

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Miscellaneous Appeal No. 1273 of 2000**

1. Jawahar Lal son of Bal Roop Sao (Dead) (Deleted)

(a) Smt. Shyamvati Devi widow of Shri Jawaharlal Gupta, Aged about 50 years (Dead) (Deleted)

(b) Surendra Kumar Gupta, Aged about 28 years

(c) Rajendra Kumar Gupta, Aged about 24 years

(d) Ritesh Kumar Gupta , Aged about 20 years

b to d all sons of Late Shri Jawaharlal Gupta.

(e) Ku. Sarika, daughter of Late Shri Jawaharlal Gupta, aged about 19 years.

(f) Deepika Gupta, daughter of Late Shri Jawaharlal Gupta, aged about 14 years being minor through natural guardian Smt. Shyamvati Devi Gupta.

All resident of Bramphpara road, Ambikapur, District Sarguja, M.P (now Chhattisgarh)

2. Mohan Sao, son of Balroop Sao, Resident of Brahma Road, Nagar Ambikapur, Police Station and Tahsil Ambikapur, District Sarguja, M.P. (Now Chhattisgarh).

---- Appellants

Versus

1. Champa Devi, daughter of Heeralal (Dead) (Deleted)

(i) Smt. Ashadevi, aged about 26 years - Daughter

(ii) Smt. Anjudevi, aged about 23 years - Daughter

(iii) Santosh Kumar, aged about 20 years - son

(iv) Ku. Suman, aged about 16 years - Daughter

(v) Ku. Sarita, aged about 13 years - Daughter

2. Kamla Devi, daughter of Heeralal

Both residents of Brahma Road, Nagar Ambikapur, Police Station and Tahsil Ambikapur, District Sarguja, M.P. (Now Chhattisgarh).

---- Respondents

For Appellants	:	Shri Manoj Paranjpe and Shri Anurag Singh, Advocates.
For Respondents	:	Shri Manoj Mishra and Shri Sushil Dubey, Advocates.

Hon'ble Shri Deepak Gupta, Chief Justice

Judgment on Board

18/11/2016.

1. This appeal is directed against the order dated 23.09.1997 passed by the Learned First Additional District Judge, Ambikapur, Sarguja in Civil Appeal No.28-A of 1991 whereby he, while hearing the appeal of the Defendants, allowed the application for amendment in the written statement filed by them and remanded the matter to the Learned Trial Court for decision afresh. Aggrieved by this order of remand, the Appellants have filed the present appeal and in this appeal, two grounds have been raised. First ground is that the Learned first Appellate Court erred in allowing the application for amendment as the amendment changed the nature of the suit. Second ground raised is that the Learned first Appellate Court was not justified in remitting the suit to the Learned Trial Court.
2. Briefly stated facts of the case are that Late Balroop Sao was the owner of the property in dispute. Shri Balroop Sao died leaving behind his widow-Basumati and three sons namely Hiralal, Jawaharlal and Mohan. Hiralal died in the year 1960 leaving behind two daughters namely Champa Devi and Kamla Devi, plaintiffs in the suit. This suit was filed on 04.05.1988. In this suit, the sisters claimed they were also the legal heirs of their father-Hiralal and were entitled to share in the property. They accordingly claimed partition of the property. The learned Trial Court held that the Appellants were in fact grand-daughters of Late Balroop Sao and

were entitled to 1/8 share each in the property and further went on to hold that in view of the provisions of Section 23 of the Hindu Succession Act, they were not entitled to claim partition of the house and therefore, dismissed the suit.

3. Aggrieved by this judgment, the plaintiffs/sisters filed an appeal and in the appeal, an application was also filed that one of the sisters being a widow was entitled to reside in the house property even if she was not entitled to claim partition. This application was allowed and the suit was remanded to the learned Trial Court. Against this order of remand, this appeal was filed which unfortunately has been pending in this Court for more than 16 years. It is a sad reflection on our judicial system that a suit filed by two sisters claiming share in the property remains undecided for 28 long years. In the meantime, one of the sisters has expired.
4. As far as challenge to the application for amendment being allowed is concerned, I find no merit in the same. The amendment does not, in any manner, change the nature of the suit.
5. The main ground raised in the suit was that the two plaintiffs being the grand-daughter of Balroop Sao had a share in the property and even the learned Trial Court held that they were entitled to 1/8 share. It only dismissed the suit on the ground that in terms of Section 23 of the Hindu Succession Act, they were not entitled to partition of the house property. By the amendment, all that was sought was that since one of the sisters was a widow, even if she was not entitled to claim partition by meets and bounds, she was entitled to reside in the house property. I fail to understand how this changes the nature of the suit. It is a smaller claim than the original claim and it arises out of the right of inheritance of the sisters in the property.

