



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL
PRADESH)
KOHIMA BENCH**

Case No. : I.A.(Civil)/84/2019

1: VEKHOLE KEZO AND 4 ORS
S/O LT. VEHUZHU KEZO
R/O KIKRUMA VILLAGE
P.S/P.O PFUTSERO
PHEK
N/L

2: VEVOTO KEZO
S/O LATE SANE0 KEZO
R/O CHIKRI NASA COLONY
PFUTSERO
PHEK DISTRICT
NAGALAND.

3: PUHOVO KEZO
S/O LATE SANE0 KEZO
R/O CHIKRI NASA COLONY
PFUTSERO
PHEK DISTRICT
NAGALAND.

4: ZHOKHOTSO KEZO
S/O LATE SANE0 KEZO
R/O CHIKRI NASA COLONY
PFUTSERO
PHEK DISTRICT
NAGALAND.

VERSUS

KERETHI VERO
S/O LT. MUTSUNYO

R/O KIKRUMA VILLAGE
P.S/P.O PFUTSERO
PHEK
N/L

Advocate for : R. IRALU
SR. ADV
Advocate for : C. T. JAMIR
SR. ADV appearing for KERETHI VERO

BEFORE
HON'BLE MR JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 18.10.2023

- 1.** Heard Mr. R. Iralu, learned senior counsel assisted by Mr. Elivil Zao, learned counsel for the applicants/appellants. Also heard Mr. C. T. Jamir, learned senior counsel assisted by Mr. N. Longkumer, learned counsel for the respondent.
- 2.** This Interlocutory Application has been filed by the applicants/appellants under Order 41 Rule 27 of the Code of Civil Procedure, 1908 in connection with First Appeal No. 02/2019 praying for allowing the applicants/appellants to produce documents annexed with the present application and marked as S-1 and S-2, in original as additional evidence during the pendency of this appeal.
- 3.** The applicants/appellants herein are the legal heirs of the Original applicant/appellant, Mr. Saneo Kezo, who had preferred an appeal under Section 96 of the Code of Civil Procedure, 1908, impugning the judgment and order dated 17.05.2019 passed by learned District Judge, Phek, Nagaland in Civil Revision No.01/2001, the said appeal has been registered as First Appeal No. 2(K)/2019.

It has been stated by the applicants in this petition, under Order 41 Rule 27 of the Code of Civil Procedure, 1908, that the original appellant, namely, Mr. Saneo Kezo, while deposing before the Trial Court on 30.09.2003, in Case No. CR-1 of 2001, had deposed during cross-examination as follows:

“In 1969 December 5th, I knew that Vechone and Dachone had sold the plot to GB Pire. I purchased the plot from GB Pire on 15.12.1969. I have sale agreement exhibited between our two parties which can be produced before this Hon’ble Court as and when necessary.”

4. The instant application, under Order 41 Rule 27 of the Code of Civil Procedure, 1908 has been filed by the applicants/appellants for allowing them to produce the said sale agreement which the original appellant was referring to while he deposed before the learned Trial Court on 30.09.2003 during his cross-examination.

5. Mr. R. Iralu, learned Senior Counsel for the applicants/appellants has submitted that the documents sought to be produced before this Court as additional evidence are of substantial character and are essential to determine the real question in dispute between the contesting parties. Mr. R. Iralu, learned Senior Counsel for the applicants/appellants has further submitted that the original appellant had tried every means to locate the said documents over the years but was not successful and he was also not aware that his son had kept his old files where past ancestral history were recorded. It is further submitted that the sale document could be traced only on 31.07.2019 in the old file from his son’s residence, who had shifted out after his marriage sometime in the year 2005 and was in possession of the same till then.

6. Mr. R. Iralu, learned Senior Counsel for the applicants/appellants has also submitted that the aforesaid two documents could not be produced before the learned Trial Court as in spite of due diligence, same could not be located by the original appellant. It is further submitted by learned Senior Counsel for the applicants/appellants that none production of the aforesaid documents before learned Trial Court would not have helped the applicant in any manner and therefore, such none production was not intentional. It is also submitted by the learned Senior Counsel for the applicants that the dispute between the parties is an old dispute since the year 1985 and the documents which are sought to be adduced as an additional evidence in this appeal were in existence even before the year 1985.

