

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 346 of 2009**

1. Dalluram (Deleted) Through Lrs.
1A. Laxmi Prasad S/o Dalluram Aged About 55 Years Resident Of Parsada, Post At Tifara, Tah. And Dist. Bilaspur (Chhattisgarh)
1B. Smt. Kamla Bai W/o. Govind Aged About 50 Years D/o Dallu Ram, Resident Of Kurda, (Champa), Post Kurda, Tah. Champa, Dist. Janjgir- Champa (Chhattisgarh)
2. Smt. Triveni Bai W/o Dhelaauram Aged About 56 Years D/o Bhukhan Nai, R/o Village Nargoda, Tah. Masturi, Distt. Bilaspur (Chhattisgarh)

---- Appellants/Defendants**Versus**

1. Rikhi Ram (Deleted) Through Lrs. (**Plaintiff**)
1A Smt. Sukwarabai W/o Rikhi Ram Aged About 75 Years Resident Of Parsada, Post Tifra, Tah. And Dist. Bilaspur (Chhattisgarh)
1B. Kanhaiya Lal S/o Rikhi Ram Aged About 50 Years Resident Of Parsada, Post Tifara, Tah. And Dist. Bilaspur (Chhattisgarh)
1C. Santosh S/o Rikhi Ram Aged About 45 Years Resident Of Parsada, Post Tifara, Tah. And Dist. Bilaspur (Chhattisgarh)
1D. Smt. Ganga Bai W/o Govind, Daughter Of Rikhi Ram Aged About 52 Years Resident Of Khokhara, Post Khokhara, Tah. And Dist. Janjgir-Champa (Chhattisgarh)
1E Smt. Kumari Bai W/o Umashankar Daughter Of Rikhi Ram Aged About 55 Years Resident Of Chorbhatti (Semara), Post- Chorbhatti, Tah.- Navagarh, Distt. Janjgir-Champa (Chhattisgarh)
2. State Of Chhattisgarh From Collector Bilaspur (Chhattisgarh)

---Respondents

For Appellants	: Shri OP Agrawal, Advocate
For Respondents 1A to 1E	: Shri Ravindra Agrawal and Shri Paras Mani Shriwas, Advocates
For Respondent No.2/State	: Shri Ravi Bhagat, Dy. Govt. Advocate

Hon'ble Shri Justice Sanjay K. Agrawal**Judgment on Board****03.02.2021.**

1. This second appeal preferred by the appellants/defendants under Section 100 of CPC has been admitted for hearing on the following substantial question of law :-

“Whether the first appellate Court was justified in rejecting the application under Order 41 Rule 27 of the CPC filed by the defendants after affirming the judgment & decree of the trial Court on merits by recording a finding which is perverse to the record?”

Additional substantial question of law:

“Whether the first appellate Court was justified in not deciding the application under Order 41 Rule 27 read with Section 151 of the CPC dated 23.3.2009 though it was ordered to be decided by order dated 17.4.2009 at the time of final hearing and thereby committed illegality?”

[For the sake of convenience, the parties will herein-after be referred as per their status before the trial Court.]

2. The plaintiff filed a civil suit for declaration and permanent injunction with regard to suit land bearing Khasra No.133 area 0.95 acre situated at Village Bodri Tahsil Bilha Distt. Bilaspur and the trial Court decreed the said suit. Feeling aggrieved by the judgment and decree of the trial Court, the appellants/defendants preferred an appeal before the first appellate Court in which the appellants/defendants filed two applications dated 19.02.2009 and 23.3.2009 under Order 41 Rule 27 of the CPC. Thereafter the matter was heard finally by the first appellate Court and rejected first application dated 19.02.2009 filed under Order 41 Rule 27 of the CPC but failed to consider and decide second application dated 23.3.2009, though it was directed vide order dated 17.4.2009 to decide both the applications at the

time of final hearing.

3. Learned counsel for the appellants/defendants submits that the first appellate court erred in law in not deciding the second application dated 23.3.2009 filed under Order 41 Rule 27 of CPC and the other application dated 19.02.2009 was decided after affirming the judgment and decree of the trial Court, as such, the procedure followed by the first appellate Court is erroneous and contrary to the settled law.

4. On the other hand, Shri Ravindra Agrawal, learned counsel for the respondents would support the impugned judgment and decree.

5. I have heard learned counsel for the parties, considered their rival contentions and went through the record with utmost circumspection.

6. In the matters of **Sanjiv Goel v. Avtar S. Sandhu¹, Jatinder Singh and Another v. Mehar Singh and Others² and Malayalam Plantations Limited v. State of Kerala and Another³**, the Hon'ble Supreme Court has reiterated that the Court below ought to have considered the application filed under Order 41 Rule 27 of the CPC in the first instance and the matter was remitted for consideration.

7. Though second application under Order 41 Rule 27 of the CPC was filed on 23.3.2009 and was ordered to be heard at the time of final hearing, the same was not decided, whereas it ought to have been decided. Since the first appellate court has failed to consider and decide the said application dated 23.3.2009, the judgment and decree of the first appellate

1) (2006) 9 SCC 748

2) (2009) 17 SCC 465

3) (2010) 13 SCC 487

Court has to be set aside and it be remanded to the first appellate Court. Similarly, the first appellate court has firstly considered the entire oral and documentary evidence on record and affirmed the judgment and decree of the trial Court and thereafter considered application dated 19.02.2009 under Order 41 Rule 27 of the CPC and rejected the same, whereas it ought have firstly considered the application dated 19.02.2009 to find out the merits of the application filed under Order 41 Rule 27 CPC, as such, the first appellate court has committed illegality, firstly not deciding the application dated 23.3.2009 filed under Order 41 Rule 27 of the CPC and secondly wrong procedure was followed while deciding the application dated 19.02.2009 filed under Order 41 Rule 27 CPC by deciding the application after affirming the judgment and decree of the trial Court, as such judgment and decree passed by the first appellate Court and order passed in the application dated 19.02.2009 filed under Order 41 Rule 27 of the CPC are set aside and the matter is remitted to the first appellate Court to decide first appeal and the applications dated 19.02.2009 & 23.3.2009 filed under Order 41 Rule 27 of the CPC afresh after giving opportunity to the parties in accordance with law, within two months from the date of receipt of a copy of this Court. Registry is directed to remit the records to the first appellate court forthwith.

8. The second appeal is allowed to the extent indicated herein-above.
No cost(s).

Sd/-

(Sanjay K. Agrawal)

JUDGE