

(2009) 04 DEL CK 0199
In the Delhi High Court
Case No : C.M. No. 8172 of 2005

Sh. Gopal Kishan and Shri Sat Pal

APPELLANT

Vs

Smt. Nirmala Devi (Since deceased) Through legal
representatives. 1), Sh. Subhash Chand Dua, Mrs. Geeta
Rani and Mrs. Kavita Rani

RESPONDENT

Date of Decision : 02-04-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 6 Rule 17, 11, 151, 35(2)

Citation : (2010) 7 RCR(Civil) 2688

Hon'ble Judges : Vidya Bhushan Gupta, J

Bench : Single Bench

Advocate : Rajan Sabharwal S.K. Bhaduri and Seema Bhaduriya, for the
Appellant; V.B. Andley Rajinder Mathur and Anu, for the Respondent

Final Decision : Dismissed

Judgement

V.B. Gupta, J.—Appellants have filed this appeal against the judgment dated 5th January, 1996 passed by Additional District Judge, Delhi, vide which suit for possession filed by Smt. Nirmala Devi (Since Deceased) was decreed.

2. The brief facts of this case are that in the year 1970, Smt. Nirmala Devi (since deceased), filed a suit for mandatory injunction against the present appellants as well as other four persons.

3. During the course of the trial, Smt. Nirmala Devi filed an application under Order 6 Rule 17 of the CPC (for short as "Code") for amendment of the plaint as the suit was sought to be amended from mandatory injunction into a suit for possession and mesne profits. The Civil Judge dismissed that application on 31st August, 1976, but review petition filed against that order was allowed on 28th October, 1976. Thereafter, appeal was filed against order dated 28th October, 1978 and that appeal was allowed on 30th November, 1978, whereby the review petition was dismissed.

4. Smt. Nirmala Devi thereafter, filed a revision petition before this Court which was allowed on 29th January, 1982 and Smt. Nirmala Devi was permitted to amend her plaint. Accordingly, amended petition was filed on 30th June, 1982 and the amended suit was for possession and mesne profits.

5. During the pendency of the present appeal, on 17th September, 2002, Smt. Nirmala Devi died and application for bringing her LR?s on record was filed.

6. Vide order dated 4th August, 2003, application for substitution for bringing LR?s of Nirmala Devi was allowed and her LR?s were brought on record and amended memo of the parties was filed.

7. Smt. Nirmala Devi was widow of one Late Sh. Pratap Chand, while the present appellants are brothers of Late Sh. Pratap Chand. House No. 36 A and B, Block No. 80, Malviya Nagar, New Delhi was allotted to Smt. Nirmala Devi on certain terms including payment of monthly rent at Rs. 20. In terms of the allotment order, she had been paying rent in her own name and from her own funds. On 28th May, 1968, the President of India executed registered lease deed in her favour. Thus she became the lessee and owner of the suit property.

8. As the parties were closely related to each other and on account of difficulties of the appellants, Smt. Nirmala Devi allowed appellants to occupy the portion of suit property consisting of two rooms with permission to use the open space and backyard as licensee under her, free of license fee.

9. It was alleged that later on, appellants started harassing her and in order to pressurize her, they filed a suit for injunction restraining her from evicting them from the aforesaid property.

10. Since appellants were harassing her, she revoked the license of the appellants and served legal notice dated 23rd April, 1970 asking them to vacate the premises within fifteen days. The appellants failed to comply with the directions of the notice and in spite of revocation of the license, did not vacate the suit premises and thus they became unauthorized occupants.

11. Smt. Nirmala Devi also claimed mesne profits from the appellants for wrongful use and occupation of the suit property, claiming a sum of Rs. 4,500/- for three years immediately preceding the filing of this suit. However, on 29th January, 1984, she gave up her claim for damages and mesne profits.

12. The appellants in their written statement took up the defence that they were the co-owners and co-sharers along with Smt. Nirmala Devi to the extent of 2/3rd share in the house and as such the present suit does not lie. They are in possession of the same since 1951, as admitted by Smt. Nirmala Devi herself in her statement filed in the Ministry of Rehabilitation dated 14th December, 1951. Appellants also took an alternative plea that they became the owners of the property by adverse possession since they are in continuous, open and hostile possession of the property for over 30 years and as such the suit for possession does not lie.

