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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 27.11.2015**

% **RSA 356/2015 and C.M. No. 21492/2015**

GANESH SINGH

..... Appellant

Through: Mr. Ajit Upadhyay & Mr. Niket
Anand, Advocates.

versus

ADYA PRASAD SINGH

..... Respondent

Through: Mr. Sunil Kumar, Mr. Atul Parmar &
Ms. Kirti Parmar, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. The respondent has appeared through counsel.
2. I have heard the submissions of learned counsel on both sides and proceed to dispose of the present appeal.
3. The present second appeal is directed against the order dated 10.08.2015 passed by the learned First Appellate Court, namely the District & Sessions Judge, Shahdara, Karkardooma Courts in RCA No.04/2013, whereby the First Appellate Court allowed the application under Order XLI Rule 27 CPC preferred by the appellant before it, who is the respondent herein, and set aside the judgment & decree dated 10.12.2012 passed by the Trial Court, namely the SCJ-cum-RC (North-East), Karkardooma Courts,

Delhi in Civil Suit No. 73/2008 and remanded the suit back to the Trial Court with a direction to allow the respondent herein/ plaintiff to place on record the documents in question, and allow him to prove the same in accordance with law. The appellant herein/ defendant was held entitled to rebut the evidence, which the respondent/ plaintiff may adduce.

4. The respondent/ plaintiff had filed the suit for declaration and injunction being Civil Suit No.73/2008 - to seek a declaration in respect of two General Power of Attorneys executed and registered by him, thereby appointing the defendant/ appellant as his attorney. These two General Power of Attorneys are dated 27.12.2007. The case of the respondent/ plaintiff was that the said two General Power of Attorneys had been obtained fraudulently by the appellant herein, and had further been misused for selling the property of the plaintiff in breach of trust. The Trial Court dismissed the suit by the judgment & decree dated 10.12.2012.

5. The respondent/ plaintiff then preferred the aforesaid first appeal and also moved an application under Order XLI Rule 27 CPC to lead additional evidence. As aforesaid, the said first appeal has been disposed of in the manner recorded hereinabove.

6. The submission of learned counsel for the appellant, firstly, is that there was no justification to allow the application under Order XLI Rule 27 CPC preferred by the respondent/ plaintiff. Learned counsel submits that the respondent had not made out a case falling either under Rule 27 CPC (1) (a), or (aa) of Order 41 CPC, namely, it was not the case of the respondent/ plaintiff that the Trial Court had refused to admit the said evidence which

ought to have been admitted, and it was also not the respondent's case that the said documents, now sought to be led in evidence additionally, were not within the knowledge or could not, after due diligence, be produced by him at the time when the decree was passed by the Trial Court. The respondent was seeking to rely on certain correspondences, which were not produced due to sheer negligence, and also were not relevant for the purpose of just decision of the case.

7. Learned counsel submits that the First Appellate Court has failed to appreciate the judgment of the Supreme Court in *Union of India Vs. Ibrahim Uddin & Another*, (2012) 8 SCC 148, wherein the Supreme Court has held that an application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. Such an application could be considered, provided it is covered by either of the pre-requisite conditions incorporated in Rule 27 of Order 41 CPC. The discretion is to be exercised by the Court judiciously, taking into consideration the relevance of the documents in respect of the issues involved in the case, and the circumstances under which such evidence could not be led in the Court below. It is only when the case falls within the four corners of requirements laid down under Rule 27 of Order 41 CPC, that the additional evidence would be taken on record.

8. Learned counsel for the appellant further submits that, in any event, the First Appellate Court was not justified in setting aside the judgment & decree passed by the Trial Court. Even if additional evidence was to be permitted to be led by the respondent/ plaintiff, and the First Appellate Court thought it fit that the same be recorded by the Trial Court, only for that

limited purpose, the matter could be remitted to the Trial Court and once the additional evidence was recorded, the same could be sent to the First Appellate Court for consideration at the time of hearing of the first appeal. The First Appellate Court could not have set aside the judgment & decree passed by the Trial Court without going into the merits of the same and testing the correctness of the said judgment & decree.

9. On the other hand, learned counsel for the respondent submits that the order passed by the First Appellate Court is well-reasoned and there is full justification for allowing the application under Order 41 Rule 27 CPC. The respondent/ plaintiff has sought to lead in evidence correspondences undertaken between the plaintiff and the defendant and between the plaintiff and DW-2 Sh. Siraj Khan. Learned counsel submits that the First Appellate Court has examined these correspondences and observed that these correspondences destroy the testimony of the defence witnesses. Thus, it cannot be said that these documents would have no material bearing on the determination that may be made by the Court.

10. Learned counsel further submits that the respondent is a resident of United States of America (USA) and the suit was filed by him through his attorney. For this reason, the documents could not be produced at the trial stage. It is further submitted that the respondent is also suffering from a mental ailment, in respect whereof, the respondent has produced medical certificate before the Trial Court. On account of his mental disturbance, the respondent/ plaintiff could not properly conduct his case before the Trial Court.

