

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.395 of 2001**

1.(a) Shahbir Khan aged about 45 years, S/o Late Sultan Khan

(b) Janhir Khan aged about 35 years, S/o Late Sultan Khan

Both R/o village Rai, Tahsil Sitapur, District Surguja (CG)

2. Sabai Das (deleted)

3. Dangbudhhin W/o Bahal Das, aged 50 years,

4. Munna Das S/o Bahal Das, aged 10 years, Minor through father and mother- Dangbudhhin,

All resident of village – Urga, Tah. Sitapur, Distt. Surguja (CG)

---- Appellants

Versus

1. Brij Mohan S/o Buddhu, age 45 yrs.

2. Ghursai (deleted)

3. Lagansai S/o Buddhu, aged 28 years.

4. Jagmohan S/o Buddhu, aged 20 yrs.

5. Lawango Bai (deleted)

6. Lanja (deleted)

All R/o village Urga, P.S.-Kamaleshwarapur, Tah. Sitapur, Distt. Surguja (CG)

7. State of Chhattisgarh Through : Collector, Surguja Ambikapur, Distt. Surguja (CG)

---- Respondents

For Appellants/defendants	:	Mr.D.N.Prajapati, Advocate
For Respondents	:	None present
For Respondent No.7	:	Mr. A.N.Bhakta, Dy.A.G.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

07.01.2019

1. The substantial questions of law involved, formulated and to be

answered in the second appeal preferred by the defendants are as under:-

- “1. Whether the first appellate Court was justified in rejecting the application under Order 41 Rule 27 of CPC when the appellants had a certified copy of the Sale Deed executed between the plaintiff and the defendant No.1 ?
2. Whether the finding of the two Courts below so far as allowing the suit of the plaintiffs in its entirety in the light of the counter claim filed by defendant No.5 Lanja is proper, legal and justified ?
3. Whether defendant No.1 has been able to establish the case of having a registered sale deed between them ?
4. Whether the appellants would not have had a right over the share of the property which fell in the name of Buddhu ?”

[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. Plaintiff-Buddhu filed a suit for declaration of title, possession, permanent injunction and declaring sale deeds dated 22.5.68 and 12.1.70 as null and void, which was decreed by the trial Court, against which, the defendants preferred first appeal under Section 96 of the CPC before the First Appellate Court and also filed an application under Order 41 Rule 27 of the CPC, copy of the said application was served to other side along with the documents

particularly sale deed dated 12.1.70 said to be executed by plaintiff-Buddhu in favour of defendant No.1. The appeal was heard and decided against the appellants/defendants, but said application was not considered by the First Appellate Court after hearing the appeal on merits. Questioning legality and validity of the judgment and decree passed by the First Appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellants/defendants, in which substantial questions of law have been framed by this Court, which have been set-out in the opening paragraph of this judgment.

3. Mr.D.N.Prajapati, learned counsel for the appellants/defendants, would submit that the First Appellate Court is absolutely unjustified in not deciding the application bearing on result of the appeal and dismissed the appeal. He relied upon the judgment of the Supreme Court in the matter of **Malayalam Plantations Limited v. State of Kerala and another**¹.
4. None present for the respondents though served.
5. I have heard learned counsel for the parties, perused the judgment and decree of the Courts below and went through the records with utmost circumscription.
6. It is true that the appellants preferred appeal under Section 96 of the CPC and also filed an application under Order 41 Rule 27 of the CPC before the First Appellate Court along with copy of sale deed dated 12.1.70 on 20.3.98, copy of said application was also served

¹ (2010) 13 SCC 487

to other side, reply was also filed by the plaintiff, but while hearing the appeal, the First Appellate Court did not take cognizance of the said application, it was neither considered nor decided, but ultimately appeal was dismissed.

7. The Supreme Court in the matter of Malayalam Plantations Limited (supra) has clearly held that when an application for reception of additional evidence under Order 41 Rule 27 CPC was filed by the parties, it was the duty of the Court to deal with the same on merits. It was observed as under:-

“15. In view of the above provision, in our opinion, when an application for reception of additional evidence under Order 41 Rule 27 of CPC was filed by the parties, it was the duty of the High Court to deal with the same on merits. The above principle has been reiterated by this Court in *Jatinder Singh v. Mehar Singh*² and *Shyam Gopal Bindal v. Land Acquisition Officer*³.

16. If any petition is filed under Order 41 Rule 27 in an appeal, it is incumbent on the part of the appellate Court to consider at the time of hearing the appeal on merits so as to find out whether the documents or evidence sought to be adduced have any relevance/bearing in the issues involved. It is trite to observe that under Order 41, Rule 27, additional evidence could be adduced in one of the three situations, namely, (a) whether the trial Court has illegally refused the evidence although it ought to have been permitted; (b) whether the evidence sought to be adduced by the party was not available to it despite the exercise of due diligence; (c) whether additional evidence was necessary in order to enable the Appellate Court to pronounce the judgment or any other substantial cause of similar nature.

18. In the light of the separate application filed under Order 41 Rule 27 CPC for reception of additional evidence by both sides, it is for the High Court to consider and take a decision one way or other as to the applicability of the same and decide the appeal with

2 (2009) 17 SCC 465

3 (2010) 2 SCC 316

reference to the said conclusion. In this view of the matter, we refrain from going into the merits of the materials placed by both sides and it is for the High Court to consider and take a decision one way or other as per the mandate of the said provision.”

8. Reverting to the facts of the present case in the light of principle of law laid down by the Supreme Court in above-stated judgment (supra), it is quite vivid that the First Appellate Court has committed illegality in not deciding the application under Order 41 Rule 27 of the CPC after hearing the appeal on merits and dismissed the appeal.
9. Accordingly, the judgment and decree passed by the First Appellate Court is hereby set aside. The matter is remitted to the First Appellate Court for hearing the appeal as well as application under Order 41 Rule 27 of the CPC in accordance with law. It is made clear that this Court has not expressed any opinion on merits of the appeal and even has not expressed any opinion on the application under Order 41 Rule 27 of the CPC and all questions are left and kept open to be considered by Appeal Court. Since the appeal was filed on 1.8.96, the said Appellate Court is directed to consider and dispose of the appeal after hearing the parties within a period of three months from the date of receipt of certified copy of this order.
10. The second appeal is allowed to the extent indicated hereinabove. Records be sent to the First Appellate Court forthwith. No cost(s).

Sd/-

(Sanjay K.Agrawal)
Judge

B/-