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H.V. VEDAVYASACHAR

v.

SHIVASHANKARA & ANR.

(Civil Appeal No. 5201 of 2009)

AUGUST 3, 2009

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[S.B. SINHA AND DR. MUKUNDAKAM SHARMA, JJ.]

Code of Civil Procedure, 1908 – O.41 r. 27 – Suit for permanent and mandatory injunction – Decreed – In appeal, C *application for adducing additional evidence – Appellate court allowing the application remanding the matter to trial court for fresh disposal after recording the evidence – On appeal, Plea of maintainability of appeal, the suit being u/s 6 of the Specific Relief Act – Held : Appeal was maintainable as suit was not* D *under Specific Relief Act – However, Appellate Court while allowing the application, could not have remanded the entire matter for disposal – It could have recorded or could have directed the trial court to record the evidence – Direction issued to trial court to transmit the case to appellate court after* E *recording the evidence – Specific Relief Act, 1963 – s.6*

Appellant filed a suit seeking permanent injunction and mandatory injunction against respondents. The suit was decreed. In appeal against the same, respondent-defendants filed an application under Order 41 r. 27 F **C.P.C. seeking permission to adduce additional evidence. The application was allowed. Despite grant of various opportunities to adduce evidence the respondent failed to do so. Thereafter, the appellate Court remanded the matter to trial court for fresh disposal after recording** G **fresh evidence. Hence, the present appeal.**

Disposing of the appeal, the Court

HELD: 1. It is not correct to say that the suit was

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instituted in terms of Section 6 of the Specific Relief Act, 1963. Appellant has not only prayed for grant of a decree for permanent injunction but has also asked for passing a decree for mandatory injunction directing the respondents to handover possession to it. Such prayers would not come within the purview of Section 6 of the Specific Relief Act. [Para 8] [272-H; 273-A-B]

2.1. High Court could not have directed the trial court to dispose of the suit after taking evidence. When an application for adducing additional evidence is allowed, the appellate court has two options open to it. It may record the evidence itself or it may direct the trial court to do so. Such an order of remand could be only in terms of Order XLI Rule 23, Order XLI Rule 23A or Order XLI Rule 25 CPC. None of the said provisions have any application in the instant case. [Paras 9 and 10] [273-E-F]

Shanti Devi and Ors. vs. Daropti Devi and Ors. **(2006) 13 SCC 775, relied on.**

2.2. In modification of the impugned order, it is directed that trial court upon recording the evidence as directed by the High Court shall transmit the records to the First Appellate Court with a copy of its report annexed thereto. [Para 12] [274-C-D]

Case Law Reference:

(2006) 13 SCC 775	**relied on**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5201 of 2009.

From the Judgment & Order dated 29.10.2007 of the High Court of Karnataka at Bangalore in RFA No. 1966 of 2007.

Balaji Srinivasan, Sudarsna Ojha, Dr. Maya Rao for the Appellants.

A C.G. Gopalsamy. T.S. Santhi, V. Balaji, Narendra Kumar for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA J. 1. Leave granted.

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2. The plaintiff is appellant before us. He filed a suit praying inter alia for the following reliefs:

> "to grant a judgment and decree of a permanent injunction restraining the first and second defendants either by themselves or through anyone on their behalf from interfering in the plaintiffs right, title and interest over and in the suit scheduled property including creating documents alienating the property to others and award cost and grant such other relief(s) as deemed fit and proper under the circumstances in the interest of justice and equity."

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3. However, an application for leave to amend the plaint was filed which having been allowed; the prayers made in the amended plaint read as under:-

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> "(a) a judgment and decree of perpetual injunction against the defendants 1 to 3 directing the defendants to restore the possession of the schedule premises to the plaintiff and not to interfere in the plaintiff's lawful possession and enjoyment of the schedule property in any manner whatsoever.
>
> (b) A judgment and decree against the defendants for mandatory injunction directing the defendants to restore the possession of the 'B' schedule property, which is marked 'ABCD' in the annexed sketch, and there may be a decree for permanent injunction against the defendants for 'CDEF' portion which is marked in the annexed sketch described as 'C' schedule to the plaint and there may be a decree

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for the enquiry into the mesne profits with Order XVIII Rule 12 of CPC, and also there may be a decree for the cost of the suit, with such other relief or reliefs as this Hon'ble Court deems fit in the circumstances of the case.:

