

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WP227 No. 5330 of 2010**

Mangal Chand S/o Shricharan, Aged About 51 Years R/o Village Kera, Tahsil Janjgir, District Bilaspur (Now Janjgir Champa) (C. G.).

---- Petitioner**Versus**

1. Abheram & Ors. S/o Ramnath, Aged About 41 Years R/o Village Kera, Tahsil Janjgir, District Bilaspur (Now Janjgir Champa) (C. G.).
2. Jhadu S/o Atmaram, Aged About 51 Years R/o Village Mohtara, Tahsil Janjgir, District Bilaspur (Now Janjgir Champa) (C. G.).
3. Jila Sahkari Kendriya Bank Maryadit, Bilaspur (C. G.) Through Its Branch Manager, Jila Sahkari Kendriya Bank, Maryadit Branch Janjgir, District Janjgir Champa (Chhattisgarh)
4. State Of Madhya Pradesh (Now Chhattisgarh), Through Collector, Bilaspur, District Bilaspur (C. G.).

---- Respondents

For Petitioner	:	Mr. Alok Bakshi
For Respondent No. 1	:	Mr. Vinod Tekam, Adv.
For Respondent No. 2	:	None
For Respondent No. 3	:	Ms. Seema Singh, Adv.
For Respondent No. 4	:	Mr. Lav Sharma, Pane Lawyer.

Order on Board**11/03/2016**

1. With consent of the parties, heard the matter finally at motion stage itself.
2. Facts of the case in brief necessary for disposal of this petition are that Civil Suit No. 188-A/1989 (Mangal Chand -v- Abheram and two others) was pending before the Civil Judge Class I, Janjgir. This court vide order dated 13-7-1990 passed in Misc. Petition No. 3690/1987 directed the trial court to consider the issues regarding maintainability of the said civil suit and whether proper court fee is paid or not as preliminary issues. As directed, the trial Court after hearing both the parties on above preliminary issues vide order dated 26-9-1990 held that civil court has no jurisdiction to hear the said civil suit. Hence said civil suit is not maintainable and the plaint is required to be returned. The trial Court also held that the suit is not properly valued as per provisions of Section 7 (iv)(c) of the Court Fees Act, 1870 as the plaintiff is required to pay *ad valorem* court fee and thereby decided both

the issues against the plaintiff. The plaintiff challenged the same being Misc. Civil Appeal No. 19/1996. The 1st Additional District Judge to the court of District Judge, Bilaspur after hearing said misc. civil appeal affirmed the adjudication regarding preliminary issue No. 1 and set aside the finding regarding preliminary issue No. 2 and held that the suit is properly valued and proper court fee has been affixed. Against said order, plaintiff/appellant/applicant filed a civil revision being C.R. No. 1017/1997 before the erstwhile High Court of M.P. After formation of present State of CG, the case was received by this Court on transfer and on 30-6-2005, on the prayer of the applicant that in view of new amendment in Section 115 of the CPC, the revision would not be maintainable and on the prayer for withdrawal of the said revision with liberty to file appropriate petition if any eventuality arises, this court dismissed the revision as withdrawn with liberty to the applicant to file appropriate proceedings under the law in case such an eventuality arises. Thereafter the applicant had filed instant writ petition on 6-5-2010.

3. Order dated 26-9-1990 goes to show that court below after passing a final order deciding preliminary issues against plaintiff observed that the suit is not maintainable before the civil court and the suit is not valued as required for affixing court fee *ad valorem*. From perusal of Order 43 of the C.P.C. it goes to show that there is no provision under Order 43 of the C.P.C. that misc. civil appeal lie against the said order. On the other hand, Order 41 of the CPC goes to show that in the present matter appeal as provided under Order 41 of the CPC was maintainable. For ready reference the word 'decree' as defined in Section 2(2) in the CPC is reproduced below :-

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation – A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit, it may be partly preliminary and partly final."

4. Perusal of definition clause of the decree goes to show that by the impugned order passed by the trial Court, the trial Court in appreciation of both the preliminary issues expressed conclusive determination of the rights of the parties with regard to any of the matters in controversy and finally disposed of the suit and such matter is not maintainable before the civil court. As there is no jurisdiction to entertain such matter and also as the suit was not properly valued, also no court fee as required was affixed, with the above definition clause, in the considered view of this Court, Order 41 of the CPC would apply, not the Order 43 of the CPC. Therefore, the appellate court while hearing the misc. appeal under the provisions of Order 43, CPC committed a grave mistake for procedural laws. Though the trial court vide order dated 26-9-1990 did not frame formal decree but it does not mean that the said order does not come under the definition clause of the decree. The court may be prayed at any moment of time to formulate the formal decree. Therefore, again the appellate court while hearing the matter as misc. civil appeal committed a mistake and also as per settled law against the said order passed by the appellate court in misc. appeal provisions of section 115 of the CPC are not attracted and that is why the applicant prayed for withdrawal of instant revision with liberty to file appropriate proceedings if any eventuality arises. It is worthy to note that after withdrawal of said civil revision on 30-6-2005, the applicant had filed instant writ petition on 6-5-2010.

5. In the considered view of this Court, under Article 227 of the Constitution of India, this court has power of superintendence over all subordinate courts. This court is not obliged to hear the matter as the district judge committed a patent illegality while hearing the matter as misc. civil appeal. On the other hand, by invoking jurisdiction vested to this Court under Article 227 of the Constitution of India, it would be appropriate that the petitioner be directed to file a first appeal as required under Order 41, CPC after formulation of the formal decree by the trial Court. The matter be heard by the appellate court strictly as per entire provisions of law without being influenced by the earlier order dated 15-2-1997 on its merit including the limitation laws as applicable for the entire facts and merit as surfaced.

6. Consequently, to part with, in the considered view of this Court, the instant writ petition is not maintainable against the order passed by the

appellate court in misc. appeal. The petitioner is directed to file a regular first appeal as required under Order 41 CPC along with limitation laws as applicable within 45 days from today. If such a first appeal is preferred within a period of 45 days, the court below i.e. the appellate court is further directed to hear the matter in accordance with law along with entire applicability of the limitation laws. If such first appeal is filed within 45 days, then only the order passed by the 5th Additional District Judge, Bilaspur in Misc Civil Appeal No. 90/96 dated 15-2-1997 be deemed as set aside. The appellate court after hearing the matter bi-party may dispose of the said appeal and other limitation matter strictly in accordance with law.

7. The petition is disposed of.
8. No order as to costs.
9. Certified copy as per rules.

Sd/-
(Chandra Bhushan Bajpai)
Judge