

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on: 07/03//2017****Judgment Delivered on: 12/05/2017****Miscellaneous Appeal No. 70 of 2011**

1. Leeladhar, S/o Bhuneshwar, Aged about 25 years, R/o Village & Post Belsondha, Tahsil and District Mahasamund (C.G.)
 2. Chitrarekha, W/o Beniram Sapra, Aged about 22 years, Qr. of Sukhdev Singh Thakur, R/o Village Shahimudhi, P.O. Gopalpur, District Korea (C.G.)
 3. Ku. Kalyani, D/o Bhuneshwar, Aged 12 years,
 4. Ku. Nandini, D/o Bhuneshwar, Aged 7 years,
 5. Maniklal, S/o Bhuneshwar, Aged 12 years,
 6. Ku. Madhu, D/o Bhuneshwar, Aged 7 years,
 7. Ku. Geeta, D/o Bhuneshwar, Aged about 5 years,
 8. Smt. Panchwati, Wd/o Bhuneshwar, herself and mother and natural guardian of minor appellants No.3 to 7, R/o Village and Post Belsondha, Tahsil and District Mahasamund (C.G.)
 9. Mus. Kaushalya, W/o Gendlal Deemar, Aged 64 years, R/o Kumharpara, Tahsil and District Mahasamund (C.G.)
 10. Mus. Susheela, W/o Kejuram Dheemar, Aged 61 years, R/o Borsi, Tahsil and District Mahasamund (C.G.)
 11. Mus. Chandrika Bai, Wd/o Uttar Kumar Dheemar, Aged 54 years, R/o Village Achhola, Tahsil and District Raipur (C.G.)
 12. Mus. Shantabai W/o Dayalu Dheemar, Aged 51 years, R/o Village Siwni, Tahsil and District Raipur (C.G.)
 13. Mus. Shakuntala Bai, W/o Narayan Ojha, Aged 48 years, R/o Village and Post Koma, Tahsil Rajim, District Raipur (C.G.)
 14. Mus. Saraswati, W/o Vishalika Dheemar, Aged 45 years, R/o Kumharpara, Ward No. 21, Mahasamund, Tahsil and District Mahasamund (C.G.)
- Appellants**

Versus

1. Bhuwanlal, S/o Dayaram Dheemar, Aged 68 years, R/o Village Padkipali, Tahsil and District Mahasamund (C.G.)

2. Mus. Mungeshiyabai Wd/o Dayaram Dheemar, Aged 63 years, R/o Village Belsonda, Tahsil and District Mahasamund (C.G.)
3. Mus. Latabai, D/o Dayaram Dheemar, Aged 26 years, R/o Village and Post Bhimbhori, P.S. Berla, District Durg (C.G.)
4. Bheekhamlal S/o Dayaram, Aged 24 years, R/o Village Belsonda, Tahsil and District Mahasamund (C.G.)
5. State of Chhattisgarh through Collector, Mahasamund (C.G.)

---- Respondents

For Appellants	:	Shri H.B. Agrawal, Senior Advocate along with Smt. Meera Jaiswal, Counsel.
For Respondent No.1	:	Shri Shivendu Pandya, Advocate

Hon'ble Shri Rajendra Chandra Singh Samant, J.

C.A.V. Judgment

1. This Miscellaneous Appeal has been preferred against the judgment dated 13-09-2010 passed by First Additional District Judge, Mahasamund (C.G.) in Civil Suit No.35-A/2008 by setting aside the impugned judgment and decree of the trial Court and passing order for remand of the case with direction for re-trial.

2. The appellants filed a civil suit for relief of declaration that appellants/plaintiffs and defendant No.1 are joint holders of the disputed property as detailed in schedule A,B,C & D and also for relief of declaration about joint possession of the property along with relief of mesne property. Respondents/defendants denied and opposed the pleadings made in the plaint and prayed for dismissal of suit. After framing the issues, the trial was conducted by the trial Court by affording opportunities to both the parties for adducing evidence. On conclusion of trial, judgment dated 30-04-2008 was passed by which judgment and decree was passed in favour of the appellants/plaintiffs granting them reliefs of declaration for title and possession.

3. The judgment and decree of learned trial Court was challenged before the Court of District Judge, which has been decided by the impugned order. In this order, it was observed that order for *ex-parte* proceeding was passed against respondent No.1. Later on, minor respondents No.3 & 4 were represented and a written statement was presented on their behalf. The contents of the written statement disclosed that it was in reality pleading for defence of respondent No.1 and also that the witnesses who appeared have supported the case of respondent No.1. A finding has been given that under the garb of defence of respondents No. 3 & 4, defence in favour of respondent No.1 was raised in proxy, which was held illegal, hence, the judgment and decree was set aside and the case was remanded for trial.

