

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.307 of 2004**

1. Ganesh S/o Sukhdeo, aged about 35 years, by caste "Gond Tribe", Resident of village Lacha, Tehsil Surajpur District Surguja (CG)
- 2.a. Indravati W/o Devchand, D/o late Baldeo, aged about 45 years, R/o Village & Post – Patna, District-Surguja (CG)

---- Appellants/Plaintiffs**Versus**

1. Raghunath, S/o Sunder Gond, aged 55 years.
2. Tilsa, Wd/o Roop Sai Gond, aged 55 years.
3. Hublal, S/o Roop Sai Gond, aged 35 years,
4. Rana Pratap, S/o Roop Sai Gond, aged 30 years.
5. Kajal, D/o Roop Sai Gond, aged 25 years

All resident of villate Lacha, Tehsil Surajpur, District Surguja (CG)

6. State of Chhattisgarh, through Collector, Surguja (CG)

---- Respondents

For Appellants	:	Mr.Rishi Mahobia, Advocate
For Res. No.1 to 5/Defendants:	:	Mr.Amiyakant Tiwari, Advocate
For Respondent No.6	:	Mr.S.K.Agrawal, G.A.

Hon'ble Shri Justice Sanjay K. Agrawal**Judgment on Board****15.03.2019**

1. The substantial question of law involved, formulated and to be answered in the second appeal preferred by the plaintiffs is as under:-

“1. Whether without affording any opportunity of hearing to rebut the order passed by the Revenue Officer in Case No.28-A-6/87-88, the same can be declared as final ? and

2. Whether without there being a suit for declaration of share and partition the appellate Court can declare the property as a joint one and share of the parties ?”

[For the sake of convenience, the parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court].

2. The plaintiffs' filed a suit for declaration of title and permanent injunction stating inter-alia that the suit land was granted in survey settlement in the name of their grandfather Raisai and after death of Ransai, Sukhdev, father of the plaintiffs, become bhumidhari under the Madhya Pradesh Land Revenue Code, 1954 and after death of Sukhdev, bhumiswami right was conferred to the plaintiffs on the suit land and therefore, they are title-holders of the suit land. Since the defendants got their names mutated in revenue records that necessitated filing of civil suit.
3. Defendants No.1 to 5 filed their written statement and denied the plaint allegations. The trial after appreciating oral and documentary evidence available on record, by its judgment and decree dated 31.10.2002, decreed the suit holding that the suit land is self-acquired property of Ransai and order passed by the Tahsildar in Revenue Case No.28A-6/87-88 is forged and said revenue proceeding be declared void. The defendants preferred first appeal under Section 96 of the CPC before the first appellate Court along with application under Order 41 Rule 27 of the CPC. That application under Order 41 Rule 27 of the CPC was allowed by the

first appellate Court and partly allowed the appeal. Against which, this second appeal under Section 100 of the CPC has been filed by the appellants/plaintiffs, in which substantial question of law have been framed by this Court, which have been set-out in the opening paragraph of this judgment.

4. Mr.Rishi Mahobia, learned counsel for the appellants/plaintiffs, would submit that the first appellate Court granted the application under Order 41 Rule 27 of the CPC and after taking into account of those documents on record, considered those documents and partly set aside finding of the trial Court with regard to issue No.3, but did not give any opportunity of hearing to rebut it on the principle of natural justice, therefore, it is liable to be set aside.
5. Mr.Amiyakant Tiwari, learned counsel for respondents No.1 to 5/defendants, would submit that even though revenue proceeding was sought to be declared void by the plaintiffs themselves as no prejudice has been caused. Even no opportunity has been granted to the plaintiffs in granting the application under Order 41 Rule 27 of the CPC.
6. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumscription.
7. The question for consideration would be whether once the document has been taken on record under Order 41 Rule 27 of the CPC, what should be the procedure to be followed by the first appellate Court.

8. The Supreme Court in the matter of Shalimar Chemical Works Limited v. Surendra Oil and Dal Mills (Refineries) and others¹

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 desire. 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 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

¹ (2010) 8 SCC 423

limited remand as provided under Order 41 Rule 28.”

9. The above-stated judgment i.e. Shalimar Chemical Works Limited (supra) has recently followed by the Supreme Court in Akhilesh Singh alias Akhileshwar Singh v. Lal Babu Singh and others², in which it has been held that Order 41 Rule 27 of the CPC is silent as to the procedure to be adopted by appellate court after admission of additional evidence and further held that in view of provisions contained in Order 41 Rule 2 of the CPC, when appellate court admits additional evidence, it is necessary for said court to grant an opportunity to other party to lead evidence in rebuttal thereof.

“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 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

² (2018) 4 SCC 659

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.....”

10. Reverting to the facts of the present case and following the principle of law laid down by the Supreme Court in the above-stated judgments (supra), in the instant case also, after taking and admitting documents on record i.e. copy of order dated 26.6.87 and copy of revenue case No.28A-6/87-88 filed by the defendants, the first appellate Court though relied upon those documents, but did not give an opportunity to the plaintiffs to lead evidence in rebuttal.
11. The submission of learned counsel for the plaintiffs that admission of those documents has not caused prejudice to the plaintiffs. In my considered opinion, accepting the argument would amount to pre-judging the issue. It is for the plaintiffs to decide and to lead evidence as they are legally entitled to have an opportunity to rebut those documents (newly admitted additional documents) particularly when finding of the trial Court against issue No.3 has been set aside by the first appellate Court on the basis of these documents, therefore, opportunity to lead evidence in rebuttal ought to have granted to the appellants/plaintiffs, which the first appellate Court has failed to grant them.
12. In view of above, the 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 of hearing to the plaintiffs to lead evidence in rebuttal. The first appellate Court shall decide the appeal within three months from today as the first appeal was preferred in the year 2002.

However, it is made clear that this Court has not expressed in opinion on 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.

13. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s). Records be sent back to the concerned first appellate Court forthwith.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-