

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MA No. 66 of 2016

1. Arun Kumar Agrawal S/o Shri Narayan Das Agrawal, R/o- Nagpur Maharastra, Present R/o- Vinoba Nagar Bilaspur, Tahsil & District- Bilaspur, (Chhattisgarh),.....(Defendant No. 1).

---- Appellant

Versus

1. Smt. S. Shashiprabha Rao W/o Shri Vasudev Rao, aged about 44 years, R/o- Ward No. 9 Vypar Vihar Road, in front of Income Tax Office, Bilaspur, Tahsil & District- Bilaspur, (Chhattisgarh).
2. Jagdish Prasad Sahu, S/o Shri Milauram Sahu, aged about 49 years, R/o- Ward No.9 Vypar Vihar Road, in front of Income Tax Office, Bilaspur, Tahsil & District- Bilaspur, (Chhattisgarh).
3. Dr. Smt. Sushilmani Timothy, W/o Shri Silas Madhukar Timothy, aged about 49 years, R/o- Ward No. 9 Vypar Vihar Road, in front of Income Tax Office, Bilaspur, Tahsil & District- Bilaspur, (Chhattisgarh).
4. Asma Nasir Khan, W/o Shri Nasir Mohammad Khan, aged about 44 years, R/o- Ward No. 9 Vypar Vihar Road, in front of Income Tax Office, Bilaspur, Tahsil & District- Bilaspur, (Chhattisgarh).
5. Smt. Kalpana Gupta, W/o Shri Satyanarayan Gupta, aged about 44 years, R/o- Ward No. 9 Vypar Vihar Road, in front of Income Tax Office, Bilaspur, Tahsil & District- Bilaspur, (Chhattisgarh).
6. Smt. Archana Gupta, W/o Shri Narendra Gupta, aged about 37 years, R/o- Ward No. 9 Vypar Vihar Road, in front of Income Tax Office, Bilaspur, Tahsil & District- Bilaspur, (Chhattisgarh).
7. Lakhanlal Gupta, S/o Shri Mureet Ram Gupta, aged about 45 years, R/o- Ward No. 9 Vypar Vihar Road, in front of Income Tax Office, Bilaspur, Tahsil & District- Bilaspur, (Chhattisgarh).
8. Bhanupratap Sahu, S/o Shri Ramprasad Sahu, aged about 37 years, R/o- Ward No. 9 Vypar Vihar Road, in front of Income Tax Office, Bilaspur, Tahsil & District- Bilaspur, (Chhattisgarh).
9. D. Gokulbabu, S/o Late Shri D.H. Sarkar, aged about 40 years, R/o- Ward No. 9 Vypar Vihar Road, in front of Income Tax Office, Bilaspur, Tahsil & District- Bilaspur, (Chhattisgarh).
10. Commissioner, Municipal Corporation Bilaspur, District- Bilaspur, (Chhattisgarh).
11. Municipal Corporation Bilaspur, Through Commissioner, Municipal Corporation Bilaspur, (Chhattisgarh).
12. State Of Chhattisgarh, Through Collector, Bilaspur, (Chhattisgarh),..... (Plaintiff).

---- Respondents

And

MA No. 67 of 2016

1. Arun Kumar Agrawal S/o Shri Narayan Das Agrawal, R/o- Nagpur Maharastra, Present R/o- Vinoba Nagar Bilaspur, Tahsil & District- Bilaspur, (Chhattisgarh),.....(Defendant No. 1).

---- Appellant

Versus

1. Smt. S. Shashiprabha Rao W/o Shri Vasudev Rao, aged about 44 years, R/o- House No. 1085/09 Ward No. 9 Vypar Vihar Road, In Front of Income Tax Bhavan, Bilaspur, Tahsil & District- Bilaspur, (Chhattisgarh).
2. Jagdish Prasad Sahu, S/o Shri Milauram Sahu, aged about 49 years, R/o- Ward No. 9 Vypar Vihar Road, In front of Income Tax Bahvan, Bilaspur, Tahsil & District- Bilaspur, (Chhattisgarh).
3. Commissioner, Municipal Corporation Bilaspur, District- Bilaspur, (Chhattisgarh).
4. Municipal Corporation Bilaspur, Through Commissioner, Municipal Corporation Bilaspur, (Chhattisgarh).
5. State of Chhattisgarh, Through Collector, Bilaspur, (Chhattisgarh),..... (Plaintiff).

