

Arbind Sharma @ Pappu Sharma and anr. Vs. Ram Chander Sharma

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Court : Patna

Decided On : Jan-15-2007

Judge : Ramesh Kumar Datta, J.

Acts : Evidence Act - Sections 74; Code of Civil Procedure (CPC) Amendment Act 46 of 1999; Code of Civil Procedure (CPC) - Sections 115 - Order 18, Rules 2 and 17A - Order 41, Rule 27 and 27(1)

Appeal No. : Civil Revision No. 940 of 2004

Appellant : Arbind Sharma @ Pappu Sharma and anr.

Respondent : Ram Chander Sharma

Advocate for Def. : Ashok Sinha, Adv.

Advocate for Pet/Ap. : Kundan Bahadur Singh and Arjun Prasad Singh, Adv.

Disposition : Application allowed

Prior history : Ramesh Kumar Datta, J. 1. In this civil revision application, the petitioners are aggrieved by the order dated 17.7.2004 passed by the Second Additional District Judge, Kaimur at Bhabhua in Title Appeal No. 8/8 of 2001 by which he has allowed the petition filed by the defendant-appellant-opposite party holding that it is necessary that the document in question be taken as additional evidence in exercise of powers under Order 41 Rule 27 of the Code of Civil Procedure. 2. The plaintiff-respon

Judgement :

Ramesh Kumar Datta, J.

1. In this civil revision application, the petitioners are aggrieved by the order dated 17.7.2004 passed by the Second Additional District Judge, Kaimur at Bhabhua in Title Appeal No. 8/8 of 2001 by which he has allowed the petition filed by the defendant-appellant-opposite party holding that it is necessary that the document in question be taken as additional evidence in exercise of powers under Order 41 Rule 27 of the Code of Civil Procedure.

2. The plaintiff-respondent-petitioners had filed Title Suit No. 55 of 1990 for a declaration that the gift deed dated 15.12.1989 purportedly executed by Most. Eitwari Kuer was never executed by her and the same is forged, fraudulent and void and is not binding on the plaintiffs. In short, the case of the plaintiffs was that on the death of the said Etiwari Kuer in the night of 14/15.12.1989 at her village, at about 10.40 A.M. on 15.12.1989 she was cremated at Harischandra Ghat, Varanasi in presence of both the plaintiffs and defendant and upon her death the plaintiffs succeeded to her share in the property left by her husband. Ramgati Lohar and thereafter are in possession of the said suit property. However, subsequently the plaintiffs learnt that a forged and fabricated deed of gift dated 15.12.1989 was purportedly executed by Most. Eitwari Kuer in favour of the defendant-opposite party, and accordingly they filed the said suit. During the trial of the suit the plaintiffs brought on the record exhibits 1 and 2 which are certified copies of entries in the register of death of Harishchander Ghat. Varanasi issued by Varanasi Maha Nagarpalika and original copy of receipt of Varanashi Maha Nagarpalika for the funeral charges. The defendants also led their evidence and defendant No. 11 stated in his evidence that the dead body of Etiwari Kuer was taken to Harish Chandra Ghat, Varanashi and certificate issued by Varanashi Maha Nagarpalika is with him as also with the plaintiffs.

3. After hearing the parties the suit was decreed by judgment and decree dated 16.2.2001. Against the same defendant-opposite party filed Title Appeal No. 8/8 of 2001. Subsequently, an application was filed on 22.3.2004 under Order 41 Rule

27 of the Code of Civil Procedure by the appellant-opposite party plying that the appellant be allowed to produce the death certificate issued by the Gram Panchayat Chainpur dated 8.9.1993 as additional evidence in which it was stated that Eitwari Kuer had died on 15/16.12.1989. It was stated in the said petition that the said death certificate was traceless and hence the same could not be filed at the time of hearing of the original suit and the appellant tried his best to search out the death certificate at every possible place but he failed and only after filing of the appeal the appellant found the said death certificate. A rejoinder was filed by the respondent-petitioners to the said petition stating that the petition under Order 41 Rule 27 CPC was filed mala fide with a view to mislead the Court since at no stage during the pendency of the suit or the appeal it had been averred by the appellant that the alleged document which he now wants to be admitted as additional evidence had been misplaced nor any statement had been made in the deposition in Court and the same has been forged and created for the purpose of filing the petition at this belated stage. It was further stated that the said death certificate is dated 8.9.1993 which is after the filing of the suit and thus had got no validity in the eye of law. The further submission was that if the alleged document was traceless and thus could not be filed in the original suit, it was open to the appellant to have filed the certified copy of the alleged certificate after obtaining the same from Gram Panchayat. Moreover, it was submitted that the petition has been filed in order to fill up the lacuna in the case of the appellant which cannot be permitted at this belated stage.

