

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 342 of 2010**

Teerath Singh S/o Sammar @ Summer Singh, Aged about 38 years, R/o Village Mahora, Tahsil Marwahi, District Bilaspur, Chhattisgarh.

---Appellant/Plaintiff

Versus

1. Sammar @ Summer Singh, S/o Late Shri Sukhlal, Aged about 65 years, R/o Village Godha Bartola, Tahsil Pendra Road, District Bilaspur, Chhattisgarh.

2. State of Chhattisgarh, Through Collector, District Bilaspur, Chhattisgarh.

--- Respondents/Defendants

For Appellant :- Mr. Ankit Singhal, Advocate

For Respondent 1 :- None

For State :- Mr. Ravi Bhagat, Dy. G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

20/01/2021

1. This second appeal preferred by the appellant/plaintiff was admitted for hearing on the following two substantial questions of law :-

“(1) Whether both the Courts below were justified in dismissing the suit of the

plaintiff by recording a finding which is perverse and contrary to the record ?

(2) Whether the first appellate Court was justified in rejecting the applications filed by the appellant/plaintiff under Order 1 Rule 10 and under Order 41 Rule 27 of the CPC ?”

[The parties will hereinafter be referred to as per their status and ranking shown before the trial Court.]

2. The dispute herein is between the son – plaintiff and the father – defendant No. 1. Plaintiff filed a suit for declaration of joint ownership of the suit property and thereby, restraining defendant No. 1 from alienating the said suit property without his consent.
3. Learned trial Court, after appreciating the oral and documentary evidence on record, by its judgment and decree dated 22/10/2008, dismissed the suit on merits against which the plaintiff preferred a first appeal before the first appellate Court along with the application under Order 1 Rule 10 CPC and Order 41 Rule 27 CPC. Learned first appellate Court, by its impugned judgment and decree dated 10/08/2010, framed three points for determination in paragraph 7 and thereafter considered the application under

Order 41 Rule 27 CPC and in just another paragraph dismissed the said applications filed by the plaintiff and consequently, dismissed the appeal as well. Questioning the impugned judgment and decree passed by the first appellate Court, this second appeal has been preferred by the appellant/plaintiff under Section 100 of the CPC in which two substantial questions of law have been framed and set out in the opening paragraph of this judgment.

4. Mr. Ankit Singhal, learned counsel for the appellant/plaintiff, would submit that the first appellate Court has failed to consider the appeal filed by the appellant/plaintiff in its proper perspective by considering the oral and documentary evidence on record being the final Court of fact and law as held by the Supreme Court in the matter of **Santosh Hazari v. Purushottam Tiwari (deceased) by Lrs.**¹. He would also submit that the application filed by the appellant/plaintiff under Order 41 Rule 27 CPC has summarily been rejected by the first appellate Court without going into the provisions for admitting additional evidence and

¹ (2001) 3 SCC 179

without considering the decision rendered by the Supreme Court in that regard in the matter of Union of India v. Ibrahim Uddin and Anr.², as such, the impugned judgment and decree passed by the first appellate Court deserves to be set aside and the matter be remitted to the first appellate Court for hearing and disposal afresh in accordance with law.

5. None appeared for respondent No. 1 though served.
6. I have heard learned counsel for the appellant/plaintiff, considered his submissions and went through the records with utmost circumspection.
7. In the first appeal preferred by the appellant/plaintiff, learned first appellate Court has framed the following three points for determination in paragraph 7 of its judgment as required under Order 41 Rule 33 of CPC :-

“प्रकरण में मुख्य विचारणीय बिंदु यह है कि -

- (1) क्या वादभूमि पैतृक संपत्ति है तथा उसमें अपीलार्थी/वादी का भी हक - हिस्सा है ?
- (2) क्या उत्तरवादी क्र. - 1 वाद भूमि को अवैध रूप से बेच रहा है ?

