

HIGH COURT OF CHHATTISGARH, BILASPUR**M.A. No. 35 of 2017****Reserved on 06.09.2021****Pronounced on 13.09.2021**

- Hiraundi Bai W/o Heera Lal, Aged About 68 Years Caste Suryawanshi, R/o Village Kirari, Tahsil Akaltara, Civil And Revenue District Janjgir-Champa, ChhattisgarhPlaintiff,

---- Appellant**Versus**

1. Sher Bahadur S/o Shri Rati Ram, Aged About 36 Years Caste Satnami, R/o Village Amartal, Tahsil Akaltara, Civil And Revenue District Janjgir-Champa, Chhattisgarh.
2. Rati Ram S/o Shri Balbhadra, Aged About 56 Years Caste Satnami, R/o Village Amartal, Tahsil Akaltara, Civil And Revenue District Janjgir-Champa, Chhattisgarh.
3. State Of Chhattisgarh, Through The District Collector, Janjgir, Civil And Revenue District Janjgir-Champa, ChhattisgarhDefendants.

---- Respondents

For Appellant:	Shri Paras Mani Shrivastava, Advocate.
For Respondents No.1 & 2:	Shri Manoj Paranjpe, Advocate appears along with Shri Shubhank Tiwari, Advocate.
For State/Respondent No.3:	Shri Raghvendra Verma, G.A.

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

1. This Miscellaneous Appeal has been preferred by the Plaintiff 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 28.01.2017 passed by the District Judge, Janjgir-champa (C.G.) in Civil Appeal No.09-A/2016 whereby, the lower appellate Court, while reversing the judgment and decree dated 18.03.2016 passed by the Civil Judge, Class-1, Akaltara in Civil Suit No.178-A/2011, has remanded the matter for

its fresh trial after allowing the application filed under Order 41 Rule 27 of CPC seeking to produce the additional documentary evidence on record. The parties to this appeal shall be referred hereinafter as per their description before the trial Court.

2. Briefly stated the facts of the case are that the Plaintiff instituted a suit claiming declaration of title and injunction with regard to the property in question bearing Khasra No.1236/4 admeasuring 0.18 acres situated at village Kirari, Tehsil Akaltara, District Janjgir-champa and also for possession after dismantling the house constructed over it by Defendants No.1 & 2. According to the Plaintiff, the alleged suit property is recorded in her name in revenue papers, which is adjacent to the main road and has sold 0.20 acre of land out of 0.27 acres from Khasra No.1236 to Defendant No.1-Sherbahadur under the registered deed of sale dated 30.03.2010, which is distinct from the suit land. However, while taking an undue advantage of her illiteracy, Defendant No.1 has mentioned the incorrect boundaries on it. Further contention of the Plaintiff is that on 25.04.2011, Defendants No.1 & 2 in her absence, while dismantling the *kachcha* house (hut) owned by her, constructed illegally a *pakka* house, and therefore, she has been constrained to institute a suit in the instant nature.

3. The Defendants have contested the aforesaid claim. It is pleaded by them that by virtue of the registered deed of sale dated 30.03.2010, the alleged suit property was purchased and only thereafter they have raised a *pakka* house over it.

4. After considering the evidence led by the parties, it was held by the trial Court that the Plaintiff is the owner of the property in question bearing Khasra No.1236/4 admeasuring 0.18 acres and accordingly decreed the

suit entitling the Plaintiff to obtain the vacant position of it.

5. The aforesaid judgment and decree has been questioned by Defendants No.1 & 2 and during the pendency of it, they moved two applications, both under Order 41 Rule 27 of CPC seeking production of additional documentary evidence, like revenue papers which are recorded in the name of Plaintiff-Hiraundi Bai, as well as, the certified copy of the registered deed of sale, said to have been executed by her to one Laxman and Gangotri, on record.

6. The Plaintiff/Respondent No.1 has submitted her reply to the aforesaid application and, the lower appellate Court after considering the same has allowed both the applications and that by setting aside the judgment and decree of the trial Court has remanded the matter to the trial Court with a direction for its fresh trial. This is the order which has been impugned by way of this appeal.

7. Learned Counsel appearing for the Appellant/Plaintiff submits that once the 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. Having failed to do so, the lower appellate Court has committed a serious illegality in remanding the matter as such. In support, he placed his reliance upon the decision rendered in the matter of ***H. P. Vedavyasachar vs Shivashankara and Another*** reported in **(2009) 8 SCC 231**.

8. On the other hand, learned Counsel appearing for the Respondents/Defendants No.1 & 2 has supported the order impugned as passed by the lower appellate Court.

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

papers attached with the memo of appeal carefully.

10. The question which arises for the determination in this appeal is as to “whether the lower appellate Court was justified in relegating the parties to the trial Court with a direction to the said Court to redetermine the suit afresh by giving its findings in the light of the additional documentary evidence?”

11. It appears from perusal of the record that the Plaintiff's claim for declaration of title, injunction and possession was decreed by the trial Court, which was, however, reversed by the lower appellate Court merely by allowing the applications of the Defendants, which were filed under Order 41 Rule 27 of CPC, while directing the concerned trial Court to decide the suit afresh. It is to be noted at this juncture the provision prescribed under Rule 28 of Order 41 which provides the 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."

12. In view of the aforesaid provision, it is clear that the appellate Court, once allowed the application filed under Order 41 Rule 27 CPC, 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 by the lower appellate Court.

13. While considering such a situation, it was observed by the Supreme Court in the matter of ***H.P. Vedavyasachar vs. Shivashankara and Another*** (supra) 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.”

14. Similar is the view taken by the Supreme Court in the matter of ***Uttaradi Mutt vs. Raghavendra Swamy Mutt*** reported in (2018) 10 SCC 484 wherein it has been observed at para 19 as under:-

19. The High Court could have issued directions to the first appellate court to determine any question of fact including the existence and genuineness of the additional evidence or for that matter, whether the contents of the said documents had been duly proved by the party relying thereon. After recording the evidence in support of such relevant matters as the High Court may have directed, the first appellate court could proceed to try such issues and return the evidence to the High Court together with its findings thereon within the prescribed time. Such a course was permissible in terms of Rule 28 of Order 41 of CPC. And on receipt of the report, the High Court could then consider the substantial questions of law already framed while admitting the second appeal and finally decide the same on all issues.

15. In the light of the principles laid down in the above mentioned judgments, the observation as made by the lower appellate Court, while remanding the matter with a direction to the concerned trial Court for its fresh trial ignoring the provisions mentioned herein above, cannot be held to be sustainable in the eye of law. Accordingly, I set aside the impugned judgment dated 28.01.2017 passed by the District Judge, Janjgi-champa

(C.G.) in Civil Appeal No.09-A/2016 and the Appeal is directed to be restored to its original number to the file of the concerned appellate Court, who 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 documentary 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 21.10.2021, who in turn, shall decide the Appeal accordingly.

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

Sd/-
(Sanjay S. Agrawal)
JUDGE