

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.9665 of 2015

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Mithilesh Kumar

.... Petitioner/s

Versus

Sunil Kumar Sharma

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. J. S. Arora, Advocate

For the Respondent/s : Mr. Shivendra Kishore, Sr. Advocate
Mr. Sanjay Prasad, Advocate with him.

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Dated : 4rd day of February, 2016

P R E S E N T

CORAM : THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

CAV O R D E R

- 3 04-02-2016 **1.** This application under Article 227 of the Constitution of India has been filed by the petitioner for setting aside the order dated 26.5.2015 passed by Addl. District & Sessions Judge, Patna in Title Appeal No.50 of 2005 whereby the Court below rejected the application filed by the appellant-petitioner under Order 41 Rule 27 CPC seeking permission to adduce additional evidence.
- 2.** Perused the order passed by the Court below. It appears that the plaintiff respondent filed Title Suit No.98 of 2000 for specific performance of contract. The defendant petitioner appeared and filed contesting written statement denying the contention of the



plaintiff respondent. Specifically, the petitioner denied the payment of entire consideration amount except Rs.20,051/-. The suit was decreed. Thereafter, the appeal was filed by the petitioner. In this appeal, the application under Order 41 Rule 27 CPC was filed seeking permission to adduce additional evidence on the ground that no sufficient opportunity was granted to the appellant for adducing evidence. The Court below by the impugned order has rejected the said application on the ground that the High Court set aside the earlier judgment of appellate Court whereby the appeal was allowed and the matter was remanded to the appellate Court for decision on merit and after remand, the petitioner was repeatedly directed to come ready for hearing of the Appeal but the application has been filed.

3. The learned counsel Mr. J. S. Arora, raised only two questions. Firstly, that in fact no evidence was adduced by the petitioner as no sufficient opportunity was granted by the trial Court. Although prior to judgment, the petitioner repeatedly filed application for permission to adduce evidence. Therefore, it will be empty formality in disposing of the appeal. Secondly, the learned counsel submitted that only because the remand order has been set aside by the High Court, the right of the appellate Court to receive additional evidence according to Order 41 Rule 27 CPC is not taken



away. In support of his contention, the learned counsel relied upon the decision of Supreme Court in the case of P. ***Purushottom Reddy Vs. Pratap Steels Ltd. (2002) 2 SCC 686*** . The learned counsel further submitted that if for the ends of justice, it is necessary for the appellate Court to receive additional evidence which is necessary for just decision of the controversies between the parties according to the Court, the same can be received as additional evidence. In the present case, since there is no evidence on behalf of the petitioner, therefore, the additional evidence is required to be taken on record in order to pronounce the Judgment effectively but the Court below without deciding the application on merit even without referring anything in the impugned order rejected the application considering the order passed by this Court whereby the remand order was set aside as if the appellate Court's jurisdiction under Order 41 Rule 27 CPC is taken away by the High Court. In support of his contention the learned counsel, the decision of the Supreme Court in the case of ***Union of India Vs Ibrahuddin 2013 (1) PLJR 48 SC*** and submitted that the Court below could have considered the application at the time of hearing of the Appeal itself which could have helped the Court in arriving at clear finding but on technical ground only the application has been rejected.

4. On the other hand the learned senior counsel, Mr.



Shivendra Kishore, submitted that sufficient opportunity was granted to the petitioner for adducing evidence in the trial Court but he did not avail the opportunity and tried to linger the matter. The High Court also in earlier civil revision application directed the petitioner to file application in the Court below but he did not file any application seeking permission to adduce evidence. In this application under Article 227, the petitioner has suppressed all these facts and, therefore, also he is not entitled to invoke the supervisory jurisdiction. According to the learned counsel, the petitioner is guilty of laches and negligent. The High Court further in the Misc. Appeal set aside the order of remand and directed the appellate Court to hear the appeal, therefore, the Court below has rightly rejected the application under Order 41 Rule 27 CPC.

5. Perused the order passed by the Court below. Form perusal of the order, it appears that the Court below has not at all considered the application filed by the petitioner under Order 41 Rule 27 on merit. The remand order was set aside by the High Court and the appellate Court was directed to hear the appeal on merit. The Court below has quoted the direction of the High Court and after quoting rejected the application holding that this appeal is very old appeal and this application is frivolous application. The Court below has not at all considered the application on merit as if the power under

Order 41 Rule 27 of the appellate Court has been taken away by the order of this Court in Misc. Appeal No.505 of 2007. In my opinion, the approach of the lower appellate Court is not according to law. Only because the remand order has been set aside by the High Court, it cannot be said that the lower appellate Court has no jurisdiction to decide the application under Order 41 Rule 27 CPC. The lower appellate Court should have disposed of the application on merit according to law. The Court below instead of disposing of the application on merit according to law, it has rejected the application on technical ground, and, therefore it can be said that the Court below has passed the order in the manner not permitted by law and thereby not exercised a jurisdiction vested in it by law.

6. Accordingly, the order passed by the Court below is hereby set aside and the matter is remanded back to the lower appellate Court for passing a fresh order according to law after hearing both the parties on the application filed by the petitioner under Order 41 Rule 27 CPC without being influenced by this order.

7. **In the result this writ application under Article 227 of the Constitution of India is allowed with the aforesaid direction.**

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(Mungeshwar Sahoo, J)