6. However, as far as second aspect of the matter is concerned, I am clearly of the view that the learned first Appellate Court should not have remanded the suit. No fresh evidence had to be recorded in this regard. The fact that the lady in question was a widow, was not dispute. No fresh evidence had to be recorded and only a finding had to be given whether she was entitled to reside in the property or not. Therefore, the learned first Appellate Court should not have remanded the suit.
7. Order 41 Rule 23 of the Code of Civil Procedure, 1908 (hereinafter called 'the CPC') empowers the Appellate Court to remand the case, which reads as follows:

"23. Remand of case by Appellate Court.- Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand."

8. Order 41 Rule 23 CPC will come into application only when the suit has been disposed of upon preliminary points and the decree is reversed in appeal. If the suit has been disposed of on merits, then Order 41 Rule 23 CPC will not apply. Remand can also be ordered under Order 41 Rule 23-A CPC, which reads as follows:

"23A. Remand in other cases.- Where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the

Appellate Court shall have the same powers as it has under Rule 23."

9. A bare reading of Order 41 Rule 23A CPC clearly shows that the Court before remanding the case where it has reversed the decree in appeal, must come to a conclusion that re-trial is necessary. In case re-trial is not necessary, then no remand is called for.

10. Order 41 Rule 24 and 25 CPC read as under:

"24. Where evidence on record sufficient, Appellate Court may determine case finally.- Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

25. Where Appellate Court may frame issues and refer them for trial to court whose decree appealed from.- Where the court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the court from whose decree the appeal is preferred and in such case shall direct such court to take the additional evidence required; and such court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor within such time as may be fixed by the Appellate Court or extended by it from time to time."

11. Order 41 Rule 24 makes it amply clear that where the evidence on record is sufficient to decide all the issues, then the appellate Court may even after re-settling the issues, decide all the issues afresh and there is no need in such a case to remand the matter. Order 41 Rule 25 CPC

empowers the appellate Court to frame fresh issues and refer them for trial to the Court where the decree is appealed. Therefore, if the appellate Court feels that a fresh issue has to be framed on the basis of the pleadings already on record or on the basis of some amendments in the pleadings, the appellate Court may, if necessary, frame issues and refer the same to the trial Court and where an appeal is preferred, in such case, the trial Court is only required to take additional evidence on the issues so framed or remanded to it and it is thereafter required to only try the issues and return the evidence to the appellate Court alongwith the findings. The purpose behind Order 41 Rule 23 CPC is to ensure speedy and effective trial. This is frustrated by ordering a wholesale remand of the case without even seeing which provision of law is applicable in the facts and circumstances of the case. As far as the present case is concerned, the relationship between the parties is not disputed. The fact that the sisters had 1/8 share is not disputed. The only question is whether this case is covered under Order 41 Rule 23 CPC or not and even if the sisters are not entitled to possession under Order 41 Rule 23 CPC, whether the sisters are entitled to right of residence or not. The evidence has been led. The issues are only legal in nature and two points for consideration which arise before the first Appellate Court are (i) whether in terms of the provisions of Section 23 of the Hindu Succession Act, the daughters are not entitled to claim a share in the residential property of the deceased; and (ii) even if they are not entitled to claim partition by metes and bounds in the residential property in which they have a share, whether the two daughters, especially the widow daughter has a right of residence. These matters should have been decided by the first appellate Court instead of remanding the case. The manner in which the case has been remanded only shows that the learned first Appellate Court was only interested in disposing of the matter and was not interested in doing

justice to the parties. Therefore, the order of the learned first appellate Court so far as remanding the case, is set aside. The matter is remanded to the learned first Appellate Court.

12. The only reason why I myself have not decided the appeal is that it would deprive the parties of a valuable right to challenge a finding of fact which right they have before the lower appellate Court.

13. Learned counsel for the parties are directed to appear before the learned first Appellate Court on 07.12.2016 and since no evidence has to be led and only arguments on the points have to be heard, the learned first Appellate Court is directed to dispose of the appeal on merits latest by 31.01.2017.

14. The appeal is allowed in the aforesaid terms.

Sd/-

(Deepak Gupta)
CHIEF JUSTICE

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