

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.150 of 2009**

Heeralal, S/o. Ranglal Sahu, Aged about 52 years,
Occupation – Agriculture, R/o. Bazarpara, Surajpur,
P.S. & Tahsil-Surajpur, District Surguja (CG)

----- **Appellant/Plaintiff**

Versus

- 1.Devdhari, S/o. Tilak, Caste-Vishwakarma, Aged about 40 years, Occupation-Labour, R/o. Village Gopalpur, P.S. & Tahsil-Surajpur, District Surguja (CG)
- 2.Bader, S/o. Tilak, Caste-Vishwakarma, Aged about 35 years, Occupation-Labour, R/o. Village Gopalpur, P.S. & Tahsil-Surajpur, District Surguja (CG)
- 3.Muniya, D/o. Tilak, W/o. Babal, Caste-Vishwakarma, Aged about 30 years, Occupation-Agriculture, R/o Village Adhina, P.S. Bhaiyathan, Tahsil Surajpur, District Surguja (CG)
- 4.Laxman, S/o. Tilak, Caste-Vishwakarma, Aged about 25 years, Occupation-Labour, R/o. Village Gopalpur, P.S. & Tahsil Surajpur, District Surguja (CG)
- 5.Duryodhan, S/o. Somarsay, Caste-Gond, Aged about 45 years, Occupation-Agriculture, R/o Village-Gopalpur, Tah. Surajpur, Distt. Surguja (CG)
- 6.Bikul, S/o. Somarsay, Caste-Gond, Aged about 55 years, Occupation-Agriculture, R/o Village-Gopalpur, Tah. Surajpur, Distt. Surguja (CG)
- 7.State of Chhattisgarh, Through the Collector, District Surguja (CG)

----- **Respondents/Defendants**

For Appellant/Plaintiff:

Mr.Ashok Kumar Shukla, Advocate

For Respondent No.1: Mr.Praveen Dhurandhar, Advocate

For Respondent No.6: Mr.Rishi Sahu, Advocate

For Respondent No.7: Mr.Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

3/3/2020

1. The substantial questions of law involved, formulated and to be answered in this second appeal preferred by the appellant/plaintiff are as under:-

"A. Whether the lower appellate Court has erred in refusing to grant the relief of restoration of possession by removing the superstructure raised by the Defendant during the pendency of the suit by observing that no relief as such was claimed by the plaintiff?

B. Whether the lower appellate Court has erred in dismissing the Appeal while exercising the power under Order 41 Rule 16(2) CPC?"

[For the sake of convenience, the parties would be referred hereinafter as per their status shown and nomenclature in the suit before the trial Court].

2. The plaintiff filed a suit for permanent injunction against the defendants. During the pendency of the suit, the plaintiff amended his plaint and also claimed that if any construction is found over the suit land unauthorizedly by the defendants, by demolishing that construction, he be given possession of the suit land. The trial Court by its judgment and decree dated 25.3.2000 restrained the defendants from interfering with possession of the plaintiff by granting decree for permanent

injunction. The plaintiff partly aggrieved against the judgment and decree of the trial Court preferred appeal stating inter-alia that prayer for demolishing construction has already been made during pendency of the suit, which has not been granted. The first appellate Court exercised the power under Order 41 Rule 16(2) of the CPC and dismissed the appeal, against which, this second appeal under Section 100 of the CPC has been filed by the appellant/plaintiff, in which substantial questions of law have been formulated by this Court, which have been set-out in the opening paragraph of this judgment.

3. Mr. Ashok Kumar Shukla, learned counsel for the appellant/plaintiff, would submit that appeal was already admitted for hearing before the first appellate court on 25.9.2000 and admission stage has already been crossed, and Order 41 Rule 16(2) of the CPC only refers to the procedure on hearing. The first appellate Court without calling and without perusing the records, straightway dismissed the appeal, which is unsustainable and bad in law.

4. On the other hand, Mr. Praveen Dhurandhar, learned counsel for respondent No.1, would support the impugned order.

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

6. Admittedly, the plaintiff's appeal was admitted for hearing on 25.9.2000 and the respondents were directed to be served with notices and ultimately respondent No.1 was represented and some of the respondents were proceeded ex-parte. The matter came up for hearing before the first appellate Court on 6.8.2008, on that day, learned first appellate Court only heard the appellant and concluded that since the plaintiff has not sought relief for demolishing unauthorized construction by amending the plaint, therefore, the appeal is not maintainable under Order 41 Rule 16(2) of the CPC.

7. Order 41 Rule 16 of the CPC provides as under:-

"16. Right to begin.-(1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply."

8. A bare perusal of the aforesaid provision would show that if the date is fixed and the Court does not dismiss the appeal at once and hear the respondent

against the appeal and the appellant shall be entitled to reply.

9. In the instant case, the first appellate Court misdirected himself in holding that the plaintiff has not claimed relief of demolition of unauthorized construction over the suit land during pendency of the suit without perusing the records, whereas relief of demolition of unauthorized construction has been asked for and without hearing the respondents, straightway dismissed the appeal under Order 41 Rule 16(2) of the CPC, which is not applicable in the present case.

10. Accordingly, the impugned order is set aside. The matter is remitted to the first appellate Court for hearing and disposal on merits in accordance with law within three months from the date of receipt of copy of this order. However, it is made clear that this Court has not expressed any opinion on merits of the case.

11. The second appeal is allowed to the extent indicated hereinabove.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-