

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.222 of 2005**

Nirmala Bai D/o Bhagela Rawat, aged about 32 years R/o Village – Katangi
(Gandai) Tah-Gandai, Distt-Rajnandgaon (CG)

---- Appellant**Versus**

1. Kanhaiya Singh (Died) through his LR's

1(A) Ramkaresh Singh (Died) through his LR's

1.a(1) Smt. Bhagwati W/o Late Ramkaresh Singh, aged about 45 years,

1.a(2) Mukesh S/o Late Ramkaresh Singh, aged about 25 years,

1.a(3) Durgeshwari D/o Late Ramkaresh Singh, aged about 21 years,

1.a(4) Dhaneshwari D/o Late Ramkaresh Singh, aged about 20 years,

1.a(5) Rakesh S/o Ramkaresh Singh, aged about 18 years,

All are resident of village Kodwa, Post Gandai, Tahsil Chhukhadan, District
Rajnandgaon (CG)

1.b. Smt.Chaiti Bai W/o Late Roop Singh, aged about 50 years,

1.c. Kamlesh Singh S/o Late Roop Singh, aged about 30 years,

1.d Birbal Singh S/o Late Roop Singh, aged about 28 years,

1.e Girvar Singh S/o Late Roop Singh, aged about 25 years,

The respondent no.1.b to 1.e. are residents of Village Kodwa, P.S. Gandai,
Distt.-Rajnandgaon (CG)

2. State of Chhattisgarh Through the Collector, Distt.-Rajnandgaon (CG)

---- Respondents

For Appellant/Plaintiff	:	Mr.Abhishek Pandey, Advocate
For Respondent No.1/Defendant	:	Mr.R.N.Jha, Advocate
For Respondent No.2	:	Mr.Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

04.09.2019

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

answered in second appeal preferred by the plaintiff is as under:-

“Whether mere filing of a certified copy of the sale deed will absolve the party concerned from proving the sale by legal evidence ?”

[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-Nirmala Bai filed a suit for declaration of title and permanent injunction stating inter-alia that she is title and possession holder of the suit land and she has never sold the suit land in favour of defendant No.1-Kanhaiya Singh, in which defendant No.1 set-up a plea that original holder of the land was Jankunwar Bai, from whom he has purchased the suit land on 17.4.71 and therefore, the suit deserves to be dismissed.
3. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 23.8.2004, decreed the suit holding that the plaintiff is title holder of the suit land and granted decree for permanent injunction. Feeling aggrieved against the judgment and decree of the trial Court, defendant No.1 preferred first appeal under Section 96 of the CPC before the first appellate Court, in which he has also filed an application under Order 41 Rule 27 of the CPC along with certified copy of the sale deed dated 17.4.71. The first appellate Court after hearing the appeal on merits, considered the application under Order 41 Rule 27 of the CPC, allowed the same and marked the document as Ex.D-1 and further considered that document and came to the conclusion that defendant

No.1 has purchased the suit land from Jankunwar Bai vide Ex.D-1 and he is title-holder of the suit land by granting appeal and dismissing the suit. Questioning the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellant/plaintiff, in which substantial question of law has been framed by this Court, which has been set-out in the opening paragraph of this judgment.

4. Mr.Abhishek Pandey, learned counsel for the appellant/plaintiff, would submit that the first appellate Court has misdirected himself in firstly granting the application under Order 41 Rule 27 of the CPC and after taking into account the sale deed dated 17.4.71 on record, considered that sale deed and set aside the decree granted in favour of the plaintiff without giving an opportunity to rebut it on the principle of natural justice, therefore, it is liable to be set aside.
5. On the other hand, Mr.R.N.Jha, learned counsel for respondent No.1/defendant, would support the impugned judgment and decree.
6. I have heard learned counsel for the parties and considered their rival submissions thoughtfully 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 by granting an application under Order 41 Rule 27 of the CPC what should be the procedure to be followed by the Appellate Court.
8. The Supreme Court in the matter of Shalimar Chemical Works Limited v. Surendra Oil and Dal Mills (Refineries) and others¹ has

¹ (2010) 8 SCC 423

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 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.”

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 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 in light of principle of law laid down by the Supreme Court in the above-stated judgments (supra), it is quite vivid that after taking and admitting additional document on record i.e. sale deed dated 17.4.71 and marking the same as exhibit, the first appellate Court straightway relied upon the said document in favour of defendant No.1 and held that defendant

No.1 has purchased the suit land from one Jankunwar Bai and did not give an opportunity to the appellant/plaintiff to prove the sale deed in accordance with law by leading evidence and also did not give an opportunity to other side to lead evidence in rebuttal and proceeded to decide the appeal finally and ultimately allowed the appeal, which is impermissible in law.

11. In the considered opinion of this Court, the first appellate Court ought to have followed the procedure laid down by Their Lordships of the Supreme Court in Shalimar Chemical Works Limited (supra) and Akhilesh Singh alias Akhileshwar Singh (supra) and by granting the application under Order 41 Rule 27 of the CPC, the first appellate Court ought to have given an opportunity not only to the appellant/plaintiff to prove the sale deed by leading evidence, but also ought to have granted an opportunity to defendant No.1 to lead evidence in rebuttal and thereafter could have decided the appeal finally and in the meanwhile the first appellate Court could have stayed the delivery of judgment till additional evidence is adduced by the parties on additional document so admitted by the first appellate Court, as such, the procedure adopted by the first appellate Court is clearly impermissible and runs contrary to the judgments rendered by the Supreme Court in Shalimar Chemical Works Limited (supra) and in Akhilesh Singh alias Akhileshwar Singh (supra).

12. In view of above, the substantial question of law is answered in favour of the plaintiff and against defendant No.1. The impugned 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 to the appellant/plaintiff to prove the sale deed by leading evidence and thereafter to defendant No.1 to lead evidence in rebuttal. However, it is made clear that this Court has not expressed any 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. The parties are directed to appear before the first appellate Court on **30th September, 2019** and thereafter to decide the appeal within three months from that day as the first appeal was preferred in the year 2004.

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/-