NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

M.A. No. 13 of 2017

1. Abdul Azim Bhondu Director Of Raza Construction Resident Of K.K.Road, Maudhapara, P.S. Maudhapara, Raipur, Chhattisgarh.
2. M/s Raja Construction Through Mohammad Gulam Ashraf S/o Haji Abdul Azim Bhondu, R/o Maudhapara, Raipur, Chhattisgarh .....Defendant No.1 To 2

---- Appellants

Versus

1. Gulabchand Chandani S/o Late Kishanchand Chandani, Aged About 61 Years R/o Nawapara Rajim, P.S. Nawapara, District Raipur, Chhattisgarh .....Plaintiff.
2. Kavita Grih Nirman Sahkari Samiti, Regd. No. 78/81-82, Through Manager/ President, Office At Siddharth Chowk, Tikrapara, District Raipur, Chhattisgarh .....Defendant No.3.

---- Respondents

For Appellants:	Shri Ankur Agrawal, Advocate.
For Respondent No. 1:	Shri Devarshi Thakur, Advocate along with Shri J. K. Gupta, Advocate.
For Respondent No. 2:	Shri Atanu Ghosh, Advocate.

Single Bench:Hon'ble Shri Sanjay Agrawal, J

Order On Board

01.05.2019

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 propriety of the judgment dated 22.12.2016 passed by the First Additional District Judge, Raipur in Civil Appeal No.43-A/14 by which, the lower appellate Court while reversing the judgment and decree dated 25.02.2014 passed by the 8th Civil Judge, Class-II, Raipur in Civil Suit No.23-A/2010 has remanded the matter.

2. Briefly stated the facts of the case are that the Plaintiff-Gulabchand Chandani instituted a suit claiming declaration of title and injunction by

submitting *inter-alia* that he purchased the suit property by virtue of the registered deed of sale dated 17.06.1992 from Kavita Grih Nirman Sahkari Samiti, Defendant No. 3.

3. The said claim was contested by the Defendants while questioning the ownership of the said Samiti and pleaded that at the relevant time, the said Samiti was not entitled to execute the registered deed of sale as such in favour of the Plaintiff. It is pleaded further that the property in question was, in fact, purchased by Defendant No. 2-Ms. Raja Construction from son of erstwhile owner, Punau under the registered deed of sale on 19.04.2002 and, therefore, the Plaintiff's suit is liable to be dismissed.

4. After considering the evidence led by the parties and by considering the issue No. 2, the trial Court, by its judgment and decree dated 25.02.2014 has arrived at a conclusion that the Plaintiff has failed to establish the fact that he purchased the property from the said Samiti in the year 1992. In consequence, the trial Court has dismissed the suit.

5. Being aggrieved, the Plaintiff has preferred an appeal under Section 96 of CPC and during the pendency of it, an application was made under Order 41 Rule 27 of CPC for production of the additional documentary evidence, like the registered deed of sale which was executed on 25.11.1982 by erstwhile owner, namely, Punau in favour of the said Samiti. The said application was contested by the Defendant. After considering the said application, it was observed by the appellate Court that the alleged document is necessary for proper adjudication of the matter by taking recourse to clause (b) of sub-rule (1) of Rule 27 of Order 41 of CPC and accordingly the said application filed on 08.08.2016 under Order 41 Rule 27 of CPC has been allowed and the matter has been remanded thereafter

to the trial Court for its fresh decision.

6. Being aggrieved, the Defendants have preferred this appeal. Shri Ankur Agrawal, learned counsel for the Appellants submits that once the application has been allowed under Order 41 Rule 27 of CPC, the lower appellate Court ought to have adopted the mode prescribed under Rule 28 of Order 41 of CPC. Without considering the said provision in its strict sense, the lower appellate Court has committed an illegality in remanding the matter as such.

7. On the other hand, learned counsel for Respondent No. 1 while supporting the judgment impugned, submits that the said document which was executed in the year 1982 was the material document, and therefore, the lower appellate Court has rightly allowed the said application by permitting the Plaintiff for production of the said document as additional documentary evidence on record. The lower appellate Court has, thus, not committed any illegality in remanding the matter as such.

8. I have heard learned Counsel for the parties and perused the entire relevant papers annexed with this appeal carefully.

9. A suit for declaration of title and injunction was made by the Plaintiff on the premises that he purchased the property on 17.06.1992 by virtue of the registered deed of sale, purported to have been executed by Kavita Grih Nirman Sahkari Samiti (Defendant No. 3) in his favour and based upon it, the suit has been filed. The trial Court by its judgment and decree dated 25.02.2014 has dismissed the suit on finding that the Plaintiff has failed to establish the fact that he purchased the suit property from said Samiti in the year 1992. The judgment and decree as passed by the trial Court was questioned by the Plaintiff before the lower appellate Court and

during its pendency, an application was made under Order 41 Rule 27 of CPC seeking production of additional documentary evidence, like the registered deed of sale dated 25.11.1982 which was executed by erstwhile owner Punau in favaour of Plaintiff's vendor, i.e. the Kavita Grih Nirman Sahkari Samiti. After considering the said application, it was allowed and the matter was remanded to the trial Court for its decision afresh.

10. Perusal of the judgment would, however, show that the appellate Court merely by allowing the said application filed under Order 41 Rule 27 of CPC has remanded the matter while setting aside the entire findings of the trial Court in utter ignorance of the mode prescribed under Rule 28 of Order 41 of CPC. The said provision is relevant for the purpose is re-produced herein 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 lower appellate Court once allowed the application filed by the Plaintiff under Order 41 Rule 27 of CPC should have either recorded the statements of the parties or directed the trial Court to record the statements 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 followed under such circumstances. Having failed so, the appellate Court has

committed an illegality in remanding the matter to the trial Court in deciding the matter afresh.

12. In view of the forgoing discussion, the appeal is allowed and I hereby set aside the impugned judgment 22.12.2016 passed by the First Additional District Judge, Raipur in Civil Appeal No.43-A/14. The appeal is directed to be restored to its original number to the file of the concerned appellate Court. The appellate Court shall proceed in accordance with the provisions prescribed under Rule 28 of Order 41 CPC by directing the trial Court and/or the subordinate Court to record the evidence based upon the said additional evidence after affording sufficient opportunity of hearing to the parties. Such direction be issued by the appellate Court and both the parties are hereby directed to remain present before the concerned appellate Court on 2nd July, 2019.

13. Registry is directed to transmit the copy of this order to the concerned appellate Court forthwith for doing the needful in the matter. No order as to costs.

Sd/-

(Sanjay Agrawal)
JUDGE

Nikita