13. It was denied by the appellants that they were the licensee in the suit property. This property was jointly allotted by the Ministry of Rehabilitation to all the members of the Joint Hindu Family. The rent of this property was being paid by them, as well as Smt. Nirmala Devi, from the joint funds. This allotment was also made to all the members of joint family in lieu of their occupation of quarter No. 647, Ali Ganj, Lodhi Road, New Delhi. Smt. Nirmala Devi had no locus standi to file this suit.

14. On 18th July, 1984, the trial court framed the following issues;

1. Whether the suit is property valued for the purposes of court fees and jurisdiction? OPP
2. Whether the plaintiff has locus standi to institute the present suit? OPP.
3. Whether the plaintiff allowed the defendants No. 1 & 2 to occupy the suit property referred to in para 5 of the plaint in the manner mentioned therein? OPP.
4. Whether the defendants No. 1 & 2 are co-owner and co-sharers with the plaintiff as alleged in the written statement? OPD.
5. Whether the defendants No. 1 & 2 have become owner by adverse possession? OPD.
6. Whether the suit is barred by time? OPD.
7. Whether the suit is barred by Principal of estoppel and res judicata? OPD.
8. Is the plaintiff entitled to recover possession of the suit property from the defendants? OPD.
9. Whether the plaintiff is entitled to damages for use and occupation? If so, at what rate and to what amount? OPP. 10. Relief.

15. On 13th November, 1984, Nirmala Devi filed an application u/s 151 of the Code stating that the appellants had earlier filed suit No. 960/1969 for perpetual injunction restraining her and others from interfering in the possession of the suit property which was in occupation of the appellants. That suit was dismissed by the trial court on 10th April, 1978 by the Court of Sh. T.D. Keshav, Civil Judge, Delhi. The aforesaid judgment was confirmed in appeal by judgment dated 21st July, 1984 of Sh. S.N. Kapoor, Additional District Judge. Thereafter, second appeal was preferred in this Court, which was also dismissed on 29th January, 1987.

16. It was also stated in that application that issues framed in the present suit are the same as those framed and decided in the earlier suit, that is, suit No. 960/1969 and judgment dated 10th April, 1978 has become final between the parties and operates as res judicata. In view of the aforesaid position, the suit of Smt. Nirmala Devi was liable to be decreed.

17. That application was contested by present appellants. They did not dispute

the filing of the earlier suit and its dismissal. However, they took the plea that issues in two suits i.e. suit No. 960/1969 and the present suit, i.e. suit No. 610/1970, are not the same.

18. On 25th August, 1987, it was agreed between the parties, that issue No. 1 (suit No. 610/1970) which was regarding the valuation of the suit, should be treated as a preliminary issue.

19. Thereafter, parties led evidence on this issue. On 4th November, 1993, counsel for Smt. Nirmala Devi gave a statement that her suit be valued for purpose of court fee and jurisdiction at Rs. 2 lacs and she be permitted to make up the deficiency in the court fee. Accordingly, she was directed to file the amended plaint and make up the deficiency in the court fee.

20. On 22nd November, 1993, it was recorded that in view of the amended plaint, wherein the suit has been valued at Rs. 2 lacs for the purpose of court fee and jurisdiction, as such it is beyond the pecuniary jurisdiction of the civil court and the suit was accordingly transferred to a court of competent jurisdiction.

21. The appellants herein, preferred a Revision Petition against order dated 22nd November, 1993 passed by Additional Senior Sub-Judge, and order dated 23rd November, 1993 of District and Sessions Judge. That revision petition was dismissed on 7th July, 1994 by Mohd. Shamim, J. Thereafter on 20th January, 1995, counsel for Smt. Nirmala Devi gave a statement wherein the relief of damages for the period prior to the filing of the suit was given upon. This is how this appeal is before this Court.

