

+ **CM (M) No.331/2007**

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Date of decision: 11th December, 2009

SMT. SAVITRI DEVI

...Petitioner

Through: Mr Rajat Aneja, Advocate.

Versus

SMT. GAYATRI DEVI & ORS.

... Respondents

Through: Mr Lalit Gupta, Advocate for the respondents 1 to 4.

AND

CM (M)No.550/2007

SHRI RAJ KUMAR & ORS.

....Petitioners

Through: Mr. Hamid S. Shaikh, Advocate

Versus

SHRI RAMESH CHANDER & ORS.

... Respondents

Through: None.

AND

CM (M)No.1296/2009

SHRI RUPENDER SINGH

....Petitioner

Through: Mr B.S. Sharma, Advocate.

Versus

SHRI RANDHIR SINGH (SINCE DECEASED) & ORS.

... Respondents

Through: None.

AND

CM (M) No.1301/2009

**SHRI JAINENDRA KUMAR JAIN
(SINCE DECEASED) THROUGH LRs**

....Petitioners

Through: Mr V. Shukla, Advocate

Versus

**HARI NATH RASTOGI
(SINCE DECEASED) THROUGH LRs**

... Respondents

Through: None.

AND

CM (M) No.1309/2009

SHRI C.L. GUPTA & ANR.

....Petitioners

Through: Mr Rajendra Dutt, Advocate.

Versus

**SHRI KANWAR CHAND SABOO
(SINCE DECEASED) THROUGH LRs & ORS**

... Respondents

Through: None.

AND

CM (M) No.1401/2009

SMT. SUDESH MEHTA & ANR.

....Petitioners

Through: Mr. Anil Kher, Sr. Advocate with Mr. S.S. Pandey,
Advocate for petitioner No.1/appellant.

Versus

**LATE SMT. PRAKASH KAUR CHADHA
THROUGH LRs S/SHRI SATISH CHANDER CHADHA
AND RAMESH CHADHA**

... Respondents

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

RAJIV SAHAI ENDLAW, J.

1. All the six petitions have been preferred invoking the jurisdiction of this court under Article 227 of the Constitution of India with respect to the order of the first appellate court on an application under Order 41 Rule 27 of the CPC. In all the cases, the application under Order 41 Rule 27 of the CPC was disposed of by the first appellate court before taking up the appeal for hearing, leading to the grievance being made with respect thereto before this court as aforesaid, even while the appeals in each of the cases are still pending for consideration before the first appellate court. This court being *prima facie* of the view that a challenge to the decision, if any, on an application under Order 41 Rule 27 of the CPC taken up prior to the hearing of the appeal, is not entertainable before this court, put the said question to the counsels as and when each of the said matters came up before this court. Attention of the counsels was also drawn by this court to the judgments of the Supreme Court in ***Gurdev Singh Vs. Mehnga Ram*** AIR 1997 SC 3572 and in ***Mahavir Singh Vs. Naresh Chandra*** (2001) 1 SCC 309. The common questions as to the very maintainability of the petition being involved in all matters, the same were taken up for hearing together, only qua the question of maintainability and the counsels in all the matters have been heard on that aspect.

2. The Supreme Court in ***Gurdev Singh***(supra) was concerned with the order made by the High Court in exercise of its revisional jurisdiction under Section 115 of the CPC and the order of the first appellate court on an application under Order 41 Rule 27 of the CPC made before the hearing of the appeal. The Supreme Court held as under:-

*“We have heard learned Counsel for the parties. The grievance of the appellants before us is that in an appeal filed by them before the learned Additional District Judge, Ferozepur, in an application under Order XLI, Rule 27(b), CPC (CPC) the learned Additional District Judge at the final hearing of the appeal wrongly felt that additional evidence was required to produce as requested by the appellants by way of examination of a handwriting expert. The High Court in the impugned order exercising jurisdiction under Section 115, C.P.C. took the view that the order of the Appellate Court could not be sustained. **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. But at this interim stage, the High Court should not have felt itself convinced that the order was without jurisdiction. Only on this short question, without expressing any opinion on the merits of the controversy involved and on the legality of the contentions advanced by both the learned Counsel for the parties regarding additional evidence, we allow this appeal, set aside the order of the High Court. In the result, the Additional District Judge, Ferozepur shall now decide the appeal on its own merits.**”*

