis of these findings, the learned Court below dismissed the plaintiff's suit.

(4) Against the said judgment and decree, the plaintiff filed title appeal no.11 of 1985. The Lower Appellate Court after stating the facts of the case of both the parties at paragraph 9 held that the plaintiff had made out a case by amendment of plaint that the defendants, second set have no heritable and transferable right and therefore, the suit property vested in the State of Bihar. The State of Bihar is neither party in the suit nor party in the Appeal. The learned Court below did not

consider this aspect and also did not realize the ad valorem Court fee first before the decision of the suit and therefore, set aside the impugned judgment and decree and remanded the matter to the Court below to realize the ad valorem Court fee for suit as well as for appeal within a month and directed to hear the parties only on the basis of the evidence available on the record.

(5) Mr. Verma, the learned Sr. counsel appearing for the appellant submitted that none of the provisions for remand is applicable in the present case and the learned Lower Appellate Court without considering either the provision contained in Rule 23(A) or Rule 25 of Order 41 remanded the matter although all the evidences are available on record and in the remand order itself the Lower Appellate Court has directed the trial court to decide the matter on the basis of the materials available on record. The learned counsel further submitted that on the ground that Court fee has not been paid by the plaintiff the decision given on merit could not have been set aside by the Lower Appellate Court. The proper course was that the learned Lower Court should have directed the plaintiff to deposit the Court fee for the suit and for the appeal both before the Appellate Court itself. On these grounds, the learned counsel submitted that the impugned judgment is not sustainable in the eye of law.

(6) The learned Sr. counsel, Mr. Sukumar Sinha appearing on behalf of the respondent submitted that because of the amendment in the plaint whereby paragraph 9(a) has been included it was necessary for the plaintiff to make the State of Bihar party in the suit and therefore, the learned Court below has rightly remanded the matter to the trial court and therefore, the impugned judgment cannot be interfered with.

(7) From perusal of the impugned judgment, it appears that the prime reason for setting aside the judgment and decree of the trial court appears to be non-realisation of the ad valorem Court fee from the plaintiff. The other ground mentioned by the Lower Appellate Court is that the learned Court below has not considered such and such aspect of the matter as mentioned in detail in paragraph 9 of the impugned judgment. Order 41 Rule 23, 23 (A) and 25 are the provisions in exercise of power under which the Appellate Court may remand the

matter to the trial court. So far Rule 23 is concerned, it speaks about disposal of the suit upon a preliminary point and if the decree is set aside or reversed in appeal then the matter may be remanded for decision. Here since the trial court had not decreed the suit on a preliminary issue, Order 41 rule 23 is not applicable. So far Rule 23(A) is concerned, it reads as follows: "Rule 23A. Remand in other cases- Where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23."

(8) Therefore, for applying Rule 23(A) of Order 41, the Appellate Court must be of the opinion that a re-trial is considered necessary. Here the learned Lower Appellate Court is not of the opinion that re-trial is necessary and therefore, the direction has been given to the Court below to hear the parties on the basis of the materials available on record. Therefore, Rule 23(A) is also not applicable. So far Rule 25 is concerned also, it is not applicable in the present case because no issue has been framed and a finding is not called for on any issue.

(9) Admittedly, both the parties had adduced oral as well as documentary evidences and therefore, all the materials are available on record. There is no finding of the Appellate Court that evidences are insufficient and the Appellate Court is unable to pronounce judgment after appreciation of the materials available on record. Rule 24 of Order 41 reads as follows:

"Rule 24. Where evidence on record sufficient, Appellate Court may determine case finally- Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resetting 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."

(10) In view of the above facts, in my opinion, Order 41 Rule 24 is fully applicable in the present case.

(11) In a decision reported in AIR 1999 Supreme Court 1125(Ashwinkumar K. Patel vs. Upendra J. Patel), the Hon'ble Supreme Court has held at paragraph 7 as follows: "7. in our view, the High Court should not ordinarily remand a case under Order 41, Rule 23, C.P.C. to the lower Court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the trial Court and considered whether the order of the trial court ought to be confirmed or reversed or modified. It could have easily considered the documents and affidavits and decided about the prima- facie case on the material available. In matters Involving agreements of 1980(and 1996) on the one hand and an agreement of 1991 on the other, as in this case, such remand orders would lead to further delay and uncertainty. We are, therefore, of the view that the remand by the High Court was not necessary."

(12) So far Court fee matter is concerned, it is well settled principles of law that a contested decree passed after considering materials available on record on merit cannot be set aside for non- payment of Court fee. In this case, the Court fee was to be realized from the plaintiff and the plaintiff had not paid the Court fee for the suit as well as for the appeal. Therefore, it was the default on the part of the plaintiff. Instead of punishing the plaintiff, the decree which was passed in favour of the defendant has been set aside by the Appellate Court. In A.I.R. 1973 Patna 439(Thakur Bhagwan Sita Ram Ji vs. Moti Prasad), a Bench of this Court has held that a decree once passed cannot be set aside for default in making good deficit Court fee. It can be disturbed only on merits or by consent of parties.

(13) In a decision reported in 2004, Volume 2, P.L.J.R. Page 755(Ram Binod Roy vs. Masomat Ram Sundari Devi), it has been held by this Court that Appellate Court should not ordinarily remand a case merely because it considered the reasoning of the trial court to be wrong. Here also, from perusal of the impugned judgment, it appears that learned Court below came to the conclusion that some aspect of the matter has not been considered by the trial court. As stated above when the materials were available on record and the Appellate Court being the

Court of fact also could have itself considered every aspect of the matter on the basis of material available on record instead of remanding the matter. In my opinion, the Lower Appellate Court itself should have decided the appeal one way or the other on the materials available on record.

(14) In view of my above discussion, I find that the impugned Appellate judgment and order are unsustainable in the eye of law, therefore, the appeal is allowed and the impugned judgment and order of remand is set aside and the matter is remanded back to the Lower Appellate Court for a fresh decision according to law by the Appellate Court itself. Since the appeal is one of the oldest appeals, therefore, the Lower Appellate Court shall decide the matter as soon as possible. The parties are directed to appear before the Lower Appellate Court within one month from today.

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