

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.233 of 2012**

1. Feru S/o Brijlal, aged about 60 years, R/o Village Raksa, Revenue Inspector Board Dhamdha, Tahsil Dhamdha, District-Durg (CG)
 2. Ghasan Bai (died) through LR's
 - (a) Bhojram S/o Lakhan, aged about 35 years,
 - (b) Rukhmani Wd/o Lakhan, aged about 38 years,
 R/o Yadav Daihanpara, Near Hanuman Mandir, Kohka, Tahsil and District-Durg (CG)
 3. Chinta S/o Feru, aged about 30 years.
 4. Redhalal S/o Feru, aged about 27 years.
- No.3&4 are resident of Village Raksa, Tahsil and District – Durg (CG)

----- Appellants/Defendants No.1 to 4**Versus**

1. Firan Bai W/o Pitamber, aged about 45 years, D/o late Brijlal, Caste-Chakh, Thethwar, R/o Village Dargaon, Kastkar, Village-Raksa, Patwari H.No.04, Ra.Ni.Mn. Dhamdha, Distt.-Durg (CG)

----- Plaintiff

2. State of Chhattisgarh, Through Collector, Durg (CG)

----- Respondents

For Appellants/Defendants:

Mr.H.B.Agrawal, Senior Advocate With Ms
Priti Yadav, Advocate

For Respondent NO.1/Plaintiff:

Mr.Vinod Kumar Sharma, Advocate

For Respondent No.2/State:

Mr.Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

01/02/2021

1. The substantial question of law involved, formulated

and to be answered in this second appeal preferred by the appellants/defendants is as under:-

"Whether the first appellate court has erred in law by allowing the appeal without any oral or documentary evidence after amendment at the appellate stage?"

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

2. The suit property was originally held by one Brijlal.

The plaintiff is daughter of Brijlal. Defendant No.1 is son of Brijlal and defendant No.2 is daughter of Brijlal, whereas defendants No.3 and 4 are sons of defendant No.1. The plaintiff filed a suit that she is entitled for partition and possession over the suit land and order deleting her name from revenue records is unsustainable and bad in law, which was opposed by defendants No.1 to 4 by filing written statement.

3. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment and decree dated 5.2.2003, dismissed the suit. On appeal being preferred by the plaintiff, the first appellate Court allowed the application for amendment and without giving an opportunity to opposite party/defendants No.1 to 4 to file their pleading and adduce evidence, allowed the first

appeal, against which, this second appeal under Section 100 of the CPC has been filed by the appellants/defendants, in which one substantial question of law has been formulated, which has been set-out in the opening paragraph of this judgment for sake of completeness.

4. Mr.H.B.Agrawal, learned Senior Counsel with Ms Priti Yadav, learned counsel for the appellants/defendants, would submit that the first appellate Court ought to have given an opportunity to file response to that application and also could have taken additional evidence. Even otherwise, the judgment and decree of the trial Court was not reversed properly by the first appellate Court as held by the Supreme Court in the matter of Santosh Hazari v. Purushottam Tiwari (Deceased) by LRS.¹ and would rely upon the judgments of the Supreme Court in the matters of J. Jermons v. Aliammal and others² and Ramnik Vallabhdas Madhvani and others v. Taraben Pravinlal Madhvani³.

5. On the other hand, Mr.Vinod Kumar Sharma, learned counsel for respondent No.1/plaintiff, would support the impugned judgment and decree.

6. I have heard learned counsel for the parties,

1 (2001) 3 SCC 179

2 (1999) 7 SCC 382

3 AIR 2004 SC 1084

considered their rival submissions made herein-above and also went through the records with utmost circumspection.

7. In civil suit filed by the plaintiff against his brother and sister, the trial Court dismissed the suit finding no merit, particularly the revenue records showing the title of Brijlal have not been filed and the plaintiff has failed to establish her title. During pendency of first appeal, an application under Order 6 Rule 17 of the CPC was filed by the plaintiff, which was allowed by the first appellate Court by the impugned judgment and thereafter proceeded to allow first appeal.
8. It has been argued by learned Senior Counsel for the appellants/defendants that in order to counter the amendment so allowed, opportunity could have been given to defendants No.1 to 4 relying upon the judgment of the the Supreme Court in the matter of J. Jermons (supra).
9. The Supreme Court in the matter of J. Jermons (supra) has held that a new plea cannot be allowed to be raised without affecting the amendment in the pleadings and without giving reasonable opportunity to opposite party to file further pleadings and to adduce evidence.

10. It is true that no opportunity was given to opposite party/defendants No.1 to 4 to file documents in response to the amendment made in the plaint. According to learned counsel for the appellants/defendants, to fill-up the lacuna, such amendment has been made and that has been allowed, but the fact remains that no reasonable opportunity was given to other side/appellants herein to oppose the amendment and to file reply and to lead evidence on that amendment so allowed. Apart from the aforesaid fact, the first appellate Court did not address on the issue whether the suit land is jointly held by the plaintiff and defendants No.1 & 2 and in which she has 1/3rd share in the suit property though decree has been granted in favour of the plaintiff. The judgment & decree passed by the first appellate Court reversing the judgment and decree of the trial Court without meeting with the reasonings recorded by the trial Court is in teeth of the judgment rendered by the Supreme Court in the matter of Santosh Hazari (supra).

11. The Supreme Court in the matter of Santosh Hazari (supra) has held as under:-

"15..... While writing a judgment of reversal the appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must

weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact (See *Madhusudan Das v. Narayanibai*⁴). The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact. (See *Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh*⁵). Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in

4 (1983) 1 SCC 35

5 AIR 1951 SC 120

second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one."

12. Reverting to the facts of the present case in the light of principle of law laid down by the Supreme Court in the above-stated judgments (supra), it is quite vivid that the first appellate Court did not consider oral and documentary evidence available on record while reversing the judgment and decree of the trial Court and merely on the basis of granting amendment and not properly appreciating the evidence already on record, allowed the appeal.

13. In that view of the matter, the impugned judgment and decree passed by the first appellate Court is hereby set-aside. The matter is remitted to the first appellate Court to give an opportunity to defendants No.1 to 4 to make consequential amendment in written statement and allow the parties to lead further evidence on amended portion of the pleadings and thereafter to consider again the plea of the parties and to decide the appeal within one month from the date of receipt of copy of this order. Parties are directed to appear before the first appellate Court on **15th February, 2021**. No notice would be necessary.

14. The second appeal is allowed to the extent indicated hereinabove by answering the substantial question of law in favour of the defendants and against the plaintiff. Records be sent to the first appellate Court forthwith. No cost(s).

Sd/-

(Sanjay K.Agrawal)
Judge

B/-