

Shri Kishore and anr. Vs. Roop Kishore

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SooperKanoon Citation : sooperkanoon.com/495360

Court : Allahabad

Decided On : Nov-22-2005

Reported in : AIR2006All103; 2006(2)AWC1486

Judge : Vineet Saran, J.

Acts : Evidence Act - Sections 103; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 41, Rule 27 and 27(1)

Appeal No. : C.M.W.P. No. 44671 of 2004

Appellant : Shri Kishore and anr.

Respondent : Roop Kishore

Advocate for Def. : Sudhir Dixit, Adv.

Advocate for Pet/Ap. : Amit Saxena, Adv.

Disposition : Petition allowed

Judgement :

ORDER

Vineet Saran, J.

1. Petitioners Shri Kishore and Bacchan Babu as well as respondent Roop Kishore are all real brothers having their landed properties situated in the village. After the

death of their father, they inherited the property in the ratio of 1/3rd share each. According to the petitioners, on 27.2.2001 a family partition took place between the three brothers in presence of the Panchayat and other witnesses, in which the respondent Roop Kishore left his 1/3rd share in favour of the petitioners, after taking a sum of Rs. 22,000/- in lieu of his share in the property. Thereafter, on 12.3.2001, respondent Roop Kishore filed Original Suit no. 126 of 2001 against the petitioners in the court of Civil Judge (Junior Division), Aligarh for partition of his 1/3rd share in the joint property. The said suit was contested by the defendant-petitioners. The trial court, vide its Judgment and Order dated 16.11.2002, dismissed the suit of the plaintiff-respondent with cost. Against the said Judgment and Order of the trial court, the plaintiff-respondent Roop Kishore filed appeal on 24.12.2002, which was registered as Civil Appeal No. 10 of 2003 in the court of District Judge, Aligarh. After lapse of more than 15 months of filing of the appeal, the respondent Roop Kishore filed an application under Order 41 Rule 27 C.P.C before the appellate court for obtaining the opinion of Hand-writing expert with regard to his signatures on the partition deed dated 27.2.2001. Petitioners filed objections to the said application and after hearing the learned Counsel for the parties, the appellate court, vide its order dated 27.9.2004, allowed the said application of the respondent. Aggrieved by the said order, the petitioners have filed this writ petition.

2. I have heard Sri Amit Saxena, learned Counsel for the petitioners, as well as Sri Sudhir Dixit, learned Counsel for the respondent and have perused the record. Counter and rejoinder affidavits have been exchanged and with the consent of the learned Counsel for the parties, this writ petition is being disposed of at this stage.

3. The respondent can adduce additional evidence at the appellate stage only under the provisions of Order 41 Rule 27 C.P.C., which reads as under:-

27 Production of additional evidence in Appellate Court-

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the appellate Court may allow such evidence or document to be produced or witness to be examined.

2) Whenever additional evidence is allowed to be produced by an appellate Court, shall record the reason for its admission.

4. The contention of the defendant-petitioners is that the application for adducing additional evidence at the appellate stage could have been entertained only if the same was within the ambit of the provisions of Order 41 Rule 27 C.P.C. It was submitted that since in the present case, the conditions of the said rule were not fulfilled, the appellate court has erred in law in allowing the same and that, accordingly, the impugned order was liable to be quashed.

5. Sri Sudhir Dixit, learned Counsel for the plaintiff-respondent, has however submitted that the burden of proving the document (partition deed dated 27.2.2001) was on the defendant-petitioners, as they had filed the said document and thus it was the duty of the defendant-petitioners to have called for a report from the Hand-writing expert; and since the same was not done before the trial court, the respondent had filed the application for calling for such a report from the hand-writing expert to verify the signature of the plaintiff-respondent on the said partition deed, which has rightly been allowed, being covered by the provisions of Sub-rule (1)(aa) of Rule 27 of Order 41 C.P.C. learned Counsel for the respondent has further submitted that to meet the ends of justice, the appellate court can always require any document to be produced or any witness to be examined, to enable it to pronounce judgment or for any other substantial cause, and thus case

of the respondent would also be covered under the provisions of Order 41 Rule 27(1)(b) C.P.C.

