

Ramesh Chander Thukral Vs. Sadershan Dev Sharma

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Court : Delhi

Decided On : Sep-30-1985

Reported in : 1986(10)DRJ66

Judge : Sultan Singh, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 41, Rule 27

Appeal No. : Civil Revision Appeal No. 618 of 1985

Appellant : Ramesh Chander Thukral

Respondent : Sadershan Dev Sharma

Advocate for Pet/Ap. : S.C. Gupta and; Arun Kumar, Advs

Judgement :

Sultan Singh, J.

(1) The respondent filed a suit for mandatory injunction and mesne profits against the petitioner which was decreed by the trial court. The petitioner filed an appeal which is pending before the Additional District Judge, Delhi. The petitioner in March, 1985 made an application under Order 41 Rule 27 of the Code of Civil Procedure (hereinafter referred to as 'the Code'). The petitioner alleges that the main contention between the parties is whether he is a tenant in the property or licensee. There is also dispute regarding the exclusive possession of the property.

The petitioner submits that he had given to his counsel conducting the case in the trial court various documents referred to in his application, and on inspection of the file the petitioner came to know that the documents were on record but the same have not been exhibited. He further submits that the trial court has not taken into consideration the documents already on record in spite of due diligence on the part of the petitioner. The petitioner thus prays that in the interest of justice he be permitted to formally prove the documents and the same be taken into consideration. The application was contested and the lower appellate court dismissed the same on the ground that the documents were not proved before the trial court on account of the negligence of the Advocate. It has been further observed that the negligence of an advocate is no ground for leading additional evidence.

(2) In this revision learned counsel for the petitioner submits that the trial court has failed to follow the established procedure for accepting or rejecting an application for additional evidence within the meaning of Order 41 Rule 27 of the Code. He submits that ordinarily evidence on record already admitted is to be considered by the appellate court. But if the case is made out for additional evidence within the meaning of any of the sub-clause of Order 41 Rule 27 of the Code the appellate court has power to allow additional evidence. Learned counsel for the respondent submits that clause (a) or (b) of Order 41 Rule 27 of the Code is not applicable. On the other hand, learned counsel for the petitioner submits that his case is covered under clauses (a) and (b) of Order 41 Rule 27 of the Code. His submission is that in spite of due diligence the documents were not exhibited before the trial court. He further submits that after consideration of the existing evidence on record the appellate court may exercise powers under clause (b) of Order 41 Rule 27 of the Code. His submission is that the proper occasion for consideration of the application under Order 41 Rule 27 of the Code is when the appellate court considers the evidence on record. I find substance in the submission of the learned counsel for the petitioner. Under Order 41 Rule 27 of the Code a party to an appeal is not entitled to produce additional evidence but if the circumstances mentioned in clauses (a), (aa) or (b) of Order 41 Rule 27 of the Code exist the appellate court may exercise discretion and admit the additional evidence. Under clause (b), the appellate court can exercise discretion to admit additional evidence

only after considering the existing evidence on record. The appellate court may require the additional documents or examine any witness to enable it to pronounce judgment. The appellate court may admit additional documents for any other substantial cause. In the present case it is apparent that the lower appellate court never had any occasion to consider the existing evidence on record. The lower appellate court therefore acted in violation of the procedure prescribed under Order 41 Rule 27 of the Code and therefore it acted illegally in the exercise of its jurisdiction.

(3) In *Arjan Singh v. Kartar Singh and others*, : [1951]2SCR258 it has been observed that the legitimate occasion for the exercise of discretion under Order 41 Rule 27 of the Code is when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. The true test therefore 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. The lower appellate court was thus not justified in rejecting the petitioner's application without examining the existing evidence on record. The impugned order is, therefore, without jurisdiction.

(4) The revision petition is accepted setting aside the impugned order. The lower appellate court is directed to consider the petitioner's application at the time of hearing of his appeal after taking into consideration the evidence available on record and determine if the petitioner can be granted relief under any of the clauses Order 41 Rule 27 of the Code. No order as to costs.

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