

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Order reserved on : 31/08/2016

Order passed on : 23/09/2016

MA No. 99 of 2012

- Santosh Kumar Shukla S/o Late Ramnath Shukla Aged About 62 Years R/o Jamadi, Tah. Jaijaipur, Dist. Janjgir-Chmapa (C.G.)

---- Appellant

Plaintiff

Versus

1. Sanjay Kumar Shukla S/o Late Ramnarayan Aged About 27 Years R/o Rohinipuram, Raipur, Dist. Raipur (C.G.)
2. Sandeep Kumar S/o Late Ramnarayan Aged About 40 Years R/o B-3, Kalindi Kunj, Ring Road, Bilaspur (C.G.)
3. Sanjiv S/o Late Ramnarayan Aged About 36 Years R/o Soni Colony, Karhi, Mungeli, Dist. Raipur (C.G.)
4. Vikas S/o Late Ramnarayan Aged About 34 Years R/o C-29, Agyeya Nagar, Bilaspur Dist. Bilaspur (C.G.)
5. Gita Bai W/o Late Ramnarayan Aged About 55 Years R/o C-29, Agyeya Nagar, Bilaspur Dist. Bilaspur (C.G.)
6. Vinod Kumar S/o Late Ramnath Aged About 55 Years 25 Bangla, House No. B-11, Bilaspur, Dist. Bilaspur (C.G.)
7. Virendra S/o Late Ramnath Aged About 50 Years R/o Sanchalak Matsya Udyog, Telibandha, Raipur, Distt. Raipur (C.G.)
8. Surendra S/o Late Ramnath Aged About 48 Years Engineer, Keda, Behind Sales Tax Office, Bilaspur Dist. Bilaspur (C.G.)
9. Laxmikanti W/o Himanshu Aged About 46 Years R/o House No. 4, Sector-1, B, 294, Balco , Dist. Korba (C.G.)
10. Vina Dubey W/o Jagatram Aged About 52 Years R/o Timnigudi, Gurupara, Sambalpur, Orrisa
11. Ashok Kumar S/o Late Ramnath Aged About 55 Years R/o B-51, Agyeya Nagar, Dist. Bilaspur (C.G.)
12. Chandrabhan S/o Hariram Aged About 35 Years R/o Jamdi, Assistant Teacher, Tah. Jaijaipur, Dist. Janjgir-Champa (C.G.)
13. Sitaram S/o Jhaduram Aged About 36 Years R/o Jamdi, Panchayat Sachiv, Tah. Jaijaipur, Dist. Janjgir-Champa (C.G.)

14.Fattelal S/o Firat Aged About 35 Years R/o Jamdi, Tah. Jaijaipur, Dist. Janjgir-Chamap (C.G.)

15.State Of Chhattisgarh Through The Collector, Dist. Janjgir-Champa C.G.

---- Respondent

For Appellant	: Shri BP Gupta, Advocate.
For Respondents No.1,2 & 5	: Shri Rajeev Shrivastava, Advocate. and 12 to 14.
For Respondent/State	: Shri Ashish Surana, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker

C A V Order

23/09/2016

Challenge in the present appeal filed under Order 43 Rule 1(u) of CPC is to the judgment and decree dated 10.7.2012 passed by the Additional District Judge, Sakti, Distt. Janjgir-Champa in Civil Appeal No.39A/2011 whereby entire matter has been remanded to the trial Court with a direction to the parties to file the relevant revenue records before the trial Court, which in turn shall record additional evidence and pass a fresh judgment. Further, the appellate Court has directed the trial Court to first draw up a preliminary decree as provided under Order 20 Rule 18 of CPC and then to proceed further.

02. Brief facts of the case are that the appellant/plaintiff filed a suit for declaration, partition and permanent injunction, *inter alia*, pleading that the plaintiff and the defendants No. 1 to 11 are the members of joint Hindu family. In the year 1996, a partition case was filed before the Court of Naib Tehsildar and in the said revenue case after mutual settlement between the parties on 25.3.1996, proceedings of division of holding account (खाता विभाजन) were conducted. Further case of the

plaintiff was that their mother Smt. Luv Kunwar was also one of the parties who died on 4.2.2009 and therefore, in respect of the joint property of Smt. Luv Kunwar which was not partitioned in the year 1996, a separate application was filed before the Additional Tehsildar vide Revenue Case No.10A-27/09-10. It has been pleaded by the plaintiff that certain necessary parties were not joined before the Court of Additional Tehsildar and thereafter, even without partition of the land certain portion of the same was sold by defendants No. 4 to 14. The plaintiff has thus prayed for his share in the undivided property which was not the subject matter of partition which took place in the year 1996. He also prayed that till proper partition is not done, the parties may be directed not to interfere in the possession and mutation proceedings may also not take place in favour of defendants No. 12 to 14.

