

NAFR

**HIGH COURT OF CHHATTISGARH, BILASPUR****Miscellaneous Appeal No. 89 of 2017****Reserved on 15.03.2019****Pronounced on 20.03.2019**

1. Bansiram, S/o Banau, Caste Rawat, Aged About 40 Years, R/o Village Betejhar, Tehsil Mohla, District Rajnandgaon, Chhattisgarh.
2. Gendram, S/o Banau, Caste Rawat, Aged About 35 Years, R/o Village Betejhar, Tehsil Mohla, District Rajnandgaon, Chhattisgarh.
3. Surjotin, W/o Banau, Caste Rawat, Aged About 60 Years, R/o Village Betejhar, Tehsil Mohla, District Rajnandgaon, Chhattisgarh.
4. Smt. Gendibai, W/o Balduram, Aged About 33 Years, D/o Banau Ram, Caste Rawat, R/o Village And Post Genji Tehsil Dondilohara, District Balod (Earlier Durg), Chhattisgarh. (L.R.s of Banau, Defendant No.2)
5. Bihau, S/o Budhu, Caste Rawat, Aged About 58 Years, R/o Betejhar, Tehsil Mohla, District Rajnandgaon, Chhattisgarh (Defendant No.3)
6. Dhanraj, S/o Mangal Yadav, Aged About 40 Years, R/o Village Bitejhar, Tehsil Mohla, District Rajnandgaon, Chhattisgarh.
7. Hirondibai (wrongly mention Hirondabai), Wd/o Mangal Yadav, Aged About 60 Years, R/o Village Bitejhar, Tehsil Mohla, District Rajnandgaon, Chhattisgarh (L.Rs of Mangal, Defendant No.1)

**---- Appellants/Defendants****Versus**

1. Birjhu, S/o Munnulal, Caste Rawat, Aged About 52 Years, R/o Balod, Tehsil Balod, District Balod (Earlier Durg), Chhattisgarh (Plaintiff)
2. Santosh, S/o Ramadhin (Bisau), Aged About 28 Years, Caste Rawat, R/o Village Sherpaar, Tehsil Mohla, District Rajnandgaon, Chhattisgarh (Defendant No.4A)
3. Smt. Devki Bai, Wd/o Ramadhin, Caste Rawat, Aged About 48 Years, R/o Village Sherpaar, Tehsil Mohla, District Rajnandgaon, Chhattisgarh (Defendant No.4B)
4. Devantin Bai, D/o Ramadhin, Aged About 48 Years, Caste Rawat, R/o Village Sherpaar, Tehsil Mohla, District Rajnandgaon, Chhattisgarh (Defendant No.4C)

5. Ram Singh, S/o Bisram Rawat, Aged About 37 Years, R/o Sherpaar, Tehsil Mohla, District Rajnandgaon, Chhattisgarh (Defendant No.5)
6. Rohanbai, D/o Bisram Rawat, Aged About 33 Years, R/o Village Sherpaar, Tehsil Mohla, District Rajnandgaon, Chhattisgarh (Defendant No.7)
7. The State of Chhattisgarh, Through Collector Balod (Earlier Durg), Chhattisgarh (Defendant No.9) **---- Respondents**

---

|                           |                                                                 |
|---------------------------|-----------------------------------------------------------------|
| For Appellant             | : Mr. Rajkumar Pali, Advocate.                                  |
| For Respondent No.1       | : Mr. Vishnu Koshta along with<br>Mr. Shobhit Koshta, Advocate. |
| For State/Respondent No.7 | : Ms. Neha Shukla, P. L.                                        |

---

**Hon'ble Shri Justice Sanjay Agrawal**

**C.A.V. Order**

1. This Miscellaneous Appeal has been preferred by the Defendants No.1(A) to 3 under Order 43 Rule 1(u) of the Code of Civil Procedure 1908 (for short 'CPC') questioning the legality and propriety of the judgment dated 25.08.2017 passed by the learned District Judge, Balod, District Balod (C.G.) in Civil Appeal No.4-A/2012, by which the lower appellate Court has remanded the matter for deciding the suit afresh in relation to Issues No. 4 to 8.
2. Briefly stated the facts of the case are that the plaintiff-Birjhu instituted a suit claiming declaration of title and injunction by submitting inter-alia, that a deed of will dated 26.10.1981 was executed by one Sukhi Bai in relation to the property in question in his favour. It is pleaded further that the defendants without any authority are interfering in his peaceful possession, therefore, the plaintiff has been constrained to file the suit in the instant nature. The said suit was contested by the defendants denying the due execution, attestation and validity of the alleged will. After considering the evidence led by the parties, the trial

Court by its judgment and decree dated 05.12.2002 dismissed the suit by holding inter-alia that the plaintiff has failed to prove the due execution and attestation of the alleged will dated 26.10.1981 (Ex. P-4). Being aggrieved, the plaintiff has preferred an appeal. During the pendency of the appeal, the plaintiff has moved as many as 4 applications (I.A. Nos.4, 4A, 5 and 7) all under Order 41 Rule 27 of the CPC and also under Order 6 Rule 17 of the CPC, marked as I. A. No.6, and after considering these applications, the lower appellate Court has allowed the same and thereafter, remanded the matter to the trial Court with a direction to decide the suit afresh in relation to Issues No.4 to 8. Being aggrieved, the appellants/Defendants No.1(A) to 3 have preferred this miscellaneous appeal.