3. In **Mahavir Singh** (supra) also the order of the High Court in the exercise of revisional jurisdiction, setting aside the order of the first appellate court dismissing the application under Order 41 Rule 27 of the CPC and allowing the said application while the appeal was still pending before the first appellate court was for consideration. The Supreme Court held

“Therefore, when the first appellate court did not find the necessity to allow the application, we fail to understand as to how the High Court could, in exercise of its power under Section 115 of the CPC, have interfered with such an order, particularly when the whole appeal is not before the court. It is only in the circumstances when the appellate court requires such evidence to pronounce the judgment the necessity to adduce additional evidence would arise and not in any other circumstance. When the first appellate court passed the order on the application filed under Order 41 Rule 27 of the CPC, the whole appeal was before it and if the first appellate is satisfied that additional evidence was not required, we fail to understand as to how the High Court could

*interfere with such an order under Section 115 of the CPC. In this regard, we may notice the decision of this court in **Gurdev Singh Vs. Mehnga Ram** in which the scope of exercise of power under Section 115 of the CPC on an order passed in an application filed under Order 41 Rule 27 of the CPC was considered. When this decision was cited before the High Court, the same was brushed aside by stating that the principles stated therein is not applicable to the facts of the case. We do not think so. The High Court ought not to have interfered with such an order.”*

4. Mr. V. Shukla counsel for the petitioner in CM(M) No.1301/2009 contended that the aforesaid judgments were under Section 115 of the CPC whereas these petitions have been preferred under Article 227 of the Constitution of India. He also relied upon the judgment of the Division Bench of this court in **Akash Ganga Builders & Engineers Pvt. Ltd. Vs. G.P.Seth** (HUF) AIR 1999 Delhi 362. However, the said judgment is not concerned with the issue raised. That is generally on the situation when additional evidence under Order 41 Rule 27 of the CPC can be permitted. Mr. B.S. Sharma, Advocate for the petitioner in CM(M) No.1296/2009 firstly relied upon **Nawab Shaqafath Ali Khan Vs. Nawab Imdad Jah Bahadur** (2009) 5 SCC 162 to contend that even if the revisional jurisdiction is not available, a remedy under Article 227 of the Constitution of India in terms of Articles 226 & 227 of the Constitution of India would be available in law; that not only the High Court can exercise its supervisory jurisdiction for the purpose of keeping the subordinate courts within the bounds of its jurisdiction as envisaged under Article 227 of the Constitution of India; even a writ of certiorari can be issued where for the subordinate or inferior courts would be amenable to the superior courts exercising power of judicial review in terms of Article 226 thereof. However again, at this stage this court is not considering whether the challenge to an order on an application under Order 41 Rule 27 of the CPC can be made under Article 227 or not, the question is whether without the decision of the appeal, the said order is challengeable at all, independently of the decision in the appeal.

5. Mr. B.S. Sharma, Advocate next relies upon **Jaipur Development Authority Vs. Kailashwati Devi** (1997) 7 SCC 297 subsequently followed in **Eastern Equipment and Sales Ltd. Vs. ING Yash Kumar** Vol. V (2008) SLT 287.

