

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.6026 of 2016

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Jagdish Shah

.... Petitioner/s

Versus

Ram Narain Gond & Ors

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Kaushal Kishore Mishra

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER

3 11-08-2016 **1.** Heard the learned counsel, Mr. Kaushal Kishore Mishra,

for the petitioner and the learned counsel, Mr. Arvind Kumar, for

the respondent.

2. Peruse the impugned order dated 17.04.2015 passed by

Second Addl. District Judge, Siwan in Title Appeal No.22 of 1994

whereby the learned lower appellate Court has rejected the

application under Order 41 Rule 27 CPC filed by the petitioner

who is appellant in the Court below.

3. The Court below rejected this application recording

findings to the effect that there is no pleading in the written

statement with respect to the document sought to be adduced as

additional evidence and that this document is relating to another

property than the suit property. Further in the memo of appeal

before the appellate Court also, nothing has been pleaded with

regard to the document and that no explanation has been given as to why the document of the year 1982 was not produced before the trial Court.

4. The learned counsel, Mr. Kaushal Kumar Mishra, relied upon decision of the Hon'ble Supreme Court reported in *AIR 2011 SC 559 Malyalam Plantation Ltd. Vs. State of Kerala & Anr.* and submitted that it is the duty of the Court to deal with the document on merit vide paragraph '10' of the Judgment. According to the learned counsel, this document was not available with the appellant and when he came to know about the document, he has filed the application under Order 41 Rule 27 CPC. The learned counsel further submitted that the Court below committed error of record in saying that the document do not relate to the property in suit, as such it is not relevant. According to the learned counsel, the document relates to the property in suit and its vital document which requires consideration on merit but the Court below instead of deciding the application at the time of hearing of the Title Appeal itself has separately passed the order.

5. On the other hand, the learned counsel for the respondent submitted that it is incorrect to say that the document was not in the custody of the petitioner. Further in view of the



application filed by him which is annexure in this writ application, it is evident that the petitioner has admitted the fact that the document was in his custody. When the document was in custody of the petitioner, it was the duty of the petitioner to have pleaded about the said document and should have produced the same as an evidence but instead of doing so at the appellate stage, Order 41 Rule 27 application has been filed with a view to fill up the lacunae. The learned counsel further submitted that no amount of evidence can be received, if there is no pleading to that effect. According to the learned counsel, it is not absolute rule that whenever any application is filed under Order 41 Rule 27 CPC, it must be heard along with the appeal. The Court, if find that the evidence sought to be adduced is baseless, it can be rejected by any stage.

6. Perused the impugned order. Perused the Judgment relied upon by the learned counsel for the petitioner.

7. The Hon'ble Supreme Court in the said very decision has also held that it is equally well settled that additional evidence cannot be permitted to be adduced so as to fill in the lacunae or to patch up the weak point in the case vide paragraph 11. At paragraph 12, the Hon'ble Supreme Court held that additional

evidence cannot be permitted at the appellate stage in order to enable other party to remove second lacunae present in that case.

At paragraph 13, the Supreme Court held as follows :-

‘13. In the light of the separate application filed under Order 41 Rule 27 CPC for reception of additional evidence by both sides, it is for the High Court to consider and take a decision one way or other as to the applicability of the same and decide the appeal with reference to the said conclusion. IN this view of the matter, we refrain from going into the merits of the materials placed by both sides and it is for the High Court to consider and take a decision one way or other as per the mandate of the said provision.’

8. From perusal of the application under Order 41 Rule 27 CPC which is annexed with this writ application, it appears that it is not the case of the petitioner that the document was not within his knowledge or it is not in his custody. No reasonable explanation has been given as to why the document was not produced before the trial Court at the time of pendency of the suit. There is no explanation at all as to why there is no pleading with respect to this document. According to the Court below, the document sought to be produced as additional evidence do not relate to the property in suit. According to the learned counsel for the petitioner, it is error of record whereas according to the learned counsel for the respondent, it is correct finding. Now, therefore,

this is a pure questions of fact. This Court is not sitting as an appellate Court so as to correct any defect or error of record committed by the Court below. Admittedly, there is no pleading with respect to the document.

9. The Hon'ble Supreme Court in *2012 (8) SCC 148 Union of India Vs. Ibrahiuddin* at paragraph 77 considering various previous Judgments and decisions held that **'a decision of Court cannot be based on grounds outside the pleadings of the parties. No evidence is permissible to be taken on record in the absence of the pleading in that respect. No party can be permitted to travel beyond its pleading and that of necessary and material facts should be pleaded by the party in support of the case set up by it.'** It was further held that **'where the evidence was not in the line of the pleading, the said evidence cannot be looked into or relied upon.'**

10. In view of the settled principal of law when there is no basis for the document which is nothing but a piece of evidence how can it be received as an additional evidence by the appellate Court. In the said decision itself at paragraph 39 has held that **'it is not the business of the appellate Court to supplement the evidence adduced by one party or the other in the lower**

Court.’ Hence in the absence of satisfactory reasons for the non-production of the evidence in the trial Court, additional evidence should not be admitted in Appeal as an party guilty of remissness in the lower Court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower Court but failed to do so or adjudicated not to do so cannot have it admitted in Appeal.

11. In view of the above settled proposition of law, I do not find any reason to interfere with the impugned order in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

12. Thus, this writ application is dismissed.

(Mungeshwar Sahoo, J)

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