---- Respondents

For Appellant – Shri Rajeev Bharat, Advocate, (in both the appeals).
For Respondents 1 to 9 (in MA No.66/2016) & For Respondents 1 and 2 (in MA No.67/2016) – Shri Anand Kumar Gupta, Advocate.
For Respondents 10 & 11 (in MA No.66/2016) & For Respondents 3 and 4 (in MA No.67/2016)– Shri Malay Kumar Bhaduri, Advocate.
For Respondent No. 12 (in MA No.66/2016) & For Respondent No.5 (in MA No.67/2016)– Shri Ramakant Pandey, Panel Lawyer.

Hon'ble Shri Justice Chandra Bhushan Bajpai

Order on Board

10/11/2016

1. Since both the miscellaneous appeals involve common question, appellant is also same in both of the appeals, facts are interconnected and of common interest, both the miscellaneous appeals heard together on motion.
2. As per the case of the appellant, the first appellate court while deciding Civil Appeal No.109A/15 and 106A/15 against the impugned judgment and decree passed by the VIIIth Civil Judge Class II in Civil Suit No.87A/2010, Civil Suit 100A/2010 judgment and decree dated 07-02-2012 whereby the trial Court dismissed the Civil Suit No.87A/10 filed by present respondents 1 to 9 and partly allowed Civil Suit No.100A/10 filed by the present respondents 1 and 2 and declared that present respondents 1 and 2 in MA No.67/2016 are the owner of lands as shown in para 29 Sub-para 1 of the impugned judgment.

The appellate court while hearing the above both civil appeals allowed the application under Order 6 Rule 17 and also under Order 41 Rule 27 of the Code of Civil Procedure, 1908 (in short 'the Code') and remanded both the civil suits for hearing without any appreciation on its merit directed that after necessary impleadment as in interim application under Order 6 Rule 17 of the Code and thereafter after taking the document on record under Order 41 Rule 27 of the Code, thereafter after affording the parties opportunity for adducing evidence for the said additional pleadings and document and after hearing, the matter be disposed of afresh on its merit. Against the said order the appellant filed these two miscellaneous appeals under Order 43 Rule 1(u) of the Code against the order passed by the appellate court in both civil appeals for remanding the matter under the provisions of Order 41 Rule 23A of the Code.

3. It is submitted on behalf of the appellant in both the miscellaneous appeals that the plaintiff/respondents in both the civil suits had filed the said civil suits claiming easementary right and also for permanent injunction against the proceedings of dispossession of the said plaintiffs. Undisputedly, land belongs to the appellant, they were claiming easementary right for public road as they were using the same for 10 to 12 years, they failed to prove this fact that for last 10 to 12 years they are using the said lands. On 25-04-2008, the land of the appellant was demarcated as the concerned respondents are the owner of the lands nearby hence they were present at the time of demarcation. They challenged the said report of demarcation before Collector, the same was pending at the time of hearing of civil suit. On 07-02-2012, the concerned trial Court accordingly dismissed the Civil Suit No.87A/10 and partly allowed the Civil Suit No.100A/10. Against the said judgment, the concerned respondents preferred civil appeal as aforementioned. During pendency of said appeals, the revision which they were preferred before the Additional Collector against the order of demarcation over the land of present appellant was allowed on 13-04-2012. Thereafter, the respective respondents/appellants filed application under

Order 6 Rule 17, under Order 41 Rule 27 of the Code for amendment in the pleadings and for taking document on record. As they were not prayed for remanding of said civil appeals, the onus is with them to prove their case regarding easementary right, no document is filed that the road in question was public road. With this, no ground for remanding is made out, the said order is bad in law, hence, both the appeals may be admitted for consideration and accordingly disposed of.

