

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**M.A No.89 of 2016**

Digeshwar Das S/o Late Shri Dehar Das Vaishnav, Aged About 45 Years R/o Village And Post Chhati, Tahsil And District Dhamtari,Defendant, Chhattisgarh

---- Appellant**Versus**

1. Jitendra Das S/o Late Ramkrishna Das, Aged About 41 Years R/o Village And Post Chhati, Tahsil And District Dhamtari, Chhattisgarh, Presently Village And Post Khola, Through Basant Chandrawanshi, Tahsil Abhanpur, District Raipur, Chhattisgarh
2. Roshan Das S/o Late Ramkrishna Das, Aged About 33 Years R/o Village And Post Chhati, Tahsil And District Dhamtari, Chhattisgarh, Presently Village And Post Khola, Through Basant Chandrawanshi, Tahsil Abhanpur, District Raipur, ChhattisgarhPlaintiffs
3. State Of Chhattisgarh, Through The Collector, Dhamtari, ChhattisgarhFormal Party, District : Dhamtari, Chhattisgarh

---- Respondents

For Appellant:	Shri Somnath Verma, Advocate.
For Respondents No.1 & 2:	None, though served.
For Respondent No.3/State:	Ravindra Agrawal, Government Advocate .

Single Bench:Hon'ble Shri Sanjay Agrawal, J
Order On Board

13.04.2018

1. This Miscellaneous Appeal has been preferred by Defendant No.1 under Order 43 Rule 1(u) of Code of Civil Procedure, 1908 (for short 'the CPC') against the judgment dated 22.9.2016 passed by the Additional District Judge, Dhamtari in Civil Appeal No.95-A/2014 by which, the lower appellate Court, while reversing the judgment and decree 18.10.2012 passed by the 2nd Civil Judge, Class-I Dhamtari in Civil Suit No.11-A/2012, has remanded the matter.

2. Undisputed facts of the case are that the Plaintiffs Jitendra Das and Roshan Das instituted a suit for declaration of title, injunction, partition and for separate possession by submitting, *inter alia*, that the suit property bearing Khasra No.744/1, 744/2 and 744/3 (New Number:-744/20) admeasuring 3 acres situated at village Chhati, Tahsil and District Dhamtari was originally held by their grand father Prem Das as temporary Government lessee. It is pleaded further that Defendant No.1- Digeshwar Das Vaishnav has applied for mutation before the Tahsildar on the basis of the fake registered deed of Will dated 13.9.1991, purported to have been executed by his father Prem Das in his favour. The said proceeding was objected by the Plaintiffs, however, it was rejected vide order dated 25.9.2002. The said order was affirmed further by the Sub Divisional Officer, Dhamtari in an appeal preferred by the Plaintiffs giving rise to an instant action.

3. Defendant No.1 has contested the aforesaid claim and pleaded that his father Prem Das has executed a registered deed of Will on 13.9.1991 in his favour and after considering the said document, the Revenue authorities have rightly passed the said orders and therefore, the claim as made by the Plaintiffs be dismissed.

4. The trial Court, after considering the evidence led by the parties, has held that the registered deed of Will dated 13.9.1991 was duly executed by Prem Das in favour of Defendant No.1-Digeshwar Das Vaishnav and accordingly, the suit was dismissed vide judgment and decree dated 18.10.2012.

5. Being aggrieved, the Plaintiffs have preferred an appeal and the lower appellate Court, in turn, while examining the issues framed by the trial Court with regard to the execution of the registered Will, has come to the conclusion

that since none of the attesting witnesses of the said Will was examined in order to establish the due execution, attestation and validity of the same and in consequence, held that the alleged Will deed was not properly executed. As a consequence of it, the lower appellate Court has remanded the matter by its impugned judgment before the trial Court under certain directions as made in paragraph-15 of its judgment.

6. Being aggrieved, Defendant No.1-Digeshwar Das Vaishnav has preferred this Miscellaneous Appeal. Shri Somnath Verma, learned Counsel for the Appellant submits that the lower appellate Court has committed an illegality in remanding the matter without considering the provisions in its proper perspective as provided under Order 41 Rule 23-A CPC. He submits further that unless and until it is observed that re-trial is considered necessary, no order as such could be passed. He therefore, submits that while remanding the matter, the lower appellate Court ought to have first recorded a specific finding in this respect and only after that, the matter could be remanded before the trial Court. Having failed so, the judgment impugned deserves to be set aside.

7. I have heard learned Counsel for the Appellant and perused the relevant papers annexed herewith carefully.

8. A perusal of the record would show that the trial Court, after considering the pleadings of the parties, has framed as many as 7 issues and upon considering the evidence available on record, dismissed the suit by giving its findings to all the issues. The findings so recorded, particularly with regard to the issue in relation to the validity of the alleged Will as framed in issue No.2 has been entertained and reversed by the lower appellate Court in an appeal preferred by the Plaintiffs holding that due execution, attestation and validity of

it cannot be upheld in absence of examination of any of its attesting witnesses. By holding as such, the lower appellate Court has reversed the judgment and decree of the trial Court and remanded the matter with the observations to decide the said issue No.2 in the light of the principles laid down in Janki Narayan vs. Narayan Namdev reported in **2003 (1) CG.L.J 190** along with other issue as framed by the trial Court. The judgment impugned remanding the matter was thus made under Order 41 Rule 23-A CPC, 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 Appellate Court shall have the same powers as it has under rule 23.

9. By virtue of the aforesaid provision, the matter could be remanded only if following twin conditions are satisfied:-

- a) that the trial Court has disposed of the case otherwise than on a preliminary point; and
- b) that a decree is reversed in appeal and re-trial is necessary.

10. It is thus clear that recording the aforesaid condition No.(b) is *sine qua non* for the lower appellate Court before remanding the matter in exercise of the powers enumerated under the aforesaid provision, if the matter is decided otherwise than on a preliminary point.

11. Reverting back to the case in hand, the trial Court has not decided the suit on a preliminary point, therefore, the second condition as enumerated in the provision is required to be seen by the lower appellate Court before remanding the matter as the suit was decided on all the issues. The question

which, therefore, exists and arise for determination is:

“whether the lower appellate Court, before remanding the matter has recorded a finding that re-trial is necessary under the facts and circumstances in the case ?”

12. I have examined the entire judgment impugned in this regard, however, no finding as such was recorded by the lower appellate Court before remanding the matter. What has been observed by the lower appellate Court is that since the attesting witnesses of the alleged Will deed dated 13.09.1991 was not examined, therefore, its validity cannot be upheld and that by observing as such, the entire matter has been remanded. Before remanding the matter, it was not observed that whether re-trial of the matter is necessary for its adjudication. In absence thereof, the entire approach of the lower appellate Court is thus vitiated and cannot be held to be sustainable in view of the provisions prescribed therein. The judgment impugned is therefore required to be and is hereby set aside.

13. In view of the foregoing discussions, the Appeal is allowed and the matter is remitted back to the concerned lower appellate Court to decide the said Civil Appeal No. 95-A/2014 in accordance with law. The concerned lower appellate Court is directed further to issue fresh notice to the Respondents before proceeding further in the matter. No order as to costs.

Sd/-
(Sanjay Agrawal)
JUDGE