

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.130 of 2009

1. Ali Asgar, aged about 50 years,
2. Jafar Ali, aged about 30 years,
3. Mohd. Latif, aged about 41 years,
4. Sabir Hussain, aged about 35 years,

All sons of Takdeer Hussain, R/o Pendra, Tahsil Pendraroad, District Bilaspur (C.G.)

(Plaintiffs)
---- Appellants

Versus

Abdul Salim (Dead) Through Legal Representatives

(Defendant)

1. (a) Smt. Kuraisha Bano, Wd/o Late Abdul Saleem, aged about 52 years,
- (b) Mohd. Saiff, S/o Late Abdul Saleem, aged about 28 years,
- (c) Sadima, D/o Late Abdul Saleem, aged about 23 years,

All R/o Village Pendra, Tahsil Pendra, Masjid Mohalla, District Bilaspur (C.G.)

---- Respondents

For Appellants: Mr. Bhaskar Payashi, Advocate.

For Respondents: Mr. Sunil Sahu and Mr. Wasim Miyan, Advocates.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

05/03/2020

1. The substantial question of law involved, formulated and to be answered in this plaintiffs' / appellants' herein second appeal is as under: -

"Whether the first appellate Court was justified in setting aside the judgment and decree of the trial Court by invoking Order 41 Rule 33 of the CPC by recording a finding which

is totally perverse to the record holding that Abdul Hakeem was not empowered to execute the Will in favour of his wife Sayra Bai, particularly in view of the fact that the said Will was not in question and even such a plea was not raised before either of the two Courts below?"

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

2. The plaintiffs filed suit for declaration of title and permanent injunction over the suit land bearing Khasra No.2312/1, area 1.00 acre and Khasra No.2312/2, area 0.30 acre, total area ad-measuring 1.30 acres situated at Village Pendra, Tahsil Pendra Road, District Bilaspur, stating inter alia that the suit land was purchased by them from one Sayra Bi, Wd/o Abdul Hakeem, vide registered sale deed dated 18-5-1990 (Ex.P-7), as Abdul Hakeem had executed a Will in favour of his wife Sayra Bi. But during the pendency of suit, the plaintiffs were dispossessed from the suit premises and therefore the plaint was amended seeking relief of possession also.
3. The defendant denied the claim of the plaintiffs stating inter alia that he is the adopted son of Abdul Hakeem and Sayra Bi has not executed sale deed in favour of the plaintiffs and no sale consideration has been passed for transfer of land and the plaintiffs were never in possession of the suit property, as such, the suit deserves to be dismissed.
4. The trial Court framed as many as six issues to decide the lis between the parties including issue as to whether the plaintiffs have purchased the suit land from Sayra Bi by registered sale deed dated 18-5-1990 (Ex.P-7) and they are title-holders of the suit land?
5. The trial Court decreed the suit by answering the issues in favour of the

plaintiffs holding that the plaintiffs have purchased the land from Sayra Bi and came into possession of the suit land and since they were dispossessed from the suit premises forcefully, therefore, they are entitled for possession also. Feeling aggrieved against the judgment & decree of the trial Court, the defendant preferred first appeal before the first appellate Court and assailed the finding that the plaintiffs have purchased the suit land from Sayra Bi by registered sale deed. The first appellate Court though agreed with the finding of the trial Court that Sayra Bi had executed sale deed in favour of the plaintiffs vide Ex.P-7 and confirmed that finding holding that the plaintiffs are title-holders, yet exercising the power under Order 41 Rule 33 of the CPC reversed the judgment & decree of the trial Court holding that the Will executed by Abdul Hakeem in favour of Sayra Bi was in violation of paragraph 118 of the Mulla's Principles of Mahomedan Law, 20th Edition, and partly reversed the judgment & decree of the trial Court resulting into filing of second appeal by the plaintiffs in which substantial question of law has been framed which has been set-out in the opening paragraph of this judgment.

6. Mr. Bhaskar Payashi, learned counsel appearing for the appellants herein / plaintiffs, would submit that the first appellate Court after having affirmed the finding of the trial Court that the plaintiffs are purchasers of the suit land from Sayra Bi by registered sale deed Ex.P-7 and thereby became title-holders of the suit land and affirmed that finding on issue No.1 could not have ventured into invoking Order 41 Rule 33 of the CPC and could not have reversed the judgment & decree of the trial Court, as it is the case where the first appellate Court has

even affirmed the finding of title in favour of the plaintiffs recorded by the trial Court. Therefore, Order 41 Rule 33 of the CPC could not have been invoked into to decide an issue which was never raised by the defendant either before the trial Court or before the first appellate Court either in pleading or in argument and it is not the case where in order to avoid the contradictory decree invocation of Order 41 Rule 33 of the CPC was necessary. As such, the first appellate Court has acted absolutely without jurisdiction in granting the appeal partly after having affirmed the finding on issue No.1.