4. The grounds raised in this appeal are that the impugned judgment is bad in law. Order for remanding the case cannot be made to fill up the lacuna of the case. Respondent who have slept in their defence cannot be accommodated in this manner. The impugned judgment/order is against the settled provision of law and liable to be set aside. Prayer has been made to set aside the order of lower Appellate Court and for issuance of further directions.

5. The legality of the judgment/order passed by the appellate Court is considered, on perusal of the order sheet of the record of the trial Court, it appears that orders of *ex-parte* proceeding against all respondents/defendants was passed on 23-06-2000 on account of their non-appearance on the date of hearing. Later on, application under Order 32 Rule 12 praying that the minor respondent/defendant No. 3 and 4 have attained the majority who may be permitted to defend themselves and that *ex-parte* order against them was passed without their representation

through guardian *ad litem*. Prayer was made for passing necessary orders. By order dated 9-1-2003, application of respondent/defendant No.3 & 4 was allowed, after incorporation of amendment, notices were issued to respondents No.3 & 4. On appearance of respondents No.3 & 4 and their submissions of pleadings, the trial was conducted and the case was decided.

6. Before the appearance of respondents No.3 & 4 and their submissions of pleadings, no hearing was conducted by the trial Court towards the decision of the case. The Civil Court invokes the provisions of Order 9 Rule 6 of CPC, for proceedings to be taken *ex-parte* when appearance is given only by the plaintiffs on the date of hearing. Hearing of a civil case purports to be, when a case is called for framing of issues under the provision of Order 14 CPC, when the case is called for disposal of the suit at the first hearing under Order 15 of the CPC or when the case is called for examination of witnesses under Order 18 of the CPC or for hearing of arguments. It is on these stages of civil suit when the case is taken up for hearing and one of the parties does not appear, the Court is empowered to pass an order and to proceed in accordance with Order 9 of CPC.

7. On perusal of the order sheets of the record of the trial Court, it appears that the case was fixed for filing of written statement by the defendants on 23-06-2000. On non-appearance of the defendants, the order to proceed *ex-parte* was passed. Respondents/defendants other than respondent/defendants No. 3 & 4 never came up to contest the suit by filing their pleadings, but it is evident from the order sheet that respondent/defendant No.1 continued giving his appearance though he never filed a written statement or ever he filed any application for setting

aside *ex-parte* proceeding against him, but respondents/defendants No. 3 & 4 actively participated and contested the case throughout.

8. Taking into consideration these facts, learned lower appellate court has set aside the judgment and decree of the trial Court and remanded the case. Whether it was permissible under the provisions of CPC is needed to be examined. A case can be remanded to the trial court by the appellate Court under the provisions of Order 41 Rule 23 of CPC according to which when a suit is disposed off on a preliminary point and the decree is reversed in appeal, then the appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand. This case is clearly not an order of remand under Order 41 Rule 23 of CPC because the suit was decided by the trial Court on conclusion of trial and not on any preliminary stage.

9. Order 41 Rule 23-A of CPC provides that the Court 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 re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23. This provision clearly states that when the case is decided on conclusion of trial, the decree appealed against when reversed by the Appellate Court after due consideration on all the grounds

in appeal in accordance with law. It is only after that Appellate Court can consider whether re-trial in the case is necessary or not?

10. In the above context, Hon'ble the Supreme Court in the matter of ***Mohandas Dattaram Prabhu & others v. U F M Mukund Honnappa Naik***, reported in **AIR 2003 (Kar) 428** in para 10 has held as under:

[10] The remand order in the present case is under Rule 23A because the trial Court, from whose decree an appeal is preferred, has disposed of the case on merits and the decree is reversed in appeal and re-trial is ordered by the Court-below. The rule reads:

"23-A Remand in other cases.- Where the Court 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 re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23."

No doubt the rule permits the Court to order a remand in the case of a decision on merits but the power under Rule 23A can be exercised by the appellate Court only after the appellate Court records a finding that the judgment and order of the trial Court are erroneous and liable to be set aside. Though the rule itself does not circumscribe the power of remand, this power has to be exercised sparingly and only if the appellate Court comes to a conclusion that the entire findings of the Court of first instance would get vitiated if the evidence sought to be produced before it is allowed to be produced. No such finding has been recorded by the Court-below in the present case. In *PATTAMMAL v. YASOTHA AMMAL*, MLJ 1980(1), 447 a learned Single Judge of the Madras High Court dealt with the scope of the power under Rule 23-A and observed:

