

Ashrafi Devi Vs. Devi Singh

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Court : Delhi

Decided On : Sep-20-1993

Reported in : (1993)105PLR15; 1993RLR572

Judge : V.B. Bansal, J.

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

Appeal No. : Civil Revision Appeal No. 407 of 1992

Appellant : Ashrafi Devi

Respondent : Devi Singh

Advocate for Pet/Ap. : Ishwar Sahai,; Tasneem Ahmedi and; S.K. Bhalla, Advs

Judgement :

V.B. Bansal, J.

(1) [ED. facts : Plaintiffs sued Deft. for possession of land and building in suit alleging that their predecessor, Shiv Charan had bought 200 sq. yds. by sale deed dt. 20.1.62 and adjacent 320 sq. yds by another sale deed and after death of Shiv Charan on 8.8.71, plaintiffs as heirs became owners. They pleaded that deft. had illegally occupied the property about 3 years back and built a room. Deft. denied ownership of plaintiffs and of Shiv Charan and contended himself to be owner and in the alternative owner by adverse possession. Trial Court held that plaintiffs had

failed to prove ownership and also held that Deft. had not established his adverse possession. Plaintiffs filed appeal before Distt. Judge and also applied for giving additional evidence (sale deeds) to establish their ownership. Deft. opposed this. Adj dismissed the application and plaintiffs filed revision against this.] After detailing above, decision is :-

(2) A bare reading of O. 41, R. 27, Cpc makes it abundantly clear that the additional evidence, whether oral or documentary, can be allowed if the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, which is not the position in the present case. The case of the plaintiffs could be covered by Clause (aa) according to which the plaintiffs have to prove that notwithstanding the exercise of due diligence the evidence was not within their knowledge and could not after the exercise of due diligence be produced by them. Is there any material on record to substantiate this plea of the plaintiffs and my answer is in the negative. It was well within the knowledge of the plaintiffs that their ownership is being denied by the defendant and it was even reflected from the cross-exam, of PW/1, the previous owner from whom the plots were stated to have been purchased by Shiv Charan. All that was required of the plaintiffs was to ask for this document from PW/1 either at the time he was examined in Court or at any time thereafter during the pendency of the suit. After the copies of the Khasra Girdawari were tendered in evidence by the defendant, an opportunity was given to the plaintiffs to produce evidence in rebuttal. But even at that stage no efforts were made by the plaintiffs. It may also be noted at this stage that the Suit was filed on 23.7.1979 PW/1, Vidya Parkash Sethi was examined on 15.7.1982. Plaintiffs closed their evidence in affirmative on 10.3.1987, while the defendant closed his evidence on 27.7.1987 and the plaintiffs closed their evidence in rebuttal on 4.8.1987. No such application was moved before the Trial Court It has not been made clear by the plaintiffs as to how they were vigilant in getting this evidence placed on record. It is not sufficient compliance of this provision to urge that the plaintiffs were diligent and in spite of due diligence this evidence could not be produced on record.

(3) In exercise of the powers u/O. 41, R. 27, Cpc the Appellate Court can permit the production of additional evidence if it requires any document to be produced or

any witness to be examined to enable it to pronounce judgment or for any other substantial cause. It is, thus, clear that the additional evidence can be permitted on a request of a party who in spite of due diligence was not in a position to produce the same or when the Court finds it necessary for the decision of the case or any other substantial cause. A perusal of the order shows that the Court did not consider it necessary to have this evidence for just decision of the case and this evidence is not required by the Court. Can in these circumstances it be said that the prayer of the plaintiffs for permission to produce this additional evidence has been declined, resulting in injustice to the plaintiffs and my answer is in the negative.

(4) K. Venkataramiah vs . A Seetharama Reddy : [1964]2SCR35 is an authority relied upon by the plaintiffs. It has been held in this case that the Appellate Court can permit production of additional evidence not only if it requires such evidence to enable it to pronounce judgment but/or any other substantial cause if the court finds that something remains obscure which has to be clarified. It has ample power to permit additional evidence under O. 41. R. 27, CPC. It has also been held that such requirement of Court is not likely to arise ordinarily unless some inherent lacuna or defect becomes apparent on an examination of the evidence and that the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands. In the instant case no such contingency has arisen and, thus, this judgment cannot be of any assistance to the plaintiffs.