7. Mr. Sunil Sahu, learned counsel appearing for the respondents herein / legal representatives of the original defendant, would support the judgment & decree of the first appellate Court and submit that the said Will executed by Abdul Hakeem in favour of his wife Sayra Bi was clearly contrary to paragraph 118 of the Mulla's Principles of Mahomedan Law, 20th Edition, as such, Order 41 Rule 33 CPC has rightly been invoked by the first appellate Court and this appeal deserves to be dismissed by answering the substantial question of law in favour of the defendants.
8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.
9. In order to appreciate the plea raised at the Bar, it would be appropriate to notice the provision of Order 41 Rule 33 of the CPC which reads as under:-

“33. Power of Court of Appeal.—The Appellate Court shall have power to pass any decree and make any order which

ought to have been passed or make and to pass or made such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under Section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has *omitted* or refused to make such order.

10. A close, careful and critical reading of the above-stated provision would show that the object of Order 41 Rule 33 of the CPC is to avoid contradictory and inconsistent decisions on the same questions in the same suit. This Rule does not confer an unrestricted right to re-open decrees which have become final and it should be exercised by the appellate Court in exceptional and rare cases to do complete justice between the parties.
11. Way back in the year 1982, in the matter of Choudhary Sahu (Dead) by LRs. v. State of Bihar¹, their Lordships of the Supreme Court have held that this rule (Order 41 Rule 33 of the CPC) is widely expressed and it must be applied with great caution. The object of this Rule is to empower the appellate court to do complete justice between the parties. Under this Rule, the court has power to make a proper decree notwithstanding that the appeal is as to part only of the decree and such power may be exercised in favour of all or any of the parties even though they may not have filed an appeal or objection. It was observed

¹ (1982) 1 SCC 232

in paragraphs 12 and 13 of the report as under:-

“12. The object of this Rule is to avoid contradictory and inconsistent decisions on the same questions in the same suit. As the power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or cross-objection, it must be exercised with care and caution. The Rule does not confer an unrestricted right to re-open decrees which have become final merely because the appellate court does not agree with the opinion of the court appealed from.

13. Ordinarily, the power conferred by this Rule will be confined to those cases where as a result of interference in favour of the appellant further interference with the decree of the lower court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. While exercising the power under this Rule the court should not lose sight of the other provisions of the Code itself nor the provisions of other laws, viz., the law of limitation or the law of court fees etc.”

Their Lordships of the Supreme Court have further held that the findings recorded by the lower court in favour of the appellants cannot be interfered with by the appellate court in absence of any appeal filed by the respondents and held in paragraph 7 as under:-

“7. The first part of this Rule authorises the respondent to support the decree not only on the grounds decided in his favour but also on any of the grounds decided against him in the court below. The first part thus authorises the respondent only to support the decree. It does not authorise him to challenge the decree. If he wants to challenge the decree, he has to take recourse to the second part, that is, he has to file a cross-objection if he has not already filed an appeal against the decree. Admittedly, the State of Bihar had neither filed any appeal nor cross-objection. Obviously, therefore, on the strength of the first part of sub-rule (1) of Rule 22 of Order 41 the State of Bihar could only support the decree not only on the grounds decided in its favour but also on the grounds decided against it. The Commissioner however, has set aside the finding in favour of the appellants on the strength of Order 41, Rule 22(1). In our opinion this he could not do.”

12. Likewise, similar is the proposition laid-down by their Lordships of the Supreme Court in the matter of Mahant Dhangir and another v. Madan Mohan and others². The Supreme Court has considered the words "as the case may require" used in Rule 33 of Order 41. It have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice. It is true that the power of the appellate court under Rule 33 is discretionary, but it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The court should not refuse to exercise that discretion on mere technicalities.

13. In the matter of State of Punjab and others v. Bakshish Singh³, their Lordships of the Supreme Court have held that power under Order 41 Rule 33 of the CPC has to be exercised cautiously and in rare cases where a totally uncalled for decree/order has been passed by lower court. It was observed in paragraphs 8 and 9 of the report as under:-

"8. This provision gives very wide power to the appellate court to do complete justice between the parties and enables it to pass such decree or order as ought to have been passed or as the nature of the case may be require notwithstanding that the party in whose favour the power is sought to be exercised has not filed any appeal or cross-objections.

9. The discretion, however, has to be exercised with care and caution and that too in rare cases where there have been inconsistent findings and an order or decree has been passed which is wholly uncalled for in the circumstances of the case. The appellate court cannot, in the garb of exercising power under Order XLI Rule 33, enlarge the scope of the appeal. Whether this power would be exercised or not would depend upon the nature and facts of each case."

14. Likewise, in the matter of K. Muthuswami Gounder v. N. Palaniappa

² 1987 (Supp) SCC 528

³ (1998) 8 SCC 222

Gounder⁴, their Lordships of the Supreme Court following the judgment of Mahant Dhangir (supra) have held that in exceptional cases Order 41 Rule 33 of the CPC enables the appellate court to pass any decree or order which ought to have been made and to make such further order or decree as the case may be in favour of all or any of the parties even though (i) the appeal is as to part only of the decree; and (ii) such party or parties may not have filed an appeal.