7. It is further submitted by the learned Senior Counsel for the applicants/appellants that the justice would be denied to the applicants/appellants if they are not allowed to produce the additional evidence as the production of the said documents is necessary to decide the real controversy between the parties.

8. It is further submitted by learned Senior Counsel for the applicants/appellants that there is no intentional negligence on the part of the applicants/appellants or any sort of deception or any attempt to fill up the lacuna to patch up the weak point of case by attempting to produce the said document at such a late stage as said document were traced out by the original appellant only on 31.07.2019.

9. In respect of the submissions made by him, Mr. R. Iralu, learned Senior counsel for the applicants/appellants has cited ruling of Hon'ble Supreme Court of India in "**Jaipur Development Authority**

Vs. Kailashwati Devi " reported in "**1997 (7) SCC 297**", wherein Hon'ble Apex Court has observed as follows:

"6. The intention of the sub-rule, in our view, is that a party who, for the reasons mentioned in the sub-clause, was unable to produce the evidence in the trial court, should be enabled to produce the same in the appellate court. The sub-rule mentions the conditions which must be complied with by the party producing the additional evidence, namely, 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" in the trial court. It is not one of the conditions that the party seeking to introduce additional evidence must have also been one who has led some evidence in the trial court. Such a view amounts to introducing an additional condition not contemplated by the sub-rule. No distinction was intended by the sub-rule between a party who has produced some evidence in the trial court and one who has adduced no evidence in the trial court. All that is required is that the conditions mentioned in the body of the sub-rule must be proved to exist. It is not permissible to restrict clause (aa) for the benefit of only those who have adduced some evidence in the trial court."

10. Learned senior counsel applicants/appellants has also cited a ruling of Hon'ble Supreme Court of India in "***Union of India vs. Ibrahim Uddin***" reported in "**(2012) 8 SCC 148**", wherein it was observed as follows:

"Order 41 Rule 27 CPC

36. The general principle is that the appellate court

should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. (Vide K. Venkataramiah v. A. Seetharama Reddy [AIR 1963 SC 1526] , Municipal Corpn. of Greater Bombay v. Lala Pancham [AIR 1965 SC 1008], Soonda Ram v. Rameshwarlal [(1975) 3 SCC 698 : AIR 1975 SC 479] and Syed Abdul Khader v. Rami Reddy [(1979) 2 SCC 601 : AIR 1979 SC 553] .)

38. Under Order 41 Rule 27 CPC, the appellate court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate 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. (Vide Lala Pancham [AIR 1965 SC 1008].)”

11. Learned Senior Counsel for the applicants/appellants also cited the ruling of Hon’ble Supreme Court of India in “***Sardar Amarjit Singh Kalra v. Pramod Gupta and Others***” reported in “***(2003) 3 SCC 272***”, wherein it was observed as follows:

“26. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice.

31. But, in our view also, as to what those circumstances are to be, cannot be exhaustively enumerated and no hard-and-fast rule for invariable application can be devised. With the march and progress of law, the new horizons explored and modalities discerned and the fact that the procedural laws must be liberally construed to really serve as handmaid, make it workable and advance the ends of justice, technical objections which tend to be stumbling blocks to defeat and deny substantial and effective justice should be strictly viewed for being discouraged, except where the mandate of law inevitably necessitates it.”

12. Learned Senior Counsel for the applicants/appellants also cited a recent ruling of Hon’ble Supreme Court of India in “***Sanjay***

Kumar Singh Vs. State of Jharkhand” (Judgment dated 10.03.2022 in Civil Appeal No. 1760 of 2022), wherein it was observed as follows:

“4. It is true that the general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. It may also be true that the appellate court may permit additional evidence if the conditions laid down in this Rule are found to exist and the parties are not entitled, as of right, to the admission of such evidence. However, at the same time, where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed. Even, one of the circumstances in which the production of additional evidence under Order 41 Rule 27 CPC by the appellate court is to be considered is, whether or not the appellate court requires the additional evidence so as to enable it to pronouncement judgment or for any other substantial cause of like nature. As observed and held by this Court in the case of [A. Andisamy Chettiar v. A. Subburaj Chettiar](#), reported in (2015) 17 SCC 713, the admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce

judgment or for any other substantial cause. It is further observed that 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.”

