

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**M.A No.19 of 2017**

1. Manbasiya W/o Late Karamchand, Aged About 38 Years R/o Village-Khadgawankala, Tahsil Pratappur, District Surajpur, Chhattisgarh, Chhattisgarh
2. Bhagat S/o Late Mardho, Aged About 58 Years R/o Village-Khadgawankala, Tahsil Pratappur, District Surajpur, ChhattisgarhPlaintiffs, District : Surajpur, Chhattisgarh

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1. Muni W/o Bhagat Aged About 33 Years D/o Ramdhan Gond, R/o Village- Khadgawankala, Tahsil Pratappur, District Surajpur, Chhattisgarh , Chhattisgarh
2. State Of Chhattisgarh, Through The Collector, Surajpur, ChhattisgarhDefendants, District : Surajpur, Chhattisgarh

-----Respondents

For Appellants: Shri DN Prajapati, Advocate.
 For Respondent No.1: Shri SP Sahu and Shri RK Pali, Advocates
 Respondent No.2/State: Ms. Abhyunnati Singh, Panel Lawyer.

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

15.02.2019

1. This Miscellaneous Appeal has been preferred by the Plaintiffs under Order 43 Rule 1 (u) of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the CPC') questioning the propriety of judgment dated 24.11.2016 passed by learned Additional District Judge, Pratappur, District Surajpur in Civil Appeal No.08-A/2016 by which, the lower appellate Court, while reversing the findings of the trial Court, has remanded the matter.
2. Briefly stated, the facts of the case are that the Plaintiffs instituted a suit claiming declaration of title and injunction by

submitting *inter alia* that the property in question described in Plaint Schedules A & B was originally held by their predecessor in interest namely Bhaiswar. It is pleaded in the Plaint that after the death of Bhaiswar, it was inherited by their father Mardho and after the death of Mardho, they inherited the property in question. According to further averments made in the Plaint, Defendant No.1-Munni while claiming herself to be the daughter of Heerachand, has instituted partition proceedings under Section 178 of the Chhattisgarh Land Revenue Code, 1959 before the revenue authorities, however, she was not the daughter of said Heerachand, the son of said Mardho. As such, she is not entitled to inherit the property in question and pleaded further that even if it is found that Munni is the daughter of Heerachand, then also, she would not be entitled to inherit the property in question along with the Plaintiffs in accordance with their Gond customary law.

3. The aforesaid claim of the Plaintiffs was contested by Defendant No.1-Munni by submitting *inter alia* that she is the daughter of Heerachand and therefore, she is also entitled to inherit the property in question. While contesting the claim as such, a counter claim was made by her praying for 1/3rd share over the property in question as described in Plaint Schedules A & B.

4. The trial Court, by its judgment and decree dated 23.12.2015, after considering the evidence led by the parties, arrived at a conclusion that though the property in question was originally

recorded in the name of Bhaiswar, however, after the death of Bhaiswar, no document was produced on record showing the name of Mardho, the father of Plaintiffs. It held further while entertaining issue No.5 that Munni-Defendant No.1 is not the daughter of Heerachand. As a consequence of it, the trial Court has dismissed the claim as well as the counter claim.

5. Being aggrieved, the Plaintiffs have preferred an Appeal under Section 96 CPC. The appellate Court, in turn, arrived at a conclusion that the finding as recorded by the trial Court in relation to issue No.5 is not proper while considering the statement of mother of said Munni namely Pancho Bai (DW-2) and held that Munni-Defendant No.1 is the daughter of said Heerachand and after holding as such, remanded the matter to the trial Court by setting aside the judgment and decree of the trial Court dated 23.12.2015 with a direction to frame an additional issue as to “whether daughter is entitled to claim any share or not in the suit property under their Gond customary law?” and directed further to decide the suit afresh after providing sufficient opportunity of hearing to the parties. This is the order which has been questioned by the Plaintiffs by way of preferring this Miscellaneous Appeal.

6. Shri DN. Prajapati, learned Counsel for the Appellants submits that while remanding the matter, the lower appellate Court has committed illegality in setting aside the entire judgment and decree passed by the trial Court and erred further in directing the trial Court

to decide the suit afresh. According to him, the appellate Court ought to have followed the provisions prescribed under Order 41 Rule 25 CPC in its strict sense. Having failed so, the appellate Court has erred in remanding the matter as such and therefore, the same deserves to be set aside and/or modified accordingly.

7. On the other hand, learned Counsel for Respondents, while supporting the impugned judgment, submit that the lower appellate Court has rightly remanded the matter as issue No.5 was incorrectly decided by the trial Court. The judgment impugned is, therefore, not liable to be interfered.

