

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Misc. Appeal No.19 of 2015

1. Shri Dev Narayan Parihar, S/o Late Laxmi Narayan Parihar, aged about 59 years, R/o House No.1540, Motipura Mohalla, Thandi Sadak, Hisar, District Hisar (Haryana).

(Defendant No.1)

2. Shri Prem Narayan Parihar, S/o Late Laxmi Narayan Parihar, aged about 52 years, R/o Forman Randhish, Industrial Corporation, Nirankari Kripa No.3, Milar Ganj, District Ludhiyana (Punjab). Present R/o Gali No.24, Near Medki Chakki, Guru Govind Singh Nagar, District Ludhiyana (Punjab).

(Defendant No.2)

3. Shri Ashirwad Group, Through Partner

(1) Dilip Singh Tikriha, S/o J.R. Tikriha, aged about 49 years,

(2) Khemlal Sahu, S/o J.L. Sahu, aged about 43 years,

(3) Yashwant Sahu, S/o Trilochan Sahu, aged about 44 years,

All R/o Ashirwad Group, Near Dr. Hingora, Tikrapara, Tahsil & District Raipur (C.G.).

(Defendant No.3)

---- Appellants

Versus

1. Smt. Krishna Devi, W/o Shri Pappu Chand Chauhan, aged about 45 years, R/o Medta City, Nagaur, Distt. Nagaur (Rajasthan).

(Plaintiff)

2. State of Chhattisgarh, Through Collector, Raipur, District Raipur (C.G.)

(Defendant No.4)

---- Respondents

For Appellants: Mr. Pushpendra Kumar Patel, Advocate.

For Respondent No.1: Mr. Ankur Agrawal, Advocate.

For Respondent No.2: Mr. Avinash Singh, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

15/11/2016

1. Though notices have been issued in this appeal and case is fixed for

final hearing, but substantial question of law has not been formulated.

Thus, the appeal is formally admitted for hearing on the following substantial question of law: -

Whether the first appellate Court is justified in remanding the matter under Order 41 Rule 23A of the CPC to re-appreciate the evidence without reversing the decree in appeal and without holding that retrial is considered necessary?

2. Suit filed by respondent No.1 herein / plaintiff for declaration of title and permanent injunction and for declaring the sale deed dated 5-10-2010 as null and void, was dismissed by the trial Court by its judgment and decree dated 17-2-2014 after answering the three issues in favour of the defendants and against the plaintiff and also holding that the suit is barred by the proviso to Section 34 of the Specific Relief Act, as bare suit for declaration of title is not maintainable because the plaintiff is not in possession of the suit land. Feeling aggrieved against the judgment and decree of the trial Court dismissing the suit, the plaintiff filed first appeal under Section 96 of the CPC. The first appellate Court by its judgment allowed the appeal and made wholesale remand under Order 41 Rule 23A of the CPC against which this miscellaneous appeal under Order 43 Rule 1 (u) of the CPC has been preferred.
3. Mr. Pushpendra Kumar Patel, learned counsel appearing for the appellants/defendants, would submit that the first appellate Court has not reversed the decree in appeal and has not recorded that retrial is necessary and unless the two conditions precedent are satisfied, wholesale remand could not have been made and therefore, the judgment impugned deserves to be set aside.

4. On the other hand, learned counsel for respondent No.1 / plaintiff would support the impugned order and oppose the appeal.
5. I have heard learned counsel for the appellants, perused the judgment impugned cautiously and analyzed the submissions made herein-above.
6. The question for consideration is whether such a course of making wholesale / open remand by the first appellate Court upon granting an application under Order 41 Rule 27 read with Section 151 of the CPC is permissible.
7. In order to consider the plea raised at the Bar, it would be appropriate to notice Section 107 of the CPC. Section 107 of the CPC reads as under: -

"107. Powers of Appellate Court.-(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power-

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."

Thus, by virtue of the above-stated provision, the first appellate Court shall have the same powers and same duties as that of the Courts of original jurisdiction (trial Court).

