

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 23.04.2018

Delivered on 09.05.2018

Misc. Appeal No. 18 of 2015

1. Mohammad Atikurehman S/o Hifzurehman Aged About 47 Years R/o Near Swastik Bakery, Near Chota Madarsa, Raipur, Tehsil And District-Raipur C.G.

---- Appellant

Versus

1. Mohmmad Hifzurehman S/o Late Mohammad Ibrahim Rehman, Aged About 76 Years R/o Baijnathpara, Raipur, Tehsil And District Raipur, C.G.
2. Raipur Development Authority Through-Chief Executive Officer Raipur Development Authority G.E. Road, Raipur, C.G.

---- Respondents

For Appellant	:	Shri Yogesh Pandey, Advocate.
For Respondent No.1	:	Shri Rahul Tamaskar, Advocate
For Respondent No.2	:	Shri Pankaj Agrawal, Advocate

Hon'ble Shri Sharad Kumar Gupta, Judge

C.A.V. ORDER

1. In this miscellaneous appeal, challenge is levied to the judgment dated 06.01.2015 of the Seventh Additional District Judge, Raipur District – Raipur, Chhattisgarh in Civil Appeal No. 30/2014 whereby and whereunder she set aside the order dated 03.02.2014 and remanded the case whereby the trial Court (the Sixth Civil Judge, Class II) in Civil Suit No. 191A/2013 rejected the plaint filed by respondent No. 1-plaintiff.

2. In brief, the case of respondent No. 1 is that the appellant – defendant No. 1 is his son. He had filed an application on 02.06.1978 for allotment of shop in wholesale cloth market, Devendranagar at Raipur in the name of appellant. Respondent No. 2 had allotted parcel of the land No. J86 and lease was registered on 29.05.1981 in the name of appellant. At that time, appellant was minor. On that land he constructed three shops on ground floor and two shops on first floor. He is

the owner of aforesaid five shops. Appellant is threatening that he will transfer the aforesaid shops.

3. Appellant had not filed written statement.

4. Appellant filed an application under Order 7 Rule 11 of the Civil Procedure Code, 1908 (in brevity, 'the Code') stating that the suit is barred under the Benami Transactions (Prohibition) Act, 1988 (in brevity, 'the Act, 1988'), thus the plaint may be rejected.

5. Respondent No. 1- plaintiff replied the aforesaid application and submitted that objection raised by appellant is the subject matter of evidence, thus, the application of the appellant may be rejected.

6. The trial Court after hearing the arguments passed the aforesaid order. Being aggrieved, respondent No.1 preferred an appeal. The Appellate Court passed the aforesaid judgment. Being aggrieved, appellant preferred this miscellaneous appeal.

7. Shri Yogesh Pandey, counsel for the appellant vehemently argued that the Appellate Court had without giving any finding or allowing the amendment application set aside the order of the trial Court and remitted the case, thus, the Appellate Court committed gross illegality, thus the impugned order be set aside.

8. Shri Rahul Tamaskar, counsel for respondent No.1 argued that the impugned order is in accordance with law and no interference is called for by this Court, thus the appeal may be dismissed.

9. Shri Pankaj Agrawal, counsel for respondent No.2 submitted that dispute is between the appellant and respondent No.1 and he is a formal party in this case.

10. Shri Yogesh Pandey, counsel for the appellant cited judgments of this Court in **Narayan Dheemar and Others v. Pawan Kumar Agrawal and Another {2016 LawSuit(Chh)726}** and **Ramesh Chandra Jaiswal v. Deena Nath Sao** decided on 08.11.2013 in M.A. No. 97 of 2012.

11. Shri Rahul Tamaskar, counsel for respondent No.1 cited judgement of the Hon'ble Supreme Court in **Sri Marcel Martins v. M. Printer and Ors. {AIR 2012 SC 1987}** and Judgment of the High Court of Madras in **Doraiswami Pillai (died) and Ors v. S.K. Munuswami Mudaliar and Ors. {(1975) 2 MLJ 8}**.

12. It would be pertinent to mention the provisions of Order 41 Rule 23A of the Code, which reads as under :-

“23A. **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 Appellant Court shall have the same powers as it has under Rule 23.”

13. Thus, the plain reading of the aforesaid provision indicates that for the applicability of the aforesaid provisions it is necessary that the decree should be reversed in appeal and re-trial is essential.

14. In the matter of **P. Purushottam Reddy and Another v. Pratap Steels Ltd. {2002 (2) SCC 686}** the Hon'ble Supreme Court has observed in para 10, relevant portion is as under:-

“10. ... 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 off the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and re-trial 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.....”

15. In the matter of **Anish Fulara v. Devcharan {2014 (2) CGLJ 2}** this Court has 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 re-trial is considered necessary.

16. During the pendency of the appeal, respondent No.1 had filed an application under Order 6 Rule 17 read with Section 141, 151 of the Code. The Appellate Court remanded the case on the ground that amendment application is essential

and is related with the dispute. The Appellate Court had not decided the aforesaid amendment application. The Appellate Court had also not given the finding that the disputed question of maintainability of plaint is a mixed question of fact and law and could not be decided only on the basis of oral submissions and could only be decided after recording of the evidence. The Appellate Court had neither reversed the finding of the trial Court nor expressed that re-trial is essential.

17. Looking to the above mentioned facts and circumstances of the case, the judicial precedents laid down in **P. Purushottam Reddy (supra)**, **Anish Fulara (supra)**, **Narayan Dheemar (supra)** and **Ramesh Chandra Jaiswal (supra)** are applicable in favour of the appellant's case. Respondent No. 1 does not get any help from the judicial precedents laid down in **Sri Marcel Martins (supra)** and **Doraiswami Pillai (supra)** because they are related with the final disposal of the case on merit under the Act, 1988.

18. Thus, looking to the above mentioned facts and circumstances, this Court finds that the Appellate Court had committed illegality while making the wholesale remand. Thus, the impugned order is set aside. The Appellate Court is directed that the aforesaid appeal be taken in its original number and the aforesaid amendment application be decided and the appeal be disposed off in accordance with the law and the procedure.

19. The parties are directed to appear before the Appellate Court on 20.06.2018 and the Appellate Court shall decide the matter within two months thereafter.

20. Record be sent back to the Appellate Court.

Sd/-

(Sharad Kumar Gupta)
JUDGE