

HIGH COURT OF CHHATTISGARH, BILASPUR**M.A. No. 102 of 2018****Reserved on 08.12.2020****Pronounced on 11.12.2020**

1. Jagatram S/o Mansay Aged About 35 Years R/o Village Nayanpur, P.S. And Tahsil Surajpur, Civil And Revenue District Surajpur Chhattisgarh.
2. Hiradhan S/o Ramsundar Aged About 28 Years Caste - Harijan R/o Village Nayanpur, P.S. And Tahsil Surajpur, Civil And Revenue District Surajpur Chhattisgarh.
3. Motilal S/o Mansay Aged About 29 Years Caste - Harijan, R/o Village Nayanpur, P.S. And Tahsil Surajpur, Civil And Revenue District Surajpur Chhattisgarh.

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1. Subaso W/o Kawalsay Aged About 47 Years Occupation - House Wife, R/o Village Nayanpur, P.S. And Tehsil - Surajpur, Civil And Revenue District Surajpur Chhattisgarh.
2. Budhani W/o Chandrika Aged About 40 Years R/o Village - Samaoli, P.S. Bhailyathan, Tehsil - Surajpur, Civil And Revenue District Surajpur Chhattisgarh.

---- Respondents

For Appellants:	Shri Surfaraj Khan, Advocate.
For Respondent No.1:	Shri Ashok Kumar Shukla along with Shri Kamlesh Sahu, Advocate.
For Respondent No.2:	Shri Vivek Agrawal, Advocate.

Single Bench: Hon'ble Shri Sanjay S. Agrawal, J**CAV Judgment/Order**

1. This miscellaneous appeal has been preferred by the Plaintiffs, except Budhani (Plaintiff No.2), under Order 43 Rule(1)(u) of Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC'), questioning the legality and propriety of the judgment dated 31.10.2018 passed in Civil Appeal No.2-A/2013, whereby the learned appellate Court, while reversing the judgment and decree dated 29.04.1985 passed in Civil Suit No.114-A/1984 by the trial Court, has remanded the matter for its fresh trial. The

parties to this appeal shall be referred hereinafter as per their description before the Court below.

2. Briefly stated the facts of the case are that a suit for declaration of title and possession was instituted by the Plaintiffs claiming their exclusive ownership with regard to the plaint schedule property ad-measuring 4.427 hectares of land situated at village Nayanpur, Tehsil and District Surajpur. According to the Plaintiffs, it was owned by their predecessor-in-interest, namely, Akbar and upon his sad demise, it was acquired by them by way of inheritance. It is pleaded further that the Defendants, while showing themselves to be the sons of said Akbar, succeeded to get the revenue records mutated and obtained its possession illegally. The Plaintiffs have, therefore, been constrained to institute the suit in the instant nature.

3. The aforesaid suit was registered as Civil Suit No.114-A/1984 and was decreed *ex parte* on 29.04.1985 and by the impugned judgment, it was reversed and the matter was remanded for its fresh trial, which has been questioned by way of this appeal.

4. According to Shri Surfaraj Khan, counsel for the Appellants/Plaintiffs the appellate Court, while reversing the findings of the trial Court has committed an illegality in remanding the matter for its trial afresh, which is not permissible under the law.

5. On the other hand, Shri Ashok Kumar Shukla, learned counsel appearing for Respondent No.1/Defendant No.1 has supported the judgment under appeal as passed by the lower appellate Court.

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

7. From perusal of the record, it appears that the Plaintiffs' claim for

declaration of title and possession was decreed *ex parte* by the trial Court on 29.04.1985 merely on the ground that the Defendants have failed to submit their written statements and failed further to lead any evidence in rebuttal of the Plaintiff's claim. It, however, appears that the trial Court, while decreeing the claim, has failed to exercise its power as provided under the law in order to ascertain the facts in its proper manner. What is reflected from its finding is that it decreed the claim even without adverting to the documentary evidence, like Namantaran Patra (Ex.P.1) and Kistbandi Khatauni B1 (Ex.P.2) as produced by the Plaintiffs. In view of the said background, it was realized by the appellate Court that a retrial of a case is necessary for proper adjudication of the case and accordingly remanded the matter for its trial afresh. The nature of the said order appears to be passed in exercise of the powers enumerated under Rule 23-A of order 41 of C.P.C., which provides as under:-

[23A. 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.]

8. According to the aforesaid provision, the appellate Court would remand the matter, if twin conditions are satisfied, firstly, if the lower Court has disposed of the case otherwise than on a preliminary point and, secondly, if the decree of the trial Court is reversed and retrial of the matter is necessary for its proper adjudication.

9. In the present case, an *ex parte* decree was drawn by the trial Court on 29.04.1985 while decreeing the ownership of the Plaintiffs along with the relief of possession. It was granted merely on the ground that the

Defendants have failed to controvert the evidence of the Plaintiffs even without adverting to those documentary evidence which were marked as Ex.P.1 and Ex.P.2. The trial Court has, thus, failed to exercise its discretion in order to ascertain the facts in its proper manner before granting the decree as such. In view of that, the appellate Court has rightly arrived at a conclusion that a retrial of the case is necessary in order to adjudicate the matter in its right perspective and, I do not find any infirmity in the same so as to call for any interference.

10. In view of above, the appeal being devoid of merits is accordingly dismissed and the parties are directed to remain present before the Civil Judge Class II, Surajpur and/or, the concerned trial Court on 18.01.2021, who in turn, shall decide the suit afresh in accordance with law.

11. Registry is directed to remit the entire file to the concerned trial Court forthwith.

No order as to costs.

Sd/-

(Sanjay S. Agrawal)
JUDGE