

(2017) 09 MP CK 0019
In the Madhya Pradesh High Court
Case No : 3519 of 2010

GURUMEL SINGH @ SONU AND OTHERS

APPELLANT

Vs

STATE OF MP AND ANOTHER

RESPONDENT

Date of Decision : 21-09-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 41 Rule 25](#), [Order 6 Rule 17](#), [Order 26 Rule 9](#), [Order 41 Rule 23](#)

Citation : (2017) 09 MP CK 0019

Hon'ble Judges : Sujoy Paul

Bench : Single Bench

Advocate : Z.M. Shah

Judgement

1. This miscellaneous appeal filed under order 43 Rule 1(u) of Code of Civil Procedure, 1908 is directed against the judgment and decree dated 27.07.2010 passed in Civil Appeal No.3-A/2009 by the learned First Additional District Judge, Raisen.

2. Draped in brevity, the relevant facts are that the respondent-plaintiff filed a Civil Suit No.17-A/2007 for permanent injunction. The trial Court framed two issues and after recording the evidence, decided those issues against the plaintiff. Aggrieved, the plaintiff preferred Civil Appeal No.3-A/2009 before the lower appellate Court.

3. During pendency of the said appeal, the appellant therein/plaintiff filed two applications viz. (a) under order 6 Rule 17 CPC; and (ii) Order 26 Rule 9 CPC. The lower appellate Court allowed those applications and thereafter remitted the matter back in purported exercise of power under Order 41 Rule 23 CPC for rehearing the matter.

4. Criticizing this judgment, learned counsel for the appellant submits that the impugned judgment runs contrary to the enabling provision of Order 41 Rule 23

and Order 41 Rule 25 CPC. He submits that the Order 41 Rule 23 CPC is clearly inapplicable because a plain reading of judgment of the trial Court shows that the civil suit has not decided the suit on any preliminary point. Indeed, it was decided on merits. The lower appellate Court has not framed any issue nor gave any finding that any material/evidence was required for delivering the judgment. In support of said contention, he relied on 2003 (4) MP 162 (Ramesh Singh and others Vs. Vaijanati Bai and others) and 2009 (1) MPLJ 620 (Arvind Vs. Mannalal).

5. Nobody appeared for the respondent/plaintiff even in the pass over found.

6. I have heard learned counsel for the appellant at length and perused the record.

7. Indisputably, the trial Court passed the judgment dated 29.11.2008 (Annexure-A/4) on merits. Both the issues were decided against the plaintiff on merits. Thus, the judgment of the trial Court was not on any preliminary point. Hence, I find substantial force in the argument of learned counsel for the appellant that Order 41 Rule 23 of CPC is clearly inapplicable. Although the lower appellate Court referred only Order 41 Rule 23 CPC while remitting the matter back to the trial Court, I deem it proper to examine the said judgment on the anvil of Rule 25 Order 41 of CPC also. A plain reading of this provision makes it clear that when the appellate Court comes to the conclusion that the trial Court has committed an error in not framing or trying the issue, or it has failed to determine any question of fact, which, in the opinion of the appellate Court, is essential for right decision of the suit, the appellate Court may frame issues and refer the same for trial to the Court for whose decree the appeal is preferred. In the present case, the appellate Court has not given any finding that the trial Court has failed to frame or try any issue nor there exists any finding that it requires determination of any question of fact. Order 41 Rule 25 CPC came for consideration before the Supreme Court in Jegannathan Vs. Raju Sigamani and another, 2012 (5) SCC 540, wherein the Apex Court held as under: "6. Order 41 Rule 23 is invocable by the appellate Court where the appeal has arisen from the decree passed on a preliminary point. In other words, where the entire suit has been disposed of by the trial Court on a preliminary point and such decree is reversed in appeal and the appellate Court thinks proper to remand the case for fresh disposal. While doing so, the appellate Court may issue further direction for trial of certain issues.

7. Order 41 Rule 23A has been inserted in the Code by Act No. 104 of 1976 w.e.f. February 1, 1977. According to Order 41 Rule 23A of the Code, the appellate Court may remand the suit to the trial Court even though such suit has been disposed of on merits. It provides that where the trial Court has disposed of the Suit on merits and the decree is reversed in appeal and the appellate Court considers that retrial is necessary, the appellate Court may remand the suit to the trial Court.

8. Insofar as Order 41 Rule 25 of the Code is concerned, the appellate Court continues to be in seisin of the matter; it calls upon the trial Court to record the finding on some issue or issues and send that finding to the appellate Court. The power under Order 41 Rule 25 is invoked by the appellate Court where it holds that the trial Court that passed the decree omitted to frame or try any issue or determine any question of fact essential to decide the matter finally. The appellate Court while remitting some issue or issues, may direct the trial Court to take additional evidence on such issue/s." [Emphasis Supplied]

8. This Court in Ramesh Singh (supra) opined that the appellate Court without considering the appeal on merits, remitted the matter back while considering an amendment application. Thus, the judgment of the trial Court cannot be countenanced.

9. Similarly, in the case of Arvind (supra), this Court opined that the judgment of the appellate Court is subject to enabling provisions of Rules 23, 23-A or 25 of order 41 CPC. The judgment passed in contravention of those provisions, cannot be countenanced.

10. As analyzed above, it is clear that necessary ingredients for invoking Rule 23 or Rule 25 of Order 41 were not available before the lower appellate Court. Resultantly, the said judgment dated 27.07.2010 cannot sustain judicial scrutiny. Resultantly, this judgment is set aside. The matter is remitted back to lower appellate Court to decide the appeal in accordance with law. The Registry shall do the needful.

11. The parties shall appear before the lower appellate rd Court on 23 October, 2017.