3. Shri Pali, learned counsel for the appellant, submits that the judgment impugned as passed by the lower appellate Court without following the procedure prescribed under Rule 28 of Order 41 of the CPC has erred in remanding the matter. According to him, the Appellate Court after allowing those applications ought to have directed the trial Court to record the evidence and obtain the same in order to decide the said appeal. Thus, the Appellate Court has erred in passing the judgment impugned, which is therefore, liable to be set aside.
4. On the other hand, learned counsel for the Respondents submits that while allowing the said applications, the appellate Court has not committed any illegality in remanding the matter.
5. I have heard learned counsel for the parties and perused the entire record carefully.

6. A suit for declaration of title and injunction was made by the plaintiff-Birjhu on the basis of deed of will dated 26.10.1981, purported to have been executed by one Sukhi Bai in his favour. Since the plaintiff has failed to examine any of the attesting witnesses of the alleged will, the trial Court has arrived at a conclusion that plaintiff has failed to prove the due execution, attestation and validity of the same. The trial Court has, thus, dismissed the suit, however, in appeal, the lower appellate Court while allowing the applications filed under Order 41 Rule 27 and also under Order 6 Rule 17 of the CPC has directed the trial Court to decide the suit afresh in relation to Issues No.4 to 8.
7. As far as the finding of the lower appellate Court allowing those aforesaid applications are concerned, I do not find any infirmity in the same as the first appellate Court would have been within its jurisdiction to permit the party to the proceedings to produce additional evidence before it for full, complete and effectual adjudications of the proceedings.
8. At this juncture, the principles laid down in the matter of *Union of India Vs. Ibrahim Uddin and Another*, reported in (2012) 8 SCC 148 are to be noted where the purport of Order 41 Rule 27 of the CPC has been considered by the Supreme Court and observed at paragraph 47 and 48 as under:-

“47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed.

“48. To sum up on the issue, it may be held that an application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite conditions incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as to on what basis such an application has been allowed. However, the application should not be moved at a belated stage.”

9. In the present case, the appellate Court, while entertaining those applications (I. A. No.4, 4A, 5 and 7) filed under Order 41 Rule 27 of the CPC opined that the suit is based upon the deed of will dated 26.10.1981 and for the proof of its due execution, the examination of its attesting witness namely, Derha is essential as others have passed away and opined further that the documentary evidence annexed with those applications pertaining to certified copies of criminal matter, order of Revenue Authority and also the certified copy of registered deed of sale dated 02.03.1965 are essential for just and proper adjudication of the matter. In other words, the proposed additional evidences were required by the Court below to answer the subject matter and in particular to pronounce the judgment on material issue.

As such, the lower appellate Court in exercise of its discretion has not committed any illegality in allowing those applications.

10. Nevertheless, the Court below has certainly committed an illegality in remanding the matter for reconsideration of Issues No.4 to 8 afresh after setting aside the judgment and decree of the trial Court by ignoring the provision prescribed under Rule 28 of Order 41 of the CPC which reads as under:-

**“28. Mode of taking additional evidence** - Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.”

11. Based upon the aforesaid provision, the appellate Court after allowing above mentioned applications, should have either recorded the statements of the parties or should have directed the trial Court to record the statement from whose decree the appeal is preferred or any other subordinate Court, who in turn, after recording the evidence, as the appellate Court may have directed, could proceed to record the statement of the parties and send the same to the concerned appellate Court. This is the procedure which should have been required under such circumstances. Having failed so, the appellate Court has, thus, committed an illegality in remanding the matter to the trial Court with a direction to decide the Issues No.4 to 8 after setting aside the judgment and decree of the trial Court in relation to these issues.
12. In view of the foregoing discussions, I hereby set aside the impugned judgment dated 25.08.2017 passed by the learned District Judge,

Balod, District Balod (C.G.) in Civil Appeal No. 4-A/2012. The appeal is accordingly directed to be restored to its original number to the file of the first appellate Court. The appellate Court shall proceed in accordance with the provisions prescribed under Order 41 Rule 28 of the CPC by directing the trial Court and/or any other subordinate Court to record the evidence based upon the said additional evidence after providing the sufficient opportunity of hearing to the parties. Such directions be issued by the appellate Court and parties present over here, i.e. Appellants, Respondents No. 1 & 7 are hereby directed to remain present before the said appellate Court on 22<sup>nd</sup> April, 2019. The appellate Court shall issue fresh notices to Respondents No. 2(Santosh), 3(Smt. Devki Bai), 4(Devantin Bai), 5(Ram Singh) & 6(Rohanbai) and then proceed as observed above.

13. With the aforesaid observations, the appeal is disposed of. No order as to costs.

Sd/-  
(Sanjay Agrawal)  
Judge