8. I have heard learned Counsel for the parties and perused the entire record carefully.

9. The appellate Court, while reversing the finding of the trial Court in relation to issue No.5 and that by holding that Defendant No.1-Munni is the daughter of said Heerachand, has observed that no particular issue was framed by the trial Court as to “whether daughter is entitled to inherit the property from her father under their Gond customary law?”. As such, the trial Court has committed serious illegality in dismissing the counter claim made by Defendant No.1. While observing as such, the lower appellate Court has set aside the judgment and decree of the trial Court and remanded the matter with a direction to decide the suit afresh after framing the additional issue regarding the entitlement of the daughter's right in her father's property under their Gond customary law. However, that

by itself could not be a ground for remitting the entire suit to the learned trial Judge upon setting aside the decree of the trial Court. The power of remand vests in the appellate Court either in terms of Order 41 Rule 23 and 23-A or Order 41 Rule 25 CPC.

10. The entire aforesaid approach of the appellate Court remanding the matter as such merely by holding that issue No.5 was wrongly decided by the trial Court cannot be held to be sustainable in the eyes of law unless and until it is considered that retrial of the suit is necessary as required under Rule 23-A of Order 41 of 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.”

11. A bare perusal of the aforesaid provision would show that its applicability would come into play only when the trial Court has disposed of the entire suit otherwise than on a preliminary point and that a decree is reversed in Appeal and that a re-trial is considered necessary. In that contingency, the appellate Court will have all the powers mentioned in Rule 23 of Order 41 CPC. Here in the instant case, in absence of considering the fact that re-trial of the suit is necessary, yet the appellate Court has set aside the entire judgment and decree of the trial Court dated 23.12.2015 with a direction to the

said Court to decide the suit afresh. The approach of the appellate Court remanding the matter as such is, therefore, not permissible and cannot be held to be sustainable.

12. When material issue has not been framed by the trial Court as observed by the appellate Court in its judgment impugned, then in such an eventuality, the appellate Court should have resorted Rule 25 of Order 41 CPC and should not have remanded the matter as such. Rule 25 of Order 41 CPC is relevant for the purpose which reads as under:-

25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.- Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor [within such time as may be fixed by the Appellate Court or extended by it from time to time].”

13. Based upon the aforesaid provision, the appellate Court should have framed the issue as observed in paragraph-26 of its judgment impugned and in stead of remanding the matter as a whole, should have framed a specific issue and then referred the

same for adjudication to the trial Court against whose decree the Appeal was preferred before the appellate Court.

14. After recording the evidence as the appellate Court may have directed, the trial Court could proceed to try the said issue and return the evidence to the appellate Court together with its findings thereon within the prescribed time. The said course is permissible in terms of Rule 25 of Order 41 CPC. However, without following the said provision, the appellate Court has committed an illegality in remanding the matter to the trial Court with a direction to decide the suit afresh.

15. The aforesaid observation of mine is fortified by the principles laid down by the Supreme Court in the matter of Shanti Devi vs. Daropti Devi and Others reported in **(2006) 13 Supreme Court Cases 775**, whereby the observation of the High Court remanding the matter for its fresh decision, merely by holding that one of the issues namely issue No.4 pertaining to validity of the will was wrongly decided, was held to be unjustified by observing at paragraph-15 as under:-

“15. In the aforementioned situation, in our opinion, it would have been proper for the High Court not to remit the matter in its entirety, which could have been done by the Court in exercise of its jurisdiction under Order 41 Rule 23 or Order 41 Rule 23-A of the Code of Civil Procedure. The impugned judgment must in the aforementioned situation be held to have been passed in terms of Order 41 Rule 25 of the Code of Civil Procedure.”

16. In view of the foregoing discussions, vis-a-vis, the observation of the appellate Court as arrived at paragraph-26 of its judgment impugned, it would be appropriate that the appellate Court frames the point (issue) on which an additional evidence could be adduced by the parties and call upon the trial Court to record an additional evidence by providing opportunities of hearing to the parties and thereafter, to return the evidence to the appellate Court together with its finding thereon and reasons therefor within the prescribed time. The said course would meet the ends of justice.

17. Accordingly, I hereby set aside the impugned judgment dated 24.11.2016 passed by learned Additional District Judge, Pratappur, District Surajpur in Civil Appeal No.8-A/2016 in part, to the extent that it has relegated the parties before the trial Court for re-deciding the suit in accordance with law. Instead, the Appeal is restored to its original number to the file of the appellate Court. The appellate Court shall frame point (additional issue) on which the additional evidence is allowed to be produced and direct the trial Court to take the additional evidence on record in accordance with law and then return the evidence to the appellate Court together with its findings thereon and the reasons therefor, within the prescribed time. Such directions be issued by the appellate Court and parties are hereby directed to remain present before the said appellate Court on 25.03.2019 who, in turn, shall communicate this order after framing the additional issue as observed in its impugned judgment to the

concerned trial Court expeditiously, preferably within two months from the said date i.e. 25.03.2019. On receipt of the said report from the trial Court, the appellate Court may then consider the Appeal and decide the same finally in accordance with law.

18. The Appeal is disposed of in the aforesaid terms. No order as to costs.

Sd/-

(Sanjay Agrawal)
JUDGE

Priya