

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR
M.A No.73 of 2012

Reserved on 23.02.2021
Pronounced on 04.03.2021

Dr. Manmohan Albert Das S/o Late Joseph Charles Das Aged About 65 Years Magarpara, Bilaspur, Tah. And Distt. Bilaspur C.G. (Defendant/Respondent) **---- Appellant**

Versus

1.(A) Albert S/o Late Aijik Isai Aged About 64 Years R/o Railway Colony, Railway Station, Bilaspur, District- Bilaspur, Chhattisgarh.

2.(B) Subhashini @ Baby W/o Momin D/o Grace Mary, Residing At Loco Kholi, Near Durga Mandir, Bilaspur, Chhattisgarh (Plaintiffs/Appellants)

-----Respondents

For Appellant:	Shri Somnath Verma, Advocate.
For Respondents No.1A:	Shri Hemant Kumar Agrawal along with Shri Amit Kumar, Advocates.
For Respondent No.2B:	Shri Basant Kaiwartya along with Shri SP Sanadhya, Advocates.

Single Bench: Hon'ble Shri Sanjay S. Agrawal, J
C A V Order

1. This Miscellaneous Appeal has been preferred by Defendant No.1 under Order 43 Rule 1(u) of the Code of Civil Procedure, 1908 (for short 'the CPC') questioning the legality and propriety of the judgment dated 18.07.2012 passed by the 2nd Additional District Judge, Bilaspur in Civil Appeal No. 40-A/2011 whereby, the lower appellate Court, while reversing the judgment and decree dated 30.11.2010 passed by the 2nd Civil Judge, Class-1, Bilaspur in Civil Suit No.510-A/2005, has remanded the matter for its fresh trial.

2. Briefly stated, the facts of the case are that the Plaintiffs instituted a

suit claiming declaration of title to the extent of half share of the house which is constructed over 3,372 sq.ft of land comprising out of Sheet No.16, Plot No.56 and 88/2 situated at Masanganj, Bilaspur and also with regard to the house constructed over 1,270 sq.ft of land along with its open space of Sheet No.23, Plot No.32 situated at Masanganj, Bilaspur. It is pleaded by the Plaintiffs that the suit property was owned by their grand father Samuel Das and during his life time, their father Adrew Charles Das predeceased to him and since they were minors at the time of the sad demise of their father, they were being looked after by their uncle Joseph Charles Das, who was father of Defendant No.1- Dr. Manmohan Albert, upon whom, they were completely Dependants. Further contention of the Plaintiffs is that said Joseph Charles Das, by taking undue advantage, had succeeded to get revenue papers mutated in his name alone and the act of him and his son Dr. Manmohan Albert is in detrimental to their interest, therefore, they have been constrained to institute the suit through their Power of Attorney holder namely Albert in the instant nature.

3. While contesting the suit, it is pleaded by Defendant No.1 that his father Joseph Charles Das and his three sisters were the only heirs of said Samuel Das and since the Plaintiffs were not his relatives, therefore, his claim is liable to be dismissed.

4. The trial Court, after considering the evidence led by the parties, arrived at a conclusion that the Plaintiffs have failed to produce their Power of Attorney on record, so as to hold that Albert was their Power of Attorney holder and was authorized to pursue their claim. It held further that the Plaintiffs have failed to establish the fact that after the death of said Samuel Das, it was recorded in joint names of his sons namely Joseph

Charles Das and Andrew Charles Das and held further that the suit as framed is improperly valued and in consequence, dismissed the claim.

5. The aforesaid judgment and decree has been questioned by the Plaintiffs in an Appeal and during its pendency, they moved two applications, one under Order 41 Rule 27 CPC seeking for the production of additional documentary evidence, like the original Power of Attorney holder of said Albert along with service certificate of Salomon (Plaintiff No.1) and Nazul Khasra Form-A, while another under Order 6 Rule 17 CPC seeking to incorporate the plea in order to show that they are the legal representatives of said Samuel Das.

6. The aforesaid applications are allowed and the matter was remanded with a direction to frame the issues as to whether the Plaintiffs are the sons of Andrew Charles Das, son of said Samuel Das ? and whether upon the death of Plaintiffs' father, they were taken care of by their uncle (Defendant's father) Joseph Charles Das ? and directed further to decide the suit afresh upon providing sufficient and reasonable opportunities of hearing to the parties. This is the order, which has been questioned by way of this Appeal and it has been admitted on the following substantial questions of law:-

“1. Whether the First Appellate Court is justified in making an order of remand in exercise of power under Order 41 Rule 23 A of the Code of Civil Procedure, without reversing the decree in appeal and without holding that retrial is necessary ?”

“2. Whether the First Appellate Court is further justified in making an order of remand, merely by granting an application under Order 6 Rule 17 of Code of Civil Procedure. And, also by granting an application under Order 41 Rule 27 of the Code of Civil Procedure ?”