15. Similarly, in the matter of Y. Nagaraj v. Jalajakshi and others⁵ their Lordships of the Supreme Court held as under: -

“27. We shall now deal with the appellant’s challenge to the decree passed in favour of Respondent 1. It is not in dispute that Respondent 1 had not challenged the findings recorded by the trial court on various issues framed by it. She also did not file cross-objections in the appeal preferred by the appellant. Though, it is possible to take the view that even in the absence of an appeal having been preferred by Respondent 1, the learned Single Judge could have exercised power under Order 41 Rule 33 CPC, as interpreted by this Court in *Nirmala Bala Ghose v. Balai Chand Ghose*⁶, *Giani Ram v. Ramjilal*⁷ and *Banarsi v. Ram Phal*¹, after having carefully examined the entire record, we are convinced that the impugned judgment cannot be sustained by relying upon Order 41 Rule 33.”

16. Thereafter, again in the matter of Lakshmanan and others v. G.

Ayyasamy⁸, similar proposition has been held by the Supreme Court and it has been observed as under: -

“8. In support of the same proposition of law, the learned counsel for the appellants placed reliance upon another judgment of this Court in *Pralhad v. State of Maharashtra*⁹, wherein this Court after interpretation of Order 41 Rule 33

4 (1998) 7 SCC 327

5 (2012) 2 SCC 161

6 AIR 1965 SC 1874

7 (1969) 1 SCC 833

8 (2016) 13 SCC 165

9 (2010) 10 SCC 458

CPC has clearly held that in the absence of an independent appeal or cross-objection being filed by the aggrieved party, the relief which was denied by the courts below cannot be granted in the second appeal filed by the appellant.”

17. In the matter of State of Sikkim v. The Jammu and Kashmir Bank Ltd.,

Delhi and others¹⁰, the Sikkim High Court has held that in order to invoke Order 41 Rule 33 of the CPC, the parties before the lower Court should be there before the appellate Court and the question raised must properly arise out of judgment of the lower Court and if these two requirements are there, the appellate Court would consider any objection raised to any part of the judgment or decree of the lower Court and it may be urged by any party to the appeal.

18. Reverting to the facts of the present case in the light of the aforesaid principles of law qua Order 41 Rule 33 of the CPC enunciated by their Lordships of the Supreme Court, it is quite vivid that the trial Court decreed the suit of the plaintiffs by adjudicating issue No.1 holding that the plaintiffs are title-holders of the suit land after having purchased the same by registered sale deed dated 18-5-1990 (Ex.P-7) from Sayra Bi and appeal was preferred by the defendant in which the first appellate Court affirmed the finding on issue No.1 holding that the plaintiffs have purchased the suit land by Ex.P-7 and thereby became title-holders of the suit land, but thereafter, the first appellate Court exercising the power under Order 41 Rule 33 of the CPC, took up the matter further and held that the Will executed by Abdul Hakeem in favour of his wife Sayra Bi is contrary to the provisions contained in paragraph 118 of the Mulla’s Principles of Mahomedan Law, 20th Edition, and thereafter, partly reversed the decree of the trial Court.

19. The two material facts which the first appellate Court failed to notice while exercising power under Order 41 Rule 33 of the CPC are firstly, the defendant had already preferred appeal and in the said appeal the first appellate Court has affirmed the finding of the trial Court on the issues of title and affirmed the title of the plaintiffs and secondly, the facts regarding validity of Will was not either before the trial Court or the first appellate Court as for the reasons best known to the defendant, it was not raised before the two Courts below. However, the first appellate Court *suo motu* entered into that controversy invoking Order 41 Rule 33 of the CPC and held that the Will said to be executed by Abdul Hakeem in favour of Sayra Bi was hit by paragraph 118 of the Mulla's Principles of Mahomedan Law, 20th Edition and thereby the plaintiffs cannot claim full title over the suit land.

20. The provision contained in Order 41 Rule 33 of the CPC is never meant for entering into the factual dispute which was neither raised nor the lis is brought before the Court. It has to be exercised cautiously and with utmost circumspection only in exceptional cases to do complete justice where totally uncalled for decree or order has been passed and to avoid the contradictory and inconsistent decision on the same question in the same suit it has become imperative, it has not to be routinely invoked and exercised, if the appellate Court does not personally agree with the pleadings and stand of the parties. As such, reversal of the decree exercising the power in the garb of exercising power under Order 41 Rule 33 of the CPC enlarging the scope of appeal reversing the judgment & decree of the trial Court cannot be countenanced, it runs contrary to the provisions contained in Order 41 Rule 33 of the CPC as

well as the well settled law delineated by the Supreme Court in the judgments noticed herein-above. Therefore, this Court is unable to sustain the judgment & decree of the first appellate Court to the extent by which the provision of Order 41 Rule 33 of the CPC has been exercised and decree of the trial Court has been partly reversed. Accordingly, that part of the judgment & decree of the first appellate Court reversing the judgment & decree of the trial Court is set aside. Rest of the judgment of the first appellate Court would remain as it is, meaning thereby, judgment & decree of the trial Court is affirmed in toto by partly modifying the judgment & decree of the first appellate Court.

21. The substantial question of law is answered accordingly and the second appeal is allowed to the extent indicated herein-above. Parties shall bear their own cost(s).

22. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge