

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****M.A No.05 of 2015**

1. Sukhnandan S/o Sunau Satnami Aged About 58 Years R/o Village- Shardha, Tah. Bilha, Distt. Bilaspur C.G., Chhattisgarh
2. Savitri Bai D/o Late Shanti Lal Satnami Aged About 37 Years R/o Village- Khapri, Tah. Lormi, Distt. Bilaspur Now Distt. Mungeli C.G., District : Mungeli, Chhattisgarh

---- Appellants**Versus**

1. Ku.Rajni S/o Late Shanti Lal Aged About 20 Years R/o Village- Bhaneshar Mission, P.S. And Tajh. Masturi, Distt. Bilaspur C.G., Chhattisgarh
2. Savitri Bai W/o Late Shanti Lal Aged About 52 Years R/o Village- Bhaneshar Mission, P.S. And Tajh. Masturi, Distt. Bilaspur C.G., District : Bilaspur, Chhattisgarh
3. Saroj Bai D/o Late Shanti Lal Aged About 19 Years R/o Village- Bhaneshar Mission, P.S. And Tajh. Masturi, Distt. Bilaspur C.G., District : Bilaspur, Chhattisgarh
4. Yogesh @ Vagesh S/o Late Shanti Lal Aged About 19 Years R/o Village- Bhaneshar Mission, P.S. And Tajh. Masturi, Distt. Bilaspur C.G., District : Bilaspur, Chhattisgarh
5. Ravi S/o Late Shanti Lal Aged About 11 Years Minor, Thru- Mother Smt. Savitri Bai, R/o Village- Bhaneshar Mission, P.S. And Tajh. Masturi, Distt. Bilaspur C.G., District : Bilaspur, Chhattisgarh
6. State Of Chhattisgarh S/o Thru- The Collector, Bilaspur C.G., District : Bilaspur, Chhattisgarh

-----Respondents

For Appellants:	Shri Ravindra Agrawal Advocate.
For Respondents No.1 to 5:	None, though served
For Respondent No.6/State:	Ms. Neha Shukla, Panel Lawyer.

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

15.03.2019

1. This Miscellaneous Appeal has been preferred by the Plaintiffs under Order 43 Rule 1(u) of the Code of Civil Procedure, 1908 (for short 'the CPC') questioning the propriety of the order dated 28.11.2014 passed by the 5th Additional District Judge, Bilaspur in Civil Appeal No.57-A/2013

by which, the lower appellate Court, while exercising the powers under Order 41 Rule 23-A, read with Order 41 Rule 25 CPC, has remanded the matter to the concerned trial Court for its decision afresh.

2. Briefly stated, the facts of the case are that the Plaintiffs instituted a suit claiming declaration of title and injunction by submitting *inter alia* that after the death of Shanti Lal, they have inherited the property in question described in Plaint Paragraph-1. It is pleaded that the Defendants, without any authority, have approached the revenue authorities for obtaining the revenue papers mutated in their names and after obtaining the same, started interfering in their peaceful possession. The Plaintiffs have, therefore, been constrained to file the suit in the instant nature.

3. The aforesaid claim was contested by the Defendants by stating that the Plaintiffs are not the heirs of said Shanti Lal and therefore, they are not entitled to claim as such.

4. After considering the evidence adduced by the parties, the trial Court has come to the conclusion that the Plaintiffs are the owners of the property in question described in Plaint Paragraph-1 and held further that the Defendants are not the heirs of Shanti Lal. As a consequence of it, the trial Court has decreed the suit in its entirety.

5. The aforesaid judgment and decree has been questioned by the Defendants in an Appeal. During the pendency of the Appeal, the Defendants have moved an application under Order 41 Rule 27 CPC seeking production of certain documentary evidence on record. The said application was contested by the Plaintiffs. It was, however, allowed by the lower appellate Court and thereafter, the matter was remanded to the concerned trial Court upon setting aside its findings for a decision afresh in

all the issues while exercising the power under Order 41 Rule 23-A r/w Order 41 Rule 25 CPC. This is the order, which has been questioned by way of this Appeal.

