

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 300 of 2005**

1. Rambriksh (since deceased) through LRs:-
 - 1.a Ramji Kashyap, S/o late Rambriksh, aged about 52 years
 - 1.b Shiv Prasad Barman, S/o late Rambriksh, aged about 42 years,
 - 1.c Kanhai Kashyap, S/o late Rambriksh, aged about 42 years,

All are R/o Village – Mohalla Koiree Tola, Ward No. 15, Ramanujganj,
District – Balrampur- Ramanujganj (C.G.)
2. Budhu, S/o- Sukhadi Miya, Aged about 45 years, Dead (DEFENDANT NO.-2) Through Legal representatives
 - 2A) Smt. Jainab Bibi, W/o Budhu Miya, Aged about 58 years,
 - 2B) Sarfuddin Ansari, S/o Budhu Miya, Aged about 26 years,
 - 2C) Jashmuddin Ansari, S/o Budhu Miya, Aged about 24 years,
 - 2D) Jashima Khatun, D/o Budhu Miya
3. Nathun (since deceased) through LRs:-
 - 3.a Suresh Prasad Kushwaha, S/o late Nathun, aged about 52 years,
 - 3.b Sitaram Kushwaha, S/o late Nathun, aged about 50 years,
 - 3.c Birbal Kushwaha, S/o late Nathun, aged about 45 years,
 - 3.d. Prem Kushwaha, S/o late Nathun, aged about 42 years,
 - 3.e Pradeep Kushwaha, S/o late Nathun, aged about 38 years,

All are R/o Village – Mohalla Koiree Tola, Ward No. 15, Ramanujganj,
District Balrampur- Ramanujganj (C.G.)

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

1. Balmukund Thakur, S/o- Durga Thakur, Aged about -55 years (Plaintiff No.-1)
2. Tetree, D/o Dhukhan Thakur, Aged about 45 years, (Plaintiff No. 2)

3. Rambriksh, S/o Nanhak Kahar, Aged about 50 years (Dead) (Plaintiff No. 3)

Through L.R.-

3A) Smt. Sundari, W/o- Rambriksh

3B) Shiva Narayan, S/o Rambriksh

3C) Kishumatia, D/o Rambriksh

3D) Dhanmatia, D/o Rambriksh

3E) Phoolleshwari, D/o Rambriksh

3F) Kaleshwari, D/o Rambriksh

All are residence of Mohalla Koiree Tola, Ward No. 15, Nagar- Ramanujganj, Distt- Sarguja (C.G.)

---- Respondents/Plaintiffs.

For Appellants : Mr. A.K. Prasad, Advocate.

For Respondents : Mr. Manoj Paranjpe, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

20/03/2019

1. The substantial question of law involved, formulated and to be answered in this plaintiffs' second appeal states as under:

“Whether first appellate court was justified in admitting the documents on record under Order 41 Rule 27 of the CPC and relying upon those documents without granting opportunity to appellants/defendants to adduce evidence in rebuttal ?

(For the sake of convenience, parties would be referred hereinafter as per their status and ranking shown in the suit before the trial Court).

2. Plaintiffs filed a suit for declaration of title, possession and permanent injunction stating inter alia that the defendants have encroached upon their suit land,

as such, they are entitled for declaration of title and possession, which was dismissed by the trial Court holding that plaintiffs have failed to establish that the defendants have encroached upon their suit land. First appeal was preferred by the plaintiffs against the judgment and decree of the trial Court before the first appellate Court. During pendency of the first appeal, application under Order 41 Rule 27 of the CPC for taking some additional documents on record was filed. Those additional documents were taken on record by the first appellate Court and relying upon those documents allowed the appeal, against which instant second appeal under Section 100 of the CPC has been preferred by the appellants/defendants, in which substantial question of law has been formulated by this Court, which has been set-out in the opening paragraph of the judgment.

3. Mr. A.K. Prasad, learned counsel appearing for the appellants/defendants would submit that the first appellate Court is absolutely unjustified in taking additional documents filed along with application under Order 41 Rule 27 of the CPC on record and further erred in law in relying upon those said additional documents, granted decree in favour of the plaintiff without giving opportunity to appellants/defendants to adduce evidence in rebuttal thereof, as such, the judgment and decree of the first appellate Court is liable to be set aside.

4. Mr. Manoj Paranjpe, learned counsel for the respondents/plaintiff would support the impugned judgment and decree.

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

6. 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 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.”

7. The above-stated judgment i.e. **Shalimar Chemical Works Limited** (supra)

1 (2010) 8 SCC 423

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.....”

8. 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, during pendency of the first appeal, respondents/plaintiffs filed some additional documents and the first appellate Court after taking on record those additional documents, granted decree in favour of the plaintiffs without giving opportunity to the defendants to lead evidence in rebuttal thereof, which is

impermissible in law, therefore, the impugned judgment and decree passed by the first appellate Court deserves to be quashed.

9. In view of above, the impugned judgment and decree passed by the first appellate Court is hereby set aside. The matter is remitted to the first appellate Court to decide the first appeal afresh in accordance with law after giving an opportunity to the appellants/defendants to lead evidence in rebuttal of the additional documents filed by the plaintiffs alongwith application under Order 41 Rule 27 of the CPC. The First Appellate Court is directed to decide the appeal afresh expeditiously preferably within a period of three months from the date of receipt of certified copy of this order as the first appeal was filed before the first appellate Court way back on 18.9.1998.

10. 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.

11. Parties are directed to appear before the first appellate Court on 15th April, 2019.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

