

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MA No. 59 of 2014****Reserved on 16.02.2021**
Pronounced on 23.02.2021

Manoranjan Prasad Pandey S/o Late Mokar Prasad Pandey Aged About 45 Years Occupation- Nothing, R/o Baikunthpur, Raigarh, Tah. Raigarh, Distt. Raigarh (Chhattisgarh) (Defendant No. 1),

---- Appellant**Versus**

1. Smt. Jamuna Bai (Deleted As Per Honble Court Order Dated 04/09/2020) Through legal heirs of respondent No.1 Smt. Jamuna Bai
 - 1 (a) Shiv Kumar Pandey S/o Late Ramesh Pandey Aged About 80 Years R/o Mahavir Chowk Baikunthpur, Raigarh, Distt.- Raigarh (Chhattisgarh),
 - 1 (b) Smt. Meera Bai Choubey W/o Manohar Prasad Choubey Aged About 75 Years R/o Village Pendruan, Tehsil - Dabhra, Distt. Janjgir-Champa (Chhattisgarh),
 - 1 (c) Smt. Vipula Bai Pandey, W/o Late Girja Kumar Pandey, aged about 69 years, R/o Baikunthpur, Raigarh, District – Raigarh (C.G.) (Plaintiffs)
2. Smt. Nanhe Bai @ Shakuntala Bai D/o D/o Abhayram Pandey Aged About 80 Years Occupation Housework, R/o Sonarpara, Raigarh, Tahsil And District Raigarh (Chhattisgarh) (Defendant No. 2),
3. State Of Chhattisgarh, Through- The Collector, Raigarh (Chhattisgarh) (Defendant No. 3),
4. Smt. Reeta Yadav W/o W/o Rajbahadur Yadav R/o Hillview Colony, Qtr.No. S-49, J.S.P.L. Colony, Kharasiya Road, Patrapali, Tahsil And Distt. Raigarh (Chhattisgarh) (Defendant No. 4),

---- Respondents

For Appellant	: Shri Rakesh Pandey, Advocate.
For Respondents No.1(a)&1(c)	: Shri Amit Sharma, Advocate.
For Respondents 1(b), 2 & 4	: None, though served.
For Respondent 3/State	: Shri Sameer Sharma, Deputy G.A.

Hon'ble Shri Justice Sanjay S. Agrawal
C.A.V. Judgment/Order

1. Challenge to this appeal preferred by Defendant No.1 – Manoranjan Prasad Pandey under Order 43 Rule 1 (u) of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') is the judgment dated 13.05.2014 passed in Civil Appeal No. 92-A/2013, whereby the appellate Court, while setting aside the judgment and decree dated 09.10.2013 passed by the trial Court in Civil Suit No.76-A/2013, has remanded the matter for its fresh trial. The parties to this Appeal shall be referred hereinafter as per their description before the Court below.

2. Briefly stated the facts of the case are that Plaintiff – Smt. Jamuna Bai instituted a suit claiming 1/3rd share over the properties in question described in plaint Schedules “A & B”, which are situated at village Baikunthpur and Jorapali of Tahsil and District Raigarh. According to the Plaintiff, it was acquired by her father Abhayram Pandey and upon his sad demise, it was inherited by all of his heirs in equal interest of 1/3rd share and the revenue papers were mutated accordingly. Further contention of her is that without her knowledge, Defendant No.1 – Manoranjan Prasad Pandey, who is her brother's son, has obtained the revenue papers recorded in his name, and therefore, she has been constrained to institute the suit in the instant nature.

3. The Defendant No.1, while contesting the suit, has set up his interest based upon the registered deed of will dated 25.05.1964, said to have been executed by his grandfather – Abhayram Pandey, while Defendant No.4 – Smt. Reeta Yadava has set up her claim with regard to the part of Kh.No. 119/1 admeasuring 1500 sq.ft. based upon a registered deed of sale executed in her favour by the said Defendant. Other Defendants were proceeded ex parte.

4. After considering the evidence led by the parties, it was held by the trial Court that the property in question is the self-acquired property of predecessor-in-interest of the parties, namely, Abhayram Pandey, who bequeathed his entire interest by virtue of a registered deed of will dated 25.05.1964 and in consequence, dismissed the claim.

