

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MA No. 39 of 2015

Udaya Economics Housing & Construction Limited, Tatibandh, Raipur,
Through Director -Saju Sandeep Samual, Age-35 years, S/o J. Samual, R/o
Sandeep Dairy Farm, House No. 36, Tendua Road, Heerapur Raipur,
Chhattisgarh

---- Appellant

Versus

1. Smt. Bhula Bai @ Bhagwati Thakur W/o Sambhu Singh Thakur D/o Kunj Bihari Thakur, R/o Village Khapri (S), Post Nipania, Tehsil-Bhatapara, District Raipur, Chhattisgarh
2. Manharan Singh Thakur S/o Kunj Bihari Thakur R/o Village Jarvay @ Heerapur, Patwari Halka No. 103, Raipur, Tehsil And District Raipur, Chhattisgarh
3. State Of Chhattisgarh Through The Collector, Raipur, Collector Office Raipur, Chhattisgarh

---- Respondents

For Appellant	:	Shri Ghanshyam Patel, Advocate
For Respondent No.1	:	Shri B.P. Sharma, Advocate
For Respondent/State	:	Shri Neeraj Sharma, Dy. Govt. Advocate

S.B.:Hon'ble Shri Justice Manindra Mohan Shrivastava

Judgment

20/01/2016

With the consent of learned counsel appearing for the parties, the matter is heard finally.

1. This appeal arises out of order dated 20th January, 2015 passed by learned lower appellate Court remanding the case for re-trial to the trial Court upon

reception of additional evidence rendered in appeal.

2. Learned counsel for the appellant argued that despite several opportunities granted, the plaintiff failed to lead evidence and the Court below rightly closed plaintiff's right to lead evidence and, thereafter, suit was dismissed holding that the plaintiff's case could not be proved for want of evidence. During the pendency of the appeal, application under Order 41 Rule 27 CPC was filed, to place on record an order passed on 10.5.2013 i.e. subsequent to the order passed by the trial Court. Plaintiff filed another application under Order 41 Rule 27 CPC to lead in evidence the sale deed after compromise arrived at in another civil suit. The plaintiff moved third application to bring on record the settlement and partition. Therefore, in these circumstances, it is argued, the learned lower appellate Court was not justified in ordering wholesale remand of the entire case for fresh trial before the trial court. The Court below ought to have considered application under Order 41 Rule 27 CPC in its proper perspective and by application of principles incorporated under Rule 27 of Order 41 CPC and if any additional evidence is required to be adduced in the interest of justice, it could have directed to the parties to appear before the trial Court and directed the trial Court to receive additional evidence and return its finding to the appellate Court to enable it to give judgment in the case. In support of his submissions, learned counsel for the appellant relied upon the judgment in the case of **Anish Fulara Vs. Devcharan**, 2014 (2) C.G.L.J. 2.
3. Learned counsel for the respondent could not dispute the legal position that if at all the learned lower appellate Court intended to allow additional evidence to be taken on record, it could have directed the trial Court to receive evidence and return a finding rather than directing wholesale remand of the case.
4. In the case of **Anish Fulara** (supra), the principles applicable in the matter of remand were elaborately considered by this Court by referring the provisions contained in Rules 23, 23-A & 25 of Order 41 and also the legal requirement before an application under Order 41 Rule 27 CPC could be

allowed for admitting additional evidence on record.

5. In the present case, the learned lower appellate Court held that despite 13 opportunities given to the plaintiff, the plaintiff failed to lead evidence and, therefore, right to lead evidence was closed. The review against the said order was preferred which was also dismissed. A miscellaneous case was also instituted, but, before it could be decided, the suit itself was dismissed.
6. The operative reason for the lower appellate Court to remand the case is that the trial court has dismissed the suit on the ground that the plaintiff failed to lead evidence, but it is a case which requires adjudication on important issue relating to title and, therefore, it was necessary for the trial Court to allow the parties to lead evidence. Therefore, it would be seen that the learned lower appellate Court did not traverse the finding as such but recorded that proper findings on various issues could not be recorded without allowing the parties to adduce evidence and that is the operative reason for the learned lower appellate Court to remand the matter.
7. The remand of the case by the appellate Court is permissible in three situations contemplated in Rule 23-A and 25 of the Order 41 CPC. While Rule 23 is applicable in case where the trial Court has disposed off the suit on a preliminary point, under Rule 23-A, it is within the province of authority of the appellate Court to order retrial if such retrial in its opinion, becomes necessary.
8. In so far as provision under Order 41 Rule 25 CPC is concerned, the appellate Court continues to be in the seisin of the matter and calls upon the trial Court to record the finding on some issue or issues and to send a finding to the appellate Court. The power under Order 41 Rule 25 is invoked by the appellate Court where it holds that the trial Court which passed the decree omitted to frame or try any issue or determine any question of fact essential to decide the matter finally. The appellate Court, while remitting some issue or issues, may direct the trial Court to take additional evidence on such issue.