8. In the matter of **P. Purushottam Reddy and another v. Pratap**

Steels Limited¹, the Supreme Court has held that unless the decree in appeal is reversed by the first appellate Court and retrial is considered necessary, wholesale remand cannot be made by the first appellate Court. It has been held as under: -

"10. The next question to be examined is the legality and propriety of the order of remand made by the High Court. Prior to the insertion of Rule 23A in Order 41 of the Code of Civil Procedure by the CPC Amendment Act, 1976, there were only two provisions contemplating remand by a court of appeal in Order 41 CPC. Rule 23 applies when the trial court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in appeal. Rule 25 applies when the appellate court notices an omission on the part of the trial court to frame or try any issue or to determine any question of fact which in the opinion of the appellate court was essential to the right decision of the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand inasmuch as the subordinate court can try only such issues as are referred to it for trial and having done so, the evidence recorded, together with findings and reasons therefor of the trial court, are required to be returned to the appellate court. However, still it was a settled position of law before the 1976 Amendment that the court, in an appropriate case could exercise its inherent jurisdiction under Section 151 CPC to order a remand if such a remand was considered pre-eminently necessary *ex debito justitiae*, though not covered by any specific provision of Order 41 CPC. In cases where additional evidence is required to be taken in the event of any one of the clauses of sub-rule (1) of Rule 27 being attracted, such additional evidence, oral or documentary, is allowed to be produced either before the appellate court itself or by directing any court subordinate to the appellate court to receive such evidence and send it to the appellate court. In 1976, Rule 23A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed

1 (2002) 2 SCC 686

in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23A as it is under Rule 23. After the amendment, all the cases of wholesale remand are covered by Rule 23 and 23A. In view of the express provisions of these rules, the High Court cannot have recourse to its inherent powers to make a remand because, as held in [Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati](#)², it is well settled that inherent powers can be availed of *ex debito justitiae* only in the absence of express provisions in the Code. It is only in exceptional cases where the court may now exercise the power of remand *dehors* Rules 23 and 23A. To wit, the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 41 Rule 31 CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for rewriting the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided.

11. In the case at hand, the trial court did not dispose of the suit upon a preliminary point. The suit was decided by recording findings on all the issues. By its appellate judgment under appeal herein, the High Court has recorded its finding on some of the issues, not preliminary, and then framed three additional issues leaving them to be tried and decided by the trial court. It is not a case where a retrial is considered necessary. Neither Rule 23 nor Rule 23A of Order 41 applies. None of the conditions contemplated by Rule 27 exists so as to justify production of additional evidence by either party under that Rule. The validity of remand has to be tested by reference to Rule 25. So far as the objection as to maintainability of the suit for failure of the plaint to satisfy the requirement of Forms 47 and 48 of Appendix A CPC is concerned, the High Court has itself found that there was no specific plea taken in the written statement. The question of framing an issue did not, therefore, arise. However, the plea was raised on behalf of the defendants purely as a

2 AIR 1965 SC 364

question of law which, in their submission, strikes at the very root of the right of the plaintiff to maintain the suit in the form in which it was filed and so the plea was permitted to be urged. So far as the plea as to readiness and willingness by reference to clause (c) of [Section 16](#) of the Specific Relief Act, 1963 is concerned, the pleadings are there as they were and the question of improving upon the pleadings does not arise inasmuch as neither any of the parties made a prayer for amendment in the pleadings nor has the High Court allowed such a liberty. It is true that a specific issue was not framed by the trial court. Nevertheless, the parties and the trial court were very much alive to the issue whether [Section 16\(c\)](#) of the Specific Relief Act was complied with or not and the contentions advanced by the parties in this regard were also adjudicated upon. The High Court was to examine whether such finding of the trial court was sustainable or not - in law and on facts. Even otherwise the question could have been gone into by the High Court and a finding could have been recorded on the available material inasmuch as the High Court being the court of first appeal, all the questions of fact and law arising in the case were open before it for consideration and decision."

9. In the matter of **Vasant Ganesh Damle v. Shrikant Trimbak Datar and another**³, considering the scope of Section 107 of the CPC, the Supreme has held as under: -

"8. The appeal is considered to be an extension of the suit because under S. 107 of the Code of Civil Procedure, the appellate Court has the same powers as are conferred by the Code on Courts of original jurisdiction in respect of suits instituted therein. Such a power can be exercised by the appellate Court "as nearly as may be" exercised by the trial Court under the Code."

10. In the matter of **S. Umapathy v. Arunachalam Pattankattiar and another**⁴, Justice P. Sathasivam, (as then His Lordship was), has held that mere reception of additional evidence cannot be a ground for order of remand and to try the suit once again by the trial Court.

The relevant portion of the said judgment is as under:-

³ AIR 2002 SC 1237

⁴ AIR 2000 Madras 259

"5. The first infirmity committed by the lower appellate Court is that there is no specific finding and reason for reception of additional documents at the appellate stage and the appellate Court failed to consider the claim of the appellants therein in terms of Order 41, Rule 27 (1) (aa) and (2) of CPC. Another infirmity is that in spite of considering those documents, after satisfying the above-mentioned provision, viz., Order 41, Rule 27 (1) (aa) and (2), it is open to the lower appellate court to consider the additional documents or additional evidence and record evidence and mark documents as mentioned in Order 41, Rule 27 (1), CPC. Here again, the lower appellate Court failed to follow the said procedure. In a matter like this, there should be always endeavour to dispose of the case by the appellate Court itself. When certain commissions and omissions made by the trial Court is brought to the notice of the appellate Court, the same should be corrected by the appellate Court."