4. After hearing the parties, the 2nd Additional District Judge, Kaimur at Bhabua allowed the said petition by the order impugned dated 17.7.2004 on the ground that Order 41 Rule 27 CPC is a right given to the parties to the appeal and the provision must be read in conjunction with the provisions of Order 18 Rule 17A and Order 18 Rule 2 CPC. The further reason mentioned in the order is that the object of the provision is to permit the parties to adduce complete evidence so as to completely adjudicate the dispute between the parties specially where such evidence is necessary for giving effective and complete relief to the parties. It was found by the appellate court that there was no negligence on the part of the applicant in submitting the additional evidence and such document is necessary for consideration of the case in the interest of justice and it appeared to him that

the document in question was not available to the party notwithstanding the exercise of due diligence and thus, to decide the real issue, it is necessary that the same is taken as additional evidence.

5. Learned Counsel for the petitioners submitted that the impugned order dated 17.7.2004 is wholly illegal and thus fit to be set aside since it amounts to an illegal exercise of jurisdiction by the appellate Court. It is submitted that the appellant-opposite party had failed to make out a case under Order 41 Rule 27(1)(aa) CPC. It is submitted that the clear case of the opposite party was that he had knowledge of the alleged death certificate dated 8.9.1993 issued by the Chainpur Gram Panchayat but since the same had been misplaced he could not locate it despite all efforts on his part. It is submitted that since the admitted case is that the document in Question was within the knowledge of the opposite party, therefore, the case cannot be covered by the first part of Clause (aa), whereas it could not be held that after the exercise of due diligence it could not be produced by him at the time when the decree appealed against was also passed. It is submitted that the appellant-opposite party should have called for the Register of the Chainpur Gram Panchayat or he could have obtained certified copy of the alleged death certificate dated 8.9.1993 and got the same exhibited as secondary evidence. In the said circumstances, it is submitted that it is not open to the opposite party to claim that due diligence had been exercised and despite that the document could not be produced and thus none of the two conditions laid down in Clause (aa) of Rule 27(1) CPC are made out by the opposite party. In the said circumstances, it is submitted that the petition under Order 41 Rule 27 CPC has been illegally allowed by the court below.

6. In support of the aforesaid proposition learned Counsel for the petitioners relies upon a decision of the Supreme Court in the case of Karnataka Board of Wakf v. Government of India and Ors. 2004(3) PLJR (SC) 245, in para 6 of which it has been held as follows:

The scope of Order XLI. Rule 27, CPC is very clear to the effect that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, unless they have shown that in spite of due diligence, they could not

produce such documents and such documents are required to enable the Court to pronounce proper judgment. In this view of the matter, we do not think there is any justification for us to interfere with the orders of the High Court.

7. Learned Counsel for the petitioner also relies upon another decision of the Apex Court in the case of N. Kamalam (dead) and Anr. v. Ayyasamy and Anr. 2001 (4) PLJR (SC) 147, in para 19 of which it has been held as follows:

8. Incidentally, the provisions of Order 41 Rule 27 has not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the Court of Appeal - It does not authorise any lacunae or gaps in evidence to be filled up. The authority and jurisdiction as conferred on to the Appellate Court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way. This Court in *The Municipal Corporation of Greater Bombay v. Lala Pancham and Ors.* : [1965]1SCR542) has been candid enough to record that the requirement of the High Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. In paragraph 9 of the judgment this Court observed: This provision does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. The High Court does not say that there is any such lacuna in this case. On the other hand, what it says is that certain documentary evidence on record supports 'in a large measure' the plaintiffs' contention about fraud and male fides. We shall deal with these documents presently but before that we must point out that the power under Clause (b) of Sub-rule (1) of Rule 27 cannot be exercised for adding to the evidence already on record except upon one of the grounds specified in the provision.

9. Another submission of learned Counsel for the petitioners is that the power in the preset matter has been exercised evidently under Order 41 Rule 27(1)(aa) and not under Clause (b) of the same since the clear case of the appellant-opposite

party in his petition was that despite the exercise of due diligence he had not been able to produce the document in Court at the stage of trial. However, it is submitted that even if for the sake of argument, if it is taken to be a part of exercise of power under Clause (b), then such Dower could have been exercised only at the time of hearing the appeal, if the Court found that without production of the document in question it was unable to pronounce the judgment. It is submitted that in the present matter hearing of the appeal has not even been taken up and while the same was pending the application had been filed: at that stage, it would have been pre-mature for the Court to have exercised the power in view of the law laid down by the Supreme Court in the case of Arjan Singh v. Kartar Singh and Ors. AIR 1951 (SC) 198. in para 7 of which it was held as follows:

The discretion to receive & admit additional evidence is not an arbitrary one, but is a judicial one circumscribed by the limitations specified in order 41, Rule 27, Civil P.C. If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of improper exercise of discretion, & the additional evidence so brought on the record will have to be ignored & the case decided as if it was non-existent. Under Order 41, Rule 27, it is the appellate Ct. that must require the evidence to enable it to pronounce judgment. As laid down by the P.C. in the well-known case of Kessowji v. G.I.P. Railway 34 I.A. 115 : 31 Bom. 381 (P.C.).

the legitimate occasion for the application of the present rule is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Ct. of fresh evidence & the application is made to import it.

and they reiterated this view in stronger terms even in the later case of Parsotim v. Lal Mohan 58 I.A. 254 : AIR (18) 1931 P.C. 143. The true test, therefore, is whether the appellate Ct. is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced.

10. Learned Counsel for the petitioners also relies upon the decision of the case of Parsotim Thakur and Ors. v. Lal Mohar Thakur and Ors. AIR 1931 Privy Council 143, which has been relied upon in the said decision of the Supreme Court.

11. The further submission of the learned Counsel for the petitioners is that in any view of the matter, the petition under Order 41 Rule 27 ought not to have been allowed after such a long lapse of time and such gross delay of 14 years after the filing of the suit in filing the application under Order 41 Rule 27 would be fatal to the same. It is pointed out that the suit was filed in the year 1990. The document in question i.e. the alleged death certificate dated 8.9.1993 itself came into existence during the pendency of the suit on 8.9.1993 and the appeal was filed in the year 2001 in which the petition in question was filed on 23.2.2004, clearly 14 years after filing of the suit and 3 years even after filing of the appeal, therefore, the same was fit to be rejected at the outset on the ground of delay itself. In support of the same proposition learned Counsel relies upon the aforesaid judgment of the Supreme Court in the case of N. Kamalam (supra), in paragraph 20 of which the said proposition has been laid down.

12. Learned Counsel for the Opposite party while did not strongly refute the argument that the application of the appellant in the court below was essentially under Clause (aa) of Order 41 Rule 27(I) but he further submitted that in view of the statements made in para 5 of the impugned order dated 17.7.2004. Clause (b) of the said provision is also applicable in the case. It was submitted that once the court below had exercised its jurisdiction under Order 41 Rule 27(1)(b) CPC, then the High Court in revision at the interim state when the appeal is pending for final hearing before the learned Additional District Judge, would not be justified and should not interfere with the order which is within the jurisdiction of the Appellate Court. It is submitted that it is open to the appellate court to exercise jurisdiction one way or the other and therefore if the order was wrong on merits, (SIC) it would be open for the petitioners to challenge the same in accordance with law after the appellate decree is passed.

13. In support of the aforesaid proposition. Learned Counsel for the opposite party relies upon the decision of the Supreme Court in the case of Gurdey Singh and Ors. v. Mehnga Ram and Anr. : AIR 1997 SC3572 in which it has been held as follows:

In our view the approach of the High Court in revision at that interim stage when the appeal was pending for final hearing before the learned Additional District Judge was not justified and the High Court should not have interfered with the order which was within the jurisdiction of the appellate court. The reason is obvious. The appellate court hearing the matter finally could exercise Jurisdiction one way or the other under Order XLI, Rule 27 specially Clause (b). If the order was wrong on merits, it would always be open for the respondent to challenge the same in accordance with law if an occasion arises to carry the matter in second appeal after an appellate decree is passed.