6. In ***Jaipur Development Authority***, the SLP converted into civil appeal was preferred to the Supreme Court against the judgment of the High Court rejecting an application under Order 41 Rule 27 of the CPC filed by the appellant for leading additional evidence in a first appeal pending before the High Court; the High Court had dismissed the application as not maintainable for the reason that the appellant had not led any evidence in the trial court. The Supreme Court held that applicability of Order 41 Rule 27 of the CPC was not limited to those cases only where some evidence had been led in the trial court. The Supreme Court as such set aside the judgment of the High Court and remanded the matter to the High Court for decision in accordance with law. Thus, it will be seen that the question of maintainability of a challenge to an order under Order 41 Rule 27 of the CPC was really not in issue though it appears that the Supreme Court did interfere with the order of the High Court acting as the first appellate court and on an application under Order 41 Rule 27 of the CPC. However exercise of jurisdiction by the Supreme Court under Article 136 of the Constitution of India is different and in my view this judgment cannot be a precedent for a question which has not been decided therein. This judgment is of a date barely one month after ***Gurdev Singh*** and does not refer thereto.

7. ***Eastern Equipment and Sales Ltd.*** was also an appeal against the order of the High Court rejecting a petition under Article 227 of the Constitution of India preferred against the order of the first appellate court dismissing an application under Order 41 Rule 27 of the CPC. The Supreme Court held that the appellate court ought to have taken a decision on an application under Order 41 Rule 27 of the CPC along with the decision in the appeal. The Supreme Court thus set aside the order of the High Court as well as of the appellate court and directed the appellate court to decide the application under Order 41 Rule 27 of the CPC along with the appeal. The Supreme Court while holding so drew support from ***Jaipur Development Authority*** though, in my view, the appropriate judgment for drawing support was as in ***Gurdev Singh*** and in ***Mahavir Singh***. This judgment also does not persuade me to hold that the law as laid down in ***Gurdev Singh*** or ***Mahavir Singh*** is not correct law.

8. Of course, Mr. B.S. Sharma, Advocate also drew attention to order dated 19th December, 2008 of another single judge of this court in **DDA Vs. Jagdish Prasad**. CM (M) 1094/2007 in which this court in exercise of jurisdiction under Article 227 interfered with the order of the first appellate court on an application under Order 41 Rule 27 of the CPC and set aside the order of the appellate court and allowed the application. However, again in the said judgment there was no challenge to the maintainability of the CM(M) and the only thing this judgment shows is that this court had on an earlier occasion entertained such challenge. However, merely because such a challenge has been entertained would not be a reason to hold that the same is maintainable in law.

9. Mr. B.S. Sharma, Advocate also relied upon **Gurnam Singh Vs. Saudagarh Singh** AIR 2005 Punjab & Haryana 267; in that also the High Court was approached in exercise of jurisdiction under Article 227 against the order of the first appellate court dismissing the application under Order 41 Rule 27 of the CPC. Though the High Court set aside the said order but hold that the same was appealable under Order 41 Rule 1 A of the CPC along with the challenge, if any, to the decision in the appeal and not independently. The High Court held that the application under Order 41 Rule 27 of the CPC should have been decided at the stage of disposal of the appeal and there is a prohibition grafted against a piecemeal decision on the application under Order 41 Rule 27 of the CPC. This judgment also does not come to the rescue of the petitioners.

10. I must record that I have found several other instances where this court has in the exercise of jurisdiction under Article 227 of the Constitution of India interfered with the order made by the first appellate court under Order 41 Rule 27 of the CPC before the decision of the appeal but none of the said cases contain a decision on the maintainability of the challenge and are on their own facts.

11. I am, therefore, not persuaded by the argument that any of the other judgments cited run contrary to the view in **Gurdev Singh** as well as in **Mahavir Singh**. Mr. Hamid S. Sheikh counsel for the petitioner in CM(M) No.550/2007 also drew attention to **Baby Vs. Travancore Devaswom Board** (1998) 8 SCC 310 to contend that the power under Article 227 is in addition to the power of revision under any legislation. His contention CM No.331/2007, 550/2007, 1296/2009, 1301/2009, 1309/2009, 1401/2009

was that the judgments in *Gurdev Singh* as well as in *Mahavir Singh* are in relation to interference by the High Court in exercise of Revisional jurisdiction and not in the exercise of jurisdiction under Article 227 of the Constitution of India.

