

HIGH COURT OF CHHATTISGARH, BILASPUR
Second Appeal No.431 of 2015

1. Ashish Kumar @ Raju, S/o Krishna Kumar Soni, aged about 46 years, R/o Kankalipara, Raipur, Tahsil and District, Raipur Chhattisgarh.
2. Hemraj Agrawal, S/o Late Goverdhan Das Agrawal, aged about 43 years, R/o Station Road, Lodhipara Raipur, Tahsil and District Raipur, Chhattisgarh.
3. Ganesh Ram Agrawal, S/o Arjun Ram Agrawal, aged about 42 years, R/o Naharpara, Raipur, Tahsil and District Raipur, Chhattisgarh.
4. Sunil Kumar, S/o Sadhuran, aged about 44 years, R/o Rupra Road, District Kalahandi, Odisha.

---- Appellants

Versus

1. Mahesh Kumar Agrawal, S/o Ramgopal Agrawal, aged about 54 years, R/o House No. E-179/ 180, Sector-5, Devendra Nagar, Raipur, Tahsil and District Raipur, Chhattisgarh.
2. Prem Narayan Sharma, S/o Ramji Lal Sharma, aged about 55 years, R/o Halwai Line, Raipur, Tahsil and District Raipur Chhattisgarh.
3. State of Chhattisgarh, through Collector, Raipur Chhattisgarh.

---- Respondents

For Appellants	: Mr. R.N.Pushty, Advocate.
For Respondent Nos.1 & 2	: Mr. B.P.Sharma, Advocate.
For State/Respondent No.3	: Mr. Tarkeshwar Nande, Panel Lawyer.

Hon'ble Shri Justice Arvind Singh Chandel

Judgment On Board

30/11/2022

1. This appeal has been filed by the Appellants/Plaintiffs under Section 100 of the Civil Procedure Code, against the judgment and decree dated 16.04.2015 passed in Civil Appeal No. 6-A/2013 by the learned District Judge, Raipur, District Raipur (C.G.), thereby affirming the judgment and decree dated

16.04.2015 passed in Civil Suit No.29-A/2011 passed by learned IXth Civil Judge Class-II, Raipur whereby the learned Civil Judge dismissed the Suit filed by the Appellants/Plaintiffs for declaration of title, ejectment, injunction and for damages.

2. The substantial question of law involved, formulated and to be answered in the second appeal preferred by the Appellants/Plaintiff are as under:-

- 1.“ *Whether, the finding with regard to paternity of Nandu, has been correctly arrived at by the Courts below as against admission of defendant and the documents exhibited on record.*
2. *Whether, Baisakhin wife of the original land holder namely Sanwala became the owner of the land to the exclusion of others after death of Nandu.*
3. *Whether, the rectification deed exhibit D/8 can be privately executed between the parties to correct the land Khasra No. 587 without intervention of the Court.*
4. *Whether, Nandu who was the child in womb inherited the entire property left by Sanwala by excluding mother the then living Baisakhin.*
5. *Whether the Lower Appellate Court was justified in dismissing the application under Order 41 Rule 27 of the Civil Procedure Code at a stage prior to hearing of the Civil Appeal No.6-A/2013, on merits”.*

3. In order to answer the aforesaid substantial questions of law, the facts required to be noticed are as under:-

3.1 The Appellants/Plaintiffs filed a suit for declaration of title and injunction on the pleadings *inter-alia* that one Sanwala @ Soula was owner of agricultural land admeasuring area 4.05 acres situated at Mauja Raipur, Patwari Halka No.104, Tehsil and

District Raipur(C.G.). It was pleaded that in consolidation of holdings that took place between 1935-36 & 1941-42, some portions of the land was allotted new Khasra No.587 comprising therein land admeasuring area 1.24 acres while the rest of the lands were allotted new Khasra No.6 comprising therein 3.34 acres. Sanwala died on 29.06.1934 and his son Nandu was then unborn who took birth on 04.07.1934. Upon death of Sanwala, Nandu, the only male child succeeded the property of Sanwala and until he attained majority, the property was being looked after by guardian mother Baisakhin and hence, her name was also recorded in revenue records. Upon attaining majority since 1953-54, Nandu continued to possess and cultivate the disputed land. It was further pleaded that the Appellants purchased land bearing Khasra No.587 from Nandu on 12.06.1990 and obtained possession from him. In August 1990, some persons from the side of Defendants proponed to sell the said land and 15-20 days back from the date of filing of the suit, the Defendants tried to fence the disputed land. It was the claim of Respondents that they had purchased the land from Hatiyarin and her other sisters. According to the pleadings of the Plaintiffs, no person other than Nandu had title or possession to the other lands. Hence, the suit was filed.

4. The Defendants filed their written statements and denied all the material contentions. It was pleaded by them that Nandu was never the owner of the property. The land was recorded in the name of Hatyarin Bai who was the daughter of Sanwala, Puneetram and Kedia Bai who were cultivating possession of the land. It was pleaded by them that they have purchased the land from these persons on 12.02.1982.
5. On the basis of above pleadings, Trial Court made as many as eleven issues. After recording of evidence by the parties and hearing the parties, vide judgment dated 11.11.2012, learned Trial Court dismissed the suit preferred by the Appellants/Plaintiffs.