14. On the question of delay learned Counsel for the opposite party argued that if the appellate court felt that interest of justice requires that the document may be received then it is open to it to exercise the power under Order 41 Rule 27 CPC even if there has been substantial delay in filing of the application. In this regard, learned Counsel sought to rely upon the observations of the Supreme Court in the case of *Billa Jagan Mohan Reddy and Anr. v. Billa Sanjeeva Reddy and Ors.* : [1994]1SCR429 , in para 4 of which it has been observed as follows:

It is settled law that if the documents are found to be relevant to decide the real issue in the controversy and when the court felt that interest of justice requires that the documents may be received, exercising the power under Order 41. Rule 27 CPC the appellate court would receive the documents and consider their effect thereof.

15. On a consideration of the facts and circumstances of the case and the submissions made on behalf of the petitioners and the opposite party I find that there is sufficient force in the arguments raised on behalf of the petitioners. From the tenor of the petition under Order 41 Rule 27 CPC. dated 22.3.2004, a certified copy of which has been produced before me, it is evident that it was clearly an application invoking the jurisdiction of the Court under Clause (aa) of the said Rule on the ground that despite exercise of due diligence and searching for the documents in Question the appellant could not produce the same before the trial court and having discovered it during the pendency of the appeal, he sought a direction of the Court to produce the same in evidence. The application of Clause

(aa) of Order 41, Rule 27(1) could arise under two circumstances. The first circumstance is when during the course of trial the document in question was not within the knowledge of the party even after the exercise of due diligence by him. From the petition dated 22.3.2004, it is evident that the appellant-opposite party claims to have knowledge of the said document at the stage of the trial and thus he is not invoking the first Part of Clause (aa). The second ground on which such document may be allowed to be produced is where the party establishes before the court that it could not after exercise of due diligence produce the said document at the time when the decree appealed against was passed. This Court fails to understand how the opposite party by exercising due diligence would have failed to produce the alleged death certificate dated 8.9.1993 which, as a matter of fact, had been issued by the Chainpur Grampanchayat much after filing of the suit itself and about which admittedly the opposite party had full knowledge at the time of hearing of the suit. Thus, even if it is accepted that after searching for the said death certificate which had been allegedly obtained by the opposite party while the suit was pending there was nothing to prevent him from obtaining a certified copy of the same and producing the same in Court since the said certificate would evidently be a public document within the meaning of Section 74 of the Indian Evidence Act. Thus, the finding of the appellate court that there was no negligence on the part of the opposite party in producing the document in question appears to be based upon a complete lack of understanding of the legal provisions and it must be held that there was no due diligence exercised by the opposite party in not producing the said document by him at the stage of the trial rather there was gross negligence on his part.

16. The decisions cited by the learned Counsel for the petitioners in this regard also clearly show that Order 41 Rule 27 does not confer a right to the parties of appeal as held by the learned Additional District Judge, rather the Power under the said provision is to be exercised in rare cases. The Apex Court has clearly held in the Karnataka Board of Wakf (supra) that the parties to an appeal are not entitled to produce additional evidence unless they have shown that in spite of due diligence they could not produce such document. In view of what has been held above, it cannot be said that the opposite party have been able to show the exercise of due diligence in the matter. Moreover, in the case of N. Kamalam

(supra) it has been clearly laid down by the Apex Court that the power under the said provision could not be exercised for adding to the evidence already on record except upon the grounds specified in the provision itself and it cannot be used to patch up the weak points in the case and fill up the omission in the court of appeal.

17. So far as the Question of application of Clause (b) of Order 41 Rule 27 is concerned, it is evident that the said clause has no application in the facts of the present case. The opposite party cannot be permitted to rely upon another chance or subsidiary observations in the impugned order dated 17.7.2004. It is evident from the decisions of the Supreme Court cited above that in a matter like the present one. Clause (b) can only be invoked if it can be shown that appellate court is unable to pronounce the judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. No such finding has been recorded in the impugned order dated 17.7.2004 by the learned Additional District Judge that without taking the said death certificate dated 8.9.1993 on the record, he would be unable to pronounce his judgment. In fact, as rightly pointed out by the learned Counsel for the petitioners, the stage for the same could have arisen only at the time of final hearing of the appeal when on the examination of the entire facts and evidence on the record the court could have reached at conclusion. In any case the certificate issued by the authorities at Varanashi, where admittedly the cremation had been made, was clearly on the record and that was also a document contemporary to the death of the deceased person and thus it could not have been held that the death certificate issued several years after the filing of the suit was essential and without it the court would be unable to pronounce the judgment. The said document would not fill up any lacuna and gap on the records of the case without which judgment could not be pronounced rather it can only be used to fill up a lacuna or gap in the case of the appellant which is not the purpose of Clause (b) of Order 41 Rule 27 CPC. Thus, on a consideration of the entire facts and the laws laid down by the Apex Court it is evident that the present is not a case where Clause (b) of Order 41 Rule 27 has any application nor has the same been applied by the court below which has purported to act clearly in terms of Clause (aa) of the said provision.