13. On the other hand, Mr. C. T. Jamir, learned senior counsel for the respondent vehemently opposed the prayer of the applicants/appellants for allowing them to adduce evidence at the appellate stage in this appeal. It is submitted by learned counsel for the respondent that the litigation between the parties are pending in this case for more than 34 years and though the original appellant has stated about the existence of the sale agreement, which is sought to be brought in at this belated stage as additional evidence, was within the knowledge of the appellant since the year 2003 and this is not a case where the said documents were not within the knowledge of the appellant. Learned Senior counsel has also submitted that apart from statement made in the application under Order 41 Rule 27 of the Code of Civil Procedure, 1908 that “*despite diligent search to locate the document, same could not be traced out*”, nothing has been stated in the said application to show that the appellant was diligent in any manner and has failed to adduce the same during trial even though on earlier occasion the case was remanded by this Court to the Trial Court, by its judgment dated 10.07.2017 passed in First Appeal No. 1(K) of 2006, only to facilitate the parties to exhibit and prove all documents on which they want to rely on for their respective case adduce the evidence which may be required, however, the present appellant in spite of clear direction by this Court failed to exhibit the documents before the

Trial Court, which the appellants intent to exhibit now in this appeal.

14. Learned Senior counsel for the respondent has also submitted that though the original appellant had deposed before the learned Trial Court on 30.09.2003 that he purchased the plot from GB Pire, however, the documents S-1 and S-2, which are sought to be produced as additional evidence in this appeal are only unregistered documents. Learned Senior counsel has submitted that Section 49 (c) of the Registration Act, 1908, which provides that no document which is required under Section 17 of the Registration Act, 1908, to be registered shall be received as an evidence of any transaction affecting such property or conferring such power unless it has been registered, creates a bar on the admissibility of such registered document as evidence and such unregistered documents do not affect any rights in respect of any immovable property and thus, the documents sought to be adduced as additional evidence does not have any impact on the outcome of the case and would not help this Court in any manner in pronouncement of the judgment in this appeal.

15. Mr. C. T. Jamir, learned senior counsel for the respondent has submitted that the production of additional evidence at the appellate stage may be allowed only on the grounds mentioned in Clause (a), (aa) and (b) of Rule 27 of Order 41 of the Code of Civil Procedure, 1908, however, it is submitted that in the instant case the appellants/applicants have failed to show that the grounds mentioned in aforementioned Clauses exist in the instant case.

16. In support of submissions made by him, Mr. C. T. Jamir,

learned counsel for the respondent has cited a ruling of Hon'ble Apex Court in "***Pramod Kumari Bhatia v. Om Prakash Bhatia***" reported in "***(1980) 1 SCC 412***" wherein it was observed as follows:

"8. Before the High Court, Pramod Kumari filed an application for reception of additional evidence. The principal additional evidence sought to be adduced was an alleged letter said to have been written by late Pearey Lal Singh to the Bank nominating Pramod Kumari as the person entitled to the amount in deposit with the Bank. The letter itself was not filed along with the application but a request was made to summon the letter from the Bank. The High Court rejected the application. The application to the High Court was made very many years after the suit had been filed, and also quite some years after the appeal had been filed before the High Court, and we do not think that we will be justified in interfering with the discretion exercised by the High Court in refusing to receive additional evidence at that stage. The appeal is therefore dismissed but in the circumstances with no order as to costs."

