

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.277 of 2005

1. Satish Kumar, S/o Malki Siddhak, Aged 44 years,
 2. Satyendra Kumar, S/o Malki Siddhak, Aged 40 years,
- Both R/o Saakin Heeralal Ward, Daupara Mungeli

(Plaintiffs)
---- Appellants

Versus

1. Sulaxna, W/o Shyamu Dinkar, Aged 53 years, R/o Heeralal Ward, Daupara, Mungeli, Tahsil Mungeli, District Bilaspur
2. Sulochana Euophil Tites (Dead) Through LRs
 - (i) Smt. Rashmi Barik, W/o Prakash Barik, aged about 52 years, R/o Lundra, P.O. Lamgaon, District Surguja (C.G.)
 - (ii) Thiyodor Tites, S/o Thiyophil Tites, aged about 61 years, R/o Tahsil Lundra, P.O. Lamgaon, District Surguja (C.G.)
 - (iii) Shobhna Masih, Wd/o Rakesh Masih, aged about 55 years, R/o Masjid Para, P.O. Surajpur, Police Station Surajpur, District Surajpur (C.G.)
3. State of Chhattisgarh. Through Jilaadhyaksh, Bilaspur.

(Defendants)
---- Respondents

For Appellants/Plaintiffs: Mr. Anand Kumar Gupta, Advocate.

For Respondents No.1 and 2(i) to (iii): -

Miss Anusha Nair, Advocate.

For Respondent No.3 / State: -

Mr. Sanjeev Kumar Agrawal, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

11/09/2019

1. This plaintiffs' second appeal under Section 100 of the CPC was admitted for hearing by formulating the following substantial question of law: -

“Whether the Court below has committed an error of law in not remitting the matter back for fresh pleadings and

evidence in the light of allowing the application under Order 41 Rule 27 CPC and straightway deciding the first appeal itself on the same day on which the application under Order 41 Rule 27 was allowed?”

(For the sake of convenience, parties hereinafter will be referred as per their status shown and ranking given in the plaint before the trial Court.)

2. The plaintiffs' suit for declaration of title and permanent injunction was decreed by the trial Court holding that they are title holders of the suit land and the defendants were restrained from interfering with their possession against which the defendants filed first appeal under Section 96 of the CPC before the first appellate Court in which they also preferred an application under Order 41 Rule 27 of the CPC. The first appellate Court heard the said application under Order 41 Rule 27 of the CPC and also heard the appeal and by a separate order dated 13-5-2005, in the order sheet, the application under Order 41 Rule 27 of the CPC was allowed and the documents and copy of Will dated 11-7-1997 were admitted as additional evidence and immediately thereafter, the first appellate Court relied upon those documents by marking them as exhibits and thereafter, relying upon those documents, allowed the appeal and set aside the judgment & decree of the trial Court against which this second appeal has been preferred by the plaintiffs in which substantial question of law has been formulated which has been set-out in the opening paragraph of this judgment.
3. Mr. Anand Kumar Gupta, learned counsel appearing for the appellants / plaintiffs, would submit that the first appellate Court has misdirected itself in firstly granting application under Order 41 Rule 27 of the CPC and thereafter, taking into account the Will dated 11-7-1997 and other documents on record, without putting the defendants to prove those

documents and thereafter to extend the opportunity to adduce evidence in rebuttal on the principles of natural justice, considered the said Will and other documents admitted as additional documents and set-aside the decree granted in favour of the plaintiffs, therefore, the judgment & decree of the first appellate Court is liable to be set-aside.