4. Learned counsel for the appellant placed reliance on the matter of **Syeda Rahimunnisa V. Malan Bi (Dead) by L.Rs. & another, etc.**¹ and relied upon paras 34 and 35 of the said judgment which are as under:-

"34. The High Court, in our view, further failed to see that if the first appellate court could decide the appeal on merits without there being any objection raised for remanding of the case to the trial court, we are unable to appreciate as to why the High Court could not decide the appeal on merits and instead raised the issue of remand of its own and passed the order to that effect.

35. It is a settled principle of law that in order to claim remand of the case to the trial court, it is necessary for the appellant to first raise such plea and then make out a case of remand on facts. The power of the appellate court to remand the case to subordinate court is contained in order XLI Rule 23, 23-A and 25 of CPC. It is, therefore, obligatory upon the appellant to bring the case under any of these provisions before claiming a remand. The appellate court is required to record reasons as to why it has taken recourse to any one out of the three Rules of Order XLI of CPC for remanding the case to the trial court. In the absence of any ground taken by the respondents (appellants before the first appellate court and High Court) before the first appellate court and the High Court as to why the remand order in these cases is called

¹ AIR 2016 SC 4653

for and if so under which Rule of Order XLI of CPC and further in the absence of any finding, there was no justification on the part of the High Court to remand the case to the trial court. The High Court instead should have decided the appeals on merits. We, however, do not consider proper to remand the case to High Court for deciding the appeals on merits and instead examine the merits of the case in these appeals.”

5. Learned counsel for the appellant prayed that as the respondents have not proved their case, there was no reason for remand as aforementioned. The appellate court erred by remanding the matter to the trial court.

6. To appreciate the facts and arguments advanced, perused the judgment and decree passed by the trial court as well as in the appellate court. It emerges that the suit filed by the present respondents of M.A.No.66/2016 was dismissed and the suit filed by respondents 1 and 2 in M.A.No.67/2016 was partly allowed by the trial court as they were declared owner of the land as mentioned in para 29 sub-para 1 of the judgment. During pendency of said appeals, if any order of Additional Collector is passed and if the said fact brought into knowledge of appellate court for amendment in the pleadings and also for taking document on record, the appellate court without appreciating anything on its merit, set aside both the judgment and decree passed by the trial court and directed that after due amendment in the pleadings of the parties, after taking document, after affording due opportunity of adducing evidence, hearing, the trial court to pass a judgment and decree afresh, with this, the trial court has to appreciate the entire material in the light of said document and order, what would be effect of said amended pleadings and document cannot be predicted at the present stage. The appellant has opportunity to amend his pleadings suitably, defend the said document on the question of law and facts, he may challenge the order of Additional Collector to the forum available with the revenue authorities, further is having opportunity to

adduce evidence, submit before the trial court on facts as well as law and the court below while appreciating the entire facts and law shall pass a judgment and decree afresh. Needless to mention that no apparent prejudice is caused to the present appellant for remand of both the appeals.

7. The case law cited Syeda Rahimunnisa V. Malan B. (Dead) by L.Rs. & another, etc. (supra) is based on different facts not applicable in the present case, on the basis of fact further surfaced during hearing of the appeal, concerned party brought this in the knowledge of the appellate court and instead deciding the same the appellate court while exercising its discretion remanded the matter with opportunity to both the parties for said fact and legal position and its application in the said dispute.

8. Upon consideration of the entire facts and other material placed, this Court is of the considered view that no prejudice is going to be caused to the appellant, he has opportunity to rebut those pleadings and document and the parties may get a judgment afresh in the light of said pleadings and documents, further the appellant has legal right to challenge said findings before first appellate court, for any temporary relief the parties concerned may pray before the trial court for protection of any of their rights available under the law till disposal of said civil suit.

9. In the considered view of this Court both these appeals are having no substance to be admitted for consideration. Consequently, MA No.66 of 2016 and MA No.67 of 2016 are dismissed at the motion stage itself with observation that the appellant has opportunity available under the law to defend for issues additionally under question before the trial court.

10 Both appeals are dismissed at the motion stage itself.

Sd/-

(Chandra Bhushan Bajpai)
JUDGE