22. It is contended by learned Counsel for the appellants that the possession of disputed premises was taken by the appellants and Smt. Nirmala Devi in 1951 and Smt. Nirmala Devi, filed the suit after more than 12 years. As the appellants had been enjoying the premises without any interference from Smt. Nirmala Devi for more than 12 years thus, they became the owners of the said premises on the ground of adverse possession.

23. It is further contended that Smt. Nirmala Devi had neither placed nor proved any document on record to show that she was having exclusive right in the suit property. Both the parties were living together as a Joint Hindu Family and the entire consideration of the suit property was paid from Joint Hindu Family funds.

24. Another contention is that there was no similarity either in the nature or the course of the issues of both the suits which were different and separate in nature. Smt. Nirmala Devi had miserably failed to show that she had spent any money for the purchase of the property as the property was purchased from the funds of the Joint Hindu Family and thus it acquires the nature and character of Joint Hindu Family property and as such the impugned judgment liable to be set aside.

25. Appellants during the course of the present appeal, filed an application under Order 41 Rule 27 CPC seeking permission to place additional evidence before this

Court being Questionnaire (Appendix-D), letter dated 27th August, 1954 issued by the Regional Settlement Commissioner to Sh. Jodha Ram, Affidavit dated 20th October, 1953 of Sh. Jodha Ram.

26. It is contended by learned Counsel for the appellant that these documents pertain to the year 1951-54 and being official records, there is no doubt regarding the authenticity of the same as the same are in the custody of the Government authorities. These documents are relevant and necessary for proper disposal of this appeal. These documents were not in the custody of the appellant and could not be produced earlier in spite of due diligence.

27. Learned Counsel for the appellants in support of application for additional evidence, relied upon following judgments;

(i) Hanuman Giri Vs. Bhure Lal, .

(ii) Akesh Kumar Jain and Anr. v. Harmeet Singh Bakshi and Anr. 92 (2001) DLT 745.

(iii) Jas Rath Vs. Union of India (UOI),

(iv) Eastern Equipment and Sales Ltd. Vs. ING. Yash Kumar Khanna,

28. On the other hand, it has been contended by learned Counsel for the respondents that issues framed in both the suits were common and Smt. Nirmala Devi was the exclusive owner of the property in question in which the present appellants were residing as her licensee.

29. The issue of ownership has already been decided in the earlier suit and moreover the appellants are taking contradictory plea, as on the one hand they state that they are the co-owners and co-sharers of the property in question while, on the other hand they are taking the plea that they have become owners by adverse possession.

30. Regarding application for additional evidence, it is contended by the learned Counsel for the respondents that the documents now sought to be produced by the appellants have already been the subject matter of the litigation inter-se the parties and these documents were within the knowledge of the appellants. Now at this stage, the appellants cannot be permitted to file these documents.

31. The present appellants had earlier filed suit (No. 960/1969) against the respondents for permanent injunction. That suit was decided in the favour of Smt. Nirmala Devi and Others. Shri T.D. Keshav, Civil Judge in that case framed the following issues:

1. Whether the plaintiffs have 2/3rd share in the suit property?
2. Whether the plaintiffs have acquired title by adverse possession to the extent of 2/3rd share in the suit property?
3. Whether the plaintiffs were licensee under defendant No. 2?

4. Whether the plaintiffs are entitled to injunction as prayed for?

5. Relief.

32. The court on issue No. 1 above, held;

From the above discussion I come to the conclusion that plaintiffs have failed to prove this issue and since the house No. 80/36-A, Malviya Nagar, New Delhi exclusively owned by Nirmala Devi and she has paid full price of that house from out of her own income and from out of 1/3rd share of the claim which fell due to her on account of death of her husband and thus the plaintiffs are not entitled to for 2/3rd share in the suit property as claimed by them.

33. As regard issue No. 2 and 3, Sh. T.D. Keshav, Civil Judge held;

As already stated above, the plaintiffs have not brought any evidence on record to prove that they are in adverse possession of the house, rather their case throughout was that they are occupying the house as members of the joint Hindu Family having their head as Smt. Nirmala Devi and now the arguments of the counsel for the plaintiffs that they claim adverse possession in the said house is also not acceptable to me when there is no material on record to prove the arguments of the counsel for the plaintiffs. Thus I come to the conclusion that plaintiffs were occupying the house in question as licensee and as such they have not acquired any title by adverse possession to the extent of 2/3rd share in the said property.