4. Miss Anusha Nair, learned counsel appearing on behalf of the defendants, would support the impugned judgment & decree.
5. I have heard learned counsel for the parties and considered their rival submissions and went through the record with utmost circumspection.
6. The question for consideration would be, whether once the document has been taken on record by granting an application under Order 41 Rule 27 of the CPC, what should be the procedure to be followed by the Appellate Court qua the admitted documents?
7. The Supreme Court in the matter of **Shalimar Chemical Works Limited v. Surendra Oil and Dal Mills (Refineries) and others**¹ has held that once the document is taken on record as additional evidence, opportunity must be given to the other side to produce the evidence in rebuttal if they so desired. Paras 16, 17 and 18 of the report state as under:-

“16. The learned single judge rightly allowed the appellant's plea for production of the original certificates of registration of trade mark as additional evidence because that was simply in the interest of justice and there was sufficient statutory basis for that under clause (b) of Order 41 Rule 27. But then the Single Judge seriously erred in proceeding simultaneously to allow the appeal and not giving the respondent-defendants an opportunity to lead evidence in rebuttal of the documents taken in as additional evidence.

17. The Division Bench was again wrong in taking the view that in the facts of the case, the production of additional evidence was not permissible under Order 41 Rule 27. As shown above, the additional documents

¹ (2010) 8 SCC 423

produced by the appellant were liable to be taken on record as provided under Order 41 Rule 27 (b) in the interest of justice. But it was certainly right in holding that the way the learned Single Judge disposed of the appeal caused serious prejudice to the respondent-defendants. In the facts and circumstances of the case, therefore, the proper course for the Division Bench was to set aside the order of the learned Single Judge without disturbing it insofar as it took the originals of the certificates of registration produced by the appellant on record and to remand the matter to give opportunity to the respondent-defendants to produce evidence in rebuttal if they so desired. We, accordingly, proceed to do so.

18. The judgment and order dated 25-4-2003 passed by the Division Bench is set aside and the matter is remitted to the learned Single Judge to proceed in the appeal from the stage the originals of the registration certificates were taken on record as additional evidence. The learned Single Judge may allow the respondent-defendants to lead any rebuttal evidence or make a limited remand as provided under Order 41 Rule 28.”

8. The above-stated judgment i.e. **Shalimar Chemical Works Limited** (supra) has recently been followed by the Supreme Court in the matter of **Akhilesh Singh alias Akhileshwar Singh v. Lal Babu Singh and others**² in which it has been held that Order 41 Rule 27 of the CPC is silent as to the procedure to be adopted by the appellate court after admission of additional evidence and further held that in view of the provisions contained in Order 41 Rule 2 of the CPC, when the appellate court admits additional evidence, it is necessary for the said court to grant an opportunity to the other party to lead evidence in rebuttal thereof. Paras 12, 14 and 17 of the report state as under:-

“12. Order 41 Rule 27 CPC, which deals with the provision of additional evidence in Appellate Court, provides for the grounds and circumstances on which the Appellate Court may allow such evidence or documents or witnesses to be examined. Order 41 Rule 27 sub-rule (2) further provides that wherever additional evidence is allowed to be produced by an Appellate Court, the court shall record a reason for its admission. Order 41 Rule 27 is silent as to the procedure to be adopted by the High court after admission of additional evidence. Whether after admission of additional evidence, it is necessary for the Appellate Court to grant opportunity to the other party to

² (2018) 4 SCC 659

lead evidence in rebuttal or to give any opportunity is not expressly provided in Order 41 Rule 27.