11. The trial Court has recorded oral evidence as well as documentary evidence and rendered a decision after a full-fledged trial. There should be always an endeavour to dispose of the case by the Appellate Court itself, where the commissions and omissions made by the first court could be corrected by the appellate Court.

12. Very recently, the Supreme Court in the matter of **Lisamma Antony and another v. Karthiyayani and another**⁵ in no uncertain terms held that remand of a case for re-appreciation of evidence and fresh decision results in harassment of litigant and shakes faith of litigants in court. Relevant paragraph of the report states as under: -

"17. Needless to say, in the present case, the suit was not disposed of on any preliminary issue by the trial court. The second appellate court should have restrained itself from remanding a case to the trial court. Remanding a case for reappreciation of evidence and fresh decision in the matter like the present one is nothing but harassment of the litigant. The unnecessary delay in final disposal of a lis, shakes the faith of litigants in the court."

13. Similarly, in the matter of **Zarif Ahmad (Dead) Through Legal**

5 (2015) 11 SCC 782

Representatives and another v. Mohd. Farooq⁶, following the principles of law laid down in **P. Purushottam Reddy** (supra), the Supreme Court has held that remand should be made only in rare situations, and observed as under: -

"13. No doubt, Section 107 CPC empowers the appellate court to remand a case, but it simultaneously empowers the appellate court to take additional evidence or to require such evidence to be taken. Rule 24 Order 41 CPC provides that where evidence on record is sufficient, the appellate court may determine the case finally. It is not a healthy practice to remand a case to the trial court unless it is necessary to do so as it makes the parties to wait for the final decision of a case for the period which is avoidable. Only in rare situations, should a case be remanded e.g. when the trial court has disposed of a suit on a preliminary issue without recording evidence and giving its decision on the rest of the issues, but it is not so in the present case."

14. Very recently, Their Lordships of the Supreme Court in the matter of **A.A. Prakasan v. Anupama and others**⁷ have clearly held that remand should not be made merely on an amendment being allowed and observed as under: -

"3. The High Court has as a consequence of its decision to permit amendment, set aside the judgment of the trial court and remanded the matter. We are of the view that even after the amendment was permitted, further question whether any fresh issue was required to be framed or fresh evidence was to be led was required to be gone into before setting aside the judgment. In case it becomes necessary to frame additional issue and permit the parties to lead further evidence, a report could be called for from the trial court on such additional issue. Remand could be ordered only if the judgment of the trial court was erroneous and the appeal court could not decide the matter and not merely on an amendment being allowed."

15. The first appellate Court has shirked of its responsibility and has not decided the first appeal in the manner the first appeal is required to

⁶ (2015) 13 SCC 673

⁷ JT 2016(9) SC 294

be dealt with and to be disposed of. The first appellate Court is a final court of facts, as pure findings of fact remain immune from challenge before this Court in second appeal. The powers of the first appellate Court while deciding a first appeal under Section 96 read with Order 41 Rule 31 of the CPC are well defined by authoritative pronouncements of the Supreme Court. It would be apposite to notice few of them profitably and gainfully herein.

15.1) The Supreme Court in the matter of **Santosh Hazari v. Purushottam Tiwari (Deceased) by LRs**⁸ has held that 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. Their Lordships of the Supreme Court observed in paragraph 15 of the report as under: -

"15. ... 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 decision of the appellate Court. The task of an appellate court affirming the findings of the trial Court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice (See *Girijanandini Devi v. Bijendra Narain Choudhary*⁹). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it. ..."

15.2) Their Lordships further laid down the principles of writing a

⁸ (2001) 3 SCC 179

⁹ AIR 1967 SC 1124

judgment of reversal and laid down two principles for the first appellate Court to keep in mind while reversing the finding of fact and held as under: -

"... While writing a judgment of reversal the appellate court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial court must weigh with the appellate court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact. (See *Madhusudan Das v. Narayanibai*¹⁰). The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate court should not interfere with the finding of the trial Judge on a question of fact. (See *Sarju Pershad Ramdeo Sahu Vs. Jwaleshwari Pratap Narain Singh*¹¹). Secondly, 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 a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present [Section 100](#) substituted in [the Code](#). The first appellate court continues, as before, to be a final court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such

10 (1983) 1 SCC 35 : AIR 1983 SC 114

11 AIR 1951 SC 120

question of law be a substantial one."