12. However, in my view, the same would not make any difference. The reason given in *Gurdev Singh* as well as in *Mahavir Singh* is not because of the language of Section 115 of the CPC but on the principle, of the application under Order 41 Rule 27 of the CPC being required to be considered by the appellate court along with the hearing of the appeal and the decision made on such application even prior to the decision on the appeal being not challengeable independently but being challengeable only along with the challenge to the decision in the appeal.

13. I also see another advantage in following the said course. If the applications under Order 41 Rule 27 of the CPC are to be heard and decided before the hearing of the appeal and if decisions thereon held to be challengeable, the same would add a tier to the litigation and delay the disposal of the appeal. In a few of the cases here under consideration, the hearing of the appeal has been stayed during the pendency of these petitions. Thus the disposal of the appeal has unnecessarily been held up. I entirely concur with the judgment of the Punjab High Court holding against piecemeal adjudication. Also, the power under Order 41 Rule 27 of the CPC is of a court seized of the appeal and no court which is not seized of the appeal, as this court in the exercise of jurisdiction, whether under Section 115 of the CPC or under Article 227 of the Constitution of India, is not competent to adjudicate the correctness of such a decision.

14. Mr. Lalit Gupta counsel for the respondent in CM(M) No.331/2007 though also drawing attention to Order 43 Rule 1 A of the CPC which permits challenge to an Order on an application under Order 41 Rule 27 of the CPC along with the challenge to the decision in appeal however disputes that the application under Order 41 Rule 27 of the CPC ought to be considered along with the hearing of the appeal only. However reference thereto would be made after considering another contention of Mr. B.S. Sharma, Advocate.

15. Mr. B.S. Sharma, Advocate would contend that the judgment in both ***Gurdev Singh*** as well as in ***Mahavir Singh*** is based on situations covered under Order 41 Rule 27 (1) (b) of the CPC only and which is of cases where the appellate court requires any documents to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause. He contends that his case was not under Order 41 Rule 27 (1) (b) of the CPC but under Order 41 Rule 27 (1) (a) or (aa) of the CPC i.e. where the trial court has refused to admit evidence which ought to have been admitted or the parties seek to produce additional evidence establishing that notwithstanding the exercise of due diligence such evidence was not within their knowledge or could not after exercise of due diligence be produced by them at the time when the order impugned in appeal was passed. He contends that where a case for leading additional evidence under Clause (a) or (aa) is made out, it is not the requirement of the courts for additional evidence but the requirement of the party to lead such evidence to prove its case in appeal. It is contended that in such cases if the application is dismissed, independent challenge thereto even before the decision of the appeal would lie; if it is not permitted the whole purpose of Order 41 Rule 27 of the CPC would be lost. The same is the contention of Mr. Lalit Gupta, Advocate though otherwise opposing the maintainability of the petition. He also contends that the applications made under Clause (a) or (aa) have to be necessarily decided before the hearing in the appeal in as much the result of the appeal is likely to be different depending upon whether the prayer for additional evidence is allowed or not.

16. The argument aforesaid, though attractive, to distinguish the judgments in ***Gurdev Singh*** as well as in ***Mahavir Singh*** as both referring to Clause (b), does not, if the judgments are to be carefully examined, makes out a case for the law laid down in the said judgments to be not applicable to the cases covered under Clause (a) & (aa). The stream of reasoning running through the said judgments is the power of the appellate court. The power vested in Order 41 Rule 27 of the CPC is of the appellate court and not of the revisional court or the High Court under Article 227 of the Constitution of India. Other reasoning is that the order is challengeable along with the decision in the appeal and not independently. In that respect, it is immaterial whether the application is made

under Clause (a)/(aa) or under Clause (b). I also find that the hearing on an application under Order 41 Rule 27 of the CPC would literally be a hearing on the entire appeal. Today, when the courts are overburdened, even otherwise it is not a fit course of action to fragment the proceedings and thereby add a tier/stage of litigation to our already existing system of multi tier litigation intended to do away with a human error. The appellate court may in a given case even though finds a case under Clause (a) or (aa) to have been made out may still not call for or allow additional evidence if otherwise convinced with the appeal on the material on record. It is for this reason also necessary that the applications are heard along with the hearing of the appeal and which is also the dicta of the Supreme Court in *Eastern Equipment & Sales Ltd.*