34. The appellants appeal was also dismissed up to Supreme Court, against the judgment dated 10th April, 1978 passed by Sh. T.D. Keshav, Civil Judge.

35. Now the question which arises for consideration is whether the earlier suit which was decided in favour of Smt. Nirmala Devi by Shri T.D. Keshav, Civil Judge, operates as res-judicata or not. Issues regarding ownership and license that were framed in the present suit as well as in the earlier suit for perpetual injunction, are same. The relevant issues of present suit (No. 610/1970) read as under;

3. Whether the plaintiff allowed the defendants No. 1 and 2 to occupy the suit property referred to in para 5 of the plaint in the manner mentioned therein?

4. Whether the defendants No. 1 and 2 are co-owner and co-sharers with the plaintiff as alleged in the written statement?

5. Whether the defendant No. 1 and 2 have become owner by adverse possession?

36. The learned Trial Court in suit filed for possession and mesne profits (suit No. 610/1970) held;

I have perused the certified copy of the judgment and decree dated 10.4.78 delivered by Shri T.D. Keshav in suit No. 960 of 1969. It has been conclusively held in the said case that Smt. Nirmala Devi has established her title to the suit

property and she is the owner of the suit property. It is further held that Shri Gopal Krishan and Satpal are not co-sharers/co-owners in the suit property. It has been held that they are only licencees in the suit property of Smt. Nirmala Devi and they have failed to establish that they have become owners by adverse possession of the suit property. These findings are categorically given in the said judgment and decree. Issue No. 2 to 5 and issue No. 8 in the present suit are clearly covered by the aforesaid findings of Shri T.D.Keshav in the Judgment and decree dated 10.4.78 in suit No. 960/69. The present suit has been filed for possession and mesne profits Smt. Nirmala Devi has been held to be the owners of the suit property as such she has the locus standi to institute the present suit. It has already been held that Shri Gopal Krishan and Satpal were only licencees of Smt. Nirmala Devi and they are neither the co-owners nor the co-sharers of suit property with Smt. Nirmala Devi. It has also been held that Shri Gopal Krishan and Satpal have not acquired any title to the suit property by adverse possession. The plaintiff Smt. Nirmala Devi has revoked the licence of Shri Gopal Krishan and Shri Sat Pal who have thereof become illegal occupation in the suit property. In these circumstances the plaintiff is clearly entitled to the possession of the suit property from the defendants.

37. Section 11 of the Code reads as under:

11. Res judicata

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I-III

xxx xxx xxx Explanation IV

Any matter which might and ought to have been made ground defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V-VIII

xxx xxx xxx

38. Supreme Court in Deva Ram and Another Vs. Ishwar Chand and Another, held;

Section 11 contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman Jurisprudence "Interest reipublicae ut sit finis litium" (it concerns the State that there be an end to law suits) and partly on the maxim "Nemo debet bis vexari pro una at eadem causa" (no man should be vexed twice over for the same cause). The section does not affect the jurisdiction

of the Court but operates as a bar to the trial of the suit or issue, if the matter in the suit was directly and substantially in issue (and finally decided) in the previous suit between the same parties litigating under the same title in a court, competent to try the subsequent suit in which such issue has been raised.

39. In *Ramadhar Shrivastava Vs. Bhagwandas*, the Supreme Court held:

The expression "matter in issue" u/s 11 of the Code of Civil Procedure, 1908 connotes matter directly and substantially in issue actually or constructively. A matter is actually in issue when it is in issue directly and substantially and a competent court decides it on merits. A matter is constructively in issue when it "might and ought" to have been made a ground of defence or attack in the former suit. Explanation IV to Section 11 of the Code by a deeming provision lays down that any matter which "might and ought" to have been made a ground of defence or attack in the former suit, but which has not been made a ground of defence or attack, shall be deemed to have been a matter directly and substantially in issue in such suit. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided. The object of Explanation IV is to compel the plaintiff or the defendant to take all the grounds of attack or defence in one and the same suit.