17. Mr. C. T. Jamir, learned counsel for the respondent has also cited a ruling of Hon'ble Apex Court in "***Shivajirao Nilangekar Patil v. Mahesh Madhav Gosavi***" reported in "***(1987) 1 SCC 227***" wherein it was observed as follows:

"27. The additional evidence as we have mentioned hereinbefore consist of certain report in India Today and certain other magazines and certain affidavits. The basic principle of admission of additional evidence is that the person seeking the admission of additional evidence should be able to establish that with the best efforts such additional evidence could not have been adduced at the first instance. Secondly the party affected by the admission of additional evidence should have an opportunity to rebut such additional evidence. Thirdly, that additional evidence was relevant for the determination of the issue. The additional evidence sought to be introduced mainly consists of alleged instances when the Chief Minister on previous occasions

had in respect of some criminal proceedings and other matters pending used his influence to drop those proceedings. Now about these, these are controversial allegations. There is no satisfactory explanation that these so called material in the form of additional evidence could not have been obtained before the institution of the petition in the High Court. To this Mr Tarkunde's submission was that it was difficult to gather evidence against a Chief Minister in office but as the case had gathered momentum, people had come in and after decision of the learned trial Judge, the Chief Minister had resigned and there was an atmosphere of belief for offering to adduce evidence which people were hesitant to give before that. We are of the opinion that at this belated stage there was not sufficient material ground on which additional evidence should be admitted for the determination of the issues involved in these appeals.

18. Mr. C. T. Jamir, learned counsel for the respondent has cited a ruling of Hon'ble Apex Court in "*N. Kamalam v. Ayyasamy*" reported in "*(2001) 7 SCC 503*" wherein it was observed as follows:

"19. Incidentally, the provisions of Order 41 Rule 27 have 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 Municipal Corpn. of Greater Bombay v. Lala Pancham [AIR 1965 SC 1008 : 67 Bom LR 782] 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 para 9 of the judgment, this Court observed: (AIR p. 1012)

"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 mala 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."

Further in Pramod Kumari Bhatia v. Om Prakash Bhatia [(1980) 1 SCC 412 : AIR 1980 SC 446] this Court also in more or less an identical situation laid down that since an application to the High Court has been made very many years after the filing of the suit and also quite some years after the appeal had been filed before the High Court, question of interfering with the discretion exercised by the High Court in refusing to receive an additional evidence at that stage would not arise. The time-lag in the matter under consideration is also enormous and the additional evidence sought to be produced was as a matter of fact after a period of 10 years after the filing of the appeal. Presently, the suit was instituted in the year 1981 and the decree therein was passed in 1983. The first appeal was filed before the High Court in April 1983 but the application for permission to adduce additional evidence came to be made only in August 1993. Needless to record that the courts shall have to be cautious and must always act with great circumspection in dealing with the claims for letting in additional evidence particularly, in the form of oral evidence at the appellate stage and that too, after a long lapse of time. In our view, a plain reading of Order 41 Rule 27 would depict that the rejection of the claim for production of additional evidence after a period of 10 years from the date of filing of the appeal, as noticed above, cannot be termed to be erroneous or an illegal exercise of discretion. The three limbs of Rule 27 do not

stand attracted. The learned trial Judge while dealing with the matter has, as a matter of fact, very strongly commented upon the lapse and failure on the part of the plaintiffs even to summon the attestors to the will and in our view contextually, the justice of the situation does not warrant any interference. The attempt, the High Court ascribed it to be a stage-managed affair in order to somehow defeat the claim of the respondents — and having had the privilege of perusal of record we lend our concurrence thereto and the finding of the High Court cannot be found fault with for rejecting the prayer of the appellants for additional evidence made in the belated application. In that view of the matter, the first issue is answered in the negative and thus against the plaintiffs, being the appellants herein.”

19. Mr. C. T. Jamir, learned counsel for the respondent has cited a ruling of Hon’ble Apex Court in “***Union of India v. Ibrahim Uddin***” reported in “***(2012) 8 SCC 148***” wherein it was observed as follows:

“Order 41 Rule 27 CPC

36. The general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. (Vide K. Venkataramiah v. A. Seetharama Reddy [AIR 1963 SC 1526] , Municipal Corpn. of Greater Bombay v. Lala Pancham [AIR 1965 SC 1008] , Soonda Ram v. Rameshwarlal [(1975) 3 SCC 698 : AIR 1975 SC

479] and Syed Abdul Khader v. Rami Reddy [(1979) 2 SCC 601 : AIR 1979 SC 553] .)

47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed."

20. Mr. C. T. Jamir, learned counsel for the respondent has cited a ruling of Hon'ble Apex Court in "***Sirajudheen Vs. Zeenath and Others***" reported in "**(2023) SCC Online SC 196**" wherein it was observed by the Apex Court that merely because a particular evidence which ought to have been adduced but had not been adduced, the Appellate Court cannot adopt the soft course of remanding the matter.

