

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.318 of 2010

1. Bhagwat (Died) Through LRs

1(A) Fuleshwari Bai, Wd/o late Bhagwat Ram Sahu, aged about 85 years, R/o Bade Karli, Tahsil Kurud, District Dhamtari (C.G.)

1(B) Bhanu Ram, S/o late Bhagwat Ram Sahu, aged about 56 years, R/o Bade Karli, Tahsil Kurud, District Dhamtari (C.G.)

1(C) Man Bai, D/o Late Bhagwat Ram Sahu, aged about 46 years, R/o Bhanpuri, District Raipur (C.G.)

2. Babulal, S/o Daulal Sahu, aged about 57 years, R/o Village and Post Office Bade Kareli, Tahsil Kurud, District Dhamtari (C.G.)

3. Chhotelal (Died) Through LRs

3(A) Asha Ram Sahu, S/o late Chhote Lal Sahu, aged about 40 years, R/o Bade Karli, Tahsil Kurud, District Dhamtari (C.G.)

3(B) Ashok Kumar, S/o late Chhote Lal Sahu, aged about 30 years, R/o Bade Karli, Tahsil Kurud, District Dhamtari (C.G.)

3(C) Bindu Bai, D/o late Chhote Lal Sahu, W/o Tapesk Kumar Sahu, aged about 45 years, R/o Sivni Bula, Tahsil and Distt. Dhamtari (C.G.)

3(D) Ashbati, D/o late Chhote Lal Sahu, W/o Ganesh Ram, aged about 34 years, R/o Bodara, District Dhamtari (C.G.)

(Defendants)

---- Appellants

Versus

1. Samaru (Died) Through LRs

(Plaintiff)

1(A) Angad Ram, S/o late Samaru, aged about 60 years, R/o Bade Kareli, Tahsil Kurud, District Dhamtari (C.G.)

1(B) Devantin Bai, W/o Anand Ram, D/o Late Samaru, aged about 65 years, R/o Village Parsatthi, Post Mendri, Tahsil Magar Lod, District Dhamtari (C.G.)

1(C) Dashoda Bai, W/o Bishelal, D/o Late Samaru, aged about 55 years, R/o Village Ranka, Post Office Shanka, Tahsil Magar Lod, District Dhamtari (C.G.)

1(D) Damin Bai, W/o Tej Ram Sahu, D/o Late Samaru, aged about 45 years, R/o Village Patewa, Post Patewa, Police Station Gobara Nawapara, Tahsil and District Raipur (C.G.)

2. Smt. Ganga Bai, D/o Alal Sahu, aged about not known, W/o Sukhdev Sahu, R/o Village Bharda, Pasgaon Magarlod, Tahsil Kurud, District Dhamtari (C.G.)

3. Smt. Jamuna Bai, D/o Alal Sahu, aged about not known, W/o Tijuram Sahu, R/o Village Devari Pas Konkera, Rajim, Tahsil Rajim, District Raipur (C.G.)

4. State of Chhattisgarh, Through the Collector, Dhamtari (C.G.)
(Defendants)
---- Respondents

For Appellants / Defendants No.1 to 3: -

Mr. Punit Ruparel, Advocate.

For Respondents No.1(A) to 3: -

None present though served.

For Respondent No.4 / State: -

Mr. Ankur Kashyap, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

05/07/2021

1. Proceedings of this matter have been taken-up through video conferencing.

2. This second appeal preferred under Section 100 of the CPC by the appellants herein / defendants No.1 to 3 was admitted for hearing on 3-3-2021 by formulating the following substantial questions of law:-

“1. Whether the first appellate Court is justified in granting those documents filed under Order 41 Rule 27 of CPC, by recording a finding which is perverse and contrary to the record?

2. Whether the first appellate Court is justified in granting the application under Order 41 Rule 27 CPC without requiring the plaintiff's to prove the documents and without giving opportunity to the defendants to prove their evidence in rebuttal, allowed the appeal, thereby committed illegality by perverse recording?”