15.3) The principles of law laid down in **Santosh Hazari** (supra) were followed with approval by the Supreme Court in the matters of **Madhukar and others v. Sangram and others**¹², **H.K.N. Swami v. Irshad Basith**¹³ and **Jagannath v. Arulappa and another**¹⁴.

15.4) The manner of hearing and disposal of first appeal was very well delineated by the Supreme Court in **B.V. Nagesh and another v. H.V. Sreenivasa Murthy**¹⁵ with reference to Order 41 of the CPC while following the judgment of **Santosh Hazari** (supra). Paragraphs 3 and 4 of the judgment of the Supreme Court in **B.V. Nagesh** (supra) read thus,

"3. How the regular first appeal is to be disposed of by the appellate Court/High Court has been considered by this Court in various decisions. Order 41, CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate Court shall state:

- a) the points for determination;
- b) the decision thereon;
- c) reasons for the decision; and
- d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. The 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 decision of the appellate Court. Sitting as a Court of first appeal, it was the duty of the

12 (2001) 4 SCC 756 : (AIR 2001 SC 2171)

13 (2005) 10 SCC 243

14 (2005) 12 SCC 303

15 (2010) 13 SCC 530 : (2010 AIR SCW 6184)

High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. ..."

15.5) Very recently, the Supreme Court in the matter of **Shasidhar v.**

Ashwini Uma Mathod¹⁶ following the ratio of **Santosh Hazari**

(supra), held as under: -

"21. Being the first appellate court, it was, therefore, the duty of the High Court to decide the first appeal keeping in view the scope and powers conferred on it under Section 96 read with order 41 Rule 31 of the Code mentioned above. It was unfortunately not done, thereby, causing prejudice to the appellants whose valuable right to prosecute the first appeal on facts and law was adversely affected which, in turn, deprived them of a hearing in the appeal in accordance with law."

15.6) In the matter of **Uttar Pradesh State Road Transport**

Corporation v. Mamta and others¹⁷, again the Supreme Court

emphasized the need to follow the mandate of Order 41 Rule 31 of

the CPC and held as under: -

"24. As observed supra, as a first appellate court, it was the duty of the High Court to have decided the appeal keeping in view the powers conferred on it by the statute. The impugned judgment¹⁸ also does not, in our opinion, satisfy the requirements of Order 20 Rule 4(2) read with Order 41 Rule 31 of the Code which requires that judgment shall contain a concise statement of the case, points for determination, decisions thereon and the reasons. It is for this reason, we are unable to uphold the impugned judgment of the High Court."

16. In the light of the aforesaid law laid down, if the facts of the case are examined, it is quite apparent that the trial Court has dismissed the suit on merits and framed three issues and recorded findings in

16 (2015) 11 SCC 269

17 (2016) 4 SCC 172

18 U.P. SRTC v. Mamta, 2014 SCC OnLine All 14830

negative against the plaintiff and in favour of the defendants and has simultaneously also held that the suit is barred by the proviso to Section 34 of the Specific Relief Act, the plaintiff is not in possession of the suit land and he has not prayed for any other relief. The appeal is filed. Course open to the first appellate Court was to consider the findings of the trial Court and if it reverses the finding and retrial is necessary, it could have made remand under Order 41 Rule 23A of the CPC which has not been done. What the first appellate Court has held is that on the question of possession, some more evidence is required to be taken. The first appellate Court could not have held that suit for bare declaration of title in absence of possession is not maintainable and for re-appreciation of the matter, the appellate Court has made remand which is not permissible and is in teeth of the law propounded by the Supreme Court. Therefore, for re-appreciation of evidence which the first appellate Court itself can do, the wholesale and open remand made by the first appellate Court is clearly impermissible in law.

17. Therefore, the impugned judgment and decree passed by the first appellate Court in C.A.No.38A/2014 making wholesale / open remand in exercise of its power under Order 41 Rule 23-A of the CPC deserves to be and is accordingly set aside.

18. Resultantly, the miscellaneous appeal is allowed. The first appeal is restored to the original file of the said Court. The first appellate Court shall hear the civil appeal afresh and decide the same in accordance with law on the basis of material available on record without being prejudiced by any of the findings recorded herein within a period of

three months from the date of receipt of certified copy of this order, as the parties are already represented and the first appeal was preferred on 29-3-2014, no further notice is necessary.

19. Parties are directed to appear before the first appellate Court on 21-12-2016.

20. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

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