40. In the light of above decisions of the Supreme Court, it is to be seen as to whether the present suit is barred by principles of *Res Judicata* or not.

41. Learned Counsel for appellants after taking through the issues and findings recorded by the trial court in the former suit filed for perpetual injunction, contended that question of ownership of the suit property was neither expressly nor substantially involved in the said suit and therefore the judgment cannot operate as *res judicata* in the subsequent suit.

42. There is no dispute about the fact that the judgment and decree dated 10.4.78 in suit No. 960/1969 has now become final between the parties and it has been confirmed in appeal by the judgment and decree dated 21.7.1986 by Shri. S.N. Kapoor, Addl. District Judge. The second appeal filed by the present appellants was also dismissed by this Court on 28.1.1987 as also the SLP dismissed by Supreme Court on 8.8.1994.

43. In (suit No. 960/1969) the issues which arose for consideration were as to whether the plaintiffs therein i.e. Sh. Gopal Krishan and Shri Satpal, who are defendant Nos. 1 and 2 in (suit No. 610/1970), have a 2/3rd share in the suit property i.e. House No. 80/36-A, Malviya Nagar, New Delhi. Further issues in (suit No. 960/1969), were as to whether Sh. Gopal Krishan and Shri Satpal, have acquired any title in the suit property by adverse possession or whether they were merely licencees of Smt. Nirmala Devi.

44. The learned Civil Judge Shri. T.D. Keshav, while dealing with these issues categorically held;

Shri. Gopal Krishan and Shri Satpal have failed to prove that the suit property had been allotted as a Joint Family property or that they have 2/3rd share in the said property as alleged by them.

He further held;

Shri. Gopal Krishan and Shri. Satpal are not entitled for any share in the suit property which is exclusively owned by Smt. Nirmala Devi i.e. the present plaintiff.

That court also concluded that;

Gopal Krishan and Shri. Satpal have not acquired any title in the suit property by way of adverse possession and they are only licencees of Smt. Nirmala Devi.

45. Thus the suit for injunction of Shri. Gopal Krishan and Shri. Satpal was accordingly dismissed.

46. In (suit No. 610/1970), the issues which arose for consideration are;

- (i) whether Smt. Nirmala Devi had locus standi to present the suit;
- (ii) whether Shri. Gopal Krishan and Shri Satpal (appellants Nos. 1 and 2) are licencees in the suit property;
- (iii) whether they are co-owners/co-sharers with Smt. Nirmala Devi; and
- (iv) whether they have become owners in the suit property by adverse possession.

47. All these issues have been entailed as issues No. 2 to 5 in (suit No. 610/1970).

48. The appellants in their written statement had taken the defence that;

- (i) they are the co-owners and co-sharers along with Smt. Nirmala Devi to the extent of 2/3rd share in the house,
- (ii) they are in possession of the property since 1951, and
- (iii) the appellants took alternative plea that they had become owner of the property by adverse possession, since they are in the continuous possession of the property for over 30 years.

49. In grounds of appeal filed by the appellants, plea of co-owner and co-sharer along with Smt. Nirmala Devi to the extent of 2/3rd share in the house has not been taken.

50. On the other hand, the plea taken by the appellants is that the parties are close relatives and had been living together as a Joint Hindu Family and the entire consideration of the suit property was paid from the Joint Hindu Family funds.

51. In (suit No. 610/1970) on the issues framed, the trial court held that, these issues have conclusively being determined and are covered by the findings given in the judgment and decree dated 10th April, 1978 in suit No. 960/1969.

52. Since the issues in suit No. 960/1969 and suit No. 610/1970 are directly and substantially same, under these circumstances the issues which were decided in favour of Smt. Nirmala Devi by Sh. T.D. Keshav, Civil Judge, in suit No. 960/1969 operates as res judicata qua suit No. 610/1970 and as such I do not find any infirmity or ambiguity in the impugned judgment. The present appeal is thus liable to be dismissed with costs.