6. Being aggrieved with the judgment and decree passed by the Trial Court, the First Appeal has been preferred by the Plaintiffs before First Appellate Court. During pendency of the first appeal, on 07.03.2013, an application under Order 41 Rule 27 of the Civil Procedure Code was filed by the Appellants/Plaintiffs. The said application was dismissed by the learned District Judge, Raipur by its order dated 23.10.2013, thereafter, vide its judgment dated 16.04.2015, the first appeal preferred by the Appellants has also been dismissed on merits. Hence, this second appeal.
7. Mr.R.N.Pushty, learned Counsel appearing for the Appellants/Plaintiffs would submit that First Appellate Court was absolutely unjustified in rejecting the application filed under Order 41 Rule 27 of the Civil Procedure Code before hearing the appeal on merits as the said application has to be considered at the time of hearing of the appeal on merits. He would further submit that the First Appellate Court has committed grave legal error in rejecting the application before hearing the appeal on merits and, thereafter proceedings to hear the appeal as such order dated 23.10.2013 as well as judgment and decree dated 16.04.2015 passed by the First Appellate Court deserves to be set aside on this ground only.
8. Mr.B.P.Sharma, learned Counsel appearing for the private Respondents would submit that the First Appellate Court has rightly rejected the application filed under Order 41 Rule 27 of the Civil Procedure Code as the First Appellate Court found no merit in the said application and as the documents sought to be produced was well within the knowledge of the Appellants/Plaintiffs and no interference is required by this Court in the instant second appeal on this ground.
9. On perusal of Sub-Rule (aa) of Order 41 Rule 27 of the Civil Procedure Code would show that the object of the rule is to provide an opportunity to the party who was not able to produce the evidence in the trial Court and thereby to provide an opportunity to produce the same in the appellate Court. In

order to produce the documents, the conditions mentioned in Sub-Rule (aa) of Order 41 Rule 27 of the Civil Procedure Code must be satisfied to exist.

10. Dealing with the issue in the matter of ***State of Rajasthan Vs. T.N.Sahani and others***¹, it was held that the Order 41 Rule 27 of the Civil Procedure Code has to be considered at the time of hearing of the appeal on merits and similarly the same has been taken by the Supreme Court in the case of ***Eastern Equipment and Sales Limited Vs. ING. Yash Kumar Khanna***². In the case of ***Khemchand Mulchand Vs. Government of Madhya Pradesh, Bhopal***³, the Madhya Pradesh High Court has also held that the application for admitting the additional documents filed at an appellate stage should be decided only after hearing of the appeal on merits. In the case of ***Abhay Kumar Nathu Lal Jain Vs. Santosh Kumar Madan Lal Naik***⁴, it has been held that the application filed under Order 41 Rule 27 of the Civil Procedure Code should be decided at the time of final hearing.

11. Relying upon the above mentioned judgments, similar view has been taken by Co-ordinate Bench of this Court in the case of ***Laxman Prasad Vs. Laxmi Prasad @ Lacchiram and others***⁵.

12. Thus, it is clear that the application under Order 41 Rule 27 of the Civil Procedure Code filed during pendency of the first appeal should not be decided before hearing the appeal on merits. The appeal must be heard first on merits and then lower appellate Court should consider as to whether application for production of additional evidence should be allowed or not. If the application is allowed then the appeal has to be heard again on merits after reception of additional evidence in order to decide the appeal finally.

13. Applying to the above principles of law laid down, if the facts of

1 (2001) 10 SCC 619

2 (2008) 12 SCC 739

3 1972 MPLJ 524

4 (2001) 1 Civil L.J. 70

5 2015(3) C.G.L.J. 161

the case are examined, it is quite clear that the First Appellate Court had taken up the application filed under Order 41 Rule 27 of the Civil Procedure Code for consideration prior to hearing the first appeal on merits and rejected the said application by order dated 23.10.2013 and thereafter heard the appeal on merits on 25.03.2015 and pronounced the judgment on 16.04.2015. Such procedure adopted by the First Appellate Court is not accordance with the law laid down as referred earlier.

14. In the light of above discussion, I am of the considered opinion that the order passed by the First Appellate Court on 23.10.2013 rejecting the application filed under Order 41 Rule 27 of the Civil Procedure Code before hearing the appeal on merits is unsustainable and contrary to law and consequently, order dated 23.10.2013 as well as judgment and decree passed by the First Appellate Court dated 16.04.2015 deserves to be set aside. Thus, the substantial question of law “*Whether the Lower Appellate Court was justified in dismissing the application under Order 41 Rule 27 of the Civil Procedure Code at a stage prior to hearing of the Civil Appeal No.6-A/2013, on merits*” (which is framed today) is answered in the manner indicated hereinabove. Since, the above substantial question of law is already answered, therefore, the matter is required to be reheard by the First Appellate Court, answering the other substantial questions of law is not required.

15. Accordingly, the second appeal is allowed in part. The order passed by the First Appellate Court dated 23.10.2013 and the impugned judgment and decree dated 16.04.2015 is hereby set aside. The first appeal as well as the application filed under Order 41 Rule 27 of the Civil Procedure Code is restored to its original number in the said Court for hearing and disposal in accordance with law. Taking note of the fact that the first appeal is of the year 2012, the said Court is directed to hear and decide the appeal expeditiously preferably within six months from the date of receipt of copy of this order.

16. Make it clear that this Court has not gone into the merits of application filed under Order 41 Rule 27 of the Civil Procedure Code which is kept open to be decided by the First Appellate Court while deciding the appeal.

17. The parties are directed to appear before the First Appellate Court on 09.01.2023. Records of the Courts be sent back forthwith. A decree be drawn up accordingly.

Sd/-
(Arvind Singh Chandel)
Judge