5. The aforesaid findings of the trial Court have been reversed by the appellate Court in appeal preferred by the Plaintiff – Smt. Jamuna Bai. It was observed by the Court below that since none of the attesting witnesses to the alleged will (Ex.D.1) was examined, and therefore, its due execution, attestation and validity cannot be upheld. In view of that observation, the matter was remanded to the trial Court with a direction to decide the suit afresh. This is the order which has been impugned by way of this appeal.

6. Shri Pandey, learned counsel appearing for the Appellant/Defendant No.1, while referring to the provisions prescribed under Order 41 Rule 23-A of CPC, submits that the Court below has committed a serious illegality in remanding the matter for its fresh decision even in absence of observing the conditions prescribed therein. In support, he placed his reliance upon the decisions rendered in the matters of ***P. Purushottam Reddy and Another*** vs. ***Pratap Steels Ltd.***, and ***Anil Fulara*** vs. ***Devcharan*** and ***Ghanshyam Agrawal & Another*** vs. ***Devcharan*** reported in **(2002) 2 SCC 686** and **2014 (2) C.G.L.J. 2** respectively.

7. On the other hand, learned counsel appearing for the respondents have supported the judgment impugned as passed by the Court below.

8. I have heard learned counsel appearing for the parties and perused the entire papers annexed with this appeal carefully.

9. From perusal of the record, it appears that the trial Court, while upholding the validity of the registered deed of will dated 25.05.1964 (Ex.D.1) executed by erstwhile owner of the property in question, namely, Abhayram Pandey in favour of his grandson – Manoranjan Prasad Pandey, has dismissed the Plaintiff's claim seeking 1/3rd share over the suit land. The finding so recorded by the trial Court has been reversed by the appellate Court on finding that since none of the attesting witnesses to the alleged will was examined, therefore, its validity cannot be upheld in view of the provisions prescribed under Section 68 of the Evidence Act and with this observation, has remanded the matter with a direction for its decision afresh on all the issues. It, thus, appears that the findings of the trial Court have been reversed in order to fill up the lacuna as none of the attesting witnesses of the alleged will was examined. However, there was no scope for passing the order of remand at that stage merely to afford fresh opportunities to adduce fresh evidence and to have a new trial. The approach of the Court below, therefore, appears to be unreasonable and no order as such could have been made in order to enable the party to fill up the lacuna or gaps in his case, as observed by the Supreme Court in the matter of ***K. Gopalan Nair vs. K. Balakrishnan Nair and others*** reported in **(2005) 12 SCC 351** wherein it has been observed at para 4 as under:-

“4. Once the trial had been concluded, there was no question of the defendants being given a second opportunity to prove their case before the trial court.”

10. That apart, it appears that the order of remand has been passed by the Court below even without reversing the findings of the trial Court recorded in all the issues and even without recording a finding as to whether re-trial of the matter is necessary, as required under Order 41 Rule 23-A of CPC. The said provision is relevant for the purpose reads as under:-

“23-A. 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 Code of Civil Procedure, 1908 by Act No.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 meeting the reasonings of the trial Court recorded in all the issues and even without considering that re-trial is necessary, has remanded the matter merely by observing inter alia that none of the attesting witnesses was examined. At this juncture, the principles laid down by the Supreme Court in the matter of **P. Purushottam Reddy and Another vs. Pratap Steels Ltd.** (supra) are to be seen wherein it has been observed at para 10 as under:-

“10. In 1976, Rule 23-A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23-A as it is under Rule 23.”

12. Similar is the observation made by the coordinate Bench of this Court reported in **Anil Fulara vs. Devcharan and Ghanshyam Agrawal & Another vs. Devcharan** (supra) wherein at para 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.”

13. In view of the aforesaid settled principles of law, the entire approach of the lower appellate Court remanding the matter to the concerned trial Court for its decision afresh in order to fill up the lacuna cannot be held to be sustainable in the eye of law.

14. In view of the foregoing discussions, the appeal is allowed. The impugned judgment dated 13.05.2014 passed by the Additional District Judge (FTC), Raigarh, in Civil Appeal No.92-A/2013 is hereby set aside and the matter is accordingly remitted to the concerned appellate Court, who shall restore the appeal to its file and decide the same on merits in accordance with law. The parties are hereby directed to remain present before the concerned appellate Court at Raigarh on 22.03.2021.

15. No order as to costs.

Sd/-

(Sanjay S. Agrawal)
Judge