

Court No. - 1

Case :- MATTERS UNDER ARTICLE 227 No. - 8033 of 2023

Petitioner :- Ram Chandar And 3 Others

Respondent :- Banshidhar (Since Deceased) And 7 Others

Counsel for Petitioner :- Sanjay Kumar Singh

Hon'ble Jayant Banerji,J.

1. Heard learned counsel for the petitioner.

2. This petition has been filed seeking the following relief:

"(a) Set aside the impugned order dated 31.05.2023 (Annexure No.7 to the petition) passed by the District Judge, Mirzapur in Civil Appeal No.2 of 2019 (Ram Chandar & Others Vs. Banshidhar & others).

(b) Allow the application Under Order dated 02.09.2022 Under Order 41 Rule 27 C.P.C. (Annexure No. 5 to the petition) and further proceedings of Appeal No.2 of 2019 (Ram Chandar & Others Vs. Banshidhar & others) pending before the District Judge, Mirzapur may be kept in abeyance, during the pendency of the present petition before this Hon'ble Court.

(c) Restrain the defendant-respondents not to interfere in the peaceful possession of the petitioner over the plot No. 440 area 8 Biswa situated in village Sarawa, Taluka Majhwa, Pargana Kasiwar, Tehsil Sadar, District Mirzapur or may direct the parties to maintain status quo on spot.

(d) Issue any other suitable, order or direction, as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

(e) Award cost of the petition in favour of the Plaintiff-- Petitioners."

3. It appears that the suit filed by the plaintiff-petitioner seeking a decree of declaration of a sale deed dated 16.9.2014 as void and for mandatory injunction was dismissed ex-parte by means of the judgment and order dated 23.11.2018. Annexure No. 3 to this petition is the memorandum of appeal bearing Civil Appeal No. 2 of 2018 that was filed by the petitioner in the court of the District Judge, Mirzapur. In the aforesaid appeal, the petitioner moved an application dated 2.9.2022 under Order 41 Rule 27 CPC seeking to bring on record additional evidence. By the order impugned dated 31.5.2023, the application has been rejected by the District Judge.

4. The contention of the learned counsel for the petitioner is that the additional evidence sought to be brought on record was

actually given to the previous advocate, who did not file the same, which documents were material for proper adjudication of the case. It is stated that thereafter a new advocate was engaged who looked into the documents and then moved the application dated 2.9.2022. It is stated that the application for additional evidence ought to have been allowed because there was substantial cause for the documents to be produced which would enable the appellate court to pronounce judgment. In support of his submissions, learned counsel has relied upon a judgment of the Supreme Court in the case of **Shalimar Chemicals Works Ltd. Vs. Surendra Oil and Dal Mills (Refineries) and others** reported in **2011 (2) AWC 1353** and a judgment of a Coordinate Bench of this Court in the case of **Chaudhari Haider Hussain and others Vs. Apar Ayukt (Prashasan), Lucknow Division and others** reported in **2016 (6) AWC 6492**. Rule 27 of Order 41 of the CPC prohibits production of additional evidence by the parties to an appeal subject to three exceptions which are as follows:

"(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."

5. It is not the case of the petitioner that the trial court had refused that evidence which ought to have been admitted. The petitioner was required to establish before the appellate court 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.

6. A perusal of the application dated 2.9.2022 reflects that the application of the petitioner was liable to be rejected on the aspect of due diligence itself which has been done by the District Judge in the impugned judgment.

7. As far as the clause (b) of sub-section (1) of Section 27 is concerned, there is no substantial cause reflected in the application dated 2.9.2022 that would merit allowing the application. For the

sake of convenience, the application dated 2.9.2022 is reproduced below:

"श्रीमानजी,

सविनय निवेदन है कि अपील उपरोक्त ने दौरान तैयारी बहस यह तथ्य प्रकाश में आया कि कुछ आवश्यक कागजात जो मुकदमें से सम्बन्धित है दाखिल होने से छूट गया है। वादीगण / अपीलान्ट्स ने अपने पूर्व अधिवक्ता को अवर न्यायालय में उक्त सबूत कागजात दाखिल करने हेतु दिया गया था परन्तु पूर्व अधिवक्ता द्वारा उक्त सबूत कागजात दाखिल नहीं किया गया। बादीगण / अपीलान्ट्स के पूर्व अधिवक्ता के लापरवाही के कारण यह गलती हुई है। जबकि वादीगण / अपीलान्ट्स द्वारा अपने वादपत्र के दफा 5 में उल्लेख किया है। कि "विवादित आराजी के निस्वत लम्बित मुकदमा का निर्णय दिनांक 19-7-2004 को हो गया है, किन्तु उसने यानी प्रतिवादी / रेस्पान्डेन्ट इस तथ्य की जानकारी हम वादीगण / अपीलान्ट्स को नहीं कराया।" वादीगण / अपीलान्ट्स के पूर्व अधिवक्ता ने उक्त सबूत कागजात के दाखिल न करने सम्बन्ध में वादीगण / अपीलान्ट्स को कभी नहीं बताया और न ही उक्त सबूत कागजात वापस ही किया गया। वादीगण / अपीलान्ट्स के नये अधिवक्ता द्वारा राय दिये जाने पर उक्त सबूत कागजात की दुसरी नकल पार्थनापत्र देकर नकल प्राप्त किया गया और बिना बिलम्ब किये उक्त सबूत कागजात दाखिल किया जा रहा है, उक्त सबूत कागजात से माननीय न्यायालय को न्याय व निर्णय करने में काफी मदद मिलेगी। हम अपीलान्ट द्वारा जानबुझकर अवर न्यायालय में सबूत कागजात दाखिल करने में कोई चुक नहीं की गयी है। कास प्रार्थनापत्र के साथ संलग्न कागजात को दाखिल किये जाने में कोई बिलम्ब पाया जाये तो दफा 5 मियाद कानून का फायदा दिया जाकर उक्त सबूत कागजात शामिल मिसिल किया जाकर साक्ष्य में पढ़ा जाना जरूरी व न्याय संगत है।

