

HIGH COURT OF CHHATTISGARH, BILASPUR

Misc. Appeal No.35 of 2014

Surajmania, D/o Bandhan & W/o Mithu, aged about 60 years,
R/o Village Luchki @ Kantiprakashpur, P.S. & Tahsil Ambikapur,
Civil & Revenue District Surguja, District Surguja,
C.G.

---- Appellant/
(Plaintiff)

Versus

1. Bharat Ram, S/o Bhausa Ram, aged about 55 years, R/o Village Luchki @ Kantiprakashpur, P.S. & Tahsil Ambikapur, Civil & Revenue District Surguja, District Surguja, C.G.
2. State of Chhattisgarh, through Collector Surguja, Ambikapur, P.S. & Tahsil Ambikapur, Civil & Revenue District Surguja, District Surguja, C.G.

---- Respondents/
(Defendants)

For Appellant:	Mr. Manoj Paranjpe, Advocate.
For Respondent No.1:	None present though served.
For State/Respondent No.2:	Mr. Avinash Singh, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

03/10/2016

1. Oppugning legality, validity and correctness of the judgment and decree dated 18-2-2014 passed by the first appellate Court whereby the said Court in exercise of jurisdiction conferred under Order 41 Rule 23-A of the CPC has made a wholesale / open remand to the trial Court for adjudicating the suit afresh after holding that legal representatives of Smt. Budhi Bai were proper as well as necessary party, this miscellaneous appeal

under Order 43 Rule 1(u) of the CPC has been preferred by the plaintiff/appellant.

[Parties will hereinafter be referred as per their status shown in the plaint.]

2. The trial Court dismissed the suit of the plaintiffs by deciding all the issues against them except holding that the legal representatives of Smt. Budhi Bai were not necessary and proper party. Feeling aggrieved against the said judgment and decree, plaintiff Surajmania preferred first appeal before the first appellate Court. The said Court by its impugned judgment allowed the appeal and remanded the matter to the trial Court for fresh decision holding that legal representatives of deceased Smt. Budhi Bai are necessary party in the suit. This appeal has been preferred by the plaintiff against the judgment and decree of the first appellate Court making wholesale remand.
3. Mr. Manoj Paranjpe, learned counsel appearing for the appellant / plaintiff, would submit that the issue of necessary party was decided by the trial Court in favour of the plaintiff against which the defendant neither preferred cross appeal nor cross objection in the first appeal preferred by the appellant herein / plaintiff being Civil Appeal No.75A/2011 and therefore the issue of necessary party was not before the first appellate Court and questions to be considered before the trial Court in the first appeal preferred by the plaintiff were whether the

plaintiffs are title holders of the suit land, whether they have perfected their title by way of adverse possession and whether they are entitled for permanent injunction. Therefore, the first appellate Court is absolutely unjustified in only answering the issue of necessary party which was not necessary and thereby making wholesale remand which is wholly impermissible in law, as the decree of the trial Court was neither reversed in appeal nor retrial was found necessary. In the circumstances, the judgment of the first appellate Court be set aside and the decree of the trial Court be restored.

4. None has appeared on behalf of defendant No.1 / respondent No.1 herein though notice has been served.
5. Mr. Avinash Singh, learned Panel Lawyer, has appeared for the State / respondent No.2.
6. The substantial question of law involved in this appeal is whether the first appellate Court is justified in setting aside the judgment and decree of the trial Court by deciding an issue, which was not under challenge and further justified in making a wholesale remand without reversing the decree in appeal and retrial was not considered necessary.
7. I have heard learned counsel for the parties, considered the submissions made by them cautiously and also gone through the record extensively.
8. In order to decide the plea raised by the parties, the trial Court

framed as many as five issues and issue Nos.1 to 3 relating to title, possession and permanent injunction, were decided against the plaintiff. However, the question of impleadment of legal representatives of Smt. Budhi Bai as necessary party, was answered in negative meaning thereby, it was decided in favour of the plaintiff holding that LRs of Smt. Budhi Bai were not necessary party. In the first appeal preferred by the plaintiff, the first appellate Court was required to consider as to whether the trial Court is justified in dismissing the suit holding that the plaintiff is not title holder and possession holder and therefore he is not entitled for permanent injunction. Instead of deciding the said issue in the appeal, the first appellate Court has chosen to decide the issue which was not required to be decided as per law because against issue No.4 regarding impleadment of necessary party, the defendant did not prefer either cross appeal before the first appellate Court or cross-objection in an appeal preferred by the defendant and as such, these parties were at issue on that point before the first appellate Court.