"The power of remand under Order 41, Rules 23 and 23-A, Civil Procedure Code can be exercised by the appellate Court if it comes to the conclusion that the judgment and decree of the trial Court are erroneous on facts or on law and are therefore, liable to be reversed or set aside. After coming to such a conclusion if the appellate Court is of opinion that the interests of justice require that there should be a fresh trial it can remand the suit for fresh disposal. The discretion of the appellate Court to order retrial is unfettered. But this discretion is not to be exercised in an arbitrary manner; it should be exercised on sound judicial principles. A remand cannot be ordered to enable a party to fill up the lacuna in the case. But where the party was denied an opportunity of producing all the evidence they desired to produce

before the trial Court then the appellate Court, in exercise of the discretionary powers to further the ends of justice may order remand or re-trial of the case. Order 41, Rule 23-A was introduced in the Code by Amendment Act CIV of 1976. Prior to the enactment of the above amending Act, Courts had held that under Order 41, Rule 23 an order of remand can be passed only on the reversal of the decree disposing of a suit on a preliminary point; and in other cases, where the judgment of the trial Court is reversed on merits and the case is remanded for re-trial to the trial Court, it can be done by the appellate Court only in exercise of its inherent powers under Section 151, Civil Procedure Code. Now under Order 41, Rule 23-A, the whole case can be remitted to the trial Court where the judgment reversed is not on a preliminary point but one on merits. Thus Order 41, Rule 23-A has widened the power of the appellate Court to remit the case to the trial Court for re-trial. But even the power under Order 41, Rule 23-A can be exercised by the appellate Court only after recording a finding that the judgment and decree of the trial Court are erroneous and are liable to be reversed or set aside."

Hon'ble the Supreme Court has further held in the matter of ***POOLAR V/S GOMATHI MOOPANAR*** reported in 1997

AIHC 59, as under :

"[10] The proposition that the order of remand should not be to fill up the lacuna of the case of the party. It is useful to refer a Division Bench judgment of this Court reported in Visalakshmi Ammal v. Dhanalakshmi Ammal, 1989 (2) L.W 414 cited supra, which reads thus,

The unsatisfactory consideration of an issue by the first court, and non-advertence to the judicial precedents by the first court while deciding an issue and the need to take additional evidence, should not always be counted in favour of making an order of remand. These lacunae, if in fact they are present, can be rectified by the appellate Court itself, unless there are very compelling circumstances to make an order of remand. An order of remand should not be taken to be matter of course on the above grounds. The power of remand should be sparingly exercised. There should be always endeavour to dispose of the case by the appellate court itself, when the commissions and omissions made by the first court could be corrected by the appellate court."

In the light of the principle enunciated in the above Division Bench judgment, the lower appellate court should make an endeavour to dispose of the case by itself and the commissions and omissions made by the trial court could be corrected by the appellate court."

Hon'ble the Supreme Court has further held in the matter of

P. Purushottam Reddy & another V/S Pratap Steels Ltd., reported in (2002) 2 SCC 686, in paragraph 10 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 23-A in Order 41 of the Code of Civil Procedure by CPC Amendment Act, 1976, there were only two provisions contemplating remand by a Court of appeal in Order 41 of 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 1976 Amendment that the Court, in an appropriate case could exercise its inherent jurisdiction under Section 151 of the 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 of the CPC. In cases where additional evidence is required to be taken in the event at 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 23A as it is under Rule 23. After the amendment, all the cases of wholesale remand are covered by Rules 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* (AIR 1965 SC 364, 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 the 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 of the CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for re-writing 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 of the CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided”.

11. In view of the settled principle so far, the power to remand the case as provided under Rule 23 or Rule 23-A or Order 41 CPC is to be exercised sparingly only in case of exception. The Court of appeal is bound to make every endeavour to decide and dispose of the appeal before it. Further, it is clearly settled that order 41 Rule 23-A of CPC which has been incorporated in the Court by amendment of 1976 is especially to cover up the cases where the provision of Rule 23 cannot be invoked. Rule 23-A is a specific and clear, that an order of remand under this Rule can be made only after the Appellate Court comes to conclusion that the judgment and decree of trial Court is erroneous or perverse on the facts or on the law applicable and no option is left except setting aside such judgment and decree and it is obvious that in the interest of justice, the remand and re-trial is necessary, then Appellate Court can direct for re-trial under Order 41 Rule 23-A of CPC for the purposes of giving a fair chance of hearing to the parties in the suit. Hence, for these reasons, the judgment of the lower Appellate Court is clearly erroneous, the order of remand of civil suit is neither covered under Order 41 Rule 23 nor under Order 41 Rule 23-A of CPC.

12. The principle is settled that Section 151 of the CPC cannot be invoked to remand a civil suit for re-trial specifically when the Code provides for it. On the basis of these findings and the reasons as

mentioned herein above, this appeal is allowed and the impugned judgment/order of the lower Appellate Court is set aside. The lower Appellate Court is directed to decide the appeal on merits in accordance with law and pass suitable orders.

13. No order as to costs.

Sd/-

(Rajendra Chandra Singh Samant)
JUDGE

Kvr