6. Having heard learned Counsel for the parties and considering the facts and circumstances of this case, in my view, the appellate court has erred in allowing the application of the plaintiff-respondent and as such the said order deserves to be set aside. It is not the case of the respondent that he was not given sufficient opportunity to produce evidence before the trial court. In the facts of the present case, the submission of the learned Counsel for the respondent that under Section 103 of the Indian Evidence Act, the burden to prove a particular fact would lie on the person who wishes the court to believe in its existence, does not have much force. It is true that the defendant-petitioners had filed the document dated 27.2.2001 and it was their duty to prove the same. However, it is evident from a perusal of the order of the trial court that for such purpose the petitioner No. 1, besides producing himself as witness, had also produced the scribe of the document as well as an attesting witness of the document, who were duly cross examined by the plaintiff. It has been categorically observed by the trial court that the plaintiff-respondent was given ample opportunity to produce evidence in his favour but instead, the plaintiff-respondent did not produce any of the eight signatories of the document in question, nor did he make any application for getting the document examined by any hand-writing expert. Thus it cannot be said that the defendant -petitioners did not discharge their duty to prove the authenticity of the document which they were relying upon. The real test in the present case would be to see as to whether what the respondent is wanting to do by filing an application under Order 41 Rule 27 C.P.C. before the appellate court, could have been done by him before the trial court or not. The answer to the same, in the present case, would be that the respondent could have called for a report of a hand-writing expert even before the trial court, for which he had sufficient opportunity. As such, since he did not avail such opportunity, he cannot thereafter be granted a fresh chance to adduce additional evidence before the appellate court.

7. The next submission of the learned Counsel for the respondent is that even after exercising due diligence, the respondent could not adduce such evidence

before the trial court because it was only after the judgment of the trial court that he realised that the duty was cast on him to disprove the document and he thus contended that the case would be covered under Clause (aa). The said submission is not tenable in law as in case if after the judgment of the trial court, a person is permitted to better or improve upon his case, then the entire purpose of Order 41 Rule 27 C.P.C. would be defeated. When the defendants-petitioners had adduced evidence to prove the document before the trial court, it was open to the plaintiff-respondent to produce adequate evidence in support of his case to disprove the said document (partition deed). The Apex Court in the case of Natha Singh v. The Financial Commissioner AIR 1976 SC 1053 has observed as follows:

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So far as the application of the appellants of additional evidence is concerned, it cannot be allowed in view of the well settled principles of law that the discretion given to the appellate court to receive and admit additional evidence is not an arbitrary one but is a judicial one circumscribed by the limitations prescribed in Order 41 Rule 27 of the Code of Civil Procedure. If the additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence, it will be a case of improper exercise of discretion and the additional evidence so brought on the record will have to be ignored. The true test to be applied in dealing with applications for additional evidence is whether the appellate court is able to pronounce judgment on the materials before it, without taking into consideration the additional evidence sought to be adduced.

8. In the present case also, the prayer for adducing the additional evidence has been made by the respondents merely to fill up the gaps in this case. In my view, the case of the respondent would thus not be covered under Clause (b) also as it is only in exceptional and extraordinary circumstances that the appellate court may, on its own, direct production of any document or witness only to enable it to pronounce the judgment or for any other substantial cause. There is no substantial cause placed before me on the basis of which, on its own, the appellate court could have directed the additional evidence to be adduced. As observed by the Apex Court in the case of Nathu Singh: : [1976]3SCR620 (supra), the true tests in such a case would be as to whether the appellate court is able to pronounce the

judgment on the materials before it, without taking into consideration the additional evidence sought to be adduced. In the present case, in my view, the appellate court could have pronounced the judgment without the additional evidence sought to be produced by the respondent, as evidence regarding proof of the document had already been adduced by the parties before the trial court. The parties cannot be given opportunity to better the case or adduce additional evidence only to fill up gaps left out in the case before the trial court else this would be a never ending process, and the parties would continue to move applications for adducing additional evidence at every stage of the proceedings.

9. The appellate court can thus direct a party to adduce additional evidence only if the conditions under Rule 27 of Order 41 C.P.C. are satisfied. Additional evidence in appeal cannot be filed by any party to the appeal as of right. Since the case of the respondent for adducing additional evidence is not covered under any of the three clauses of Rule 27 of Order 41C.P.C., the appellate court has erred in law in passing the impugned order dated 27.9.2004 allowing the application of the respondent to produce additional evidence.

10. Accordingly, this writ petition is allowed. The order dated 27.9.2004 passed by the Additional District Judge, Aligarh in Civil Appeal No. 10 of 2003 is quashed. Both the sides have submitted that as the appeal is pending since 2003, it may be disposed of at the earliest. Accordingly, it is provided that the lower appellate court shall decide the appeal expeditiously, preferably within six months from the date of filing of a certified copy of this order before it, without granting any unnecessary adjournment to either party.

No order to cost.