(3) क्या वाद भूमि का क्रेता लल्लू सिंह प्रकरण का आवश्यक पक्षकार है ? इन्ही विचारणीय बिन्दुओं पर आगे विचार किया जाएगा ।”

8. Thereafter, the first appellate Court did not take up the aforesaid three points one by one for consideration but in the next paragraph firstly considered the application filed by the appellant/plaintiff under Order 41 Rule 27 of the CPC and simply on the basis that the area of the suit property shown in the plaint is different to the area shown in the additional document filed along with the application under Order 41 Rule 27 of CPC and further finding that the appellant/plaintiff has not approached the Court with clean hands, the first appellate Court held that the additional documents cannot be admitted in evidence and the purchasers of the suit property are also not necessary party and proceeded to dismiss the applications filed by the appellant/plaintiff under Order 1 Rule 10 CPC and Order 41 Rule 27 CPC and consequently, dismissed the appeal as well.
9. The Supreme Court in the matter of **Santosh Hazari** (supra) has clearly indicated the manner in which the first appeal has to be heard by the

Court. Paragraph 15 of the judgment states as under :-

"15. ... The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. The task of an appellate court affirming the findings of the trial court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice (See *Girijanandini Devi v. Bijendra Narain Choudhary*³). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it."

10. Thus, in light of the aforesaid pronouncement of Their Lordships of the Supreme Court, it was quite imperative for the first appellate Court to take up all the three points for determination one by one in light of the oral and documentary evidence on record, but the first appellate Court did not take up the three

points for determination in sequence and simply considering the application under Order 41 Rule 27 of CPC for taking additional documents on record and only on the basis of difference in the area of the suit property mentioned in the plaint from the area of the suit property mentioned in the additional document, the first appellate Court proceeded to reject the applications filed by the appellant/plaintiff under Order 1 Rule 10 CPC and Order 41 Rule 27 CPC and consequently, dismissed the appeal which is wholly impermissible in law. Not only this, the application under Order 41 Rule 27 of CPC has to be considered by the first appellate Court after hearing the appeal on merits.

11. In the matter of Ibrahim Uddin (supra), Their Lordships of the Supreme Court have laid down the procedure for hearing the application under Order 41 Rule 27 CPC which states as under :-

"Order 41 Rule 27 CPC

36. The general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right,

to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. (Vide *K. Venkataramiah v. A. Seetharama Reddy*⁴, *Municipal Corpn. Of Greater Bombay v. Lala Pancham*⁵, *Soonda Ram v. Rameshwarlal*⁶ and *Syed Abdul Khader v. Rami Reddy*⁷.)

37. The appellate court should not ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide *Haji Mohammed Ishq v. Mohd. Iqbal and Mohd. Ali and Co.*⁸)

38. Under Order 41 Rule 27 CPC, the appellate court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate

4 AIR 1963 SC 1526

5 AIR 1965 SC 1008

6 AIR 1975 SC 479

7 AIR 1979 SC 553

8 AIR 1978 SC 798

court is empowered to admit additional evidence. (Vide *Lala Pancham*)

39. It is not the business of the appellate court to supplement the evidence adduced by one party or the other in the lower court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide *State of U.P. v. Manbodhan Lal Srivastava*⁹ and *S. Rajagopal v. C.M. Armugam*¹⁰)"

12. In the instant case, learned first appellate Court has not followed the principle of law laid down by Their Lordships of the Supreme Court in **Ibrahim Uddin** (supra) and only on the factual score, has straightway rejected the application under Order 41 Rule 27 CPC. On the basis of the aforesaid legal analysis, I am of the considered opinion that the first appellate Court has failed to consider the question of title over the suit property as well as plaintiff's application under Section 41 Rule 27 CPC in accordance with the well-settled law in his behalf as noticed herein-above. Consequently, the impugned judgment and decree passed by the

9 AIR 1957 SC 912

10 AIR 1969 SC 101

first appellate Court is hereby set aside and the first appeal along with the applications filed by the plaintiff under Order 1 Rule 10 CPC and Order 41 Rule 27 CPC are remitted to the first appellate Court for hearing and disposal afresh in accordance with law within 60 days after service of notice to the respondents/defendants.

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

14. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet