

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Misc. Appeal No.59 of 2015

Budhram, S/o Dhanau Ram, aged about 55 years, R/o Village Kurda, Tahsil Champa, District Janjgir-Champa, C.G.

---- Appellant/
(Defendant No.1)

Versus

1. Smt. Ganeshi Bai, Widow of Laxmi Das, aged about 50 years,

2. Smt. Ramdas, S/o Laxmi Das, aged about 25 years,

Both R/o Village Kurda, Tahsil Champa, District Janjgir-Champa, C.G.

(Plaintiffs)

3. State of Chhattisgarh, through the Collector, Janjgir-Champa, District Janjgir-Champa, C.G.

(Defendant No.2)
---- Respondents

For Appellant: Mr. Vishnu Koshta, Advocate.
For Respondents No.1 & 2: Mr. Manoj Paranjpe, Advocate.
For State/Respondent No.3: Mrs. Astha Shukla, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

04/10/2016

1. This miscellaneous appeal under Order 43 Rule 1(u) of the CPC has been admitted for hearing by order dated 19-6-2015, but no substantial question of law has been framed whereas, the Supreme Court in the matter of **Narayanan v. Kumaran and others**¹ has held that the constraints of Section 100 of the CPC continue to be attached to an appeal under Order 43 Rule 1(u) of

1 (2004) 4 SCC 26

the CPC. The appeal under Order 43 Rule 1(u) of the CPC can only be heard on the grounds a second appeal is heard under Section 100 of the CPC. This view has subsequently been followed by the Supreme Court in the matter of **Jegannathan v. Raju Sigamani and another**². In view of that, the matter is to be heard on the substantial question of law. Accordingly, the following substantial question of law is framed for determination of this miscellaneous appeal: -

Whether the first appellate Court is justified in making wholesale remand in exercise of power conferred under Order 41 Rule 23-A of the CPC without reversing the decree in appeal and without holding that retrial is necessary by merely granting an application under Order 41 Rule 27 of the CPC?

2. The suit filed by respondents No.1 and 2 herein / plaintiffs was dismissed by the trial Court by its judgment and decree dated 15-6-2012 passed by the Civil Judge Class-I, Champa, Distt. Janjgir-Champa, in Civil Suit No.203A/2008 and all the six issues were answered against the plaintiffs, and it was also held that the suit land is the service land against which the plaintiffs preferred first appeal before the first appellate Court and also filed an application under Order 41 Rule 27 of the CPC. The first appellate Court only heard the application under Order 41 Rule 27 of the CPC, did not reverse the decree of the trial Court in appeal and also did not record finding that retrial is necessary and made wholesale / open remand to the trial Court for re-appreciating the evidence on record after considering additional

2 (2012) 5 SCC 540

documents.

3. Mr. Vishnu Koshta, learned counsel appearing for the appellant / defendant No.1, would submit that the first appellate Court is absolutely unjustified in making wholesale / open remand to the trial Court without reversing the decree in appeal and without considering that retrial is considered necessary as provided under Order 41 Rule 23-A of the CPC. He would further submit that merely an application for additional evidence is granted, it would not be per se necessary to make wholesale remand to the trial Court in view of the provisions contained in Section 107 of the CPC which empowers the first appellate Court to exercise all powers of the trial Court and, therefore, such a course resorted to by the first appellate Court is absolutely illegal, as it amounts to shirking the responsibility by the first appellate Court.
4. However, Mr. Manoj Paranjpe, learned counsel appearing for respondents No.1 and 2 / plaintiffs, would support the impugned judgment.
5. I have heard learned counsel for the parties, perused the judgment impugned cautiously and analyzed the submissions made herein-above and also gone through the records of the Courts below thoroughly and extensively.
6. The question for consideration is whether such a course of making wholesale / open remand by granting application under Order 41 Rule 27 read with Section 151 of the CPC is

permissible.

7. In the instant case, the first appellate Court has remanded the case to the trial Court merely to afford an opportunity to the respondent / plaintiff to prove due execution and attestation of the will which the first appellate Court itself can record the evidence and mark document, if any, as provided in 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."

8. In the matter of **Vasant Ganesh Damle v. Shrikant Trimbak**

Datar and another³, 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."

3 AIR 2002 SC 1237

9. 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:-

"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."

10. 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.

11. Thus, keeping in view the aforesaid pronouncements, mere reception of additional evidence, if any, by the first appellate

Court cannot be a ground for remanding the matter to the trial Court for *de novo* consideration.