11. In the aforesaid background, the substantial question of law that arises for consideration is: *whether the First Appellate Court was justified in setting aside the judgment & decree passed by the Trial Court while allowing the application under Order XLI Rule 27 CPC, without going into the merits of the said judgment & decree passed by the Trial Court, and without finding an error in the same?*

12. Having heard learned counsel and perused the impugned judgment as well as the judgment of the Trial Court and the other documents placed on record, I am of the view that while no error could be found in the impugned judgment insofar as it allows the respondent's application under Order XLI Rule 27 CPC, at the same time, the setting aside of the judgment & decree of the Trial Court, by the First Appellate Court, was unjustified and not called for.

13. The First Appellate Court, in the impugned order, has taken note of the relevant facts that the parties are real brothers; the plaintiff/ respondent is residing in USA and he is not mentally sound. The First Appellate Court has also given its reasons for allowing the application by observing that on perusing the correspondences sought to be brought on record as additional evidence, it appears that they go contrary to the evidence led by Sh. Ganesh Singh (DW-1) and Sh. Siraj Khan (DW-2). Notice has also been taken of the fact that the suit was filed by him through his Special Power of Attorney. Since these documents are very relevant for the purpose of appreciation of evidence, particularly the depositions of DW-1 and DW-2 – as they contradict the testimonies of DW-1 and DW-2, taking the said documents on record and appreciation thereof is necessary for just decision of the case.

14. The First Appellate Court has also observed that not permitting the said additional evidence to be taken on record may lead to miscarriage of justice qua the respondent/plaintiff. Conversely, no prejudice would be caused to the appellants, as they would have the opportunity to meet the said additional evidence by leading their own evidence in rebuttal, apart from cross-examining the plaintiff's witness. The First Appellate Court has also compensated the appellant by awarding costs of Rs.20,000/-.

15. A perusal of Order 41 Rule 27(1)(b) CPC shows that the Appellate Court may itself require any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause. Thus, even if the case is not covered by clauses (a) and (aa) of Rule 27 (1) of Order 41, the power of the Appellate Court to call for additional evidence – if it impinges on the judgment that it may pronounce, or for other substantial cause, is not circumscribed by clauses (a) and (aa) aforesaid. Procedures are handmaids of justice, and the eventual goal of the Court is to do substantial justice between the parties. The making of the application under Order 41 Rule 27 CPC in the present case does not appear to be a *mala fide* exercise by the respondent/ plaintiff only with a view to drag on the proceedings. In the light of the circumstances in which the suit was filed through an Attorney – as the respondent/plaintiff resides in USA, and the mental illness suffered by the plaintiff, it does not appear to be a case of sheer negligence on the part of the plaintiff in not producing the said evidence at the trial stage. Merely allowing the said application moved by the respondent/ plaintiff to lead additional evidence does not cause prejudice to the appellant/ defendant, since the appellant/ defendant would have

sufficient opportunity to meet the additional evidence sought to be led by the respondent/ plaintiff. The appellant/defendant has been sufficiently compensated with costs. The ultimate aim of the Court is to find the truth.

16. Consequently, the impugned order insofar as it allows the application moved under Order 41 Rule 27 CPC is concerned, I am not inclined to interfere with the exercise of its discretion by the First Appellate Court after examining the additional evidence sought to be led in the light of the testimonies of DW-1 and DW-2.

17. However, there is merit in the submission of learned counsel for the appellant that the judgment & decree passed by the Trial Court has wrongly been set aside by the First Appellate Court. While remanding the case back to the Trial Court for recording of additional evidence, the First Appellate Court after allowing the said application under Order 41 Rule 27 CPC, could have either taken the evidence before it, or could have directed the Trial Court to record the additional evidence and send the same back to the Appellate Court. There was no occasion for the First Appellate Court to set aside the judgment & decree passed by the Trial Court, merely because additional evidence is required to be recorded in the matter. The correct course to be adopted by the First Appellate Court would have been to require the Trial Court to record additional evidence and send the same to the First Appellate Court. The First Appellate Court should have adjourned the first appeal to await the said additional evidence as would have been recorded by the Trial Court, and thereafter to hear the first appeal on merits after taking into consideration the additional evidence. Without going into the merits of the judgment and decree passed by the Trial Court, and without

faulting the same, the First Appellate Court should not have set aside the said judgment and decree of the Trial Court.

18. Accordingly, to the aforesaid extent, this appeal is allowed. It is directed that the Trial Court shall record the additional evidence and send the same to the First Appellate Court, whereafter the first appeal preferred by the respondent/ plaintiff shall be heard by the Appellate Court and disposed of on merits. It is made clear that any observations made in this judgment shall not come in the way of either party, as and when the first appeal is taken up for consideration after additional evidence has been recorded in the matter.

19. The appeal stands disposed of in the aforesaid terms.

VIPIN SANGHI, J.

NOVEMBER 27, 2015

B.S. Rohella