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

3. The plaintiff's suit for declaration of title and permanent injunction was dismissed on merits. The plaintiff preferred first appeal being

aggrieved against the judgment & decree of the trial Court and during the pendency of first appeal, he also preferred an application under Order 41 Rule 27 of the CPC holding that those documents are revenue documents being orders of revenue court which are part of Exs.P-1 & P-7. The first appellate Court took cognizance of the application in its judgment in para 8 and allowed the said application and thereafter, relied upon those documents and granted decree for declaration of title and permanent injunction in favour of the plaintiff. The appeal was virtually allowed setting aside the judgment & decree of the trial Court against which this second appeal has been preferred and substantial questions of law have been formulated which have been set-out in the opening paragraph of this judgment for the sake of completeness.

4. Mr. Punit Ruparel, learned counsel appearing for the appellants herein / defendants No.1 to 3, would submit that the first appellate Court is absolutely unjustified in granting the said application without giving opportunity to the defendants to rebut those documents and adduce evidence, even the first appellate Court did not require the plaintiff to prove those documents in accordance with law and thereafter allowed the appeal relying upon the said documents and decree has been granted which is absolutely illegal and bad in law. Therefore, the judgment & decree of the first appellate Court deserve to be set aside and the matter be remitted to the first appellate Court for giving opportunity to the defendants by setting aside the judgment and decree of the first appellate Court.
5. None present for respondents No.1(A) to 3 herein / LRs of the plaintiff and defendants No.4 & 5, though served.
6. I have heard learned counsel for the appellants herein / defendants

No.1 to 3 and considered his submissions and also went through the records with utmost circumspection.

7. The Supreme Court in the matter of Shalimar Chemical Works Limited v. Surendra Oil and Dal Mills (Refineries) and others¹ has held that once the document is taken on record as additional evidence, opportunity must be given to the other side to produce the evidence in rebuttal if they so desired. Paragraphs 16, 17 and 18 of the report state as under:-

“16. The learned single judge rightly allowed the appellant's plea for production of the original certificates of registration of trade mark as additional evidence because that was simply in the interest of justice and there was sufficient statutory basis for that under clause (b) of Order 41 Rule 27. But then the Single Judge seriously erred in proceeding simultaneously to allow the appeal and not giving the respondent-defendants an opportunity to lead evidence in rebuttal of the documents taken in as additional evidence.

17. The Division Bench was again wrong in taking the view that in the facts of the case, the production of additional evidence was not permissible under Order 41 Rule 27. As shown above, the additional documents produced by the appellant were liable to be taken on record as provided under Order 41 Rule 27 (b) in the interest of justice. But it was certainly right in holding that the way the learned Single Judge disposed of the appeal caused serious prejudice to the respondent-defendants. In the facts and circumstances of the case, therefore, the proper course for the Division Bench was to set aside the order of the learned Single Judge without disturbing it insofar as it took the originals of the certificates of registration produced by the appellant on record and to remand the matter to give opportunity to the respondent-defendants to produce evidence in rebuttal if they so desired. We, accordingly, proceed to do so.

18. The judgment and order dated 25-4-2003 passed by the Division Bench is set aside and the matter is remitted to the learned Single Judge to proceed in the appeal from the stage the originals of the registration certificates were taken on record as additional evidence. The learned Single

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Judge may allow the respondent-defendants to lead any rebuttal evidence or make a limited remand as provided under Order 41 Rule 28.”

8. The above-stated judgment i.e. Shalimar Chemical Works Limited (supra) has recently been followed by the Supreme Court in the matter of Akhilesh Singh alias Akhileshwar Singh v. Lal Babu Singh and others², in which it has been held that Order 41 Rule 27 of the CPC is silent as to the procedure to be adopted by appellate court after admission of additional evidence and further held that in view of the provisions contained in Order 41 Rule 2 of the CPC, when appellate court admits additional evidence, it is necessary for said court to grant an opportunity to other party to lead evidence in rebuttal thereof.

Paragraphs 12, 14 and 17 of the report state as under: -

“12. Order 41 Rule 27 CPC, which deals with the provision of additional evidence in Appellate Court, provides for the grounds and circumstances on which the Appellate Court may allow such evidence or documents or witnesses to be examined. Order 41 Rule 27 sub-rule (2) further provides that wherever additional evidence is allowed to be produced by an Appellate Court, the court shall record a reason for its admission. Order 41 Rule 27 is silent as to the procedure to be adopted by the High court after admission of additional evidence. Whether after admission of additional evidence, it is necessary for the Appellate Court to grant opportunity to the other party to lead evidence in rebuttal or to give any opportunity is not expressly provided in Order 41 Rule 27.