9. The Supreme Court in the matter of **Banarsi and others v. Ram Phal**¹, taking in view the amendment made in the CPC, has clearly held that after amendment in Order 41 Rule 22 of the CPC, cross-objection can be preferred either against the finding or against an issue decided against any of the parties.

1 (2003) 9 SCC 606

Paragraphs 10 and 11 of the said report states as under: -

"10. The CPC Amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:-

- (i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent.
- (ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent.
- (iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross objection. The law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support

the decree without cross objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In the pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent."

10. Thus, following the law laid down by the Supreme Court in the above-stated judgment, in absence of any cross-objection or cross-appeal by the defendant, the trial Court was wholly incompetent to take-up and to adjudicate the issue of necessary party in the suit and thereby, the trial Court could not have decided the issue which was not called for determination, as it was wholly unnecessary, as such, the decision on the said issue of necessary party had become final and the first appellate Court could not have made open remand without deciding the other issues on merit which was questioned by filing first appeal.

11. Not only this, 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 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.

11.1) The Supreme Court in the matter of **Santosh Hazari v. Purushottam Tiwari (Deceased) by LRs**² 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*³). 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. ..."

2 (2001) 3 SCC 179

3 AIR 1967 SC 1124

11.2) Their Lordships further laid down the principles of writing a 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*⁴). 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*⁵). 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;

4 (1983) 1 SCC 35 : AIR 1983 SC 114

5 AIR 1951 SC 120

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 question of law be a substantial one."

11.3) 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**⁶, **H.K.N. Swami v. Irshad Basith**⁷ and **Jagannath v. Arulappa and another**⁸.

11.4) 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**⁹ 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;

6 (2001) 4 SCC 756 : (AIR 2001 SC 2171)

7 (2005) 10 SCC 243

8 (2005) 12 SCC 303

9 (2010) 13 SCC 530 : (2010 AIR SCW 6184)

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 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. ..."

11.5) Very recently, the Supreme Court in the matter of

Shasidhar v. Ashwini Uma Mathod¹⁰ 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."

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

Corporation v. Mamta and others¹¹, again the Supreme Court

10 (2015) 11 SCC 269

11 (2016) 4 SCC 172

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 judgment¹² 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."

12. Coming back to the facts of the present case, it would appear that the first appellate Court even did not advert to the finding of the trial Court on all others issues, except the issue of necessary party and only after reversing the finding on necessary party which was not required to be decided in absence of cross-objection, made wholesale remand and as such, the appeal has not been dealt with in the manner the first appeal is required to be decided in accordance with the procedure provided in the CPC and omitted to follow the principles laid down in **Santosh Hazari** (supra), which have been followed subsequently.

13. The matter did not stop here. The first appellate Court has made wholesale remand in exercise of the power conferred under Order 41 Rule 23-A of the CPC. Order 41 Rule 23-A of the CPC reads as under: -

"23-A. Remand in other cases.-Where the Court

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

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 retrial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23."

14. The question would be whether the first appellate Court is justified in remanding the matter under Order 41 Rule 23-A of the CPC without reversing the decree in appeal and without holding that the retrial is necessary.

15. Order 41 Rule 23-A of the CPC has been inserted in the Code by Act 104 of 1976 with effect from 1-2-1977. According to Order 41 Rule 23-A of the CPC, the appellate Court may remand the suit to the trial Court even though such suit has been disposed of on merits. It provides that where the trial Court has disposed of the suit on merits and the decree is reversed in appeal and the appellate Court considers that retrial is necessary, the appellate Court may remand the suit to the trial Court. Thus, on twin conditions being satisfied, the appellate Court can exercise the same power of remand under Order 41 Rule 23-A of the CPC.

16. In the matter of **P. Purushottam Reddy and another v. Pratap Steels Limited**¹³, 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: -

13 (2002) 2 SCC 686

"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 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](#)¹⁴, 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 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."

17. In the matter of **Municipal Corporation, Hyderabad v. Sunder Singh**¹⁵, the Supreme Court while considering the scope of Order 41 Rule 23 of the CPC has held that the Court should be loathe to exercise its power under Order 41 Rule 23 of the CPC and an order of wholesale remand should not be passed routinely. It was held as under: -

"11. It is now well settled that before invoking the said provision, the conditions precedent laid down therein must be satisfied. It is further well settled that 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. The appellate court cannot shirk its duties."