18. In view of what has been laid down above, the reliance of the opposite party in the case of Gurdev Singh (supra) is without any basis. In the said case the application was clearly under Order 41 Rule 27(b) CPC and thus the Apex Court held that it was for the appellate court to exercise its jurisdiction one way or the other under the said provision and having done so the High Court ought not to have interfered in its exercise of revisional jurisdiction under Section 115 of the Code of Civil Procedure.

19. In the present case the appellate court has clearly acted illegally in exercise of its jurisdiction under Order 41 Rule 27 of the, cod. Before the discretion under Clause (aa) could be exercised the party invoking the jurisdiction of the appellate court must establish that even after the exercise of due diligence the document in Question could not be produced by him before the trial court and the appellate, court even while allowing such additional evidence to be produced, is required to record its reasons for admission of such document. As already held, the opposite party had totally failed to establish that even after exercise of due diligence either the original document which he had obtained earlier or the certified of the same could not have been produced by him. Once the party has failed to establish the pre-existing fact for the exercise of /jurisdiction under Clause (aa) then any such exercise of jurisdiction by the appellate court has to be held as an illegal exercise of jurisdiction which ought to be interfered with under the revisional jurisdiction of this Court. It has been clearly held in the case of Arian Singh (supra) that the discretion to receive and admit additional evidence is not an arbitrary one, but is a judicial one circumscribed by the limitations specified in Order 41 Rule 27 CPC.

20. In the aforesaid context, this Court is also surprised at the observations made in the impugned order dated 17.7.2004 that the provision of Order 41 Rule 21 CPC must be read in conjunction with provisions of Order 18 Rule 17-A and Order 18 Rule 2. It appears that the learned Additional District Judge was wholly ignorant of the fact that Rule 17-A of Order 18 has been repealed by the CPC Amendment Act 46 of 1999 with effect from 1.7.2002 and thus, there would be no occasion for any Court to rely upon any such provision. Further, this Court is unable to see how the Order 18 Rule 2 has any application in the matter of interpretation of Order 41 Rule 27 CPC.

21. So far as the reliance upon the case of Billa Jagan Mohan Reddy (supra) is concerned the same was a case where the trial court had refused to accept the documents since the same had been filed at a belated stage by the trial court. It was not at all a case under Order 41 Rule 27 CPC and the passing reference to the said provision in the said order of the Supreme Court have no application while deciding the scope of the said provision. The Question of delay at the stage of trial and the Question of delay when documents are sought to be produced at appellate stage would definitely stand upon different footing, and, in my opinion, the present case is nearer to the facts of the case of N. Kamalam (supra) relied upon by the learned Counsel for the petitioner. In that case the suit was instituted in the year 1981 and decree was passed in 1983 whereafter the first appeal was filed in April, 1983 but the application for adducing additional evidence was made only in August, 1983. In the said circumstances, the Apex Court held that the claim for production of additional evidence was rightly rejected. In the present matter, the suit was filed in 1990 and was decreed in the year 2001, the document in question was prepared on 8.9.1993, much after filing of the suit, evidently at the behest of the opposite party, and the same was not produced till the date of decree. Thereafter the appeal was also filed in the year 2001 but at no stage any averment with regard to death certificate issued by the Chainpur Gram Panchay at has been made. Thereafter, clearly 3 years after filing of the appeal the petition dated 22.3.2004 under Order 41 Rule 27 has been filed, hence the 14 years delay from the date of filing of the suit and 3 years delay from the date of filing of the appeal, that too of a document which had come into existence more than 3 years after the filing of the suit, would definitely act as a bar on the admission of such document in evidence at the appellate.

22. For the aforesaid reasons this Court holds that by the impugned order dated 17.7.2004 the learned Additional District Judge has exercised his jurisdiction illegally and the said order is thus, fit to be quashed.

23. In the result, the order dated 17.7.2004 is quashed and the civil revision application is accordingly allowed but in the facts and circumstances of the case there shall be no order as to costs.