अतः निवेदन है कि प्रार्थनापत्र देने में हुए बिलम्ब को दफा 5 मियाद कानून का फायदा दिया जाकर अपील उपरोक्त में प्रार्थीगण द्वारा फिहरिस्त सबूत के साथ दाखिल सबूत कागजात को सामिल मिसिल किये जाने की कृपा करे।

न्याय होगा।"

8. It is pertinent to mention here that in this petition, the list of documents that was sought to be produced as additional evidence has not been enclosed. Under the circumstances, learned counsel for the petitioner cannot seek benefit of the judgments cited by him. In **Shalimar Chemicals Works Ltd.**, the fact scenario that was considered by the Supreme Court was quite different from the present case. The Supreme Court had noticed that serious mistakes were committed in the case at all stages. It was held that the trial court should not have marked as exhibits the xerox copies of the certificates of registration of the trade mark in the face of the objection raised by the defendants. It should have declined to take them on record as evidence and left the plaintiff to support its case by whatever means it proposed rather than leaving the issue of admissibility of those copies open and hanging, by marking them as exhibits subject to objection of proof and admissibility. The

Supreme Court observed as follows:

"12. On a careful consideration of the whole matter, we feel that serious mistakes were committed in the case at all stages. The trial court should not have "marked" as exhibits the Xerox copies of the certificates of registration of trade mark in face of the objection raised by the defendants. It should have declined to take them on record as evidence and left the plaintiff to support its case by whatever means it proposed rather than leaving the issue of admissibility of those copies open and hanging, by marking them as exhibits subject to objection of proof and admissibility. The appellant, therefore, had a legitimate grievance in appeal about the way the trial proceeded. The learned single Judge rightly allowed the appellant's plea for production of the original certificates of registration of trade mark as additional evidence because that was simply in the interest of justice and there was sufficient statutory basis for that under clause (b) of Order XLI, Rule 27. But then the single Judge seriously erred in proceeding simultaneously to allow the appeal and not giving the defendants/respondents an opportunity to lead evidence in rebuttal of the documents taken in as additional evidence. The Division Bench was again wrong in taking the view that in the facts of the case, the production of additional evidence was not permissible under Order XLI, Rule 27. As shown above the additional documents produced by the appellant were liable to be taken on record as provided under Order XLI, Rule 27 (b) in the interest of justice. But it was certainly right in holding that the way the learned single Judge disposed of the appeal caused serious prejudice to the defendants/respondents. In the facts and circumstances of the case, therefore, the proper course for the Division Bench was to set aside the order of the learned single Judge without disturbing it insofar as it took the originals of the certificates of registration produced by the appellant on record and to remand the matter to give opportunity to defendants/respondents to produce evidence in rebuttal if they so desired. We, accordingly, proceed to do so. The judgment and order dated April 25, 2003 passed by the Division Bench is set aside and the matter is remitted to the learned single Judge to proceed in the appeal from the stage the original of the registration certificates were taken on record as additional evidence. The learned single Judge may allow the defendants/respondents to lead any rebuttal evidence or make a limited remand as provided under Order XLI, Rule 28."

9. Similarly, in the case of **Chaudhari Haider Hussain**, two documents dated 5.12.1951 which was the original agreement and, an order dated 29.12.1951 passed by the Parganadhikari on the basis of the compromise were sought to be brought on record. After considering the aforesaid judgment in **Shalimar Chemicals Works Ltd.**, it was held that the order and the compromise agreement of 1951 that formed part of the application that was sought to be brought on record by the application under Order 41 Rule 27 (b) CPC, ought to have been brought on record and the case was accordingly, allowed while setting aside the order rejecting the application for additional evidence.

10. The appellate court has taken a decision with regard to the

application under Order 41 Rule 27 and has applied its mind to the same. As stated above, list of documents sought to be filed by way of additional evidence has not been filed in this petition. Moreover, the appellate court has considered the aspect of due diligence while rejecting the application.

11. Under the circumstances, no interference is called for and this petition is **dismissed**.

Order Date :- 2.11.2023

A. V. Singh

(Jayant Banerji, J.)