

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**M.A. No. 79 of 2015**

1. Amira S/o Mohar Sai Aged About 45 Years R/o Village Chikni, Tahsil Pratappur, District Surajpur Chhattisgarh.
2. Amir Sai S/o Mohar Sai Aged About 40 Years R/o Village Chikni, Tahsil Pratappur, District Surajpur Chhattisgarh.
3. Ravishankar S/o Mohar Sai Aged About 30 Years R/o Village Chikni, Tahsil Pratappur, District Surajpur Chhattisgarh.
4. Rameshshar S/o Shankar Aged About 45 Years R/o Village Parmeshwarpur, Tahsil Pratappur, District Surajpur Chhattisgarh.
5. Bhikhram S/o Sahdev Aged About 50 Years R/o Village Parmeshwarpur, Tahsil Pratappur, District Surajpur Chhattisgarh.

---- Appellants**Versus**

1. Chamru S/o Jhalka Aged About 60 Years R/o Village Hariharpur, P.S. And Tahsil Pratappur, District Surajpur Chhattisgarh.
2. State Of Chhattisgarh Through The Collector, District Surajpur Chhattisgarh.

---- Respondents

For Appellants:	Shri Ashok Kumar Shukla, Advocate.
For Respondent No. 1:	Ms. Priyanka Mehta, Advocate.
For State/Respondent No. 2:	Ms. Neha Shukla, Panel Lawyer.

Single Bench: Hon'ble Shri Sanjay Agrawal, J**Order On Board****27.06.2019**

1. This Miscellaneous Appeal has been preferred by the Defendants under Order 43 Rule 1(u) of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') questioning the legality and propriety of the judgment dated 25.02.2015 passed by the Additional District Judge, Pratappur, District Surajpur in Civil Appeal No.02-A/2014, by which, the lower appellate Court while reversing the finding of the trial Court passed on 23.01.2014 in Civil Suit No.80-A/2011, has remanded the matter while framing certain issues.

2. Shri Ashok Kumar Shukla, learned counsel for the Appellants submits that the judgment under appeal as passed by the lower appellate Court while reversing the judgment and decree of the trial Court is apparently contrary to law. He submits further that the trial Court has decided the suit on all the issues, therefore, in absence of finding regarding insufficiency of the evidence, the Court below ought not to have remanded the matter and instead ought to have exercised its powers provided under Order 41 Rule 24 of CPC. Having failed so, the Court below has committed an illegality in remanding the matter merely on the ground that the trial Court has not considered the evidence in its proper perspective. In support, he placed his reliance upon the decision rendered in the matter of **Zarif Ahmad (Dead) through Legal Representatives and another Vs. Mohd. Farooq** reported in **(2015) 13 SCC 673**.

3. On the other hand, Ms. Priyanka Mehta, learned counsel for Respondent No. 1 while supporting the judgment impugned submits that while remanding the matter, lower appellate Court has not committed any illegality as certain essential issues were neither framed nor evidence was properly considered by the trial Court. She placed her reliance upon the decision rendered in the matter of **J. Balaji Singh Vs. Diwakar Cole and others** reported in **(2017) 14 SCC 207**.

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

5. A suit for declaration of title and injunction has been made by the Plaintiff Chamru in respect of the property described in plaint Schedule 'A', alleging *inter alia* that after the death of his maternal grandfather (Nana) Dheersai, it was inherited by his mother Bifiya Bai and maternal uncle

(Mama) Amarsai. According to the Plaintiff, the Defendants had obtained the registered deed of Will from his maternal uncle on 16.11.1999 which was subsequently cancelled by him on 06.12.1999 and thereafter executed a registered deed of Will in his favour on 30.07.2001 and based upon which, he acquired valid right, title and interest upon the suit land. It is pleaded further in the plaint that when he approached the revenue authorities for obtaining the revenue papers mutated in his name, an objection was raised by the Defendants based upon a forged registered deed of Will dated 09.01.2002, purported to have been executed by said Amarsai, in their favour and trying to dispossess him. As such, the Plaintiff has been constrained to file the suit in the instant nature.

6. While disputing the execution, attestation and validity of the alleged registered deed of Will dated 30.07.2001, it is pleaded by the Defendants that while cancelling the same, the suit property has been bequeathed by said Amarsai in their favour on 09.01.2002. It is pleaded further that Moharsai (Defendant No.4), the father of Defendants No. 1 to 3, was the nephew of said Amarsai and that by giving incorrect pedigree of erstwhile owner Dheersai, the Plaintiff is trying to set up his claim upon the suit land based upon the alleged registered deed of Will dated 30.07.2001, which has already been cancelled by said Amarsai by executing a registered deed of Will on 09.01.2002. The plaintiff's claim is, therefore, liable to be dismissed.

7. After considering the evidence led by the parties, the trial Court while upholding the validity of the registered deed of Will dated 09.01.2002 (Ex.D.1) executed in favour of Defendants No. 1 to 3 arrived at a conclusion that the Plaintiff is neither the owner of the suit property nor

entitled to the relief of injunction as claimed by him. As a consequence, the Plaintiff's claim has been dismissed by the trial Court vide its judgment and decree dated 23.01.2014.