14. Order 41 Rule 2 provides that the appellant shall not, except by leave of the court, be allowed to urge any ground in the appeal, which is not set forth in the memorandum of appeal. The proviso to Order 41 Rule 2 engrafts a rule, which obliged the Court to grant a sufficient opportunity to the contesting party, if any new ground is allowed to be urged by another party, which may affect the contesting party. The provision engrafts rule of natural justice and fair play that contesting party should be given opportunity to meet any new ground sought to be urged. When the appellate court admits the additional evidence under Order 41 Rule 27, we fail to see any reason for not following the

same course of granting an opportunity to the contesting party, which may be affected by acceptance of additional evidence. In the present case, additional evidence, which were brought on the record were registered sale deeds, which were executed by present appellant and his other co-sharers and what was relied on before the High Court was that the appellant admitted in the sale deeds that the partition has taken place in the family. The main issue in the First Appeal before the High Court was as to whether the finding of the trial court that no partition by metes and bounds has taken place in the family is correct or not. The additional evidence which was admitted has been relied on by the High Court while allowing the appeal. It was in the interest of justice that the High Court ought to have allowed opportunity to the plaintiffs, who were respondents to the first appeal to either lead an evidence in rebuttal or to explain the alleged admissions as relied on by the defendants. The mere fact that no counter affidavit was filed to the IAs was not decisive. Since IAs having not been admitted, occasion for counter affidavit did not arise at any earlier point of time. The High Court on the same day i.e. 8-3-2017 has allowed the IAs as well as the first appeal. The fact that the contesting respondents to the first appeal, who were the appellant before us were not represented at the time of hearing of the first appeal, was not a reason for not giving opportunity to them to lead evidence in rebuttal.

17. The submission of the learned counsel for the respondents that execution of sale deeds was never denied by the present appellant before the High Court, hence no error has been committed by the High Court in relying on the contents in the sale deed cannot be accepted. Even if, execution of sale deeds was not denied, the appellate court before which any statement in sale deeds is relied on ought to have given an opportunity to lead evidence in rebuttal or to explain the admission. Opportunity to explain the admission contained in the sale deeds was necessary to be given to the contesting party in the facts of the present case. We thus are of the opinion that the High Court erred in simultaneously proceeding with the hearing of the appeal after admitting additional evidence on record. The High Court ought to have given opportunity to the contesting respondents in the first appeal to lead evidence in rebuttal or to explain the alleged admission as contained in the sale deed, which having not been done ...”

9. Reverting to the facts of the present case following the principles of law laid down by the Supreme Court in the above-stated judgments

(supra), in the instant case, the application filed by the plaintiff under Order 41 Rule 27 of the CPC was allowed by the first appellate Court and admitted certain documents on record holding them to be part of Exs.P-1 & P-7 and thereafter, relying upon those documents granted the appeal, but the first appellate Court neither required the plaintiff to prove those documents in accordance with law nor given opportunity to the defendants to file documents and adduce evidence in support of their stand, while admitting the documents under Order 41 Rule 27 of the CPC and did not provide an opportunity to rebut or to prove the documents which is contrary to the well settled law in this regard noticed herein-above.

10. In view of the above, the impugned judgment & decree passed by the first appellate Court are hereby set aside. The substantial questions of law are answered accordingly. The matter is remitted to the first appellate Court. The first appellate Court would require the plaintiff to prove those documents in accordance with law and thereafter, the defendants will also be allowed to file additional documents and will be granted time to prove the additional documents if any and thereafter, the first appellate Court should proceed in accordance with law. The whole exercise will be completed within a period of six days from the date of receipt of a copy of this judgment.
11. The second appeal is allowed to the extent indicated herein-above leaving the parties to bear their own cost(s).
12. Records be sent back to the concerned first appellate Court forthwith.

Sd/-
(Sanjay K. Agrawal)
Judge