

IN THE BOARD OF REVENUE FOR RAJASTHAN, AJMER**Appeal Decree/TA/4677/2005/Jaisalmer.**

State of Rajasthan through Tehsildar Colonisation Nachna no.
2, Distt. Jaisalmer.

.....Appellant.

VERSUS

1. Smt. Sapooria d/o Dhode Khan,
2. Basai d/o Dhode Khan
Muslim, Residents of Village Sankadiya Distt. Jaisalmer.

.....Respondents.

D.B.

Shri Suraj Bhan Jaiman, Member

Shri Rajinder Kumar, Member

Present:-

Sh. Pushpendra Singh Naruka, Dy. Govt. Advocate for the Appellant
Shri N.K Goyal, counsel for the Respondents.

JUDGMENT

Date: 03-07-2018

Per Shri Rajinder Kumar, Member

1. This second appeal has been preferred under section 224 of the Rajasthan Tenancy Act, 1955 against the judgment and decree dated 03-06-2005 of learned Commissioner Colonisation cum Revenue Appellate Authority, Jaisalmer whereby appeal no. 148/01 filed by the respondents was accepted and the judgment and decree of the trial court dismissing suit of the respondents was set aside.
2. We have heard learned counsels for the parties.

3. On behalf of the State Government, Sh. Naruka has argued that the impugned judgment and decree are *per se* illegal, as the same have been passed without considering the judgment of the trial court and the arguments advanced by the State Government. The learned trial court gave issue-wise findings and a well considered judgment was passed by it but the learned by first appellate court set aside the same by passing a cryptic judgment. No issue-wise findings have been recorded by the first appellate court while disagreeing with the judgment and decree of the trial court. Therefore, a request has been made to set aside the impugned judgment and to restore that of the trial court.
4. On behalf of the respondents, Sh. Goyal has opposed the above submissions. He has supported the judgment passed by learned first appellate court.
5. We have given our thoughtful consideration to the above submissions and perused the record very carefully.
6. The substantial question of law involved in this appeal is whether the judgment of the first appellate court is cryptic and as the same has been passed without dealing with all the issues and evidence led by the parties, the same has resulted in miscarriage of justice?
7. A perusal of the judgment of the trial court reveals that issue-wise findings were given by it while dismissing the suit of the plaintiffs/respondents where as the learned first appellate court while reversing the judgment and decree of the trial court did not gave issue-wise findings as per mandate of the Code of Civil Procedure, 1908. In the matter of Santosh Hazari vs. Purushottam Tiwari (Dead) by L.Rs JT 2001 (2) SC 407 Hon'ble Supreme Court opined:-

"The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable

right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind, and record findings supported by reasons, on all the issues arising along with the contentions put forth and pressed by the parties for decisions of the appellate court."

"While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at different findings. This would satisfy the Court hearing a further appeal that the first appellate court had discharged the duty expected of it."

The facts of the present case are squarely covered by the *ratio decidendi* of the above cited case. The impugned judgment of the first appellate court shows that it falls short of consideration expected from the court of first appeal, as it did not deal with all the issues and the evidence led by the parties before recording its findings of reversal of the judgment of trial court.

8. One more legal infirmity in the impugned judgment has been noticed at the time of arguments. In the original suit filed by the respondents, one Sh. Nasir Khan s/o Adham Khan r/o Sankadiya was also made defendant no. 2 but in the first appeal, he was not impleaded as party respondent by the plaintiffs and this material facts also went unnoticed of the learned first appellate court. The effect of not impleading him as respondent in the first appeal was not considered by the first appellate court in passing the impugned judgment. Though misjoinder and non-joinder of parties may not defeat the suit/appeal, yet the non-joinder of a necessary party is always fatal. The learned first appellate court did not consider the fact whether Sh. Nasir Khan was a necessary party or not and what was the effect not impleading him in the appeal filed before it.

9. Therefore, the substantial question of law is answered accordingly and thus, the impugned judgment and decree being cryptic, deserve to be set aside with a direction to the learned first appellate court to decide the first appeal afresh in accordance with law.
10. Consequently, this appeal is accepted and the judgment and decree of the first appellate court are set aside. The matter is remanded to the first appellate court with a direction to register the appeal to its original number and to decide the same afresh in accordance with law after giving proper opportunity of hearing to the parties concerned.

Pronounced.

(Rajinder Kumar)
Member

(Suraj Bhan Jaiman)
Member