03. Vide judgment and decree dated 6.5.2011 the suit filed by the plaintiff was decreed by the trial Court, against which an appeal was preferred by defendants No. 1 to 5. However, by the impugned judgment and decree, the first appellate Court has set aside the judgment and decree dated 6.5.2011 of the trial Court and remanded the matter to the trial Court with a direction to first draw up a preliminary decree of partition as required under Order 20 Rule 18 of CPC and after receiving final report, judgment and decree be passed afresh. The appellate Court has further held that the judgment and decree has been passed by the trial Court without considering the relevant documents of the revenue authorities as none of the parties had filed those documents before the trial Court. According to the

appellate Court, both the parties have not filed the relevant documents in support of their pleadings whereas filing and proving of those documents are necessary for final adjudication of the matter. It is this remand order passed by the appellate court which has been assailed by the plaintiff in this appeal.

04. Counsel for the appellant submits as under:

(i) that the first appellate Court has erred in law while passing the order of wholesale remand of the matter.

(ii) that the first appellate court was under an obligation to decide the appeal on the basis of material available with it and had no business to direct the parties to file revenue documents and then directing the trial Court to decide the case afresh on that basis. According to the counsel for the appellant, this amounts to fulfilling the lacuna by the first appellate Court which is not permissible under the law.

(iii) that drawing of preliminary decree as required under Order 20 Rule 18 is not necessary in the present case.

(iv) that in the first appellate Court no application was filed by the defendants under Order 41 Rule 27 of CPC and therefore, the Court below was not justified in remanding the matter.

(v) that if the parties were interested to file any document, they could have filed the same at the stage of first appeal itself and in that eventuality, the first appellate Court instead of remanding the matter could have recorded evidence and passed the judgment and decree or alternatively, could have remanded the matter to the trial Court on a

particular issue for recording evidence and its finding thereon and directed the trial Court for sending it back to the appellate Court for decision.

(vi) that without recording any finding on the issue raised by the parties, the appellate Court has passed the order of remand which is contrary to law.

05. On the other hand, supporting the impugned judgment it has been argued by Shri Rajeev Shrivastava that for grant of substantial justice, the order of remand has been passed and there is nothing wrong in it. He submits that it is not only defendants No. 1 to 5 who have been granted permission to file additional documents and lead evidence, but the plaintiff would also be at liberty to file documents and prove the same in rebuttal.

06. State counsel has also duly assisted the Court.

07. Heard learned counsel for the parties and perused the material available on record.

08. On the pleadings of the respective parties and the material on record, the following substantial question of law arises for adjudication:

“Whether the First Appellate Court is justified in making wholesale and open remand without dealing with the findings recorded by the trial Court on particular issues?

9. From the judgment passed by the trial Court it is apparent that as many as eight issues were framed by it and all have been answered in favour of the plaintiff. The first Appellate Court however, without

meeting out and up-setting the finding recorded by the trial Court on any of the issues, has disturbed the same by remitting the matter with a direction to the trial Court to decide the suit afresh. Making such wholesale and open remand without taking pains to meet the finding of the trial Court, is not permissible under the law.

It is also pertinent to note that so far as the powers of Appellate Court to refer a particular issue to the Trial Court for recording the additional evidence is concerned, the same is contemplated in Rule 25 of Order XLI. However, in such case also, the Appellate Court has to frame the issue for referring the same to the Trial Court from whose decree the appeal is preferred, and direct the Trial Court to take the additional evidence as required. In such case, the Trial Court has to try the said issue or issues referred by the Appellate court, and return the evidence to the Appellate Court together with its findings thereon and the reasons thereon. The Appellate Court thereafter has to decide the appeal on the additional evidence and additional findings recorded by the Trial Court. Under no circumstances, the Appellate Court could have remanded the case to the Trial Court without following the procedure either under Rule 23 or 23A or 25 of Order XLI.

10. It is a settled legal position that in the cases like the present one, the Court should loathe to exercise its power in terms of Order XLI Rule 23 of the Code of Civil Procedure and an order of remand should not be passed routinely. It is not to be exercised by the appellate Court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial Court, it has to come with a proper finding of its own and it should not shirk its duties. Further

settled legal position with respect to remand cases is that the Court should not ordinarily remand a case under Order XLI Rule 23 CPC merely because the reasoning of the lower Court on some point was wrong as such remand order leads to un-necessary delay and cause prejudice to the parties to the case.

11. In view of above factual and legal position, this Court is of the considered opinion that the lower Appellate Court has committed an error of law in making wholesale and open remand of the case to the trial Court without upsetting the finding recorded by the trial Court on any of the issues and being so the judgment impugned dated 10.7.2012 cannot be made to stand and it is hereby set aside. First appellate Court is directed to decide the appeal on its own merits in accordance with law.

12. Substantial question of law framed by this Court is thus answered in negative.

13. Parties to appear before the First appellate Court on 28.11.2016.

14. Appeal allowed.

Sd/

(Pritinker Diwaker)

Judge