

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 352 of 2003**

1. Ramanlal (deleted)
2. Smt. Bhanmati, Daughter of Late Deep Chand, Aged about 40 years,
3. Yashoda, Daughter of Late Deep Chand, Aged about 28 years,
4. Shyam Bati, widow of Late Deep Chand
5. Sarala, Daughter of Late Deep Chand
6. Bainulal, Son of Late Deep Chand, Aged about 25 years,
7. Vimlawati, Daughter of Late Deep Chand, Aged about 22 years,

Appellants No. 2 to 7 are residents of Hikamipara, Jagdalpur, District Bastar (C.G.)

----Appellants/Defendants

Versus

1. Rangulal, Son of Kapoor Chand, Aged about 48 years, Residents of Hikamipara, Jagdalpur, District Bastar (C.G.)
2. Smt. Subhadra Bai, Daughter of Rupchand, Wife of Hardev, Aged about 48 years, Resident of Village – Ulnear, Sivani, Tehsil Jagdalpur, District-Bastar (C.G.)
3. Raman Lal, Son of Late Deep Chand, 42 years, resident of Hikamipara, Jagdalpur, District – Bastar (C.G.)
4. Bidhanlal @ Bidheneshwar, son of Mul Chand, Aged about 50 years,
5. Chiranjilal (died) through LRs:-
 - 5(a) Smt. Radha, W/o Late Chiranjilal, aged about 50 years,
 - 5(b) Ku. Suruchi, D/o Late Chiranjilal, aged about 25 years,
 - 5(c) Ku. Suman, D/o Late Chiranjilal, aged about 23 years.
6. Krishnalal, Son of Mulchand, Aged about 45 years,

Respondents No. 4 to 6, residents of Panarapara, Jagdalpur, District Bastar (C.G.)

7. Ramnath, S/o (Not known to the appellants), H/o Smt. Budhmati, aged about 65 years,
8. Smt. Budhmati, Daughter of Kapoor Chand, Aged about 65 years,
9. Basant Lal, Son of Kappor Chand,

Respondents No. 7 & 8 are residents of Barakhupara, Narayanpur, District Bastar (C.G.)

---- Respondents/plaintiffs

For Appellants : Shri Prafull N. Bharat, Advocate.
 For Respondents No. 1 to 4 and 7 & 8 : Smt. C.K. Navrang, Advocate.
 For Respondents No. 5(a) to 5(c) & 6 : Shri Avinash K. Mishra, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

13/02/2019

(1) The substantial questions of law involved, formulated and to be answered in this defendants' second appeal state as under:

“1. Whether in view of admission by PW-1, Rangulal that his father had earlier preferred a suit for the same property which was decided against him, the present suit for partition is maintainable ?

2. Whether the lower appellate Court is justified in granting the application under Order 41 Rule 27 of the CPC and relying upon those documents without affording opportunity to the appellants/defendants to rebut the said additional evidence ?”

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

(2) Plaintiffs' suit for partition and possession was dismissed by the trial Court,

against which he preferred first appeal before the first appellate Court. In the first appeal he also filed an application under Order 41 Rule 27 of the Code of Civil Procedure (henceforth "CPC") read with Section 151 of the CPC for taking two documents: first is application dated 5.3.1946 filed by one Deepchand before the Town Committee; and another is order sheets of Secretary, Town Committee, which was allowed by the first appellate Court and simultaneously those additional documents were read into evidence and decreed the suit by the impugned judgment & decree. Against which, this second appeal under Section 100 of the CPC has been filed by the appellants/defendants, in which substantial question of law has been framed by this Court, which has been set-out in the opening paragraph of this judgment.

(3) Mr. Prafull N. Bharat, learned counsel for the appellants/defendants would submit that the First Appellate Court, after admitting the additional documents on record by granting application under Order 41 Rule 27 of CPC, ought to have given reasonable opportunity to rebut / lead the said additional evidence to the defendants, if any, which the first appellate has not given and thereby committed legal error in proceeding simultaneously to allow the appeal and not giving the appellants/defendants an opportunity to lead evidence in rebuttal of the documents taken as additional evidence.

(4) On the other hand, learned counsel appearing for the respondents/plaintiffs would support the impugned judgment and decree.

(5) I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the record with utmost

circumspection.

(6) The question for consideration would be whether once the documents have been taken on record under Order 41 Rule 27 of the CPC what should be the procedure to be followed by the Appellate Court.

(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 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

1 (2010) 8 SCC 423

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 followed by the Supreme Court in **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 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 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 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 two additional documents on record i.e. application dated 5.3.1946 filed by one Deepchand before the Town Committee; and order sheets of Secretary, Town Committee,, the First Appellate Court did not give an opportunity to the appellants/defendants to lead evidence in rebuttal and proceeded to decide first appeal finally and ultimately allowed the appeal decreeing the suit of the plaintiff, which is impermissible in law. The First Appellate Court ought to have allowed and granted time to the appellants/defendants to file / lead evidence in rebuttal.

(10) In view of above, the substantial question of law is answered in favour of the defendants and against the plaintiffs. The impugned judgment and decree, except the order granting application under Order 41 Rule 27 of the CPC, 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 present appellants to lead evidence in rebuttal. The First Appellate Court shall decide the appeal within four months from today as the first appeal was preferred in the year 2001. 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.

(11) 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

D/-

