
(2019) 10 MP CK 0110

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 127 Of 2014

Rakesh And Another

APPELLANT

Vs

Sahab Singh And Others

RESPONDENT

Date of Decision : 22-10-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 151, Order 43 Rule 1, Order 41 Rule 28,
Order 41 Rule 27

Citation : (2019) 10 MP CK 0110

Hon'ble Judges : Sheel Nagu, J

Bench : Single Bench

Advocate : B.D. Jain, Jitendra Singh Rathore, Prashant Sharma

Final Decision : Allowed

Judgement

1. This Miscellaneous Appeal preferred under Order XLIII Rule 1 of the Code of Civil Procedure, 1908 (for brevity "Code") questions the legality and validity of impugned judgment and decree dated 21.12.2013 passed by III Additional District Judge, Morena, District Morena (M.P.) in Civil Appeal No.8A/2013, whereby while allowing the appeal preferred by defendants No.6 and 7, the appellate court has remanded the matter to the learned Trial Judge in exercise of powers under Order XLI Rule 28 of the Code to adduce evidence on the additional evidence brought on record by defendants No.6 to 8 by allowing the application under Order XLI Rule 27 read with Section 151 of the Code with a further direction to pass a fresh judgment and decree.

2. The objection raised, in the present appeal, is to the direction of setting aside judgment and decree of Trial Court while passing the aforesaid order of remand. It is submitted that the provision of Order XLI Rule 28 of the Code does not empower the appellate forum to set aside the judgment and decree against which an appeal is made while remanding the matter.

2.1 For ready reference and convenience, the provisions of Order XLI Rule 28 of

the Code are reproduced as under:

"28. Mode of taking additional evidence.- Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court."

2.2 Bare scrutiny of the aforesaid provisions reveals that whenever additional evidence is allowed to be produced by the appellate court, the course available before the appellate court is either to take such evidence qua the said additional material allowed to be brought on record under Order XLI Rule 27 of the Code or to remand the matter to the trial court to take such evidence and send back the same to the appellate court for final decision. The said provision clearly reveals that the appellate court is not possessed with any power to set aside the judgment and decree of the trial court while exercising the power under Order XLI Rule 28 of the Code.

3. From the above, it is evident that the learned First Appellate Court has wrongly exercised the jurisdiction vested in it under Order XLI Rule 28 of the Code by setting aside the judgment and decree passed by the learned Trial Judge on 18.08.2009 in Civil Suit No.2A/09.

4. Accordingly, present appeal stands allowed to the following extent:-

(1) The impugned judgment and decree passed by the learned First Appellate Court i.e. III Additional District Judge, Morena, District Morena (M.P.) dated 21.12.2013 in Civil Appeal No.8A/2013 to the extent it sets aside the judgment and decree of the Trial Court dated 18.08.2009 passed in Civil Suit No.2A/09, stands set aside.

(2) The remaining part of the impugned judgment and decree dated 21.12.2013 regarding remand shall remain intact.

(3) The Trial Court is directed to adduce evidence in regard to the material / documents brought on record under Order XLI Rule 27 of the Code and send the record to the First Appellate Court for deciding Civil Appeal 8A/2013, as expeditiously as possible.

No cost.