14. Order 41 Rule 2 provides that the appellant shall not, except by leave of the court, be allowed to urge any ground in the appeal, which is not set forth in the memorandum of appeal. The proviso to Order 41 Rule 2 engrafts a rule, which obliged the Court to grant a sufficient opportunity to the contesting party, if any new ground is allowed to be urged by another party, which may affect the contesting party. The provision engrafts rule of natural justice and fair play that contesting party should be given opportunity to meet any new ground sought to be urged. When the appellate court admits the additional evidence under Order 41 Rule 27, we fail to see any reason for not following the same course of granting an opportunity to the contesting party, which may be affected by acceptance of additional evidence. In the present case, additional evidence, which were brought on the record were registered sale deeds, which were executed by present appellant and his other co-sharers and what was relied on before the High Court was that the appellant admitted in the sale deeds that the partition has taken place in the family. The main issue in the First Appeal before the High Court was as to whether the finding of the trial court that no partition by metes and bounds has taken place in the family is correct or not. The additional evidence which was admitted has been relied on by the High Court while allowing the appeal. It was in the interest of justice that the High Court ought to have allowed opportunity to the plaintiffs, who were respondents to the first appeal to either lead an evidence in rebuttal or to explain the alleged admissions as relied on by the defendants. The mere fact that no counter affidavit was filed to the IAs was not decisive. Since IAs having not been admitted, occasion for counter affidavit did not arise at any earlier point of time. The High Court on the same day i.e. 8-3-2017 has allowed the IAs as well as the first appeal. The fact that the contesting respondents to the first appeal, who were the appellant before us were not represented at the time of hearing of the first appeal, was not a reason for not giving opportunity to them to lead evidence in rebuttal.

17. The submission of the learned counsel for the respondents that execution of sale deeds was never denied by the present appellant before the High Court, hence no error has been committed by the High Court in relying on the contents in the sale deed cannot be accepted. Even if, execution of sale deeds was not denied, the appellate court before which any statement in sale deeds is relied on ought to have given an opportunity to lead evidence in rebuttal or to explain the admission. Opportunity to explain the admission contained in the sale deeds was necessary to be given to the contesting party in the facts of the present case. We thus are of the opinion that the High Court erred in simultaneously proceeding with the hearing of the appeal

after admitting additional evidence on record. The High Court ought to have given opportunity to the contesting respondents in the first appeal to lead evidence in rebuttal or to explain the alleged admission as contained in the sale deed, which having not been done.....”

9. Reverting to the facts of the present case in light of the principle of law laid down by the Supreme Court in the above-stated judgments (supra), it is quite vivid that after taking and admitting additional documents on record on 13-5-2005 and after marking the same as exhibit, the first appellate Court straightway relied upon the said documents in favour of the defendants and set-aside the judgment & decree of the trial Court. Neither the first appellate Court asked the defendants to prove those documents which were admitted pursuant to granting application under Order 41 Rule 27 of the CPC by leading evidence nor extended opportunity to the other side to lead evidence on rebuttal and decided finally granting appeal which runs contrary to the principle of law laid down and procedure adopted by the Supreme Court in Shalimar Chemical Works Limited (supra) and Akhilesh Singh alias Akhileshwar Singh (supra). In the considered opinion of this Court, after granting application under Order 41 Rule 27 of the CPC, the first appellate Court ought to have given opportunity to the defendants firstly to prove those documents in accordance with law and thereafter, could have allowed the plaintiffs to lead evidence in rebuttal, if any, and thereafter, could have passed the judgment and meanwhile, the first appellate Court could have stayed the delivery of judgment till the additional evidence is adduced by the parties on additional documents so admitted by the first appellate Court. As such, the procedure adopted by the first appellate Court is clearly impermissible in law in view of the binding pronouncement of the Supreme Court noticed herein in the aforesaid cases.

10. In view of the above, the substantial question of law is answered in favour of the plaintiffs and against the defendants. The impugned judgment and decree passed by the first appellate Court is hereby set aside. The matter is remitted to the first appellate Court for deciding the appeal afresh after giving an opportunity to the appellants / plaintiffs to prove the Will and rin pustika by leading evidence and thereafter to the defendants to file documents and lead evidence. However, it is made clear that this Court has not expressed any opinion on the merits of the case and it is for the first appellate Court to hear and decide the appeal on merits and take a decision in accordance with law. Parties are directed to appear before the first appellate Court on 14th October, 2019 and thereafter the first appellate Court shall decide the appeal within three months from that day as the first appeal was preferred in the year 2004.
11. The second appeal is allowed to the extent indicated herein-above leaving the parties to bear their own cost(s).
12. Records be sent back to the concerned first appellate Court forthwith.

Sd/-
(Sanjay K. Agrawal)
Judge