18. In the matter of **Ashwinkumar K. Patel v. Upendra J. Patel**

15 JT 2008(7) SC 247

and others¹⁶, the Supreme Court has held that the appellate Court should not ordinarily remand a case under Order 41 Rule 23 of the CPC, as remand orders lead to unnecessary delay and cause prejudice to the parties and the appellate Court should itself consider material available and should decide the appeal one way or other. It was held as under: -

"7. In our view, the High Court should not ordinarily remand a case under Order 41, Rule 23, CPC to the lower Court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the trial Court and considered whether the order of the trial Court ought to be confirmed or reversed or modified. It could have easily considered the documents and affidavits and decided about the prima-facie case on the material available. In matters involving agreements of 1980 (and 1996) on the one hand and an agreement of 1991 on the other, as in this case, such remand orders would lead to further delay and uncertainty. We are, therefore, of the view that the remand by the High Court was not necessary. "

19. Very recently, the Supreme Court in the matter of **Lisamma Antony and another v. Karthiyayani and another**¹⁷ 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

16 AIR 1999 SC 1125

17 (2015) 11 SCC 782

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."

20. Similarly, in the matter of **Zarif Ahmad (Dead) Through Legal Representatives and another v. Mohd. Farooq**¹⁸, 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."

21. Very recently, Their Lordships of the Supreme Court in the matter of **A.A. Prakasan v. Anupama and others**¹⁹ 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.

18 (2015) 13 SCC 673

19 JT 2016(9) SC 294

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."

22. Now, keeping in view the twin requirements of Order 41 Rule 23-A of the CPC and the law laid down by the Supreme Court in afore-cited cases, I proceed to examine legality and correctness of the impugned judgment of the first appellate Court remanding the case to the trial Court. In the present case, the trial Court has disposed of the suit on merits by deciding and recording findings on all the issues and not on the preliminary issue. The first appellate Court set aside the judgment and decree of the trial Court and directed the trial Court to decide the suit afresh, after giving an opportunity to the parties to lead oral evidence as well as documentary evidence, as nature of order passed by the appellate Court would show that order has been passed by the first appellate Court in exercise of its power under Order 41 Rule 23-A of the CPC. Now, the question to be considered is whether the first appellate Court has reversed the decree in appeal and whether it is held that retrial is considered necessary. A careful perusal would show that the first appellate Court did not reverse the

finding recorded by the trial Court on issue Nos.1, 2 and 3, and even did not consider proper to advert to the finding recorded on three issues which the plaintiff / appellant herein has seriously challenged and no finding was ever recorded that retrial is necessary which is one of the twin conditions for exercise of jurisdiction under Order 41 Rule 23-A of the CPC. The first appellate Court has committed grave illegality in making wholesale remand and making it open to the trial Court in exercise of power under Order 41 Rule 23 of the CPC.

23. Firstly, the first appellate Court has considered the issue of necessary party which was not assailed before it by the defendant / respondent No.1 herein either by preferring a cross-objection which the plaintiff did not challenge and thereafter, the first appellate Court has failed to consider the appeal in the manner indicated in **Santosh Hazari** (supra) and subsequent judgments aforementioned, and did not reverse the findings of the trial Court and made wholesale remand which is totally unnecessary in view of the judgments of the Supreme Court on the question of remand noticed herein-above and this Court also in the matter of **Anish Fulara v. Devcharan**²⁰ in which it has been held that power of wholesale remand has to be exercised sparingly and only when the decree of the trial Court is reversed in appeal and retrial is considered necessary. The first appellate Court has decided the appeal in an unsatisfactory

20 2014(2) C.G.L.J. 2

manner. Even the points for determination were not framed as required under Order 41 Rule 31 of the CPC.

24. In view of the above, the appeal is allowed. Judgment and decree dated 18-2-2014 passed by the 2nd Additional District Judge, Surguja, Ambikapur in Civil Appeal No.75A/2011 are hereby set aside. Civil Appeal No.75A/2011 is restored to the original file of the 2nd Additional District Judge, Surguja, Ambikapur for hearing and disposal in accordance with law following Order 20 Rule 4(2) and Order 41 Rule 31 of the CPC within three months from the date of receipt of certified copy of this order, after noticing the plaintiff, as the appeal was preferred on 7-1-2011. No order as to cost(s).

25. Parties are directed to appear before the first appellate Court on 7-11-2016.

Sd/-
(Sanjay K. Agrawal)
Judge