17. The other appearing counsels have *inter alia* reiterated the same contentions as already noticed herein above.

18. I, therefore, hold that the applications under Order 41 Rule 27 of the CPC ought to be heard along with the hearing of the appeal only and orders thereon ought not to be pronounced prior to the orders in the appeal. If the appellate court is of the view that additional evidence is to be permitted, the appellate court would either allow the evidence to be led before itself or remand the matter and in any case after the same would rehear the appeal. However, the same is no ground for dissecting the hearing.

19. I further hold that even in cases where the applications under Order 41 Rule 27 of the CPC have been adjudicated upon prior to the adjudication of the appeal, no challenge there against is maintainable; the challenge thereto is to be made along with the challenge to the decision in the appeal only. I must however clarify that where, after the hearing of the application and the appeal, the appellate court allows the application and/or orders the additional evidence to be led before itself and/or remands the matter, such order would be challengeable.

20. Having laid down the general principles, I proceed to take each individual case.

1. **CM(M) No.1296/2009.**

In this case notice of the petition has not been issued as yet. The appeal is still pending before the appellate court. In terms of the above, the petition is not held maintainable and is dismissed.

No order as to costs.

2. **CM(M) No.1301/2009.**

The position in the case is the same as above. This petition is also dismissed with no order as to costs.

3. **CM(M) No.1309/2009.**

The position in the case is the same as above. This petition is also dismissed with no order as to costs.

4. **CM(M) No.1401/2009.**

This petition had come up after consolidated hearing. However the senior counsel was informed and heard. This petition is also dismissed with no orders as to costs.

5. **CM(M) No.331/2007.**

In this petition notice was issued and hearing of the appeal before the appellate court stayed vide order dated 6th March, 2007. The counsel for the petitioner has contended that since the petition was entertained and remained pending for nearly two years and since earlier this court has been entertaining such petitions, this petition be entertained. The counsel for the respondent however contends that the remedy of second appeal is available in the present case also. Merely because the petition was

entertained and has been pending for two years does not persuade me to go contrary to the position in law as discussed hereinabove.

This petition is also dismissed with no order as to costs.

6. CM(M) No.550/2007.

In this case also notice was issued and the petition has been pending for the last over two years though there was no stay of hearing of the appeal, however the fact remains that the appeal has not been heard owing to the pendency of this petition. The counsel for the petitioner contends that though the application in this case was titled as one Order 41 Rule 27 of the CPC but in fact was for leading the evidence already on record. It is stated that two suits had been ordered to be consolidated and evidence is being recorded together therein; for this reason evidence on the record of one remained to be taken on the record of the other; that the prayer to the appellate court was only to permit the certified copies of the evidence already led on the file of the case from which the appeal had arisen. There is merit in this contention. However, for the reasons below mentioned, this petition is also dismissed with no order as to costs.

21. The Supreme Court in *Eastern Equipment & Sales Ltd.* ordered setting aside of the orders of the appellate court under Order 41 Rule 27 CPC made prior to the hearing of the appeal and directed the hearing of the applications afresh along with the hearing of the appeal. Following the same, it is directed that in spite of dismissal of all the aforesaid petitions, the orders on applications under Order 41 Rule 27 of the CPC made prior to the hearing of the appeal in all the aforesaid cases are set aside and the applications ordered to be considered afresh along with the hearing of the appeal.

RAJIV SAHAI ENDLAW, J

December 11, 2009/PP