(5) There can possibly be no dispute that the discretion given to the Appellate Court by O. 41, R. 27 to receive and admit additional evidence is not an arbitrary one but is a judicial one, circumscribed by the limitations specified in the Rule, and permitting additional evidence contrary to the principles governing the reception of such evidence would be an improper exercise of discretion. -When the petitioner on whom onus lies to prove the ownership fails to discharge the onus, he is not entitled to be permitted to produce the same and to prove ownership after the case is decided against him unless he proves that he was unable to produce the evidence in spite of being diligent. In such circumstances, the Court does not require this type of evidence for pronouncing judgment. A mere assertion in the application has not the effect of establishing that the evidence now required to be

permitted could not be produced during trial. Where the plaintiffs fail to give satisfactory Explanationn for not producing the evidence in Lower Court, they cannot be permitted to do so by the Appellate Court and, thus, the permission has to be declined. Reference in this regard can be made to Roop Chand vs . Gopi Chand : [1989]2SCR184 .

(6) Learned counsel for the plaintiffs has also placed reliance upon Smt. Dharma vs. Roop Ram 1985 (2) R.C.R. 525 wherein exercising the powers under O. 41, R.27 the production of additional evidence was allowed by the High Court. It was a case in which Arc passed an order of eviction against the petitioners/tenants. The tenanted room was let out to Tara Chand, predecessor-in-interest of the petitioners and eviction was sought by the landlord u/S. 14(1)(e) of Delhi Rent Control Act. There was no dispute with regard to the relationship of landlord and tenant and that the landlord was the owner of the disputed property. There was no dispute that no other property was available to the landlord. The only dispute was as to whether the premises were let out for residential purpose or for commercial purpose, In order to prove that the premises were let out for residential purpose, the landlord had produced oral evidence while in rebuttal Smt. Dharma, one of the respondent appeared in the witness box and examined two witnesses, claiming that the tenancy was for commercial purpose. On appreciating the evidence it was found by G.C. Jain, J. that addition evidence was required for enabling the Court to pronounce the judgment satisfactorily since the petitioners wanted to produce Survey Report made by the officials of the Mcd showing that this room was in possession of Kanwal Band and various receipts purporting to have been issued by the landlord showed that this room was described as a shop. It was also observed by G C. Jain, J. that Tara Chand, the original tenant had been murdered and the petitioners were illiterate persons who could not lay their hands on this important document and it was found to be a substantial cause for allowing additional evidence. That was a case in which permission was granted to produce additional evidence in view of the peculiar facts and the Court felt that there was substantial cause for permitting evidence. The facts of the present case are, however, entirely different and do not call for exercise of discretion for permitting the plaintiffs to produce this additional evidence.

(7) Counsel for plaintiffs has also referred to *Mis. Scooter India Ltd. vs. Subhash Chander (Supra)*. The facts of this case are also entirely different and, thus this case also cannot be of any help to the plaintiffs. In that case the learned Rent Control Tribunal for the first time referred to the letter vide which the terms of the original agreement of agency. Exhibit PX/1, were changed and such document had not been produced and the witness was not asked to produce the same during cross-exam. However, in the instant case, the defendant had from the very beginning taken up the plea that the plaintiffs were neither the owners nor in possession of the property and so it was known to the plaintiffs from the very beginning that they were to prove their ownership. For this purpose not only that the Sale Deeds were to be proved, but the plaintiffs were also required to prove that the person who had executed the Sale Deed in favor of Shiv Charan was the owner of the property regarding which the Sale Deed was executed. This was necessary evidence required to be produced by the plaintiffs and it appears that being not diligent they did not produce this evidence and, so, cannot be permitted to fill up the lacuna.

(8) It is not possible to hold that the plaintiffs were not aware that their Vendor was in possession of the documents indicating that they were the owners of the plots which were sold to Shiv Charan. In any case there is nothing on the Trial Court record that any such enquiry was made for PW/I who, in fact, stated that he did not bring the document showing owner of the company, meaning thereby that these documents were available. The Court must never aid a negligent party who wakes to the need only after an adverse has been passed.

(9) The provision of O. 41, R. 27 cannot be taken recourse to merely because a party at the stage of appeal finds that some material could have tilted the decision in its favor and the same has not been produced and that it should have been produced. It appears that after the case has been decided against the plaintiffs they have become wiser and wanted to produce the copy of the Sale Deeds which could be produced during trial had they been slightly diligent. The plaintiffs cannot be permitted to fill up the lacuna. Reference in this regard can be to *Rajinder Nath vs. Rani Chander Kanta*.