6. Shri Ravindra Agrawal, learned Counsel for the Appellants submits that the lower appellate Court has passed the judgment under Appeal even without observing the conditions as required under Rule 23-A of Order 41 CPC and thus, has committed an illegality in remanding the matter by directing the trial Court to decide the suit afresh. According to him, once an application has been allowed under Order 41 Rule 27 CPC, the lower appellate Court ought to have adopted the mode prescribed under Rule 28 of Order 41 CPC. Without considering the said provision in its strict sense, the lower appellate Court has erred in remanding the matter as such. In support, Shri Agrawal has placed his reliance upon the decision rendered in the matter of **Anil Fulara vs Devcharan** and **Ghanshyam Agrawal & Another vs. Devcharan** reported in **2014(2) C.G.L.J 2**

7. I have heard learned Counsel for the Appellants and perused the entire record carefully.

8. A suit for declaration of title and injunction was made by the Plaintiffs and the trial Court, after considering the evidence led by the parties, has considered all the issues and thereafter, decreed the suit. The finding of the trial Court has, however, been reversed by the lower appellate Court in an Appeal preferred by the Defendants merely by allowing their application filed under Order 41 Rule 27 CPC even without following the mode prescribed under Rule 28 of Order 41 CPC and remanded the matter in exercise of the powers enumerated under Order 41 Rule 23-A read with Order 41 Rule 25 CPC.

9. Order 41 Rule 23-A CPC is relevant for the purpose, which reads as under:-

"Remand in other Cases.- Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23."

10. The aforesaid provision has been inserted in the CPC by Act 104 of 1976 which came into force from 01.02.1997. According to the said provision, the appellate Court may remand the suit to the trial Court even though the said suit has been disposed of on merits. It provides that where the trial Court has disposed of the suit on merits and a decree is reversed in Appeal and the appellate Court considers that re-trial is necessary, the appellate Court may remand the suit to the trial Court. Thus, on twin conditions being satisfied, the appellate Court can exercise the same power of remand under Order 41 Rule 23-A CPC. However, in the instant case, the lower appellate Court even without considering that re-trial is necessary, has remanded the matter. At this juncture, the principles laid down in *Anil Fulara vs Devcharan and Ghanshyam Agrawal & Another vs. Devcharan* (supra) as relied upon by Shri Agrawal are to be noted where at paragraph-21, it has been observed as under:-

"21. The matter does not stop here. The First Appellate Court neither considered nor recorded a finding that retrial is necessary which is one of the twin conditions for exercise of power under Order 41 Rule 23-A of CPC. Thus, the impugned judgment and decree was passed without reversing the decree of trial Court, as none of the issues raised and decided by the trial Court has been reversed in appeal by the First Appellate Court and without holding retrial is necessary, the First Appellate Court

has committed serious illegality in directing the wholesale and open remand in exercise of power under Order 41 Rule 23-A of CPC. Thus, the first substantial question of law is answered accordingly.”

11. By applying the aforesaid principles to the case in hand, the entire approach of the lower appellate Court remanding the matter to the concerned trial Court for its decision afresh, cannot be held to be sustainable in the eye of law.

12. Now, pertinently to be noted here further that the appellate Court merely by allowing the application filed by the Defendants under Order 41 Rule 27 CPC, has set aside the entire finding of the trial Court even without assigning any reasons thereof and that by ignoring the mandatory provisions prescribed under Rule 28 of Order 41 CPC. In such circumstances, the judgment impugned as passed by the lower appellate Court cannot be held to be sustainable.

13. Order 41 Rule 28 CPC, which prescribes mode of taking additional evidence reads as under:-

"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.”

14. Based upon the aforesaid provisions, the appellate Court once allowed the application filed by the Defendants under Order 41 Rule 27 CPC 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 followed under such circumstances. Having failed so, the appellate Court has, thus, committed an illegality in remanding the matter to the trial Court for deciding the matter afresh.

15. In view of the foregoing discussions, I hereby set aside the impugned judgment dated 28.11.2014 passed by 5th Additional District Judge, Bilaspur in Civil Appeal No.57-A/2013. 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 providing sufficient opportunity of hearing to the parties. Such directions be issued by the appellate Court and Appellants/Plaintiffs are hereby directed to remain present before the concerned appellate Court on 22.04.2019. The concerned appellate Court is directed further to issue fresh notices to the Defendants (Respondents herein) and shall decide the Appeal as soon as possible. No order as to costs.

16. Registry is directed to transmit the entire record forthwith to the 5th Additional District Judge, Bilaspur or the concerned appellate Court.

Sd/-
(Sanjay Agrawal)
JUDGE