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53. By way of the present application, appellants seek to place and prove on record certain documents issued by Regional Settlement Commissioner, Jaisalmer House.

54. In Para 11 of the appeal, it is stated;

That the petitioner No. 1 on 21.3.1994 made an application to the settlement officer (Record) Jaisalmer House, New Delhi requesting for inspection of the records of the petitioner's compensation and settlement. That vide letter dated 31st March, 1994 the settlement officer, gave certified copies of the documents required by the petitioners. It is submitted that the documents clearly show that the said house was allotted to the respondent and appellants herein in their equal share.

55. As per these averments, appellants received certified copies of the documents, as required by them. Moreover, as per letter dated 31st March, 1994 of the Settlement Officer, appellant No. 1, (Gopal Krishan) received certified copies of the documents. Relevant portion of this letter reads as under;

1. Letter No. D/35/U/(CC)/1314/IV (NT)/17408 dt. 27.8.54.

2. Questionnaire by Sh. Jodha Ram dt. 1.2.

3. Statement of Sh. Jodha Ram dt. 3.2.59.

4. Questionnaire of Sh. Gopal Krishan dt. 11.4.67.

5. Affidavit of Shri Gopal Krishan dt.11.4.67.

6. Questionnaire of Sh. Satpal dt. 11.4.67.

7. Affidavit of Sh. Satpal dt.11.4.67. From CAF No. D/1314/IV (NT).

56. Thus, as per appellants own case, they had received the documents as early as 1994, which they now want to prove. The present application was filed in the year 2005, but there is no explanation as to why there is such long delay in filing this application when, admittedly these documents were in possession and custody of the appellants. 57. There is no dispute about the principle of law laid

down in the various judgments cited by learned Counsel for the appellants but keeping in view the facts and circumstances of the present case, when there is delay of more than eleven years in filing the present application, no ground is made out for allowing this application.

58. In view of the above discussions, the present appeal as well as application for additional evidence are not maintainable and same are dismissed with costs throughout.

59. It is well-settled that when litigation has been needlessly protracted by an unsuccessful litigant, he should be burdened with heavy costs. The general rule is that the successful party is entitled to costs, unless he is guilty of misconduct, negligence or omission.

60. The litigation started between the parties in the year 1969 and appellants lost the battle up to the Supreme Court. When Smt. Nirmala Devi (since deceased) sought to have fruits of the possession of the property owned by her, she could not get its possession in her lifetime. It is most unfortunate that the owner of the property could not enjoy the benefit of her own property in her lifetime and even after her death, the appellants, though closely related to Smt. Nirmala, Devi did not have the basic courtesy to vacate the property, owned by her.

61. The appellants had been fighting this litigation having no legal rights at all and dragged Smt. Nirmala Devi (since deceased) up to Supreme Court.

62. With regard to imposition of costs, in Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), , Supreme Court held that;

Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs as awarded on the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In large number of cases, such an order is passed despite Section 35(2) of the Code. Such a practice also encourages filing of frivolous suits. It also leads to taking up of frivolous defences. Further wherever costs as awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the Court in its discretion may direct otherwise by recording reasons thereof. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost besides the payment of the court-fee, lawyer's fee, typing and other cost in relation to the litigation.

63. Under these circumstances, the appellants are directed to pay Rs. 50,000/- (Rupees Fifty Thousand) as costs to the respondents. The costs shall be paid to the respondents or deposited in the trial/executing court, within one month from today.

64. Since, the appellants are in unauthorized possession of the property in question, being licensee and their license having come to an end, in the year 1970, they are directed to vacate the premises in question and hand over the possession to the respondents, within one month from today, failing which they shall be liable to pay occupation charges @ Rs. 5,000/- per month, till the date they vacate the premises in question. Occupation charges are assessed keeping in view the fact that the property is situated in posh locality of South Delhi.

65. In case, the appellants fail to comply with the above directions, the executing court shall execute the decree and for that purpose it shall provide necessary police aid to the respondents.

66. Trial court record be sent back forthwith.