8. The aforesaid finding of the trial Court is reversed by the lower appellate Court in an appeal preferred by the Plaintiff while exercising the power enumerated under Order 41 Rule 23-A of CPC and remanded the matter by framing certain issues. It has been observed by the lower appellate Court that the evidence adduced by the parties has not been considered properly nor proper issues have been framed. However, from perusal of the evidence adduced by the parties coupled with the documentary evidence, it is evident that both the parties have not only produced the attesting witnesses of their respective Wills but also led their evidence extensively which lead to an irresistible conclusion that sufficient evidence has been led by the parties. Besides, while remanding the matter, it has not been observed by the lower appellate Court that the evidence led by the parties is insufficient. What is, therefore, reflected from a bare perusal of the order impugned that the matter has been remanded merely on the ground that the evidence led by the parties was not discussed properly by the trial Court. However, in absence of recording such a finding, the Court below should have exercised its power as required under Rule 24 Order 41 of CPC, which reads as under:-

“24. Where evidence on record sufficient, Appellate Court may determine case finally. -
Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has

proceeded wholly upon some ground other than that on which the Appellate Court proceeds.”

9. By virtue of the aforesaid provision, it is, thus, clear that if evidence adduced by the parties is sufficient to enable the appellate Court to pronounce the judgment, the appellate Court may after re-settling the issues, if required to be framed necessarily, decide the suit finally. The rule, thus, enjoins on an appellate Court to determine the case finally where the evidence on record is sufficient for enabling it to pronounce a judgment and in the event of sufficiency of the evidence, the matter is required to be decided under this provision else the entire object in enacting this provision would be defeated.

10. In the case in hand, in order to establish the execution of the registered deed of Will dated 30.07.2001 (Ex.P.19), the Plaintiff has produced its attesting witness Roopsai (PW-2) along with others, while the Defendants have also produced their evidence including the attesting witnesses of the Will dated 09.01.2002 (Ex.D.1). It is, thus, evident from the record that both the parties have adduced their evidence sufficiently and the Court below while remanding the matter has, therefore, not recorded a finding that the evidence adduced by the parties is not sufficient. In absence of recording such a finding, the Court below instead of remanding the matter should have exercised its power as required under the aforesaid provision. Having failed so, the appellate Court has committed an illegality in remanding the matter merely on the ground that the evidence adduced by the parties was not considered in its proper manner by the trial Court. The entire approach of the appellate Court, thus, vitiates its finding and cannot be held to be sustainable in the eye of law.

11. At this juncture, the principles laid down by the Supreme Court in the matter of ***Zarif Ahmad (Dead) through Legal Representatives and another Vs. Mohd. Farooq*** reported in (2015) 13 SCC 673 are to be seen where at paragraph 13 it has been held as under:-

“13. No doubt, Section 107 CPC empowers the appellate court to remand a case, but it simultaneously empowers the appellate court to take additional evidence or to require such evidence to be taken. Rule 24 Order 41 CPC provides that where evidence on record is sufficient, the appellate court may determine the case finally. It is not a healthy practice to remand a case to the trial court unless it is necessary to do so as it makes the parties to wait for the final decision of a case for the period which is avoidable. Only in rare situations, should a case be remanded e.g. when the trial court has disposed of a suit on a preliminary issue without recording evidence and giving its decision on the rest of the issues, but it is not so in the present case.”

12. Now, in so far as the contention of Ms. Mehta based upon the principles laid down in the matter of ***J. Balaji Singh Vs. Diwakar Cole and others*** reported in (2017) 14 SCC 207 is, however, noted to be rejected as the facts involved in the said matter was entirely distinguishable from the facts of the present case. That is the case where an application seeking production of the additional documentary evidence under Order 41 Rule 27 of CPC was allowed and, therefore, in that factual scenario, it was held that the appellate Court cannot decide the appeal on merits. However, in the instant case, both the parties have adduced their evidence and it was not the case where the evidence adduced by them is insufficient. In such eventuality, the Court below should have exercised its power as provided under Order 41 Rule 24 of CPC instead of remanding

the matter to the trial Court by framing certain issues which even not required to be framed as controversy involved between the parties are in relation to the execution of Wills (Ex.P.19 & Ex.D.1). According to the pleadings of the parties, it is evident that the Plaintiff is trying to set up his right on the strength of the registered deed of Will dated 30.07.2001 (Ex.P.19) whereas its execution was disputed by the Defendants based upon the registered deed of Will dated 09.01.2002 (Ex.D.1). As such, the issues so framed by the lower appellate Court while remanding the matter are not required to be framed as the same were covered under the issues framed by the trial Court.

13. In view of the foregoing discussions, the appeal is allowed. The impugned judgment dated 25.02.2015 passed by the Additional District Judge, Pratappur, District Surajpur in Civil Appeal No.02-A/2014 is hereby set aside and the matter is accordingly remitted to the concerned appellate Court who shall restore the appeal to its file and decide the same on merits in accordance with law. The parties are hereby directed to remain present before the Additional District Judge/concerned appellate Court, Pratappur District Surajpur on 19.08.2019.

14. Registry is hereby directed to transmit the entire record forthwith to the concerned Court. No order as to costs.

Sd/-

(Sanjay Agrawal)
JUDGE