7. Shri Verma, learned Counsel for the Appellant submits that the lower appellate Court has passed the judgment under Appeal even without observing as to whether re-trial is considered necessary as required under Rule 23-A of Order 41 CPC and thus, has committed an illegality in remanding the matter by directing the trial Court to decide the suit afresh. According to him, once an application has been allowed under Order 41 Rule 27 CPC, the lower appellate Court ought to have adopted the mode prescribed under Rule 28 of Order 41 CPC. Without considering the said provision in its strict sense, the lower appellate Court has erred in remanding the matter as such. In support, Shri Verma has placed his reliance upon the decision rendered in the matter of Anil Fulara vs Devcharan and Ghanshyam Agrawal & Another vs. Devcharan reported in 2014(2) C.G.L.J 2.

8. On the other hand, learned Counsel for the Respondents have supported the judgment under Appeal as passed by the lower appellate Court.

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

10. From perusal of the record, it appears that the Court below has reversed the findings of the trial Court and remanded the matter with a direction to decide the suit afresh by observing *inter alia* that the trial Court, while deciding the suit, has omitted and/or failed to frame an issue in order to ascertain the fact as to whether the Plaintiffs are the heirs of said Samuel Das or not and remanded the matter merely by allowing those applications of the Plaintiffs. It thus, appears that the lower appellate Court has reversed the said findings even without considering the

conditions required under Order 41 Rule 23-A CPC which provides as under:-

"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."

11. The aforesaid provision has been inserted in the CPC by Act 104 of 1976 which came into force from 01.02.1977. According to the said provision, the appellate Court may remand the suit to the trial Court even though the said suit has been disposed of on merits. It provides that where the trial Court has disposed of the suit on merits and a decree is reversed in Appeal and the appellate Court considers that re-trial is necessary, the appellate Court may remand the suit to the trial Court. Thus, on twin conditions being satisfied, the appellate Court can exercise the same power of remand under Order 41 Rule 23-A CPC. However, in the instant case, the lower appellate Court, even without considering that whether re-trial is necessary or not, has remanded the matter. At this juncture, the principles laid down in *Anil Fulara vs Devcharan* and *Ghanshyam Agrawal & Another vs. Devcharan* (supra) as relied upon by *Shri Verma* are to be noted where at paragraph-21, it has been observed as under:-

"21..... The First Appellate Court neither considered nor recorded a finding that retrial is necessary which is one of the twin conditions for exercise of power under Order 41 Rule 23-A of CPC. Thus, the impugned judgment and decree was passed without reversing the decree of trial Court, as none of the issues raised and decided by the trial Court has been reversed in appeal by the First Appellate Court and without holding retrial is necessary, the

First Appellate Court has committed serious illegality in directing the wholesale and open remand in exercise of power under Order 41 Rule 23-A of CPC. Thus, the first substantial question of law is answered accordingly.”

12. By applying the aforesaid principles to the case in hand, the entire approach of the lower appellate Court remanding the matter to the concerned trial Court for its decision afresh, cannot be held to be sustainable in the eye of law and the first question framed is, thus, answered in negative.

13. Besides, it is pertinently to be noted here that the appellate Court merely by allowing the application filed by the Plaintiffs under Order 41 Rule 27 CPC, has set aside the entire findings of the trial Court even without assigning any reasons thereof and that by ignoring the mandatory provisions prescribed under Rule 28 of Order 41 CPC. In such circumstances, the judgment impugned as passed by the lower appellate Court cannot be held to be sustainable.

14. Order 41 Rule 28 CPC, which prescribes mode of taking additional evidence reads as under:-

"Mode of taking additional evidence.-Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.”

15. Based upon the aforesaid provisions, the appellate Court, if once allowed the application filed by the Plaintiffs under Order 41 Rule 27 CPC, then, it should have either recorded the statements of the parties or should have directed the trial Court to record the statement from whose decree the Appeal is preferred or of any other subordinate Court, who in

turn, after recording the evidence, as the appellate Court may have directed, could have proceeded to record the statement of the parties and send the same to the concerned appellate Court. This is the procedure which should have been followed under such circumstances as observed by the Supreme Court in the matter of H.P. Vedavyasachar vs. Shivashankara and Another reported in (2009) 8 SCC 231 wherein, it has been observed at para 7 as under:-

“7.....When an application for adducing additional evidence is allowed the appellate court has two options open to it. It may record the evidence itself or it may direct the trial court to do so.”

16. In view of the above, the second substantial question of law is also answered in negative. Accordingly, I here by set aside the impugned judgment dated 18.07.2012 passed by the 2nd Additional District Judge, Bilaspur in Civil Appeal No.40-A/2011. The Appeal is directed to be restored to its original number to the file of the concerned appellate Court. The appellate Court shall proceed in accordance with the provisions prescribed under Rule 28 of Order 41 CPC by directing the trial Court and/or the subordinate Court to record the evidence based upon the said additional evidence after providing sufficient opportunity of hearing to the parties. Such directions be issued by the appellate Court and the parties present over here are directed to remain present before the concerned appellate Court on 08.04.2021, who in turn, shall decide the Appeal as soon as possible.

17. With the aforesaid observation, the Appeal is allowed. No order as to costs.

18. Registry is directed to remit back the entire record to the concerned appellate Court along with the order of this Court forthwith.

Sd/-
(Sanjay S. Agrawal)
JUDGE

Priya