9. Therefore, an order of remand must be referable to any of the provisions referred to herein above. An order of remand cannot be directed on mere asking of the parties nor it can be remanded only to allow the parties to have another round of trial by leading those evidence which it failed to lead despite sufficient opportunity awarded to him by the Court nor to allow the party to have another round of trial because there are some other relevant evidence which has surfaced at the appellate stage. These principles were enunciated by the Supreme Court in the case of **P. Purushottam Reddy and Anr. Vs. Pratap Steels Ltd. (2002) 2 SCC 686** , wherein the Supreme Court 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 first appellate Court. The relevant observations of the Supreme Court as contained in para-10 and 11 are reproduced for ready reference.

“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 23-A 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 23-A 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 23-A as it is under Rule 23. After the amendment, all the cases of wholesale remand are covered by Rules 23 and 23-A. 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* (AIR at p. 399), 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 23-A. 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 23-A 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 23-A 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 con-

cerned, 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.”

10. In a subsequent decision in the case of **Municipal Corporation, Hyderabad Vs. Sunder Singh**, JT 2008 (7) SC 247, the Supreme Court while examining the ambit and scope of provision contained in Order 41 Rule 23, held that the Court should be loathe to exercise its power under Order 41 Rule 23 CPC and order of wholesale remand should not be passed routinely. It was observed thus:

“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 41 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.”

11. The practice of remand as a routine matter was deprecated by the Supreme Court in the case of **Ashwinkumar K. Patel Vs. Upendra J. Patel & Ors. AIR 1999 SC 1125**, in following words:

“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 the 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.”

12. If the aforesaid principles are applied to the present case, the impugned order cannot be sustained in law for the reason that the learned lower appellate Court has remanded the case only giving a fresh opportunity to a failed plaintiff to have second round of trial and opportunity to again lead evidence in the matter where it failed to lead evidence on as many as 13 occasions.

13. The learned lower appellate Court ought to have decided the appeal on its own merits and it was only after it considered that it was necessary to take additional evidence on appellant's application under Order 41 Rule 27 CPC that it could have directed the trial Court to receive additional evidence as proposed to be adduced and return its finding with regard to proof of additional evidence to the appellate Court to enable it to pronounce a judgment on the matter. The power of appellate Court empowered under Section 107 CPC is extracted herein-below

“107. Power 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 the Code on Courts of original jurisdiction in respect of suits instituted therein.”

14. The learned Court below has not recorded specific finding as to how it considered, with reference to requirement of law under Order 41 Rule 27, necessary in the interest of justice to allow additional evidence to be adduced. It is well settled legal position that mere acceptance of additional evidence without anything more, cannot be a ground for order of remand and retrial of suit by the trial Court. Even if the learned lower appellate Court considered that the requirement under Rule 27 of Order 41 were satisfied to admit the additional evidence on record, course open to the learned lower appellate Court was to grant the parties opportunity to prove the proposed additional evidence and for this purpose direct the parties to appear before the trial Court to lead evidence and direct trial Court to

collect evidence and return finding with regard to proof of document. All endeavor should have been made to dispose off the case at the appellate stage itself rather than remanding the matter.

15. It should not be a matter of course to allow additional evidence to be adduced at the appellate stage. The principle in this regard has been reiterated by the Supreme Court in plethora of decisions. It would be profitable to record the observations of the Supreme Court in the case of **Union of India Vs. Ibrahim Uddin and another** 2013 AIR SCW 2752 wherein it was held:

“26. The appellate court should not ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide *Haji Mohammed Ishaq v. Mohd. Iqbal and Mohd. Ali and Co.*)

27. Under Order 41 Rule 27 CPC, the appellate court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a

lacuna in the evidence that the appellate court is empowered to admit additional evidence. (Vide *Lala Pancham*.)

28. It is not the business of the appellate court to supplement the evidence adduced by one party or the other in the lower court. Hence, in the *absence of satisfactory reasons for the non-production of the evidence in the trial court*, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide *State of U.P. v. Manbodhan Lal Srivastava* and *S. Rajagopal v. C.M. Armugam*.)

29. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a “substantial cause” within the meaning of this Rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.”

16. Learned lower appellate Court has not even considered the applications under Order 41 Rule 27 CPC by application of the aforesaid principles of law.

17. In view of the above, impugned order directing remand of the case can not be sustained in law and is set aside. The matter is remitted to the learned lower appellate Court to reconsider the matter in the light of provisions contained in Order 41 Rule 27 CPC. Even if the learned lower appellate Court finds that admission of additional evidence is necessary in the

interest of justice, instead of remanding the matter to the trial Court for trial afresh, the lower appellate Court shall endeavor to decide the matter itself by directing the parties to appear before the trial Court to lead evidence and directing the trial Court to return the finding on the same to the appellate Court to enable it to decide the matter one way or the other.

18. The appeal is accordingly allowed to the extent and in the manner indicated above.

Sd/-
(Manindra Mohan Shrivastava)
Judge