12. Thus, not only the impugned judgment and decree of the first appellate Court suffers from infirmity, but the order granting application under Order 41 Rule 27 of the CPC also suffers from illegality for one or more reasons. Order 41 Rule 27 of the CPC provides as under: -

"27. Production of additional evidence in Appellate Court.- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the court shall record the reason for its admission."

13. A bare perusal of the impugned judgment would show that the first appellate Court has granted the application under Order 41

Rule 27 of the CPC simply stating that documents filed along with the application under Order 41 Rule 27 of the CPC are public documents and the ground assigned by the appellant / defendant No.1 is justified, and set aside the judgment and decree of the trial Court and made an order of wholesale remand to the trial Court to decide afresh. The appellate Court may permit additional evidence only and only, if the conditions laid down in Rule 27(b) of Order 41 of the CPC are satisfied to the Court. This rule will not apply, when, on the basis of evidence on record, the appellate Court can pronounce a satisfactory judgment, though it is entirely discretionary.

14. In the matter of **Union of India v. Ibrahim Uddin and another**⁵, while dealing with an application under Order 41 Rule 27 of the CPC, the Supreme Court has held as under: -

"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 Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co.](#), AIR 1978 SC 798).

27. Under Order XLI, 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

5 2013 AIR SCW 2752

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 & Ors. (supra)].

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](#), AIR 1957 SC 912; and [S. Rajagopal v. C.M. Armugam & Ors.](#), AIR 1969 SC 101).

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."

15. In my considered opinion, the First Appellate Court has failed to consider and meet the twin requirements of Order 27 Rule 1(b) of the CPC as it has not been held that for the purpose of pronouncing judgment fresh opportunity of adducing evidence is required to be granted to the respondent/plaintiff and it has also not been held that the Appellate Court cannot pass a satisfactory judgment and same comes 'within' the meaning of "for any

substantial cause" as provided in Order 41 Rule 27(b) of the CPC.

16. 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.

16.1) The Supreme Court in the matter of **Santosh Hazari v. Purushottam Tiwari (Deceased) by LRs**⁶ 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

6 (2001) 3 SCC 179

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*⁷). 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. ..."

16.2) 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*⁸). 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

7 AIR 1967 SC 1124

8 (1983) 1 SCC 35 : AIR 1983 SC 114

Judge on a question of fact. (See *Sarju Pershad Ramdeo Sahu Vs. Jwaleshwari Pratap Narain Singh*⁹). 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 question of law be a substantial one."

16.3) 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**¹⁰, **H.K.N. Swami v. Irshad Basith**¹¹ and **Jagannath v. Arulappa and another**¹².

16.4) 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**¹³ 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

9 AIR 1951 SC 120

10 (2001) 4 SCC 756 : (AIR 2001 SC 2171)

11 (2005) 10 SCC 243

12 (2005) 12 SCC 303

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

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 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. ..."

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

Shasidhar v. Ashwini Uma Mathod¹⁴ 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

14 (2015) 11 SCC 269

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."

16.6) In the matter of **Uttar Pradesh State Road Transport Corporation v. Mamta and others**¹⁵, 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 judgment¹⁶ 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."

17. 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.

15 (2016) 4 SCC 172

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

18. 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 and even did not consider proper to advert to the finding recorded on the issues which the appellant herein / defendant No.1 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 by merely granting an application under Order 41 Rule 27 of the CPC.

19. Therefore, the impugned judgment and decree passed by the first appellate Court in C.A.No.11A/2015 making wholesale / open remand in exercise of its power under Order 41 Rule 23 of the CPC deserves to be and is accordingly set aside. Order of the first appellate Court passed under Order 41 Rule 27 of the CPC also cannot be sustained and is hereby set aside.

20. Resultantly, the miscellaneous appeal is allowed. The first appeal as well as the application under Order 41 Rule 27 of the CPC are restored to the original file of the said Court. The first appellate Court shall hear both the civil appeal and the application under Order 41 Rule 27 of the CPC 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 2-7-2012, no further notice is necessary. No order as to cost(s).

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

22. It is made clear that the appellate Court shall both the civil appeal and the application under Order 41 Rule 27 of the CPC and while hearing, if it feels that the respondent / plaintiff has

made out a case for reception of additional evidence after rendering a specific finding, it shall record evidence and mark documents and shall thereafter, considering the judgment and decree of the trial Court, dispose of the appeal one way or the other.

Sd/-
(Sanjay K. Agrawal)
Judge

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