4. The said suit was decreed. The respondents herein preferred an appeal thereagainst before the High Court. An application for permission to adduce additional evidence in terms of Order XLI Rule 27 of the Code of Civil Procedure was filed inter alia on the premise that respondents had not been given opportunity to adduce said evidence by the learned trial judge. The said application was allowed. It is stated that an opportunity had been granted to the respondents to adduce their evidence on four occasions namely 30th March, 2007, 5th June, 2007, 11th June, 2007 and 13th June, 2007. But despite the same they failed to do so. However, by reason of the impugned judgment, the first appellate court directed as under:-

"Under the above circumstances and particularly having regard to the appellants being not given enough opportunity by the trial court to place their evidence, I am of the view that the matter requires remand to the trial court for fresh disposal so far as the claim of the respondent for delivery of vacant possession of 'B' schedule property is concerned. Since the remand has been found to be necessitated for the aforesaid reasons, I refrain from discussing the other aspects of the case in regard to which the learned counsel for both parties have argued at great length and also placed reliance on several decisions of various High Courts and also of the Supreme Court. It is needless to say that any observations at this juncture when the matter is being remanded would only affect the case of the parties on merits and hence, I proceed to pass the following order:

The application field by the appellants for leading additional evidence is allowed and the appellants are permitted to lead

A additional evidence before the trial court. the respondent also be provided opportunity to cross-examine the appellants in regard to the additional evidence that is sought to be produced and the trial court shall thereafter dispose of the case on merits insofar as 'B' Schedule property is concerned."

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5. The appellant is before us questioning the correctness of the said judgment.

6. The learned counsel appearing on behalf of the appellant has raised two contentions before us:-

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(i) the suit being one under Section 6 of the Specific Relief Act, an appeal was not maintainable against the judgment and decree passed therein:

(ii) No case has been made out for grant of an D opportunity to adduce additional evidence and that in any event for the said purpose, the entire case could not have been remanded to the trial court for fresh disposal after recording fresh evidence as it was not a removal as envisaged under Order XLI E Rule 23 of CPC.

7. The learned counsel appearing on behalf of the respondents, however, would contend that:

F (i) the learned trial judge committed an illegality in refusing to take evidence which the respondent intended to adduce by closing the case on 13.06.2007 which necessitated filing of an application under Order XLI Rule 23 of the Code of Civil Procedure.

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(ii) The High Court having found that it may not be possible for it to record evidence issued the following aforementioned directions.

H 8. So far as the contention of the learned counsel for the

appellant that the suit was instituted in terms of Section 6 of the Specific Relief Act, 1963 is concerned, in our opinion, the same cannot be accepted . Appellant has not only prayed for grant of a decree for permanent injunction but has also asked for passing a decree for mandatory injunction directing the respondents to handover possession to it. Such prayers, in our opinion, would not come within the purview of Section 6 of the Specific Relief Act.

9. However, so far as the second contention raised by the learned counsel for the appellant is concerned, in our opinion, the same has substance. When an application for adducing additional evidence is allowed the appellate court has two options open to it. It may record the evidence itself or it may direct the trial court to do so. Order XLI Rule 28 of the CPC reads 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."

10. For the aforementioned purpose, in our considered opinion, the High Court could not have directed the trial court to dispose of the suit after taking evidence. Such an order of remand could be only in terms of Order XLI Rule 23, Order XLI Rule 23A or Order XLI Rule 25 of the Code. None of the said provisions have any application in the instant case.

11. This Court in *Shanti Devi & Ors. v. Daropti Devi And Others* (2006) 13 SCC 775 has held as under:-

> "But the same by itself could not be a ground for remitting the entire suit to the learned trial judge upon setting aside the decree of the learned trial court. The power of remand vests in the appellate court either in terms

A of Order 41 Rules 23 and 23A or Order 41 Rule 25 of the Code of Civil Procedure. Isue 4 was held to have been wrongly framed. Onus of proof was also wrongly placed and only in that view of the matter the High Court thought it fit to remit it to the learned trial judge to determine a question
B of fact, which according to it was essential upon reframing the issue."

12. None of the aforementioned provisions were available to the High Court. We, therefore,in modification of the order
C passed by the High Court direct as under:

(i) The learned trial court upon recording the evidence as directed by the High Court shall transmit the records to the First Appellate Court with a copy of its report annexed thereto.

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(ii) Such an exercise by the learned trial court must be completed within a period of four weeks from the date of communication of this order.

(iii) The first appellate court must dispose of the first
E appeal on receipt of the said order as also the evidence as adduced as expeditiously as possible and not later than 8 weeks from the date of receipt of the said report.

F 13. We are passing the order keeping in view the fact that the appellant is said to have been dispossessed as far back as 1993.

14. In the facts and circumstances of this case, there shall
G be no order as to costs.

15. The appeal is disposed of, accordingly.

K.K.T. Appeal disposed of.