21. Mr. C. T. Jamir, learned Senior counsel for the respondent has submitted that in spite of having the judgment of the Trial Court in his favour, the respondent has been deprived of his right to enjoy the suit property and the instant application for production of additional evidence at this belated appellate stage has been filed by the appellants, who are illegally possessing the suite property, only to cause further delay in final disposal of the pending appeal.

22. I have considered the submissions made by learned senior counsel for both the sides and have perused the materials on record carefully.

23. This dispute between the parties relates to a plot of land measuring 12" X 24" and the litigation between the parties in this case is pending since more than 34 years. It also appears that the

parties have approached this Court on more than one occasion and in the year 2017 by judgment dated 10.07.2017 passed in First Appeal No. 1(K)/2006, the case was remanded back to the Court of learned District Judge, Phek with a direction to try the case afresh by giving the parties a chance to exhibit and prove all the documents which they want to rely on for their respective case. However, in spite of clear direction of this Court, the appellant, who has stated about the documents, which are sought to be produced as additional evidence, in 2003 itself has failed to adduce the same before Trial Court. It also appears that though the original appellant has claimed to purchase the suit land, however, the documents sought to be produced as additional evidence are not even sale deeds, much less a registered one. On bare perusal of documents S1 and S2 which are sought to be exhibited by the appellant would show that same are captioned as "agreement" and are not registered, hence, under Section 49 (c) of the Registration Act, 1908, the admissibility of such a documents as evidence of any transaction affecting such property is barred, hence, even if appellants are allowed to produce such documents as additional evidence at this appellate stage, it may not be of any help to this Court as, considering the evidentiary value of the document sought to be exhibited, even without such documents, this Court can pronounce judgment in this appeal on the basis of materials already before it.

24. It also appears on careful examination of the application under Order 41 Rule 27 of the Code of Civil Procedure, 1908 which has been filed by the appellant, that apart from using the phrase "diligent search" in the said application, sufficient facts are not

pleaded, in the said application, from where it could be ascertained as to whether the appellant even after exercise of due diligence failed to produce the said documents before any court, at any stage, at any point of time. There is no materials on record to show as to what prevented the original appellant to search the place, on earlier occasion when the trial was pending, from where the documents sought to be exhibited were actually traced out. This Court is of considered opinion that the appellant has failed to show that there was due diligence on his part in trying to search out the documents which he intends to adduce as additional evidence at this belated stage. Mere pleading that due justice would be denied to the applicants/appellants if the documents sought to be produced as additional evidence are not allowed to be produced in this appeal is not sufficient to allow the prayer of the applicants/appellants. The applicants/appellants have failed to show that their case falls under any of the circumstances enumerated in Rule 27 of Order 41 of the Code of Civil Procedure, 1908 so as to allow the prayer of the applicants/appellants.

25. The judgments cited by learned counsel for both sides in support of their submission also show that the general principle is that the Appellate Court should not travel outside the record of the lower court at appellate stage and cannot take any evidence in appeal. The exception which is provided in Order 41 Rule 27 of the Code of Civil Procedure, 1908 is to be made applicable only sparingly that too only on grounds mentioned in the said Rule itself. In the instant case, though the documents sought to be produced now were within the knowledge of the original appellant since the year 2003, he failed to produce the same before the Trial Court

during long pendency of trial. The want of due diligence on the part of the appellant has already been discussed herein before. Further, it has also been discussed herein before that this Court can pronounce judgment in this appeal on the basis of materials already before it. The appellants/applicants have also failed to show any other substantial cause for allowing them to produce the documents which are marked as S1 and S2 as additional evidence at this belated stage in this appeal.

26. For the reasons mentioned herein above, this Court is of considered opinion that the applicants/appellants have miserably failed to show any reasonable ground for allowing them to produce documents marked as S1 and S2 as additional evidence at this belated stage in this appeal. The prayer of the applicants/appellants for adducing additional evidence at appellate stage is accordingly rejected and this interlocutory application is accordingly dismissed.

JUDGE

Comparing Assistant