

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WP227 No. 859 of 2017**

Dayaram @ Dinesh Kumar S/o Sajjan Singh Thakur, Aged About 65 Years
Caste Gond, R/o Jhuniyapara, Kanker, District North Bastar, Kanker,
Chhattisgarh.

---- Petitioner

Versus

1. Manohar Netam S/o Ramchandra Netam, Aged About 67 Years R/o Village Jhuniyapara, Kanker, District North Bastar, Kanker, Chhattisgarh.
2. Smt. Kusum Netam, W/o Manohar Netam, Aged About 66 Years R/o Village Jhuniyapara, Kanker, District North Bastar, Kanker, Chhattisgarh.
3. State Of Chhattisgarh, Through The Collector, Kanker, District North Bastar, Kanker, Chhattisgarh.

---- Respondents

For Petitioner	:	Mr. D. N. Prajapati, Advocate.
For Respondents/State	:	Mr. Majid Ali, Panel Lawyer for the State.

Hon'ble Shri Justice Sanjay K. Agrawal**Order On Board****07/12/17**

1. Learned counsel for the petitioner submits that the petitioner / plaintiff has filed a suit for declaration of title and permanent injunction which has been rejected by the trial Court in exercise of power conferred under Order 7 Rule 11 of the C.P.C. by order dated 12.05.2017, against which the petitioner has preferred an appeal under Order 43 Rule 1 of the C.P.C. which has also been dismissed by the First Appellate Court by order dated 14.07.2017 affirming the order of the trial Court, against which the petitioner has preferred this writ petition under Article 227 of the Constitution of India questioning the same.

2. Learned counsel for the petitioner would submit that the impugned

order is unsustainable and bad in law and is liable to be set aside.

3. I have heard learned counsel for the petitioner.

4. In order to decide the plea raised at the Bar, it would be profitable to refer to the definition of term "decree" in CPC, Section 96 CPC and Section 115 of the Code of Civil Procedure:--

(1) Section 2(2) of the Code defines 'decree' to mean:

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include --

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.--A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposed of the suit, it may be party preliminary and party final;"

(2) Section 96 of the Code provides for appeals from, original decree:

"96. *Appeal from original decree.*--(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex-parte.

(3) No appeal shall lie from a decree passed by the Court

with the consent of parties.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of small Cause, when the amount or value of the subject-matter of the original suit does not exceed [ten thousand rupees]

(3) Section 115 of the Code provides for revision:

2 "115. Revision.—

(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears --

(a) to have exercised a jurisdiction not vested in it by law,
or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Explanation.--In this Section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding."

5. Short question for consideration would be whether order rejecting plaint would have the force of decree within the meaning of Section 2(2) of the CPC and whether appeal would lie against the order rejecting plaint.

6. The Supreme Court in the matter of **Chandi Prasad v. Jagdish Prasad**¹ has held that "decree" to mean the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final.

7. The question as to whether the order rejecting the plaint would have force of decree and would be covered by Section 2(2) of the CPC also came up for consideration before Supreme Court in the matter of **Shamsher Singh v. Rajinder Prashad and others**², in which Their Lordships have held as under:--

"3. ...In the present case the plaint was rejected under Order 7, Rule 11 of the C.P.C. Such an order amounts to a decree under Section 2(2) and there is a right of appeal open to the plaintiff."

8. Very recently, the Supreme Court in the matter of **Rishabh Chand Jain v. Ginesh Chandra Jain**³ has held that order rejecting application under Order 7 Rule 11 CPC has a force of decree and only remedy is appeal under Section 96 read with Section 41 of the Code and no revision lies under Section 115 of the Code of Civil Procedure. Relevant paragraph of the report states as under:--

1 (2004) 8 SCC 724

2 (1973) 2 SCC 524

3 (2016) 6 SCC 675

"In terms of Section 2(2) of the Code, in case, the court adjudicating the case, conclusively determines the rights of the parties with regard to any one or more or all of the matters in controversy in the suit, the requirement of decree is satisfied. Such determination can be preliminary or final. Rejection of a plaint is deemed to be a decree under Section 2(2) of the Code. Only two orders are excluded -- (i) any adjudication from which an appeal lies as an appeal from an order and (ii) any order orders. The impugned order does not come under Order XLIII. The order has conclusively determined the rights of the parties with regard to one of the matters in controversy in the suit, viz., Res Judicata. True, it is not an order passed on framing an issue. But at the same time, there is adjudication on the controversy as to whether the suit is barred by Res Judicata in the sense there is a judicial determination of the controversy after referring to the materials on record and after hearing both sides. The impugned order dismissing the suit on the ground of Res Judicata does not cease to be a decree on account of a procedural irregularity of non-framing an issue. The court ought to treat the decree as if the same has been passed after framing an issue. The court ought to treat the decree as if the same has been passed after framing the issue and on adjudication thereof, in such circumstances. What is to be seen is the effect and not the process. Even if there is a procedural irregularity in the process of passing such order, if the order passed is a decree under law, no revision lies under Section 115 of the Code in view of the specific bar under sub-section (2) thereof. It is only appealable under Section 96 read with Order XLI of the Code. The order passed by the trial Court is a composite order on rejecting of the plaint as there is no cause of action and dismissal of the suit as not maintainable on the ground of Res Judicata. Both aspects are covered by the definition of decree under Section 2(2) of the Code and, therefore, the remedy is only appeal and not revision even if there is any irregularity in passing the decree."

9. In view of the provisions contained in the Code of Civil Procedure and the authoritative pronouncement of the Supreme Court in the matters of **Shamsher Singh** (supra) and **Rishabh Chand Jain** (supra), I unhesitatingly & unreservedly hold that against the order rejecting a plaint under Order 7 Rule 11 CPC by appeal court only remedy to the plaintiff against the order is to file first appeal under Section 96 read with Section 41 of the Code of Civil Procedure, 1908 and upon dismissal of First Appeal, Second Appeal under

Section 100 of the C.P.C. would lie.

10. As a fall out and consequence of the aforesaid discussion, the civil revision as framed & filed is dismissed as not maintainable reserving liberty in favour of the plaintiff/petitioner to file appeal in accordance with law. No order as to costs.

11. The certified copy of the impugned order and other relevant documents be returned to the learned counsel for the petitioner, after furnishing an attested photocopy thereof.

SD/-
(Sanjay K. Agrawal)
Judge