

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.18343 of 2015

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Md. Yasin

.... Petitioner/s

Versus

Md. Ishaque Ansari

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Sunil Srivastava

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER

4 22-11-2016 Hear learned counsel for the petitioner and learned counsel for the respondent.

2. Perused the impugned order dated 09.10.2015 passed by the learned Additional District Judge-10th, Patna in T.A. No. 120 of 2011 whereby the learned lower appellate court has allowed the application under Order 41 Rule 27 C.P.C. filed by the respondents in the appeal.

3. Learned counsel for the petitioner submitted that witnesses were sought to be examined by the respondent after closure of the evidence of both the parties in the court below. The trial court rejected the said application and refused to grant any permission for further examination of the witnesses. Against the said order, the respondents filed civil revision No. 2025 of 2006, which was dismissed as withdrawn with liberty to seek any other remedy available under law. Therefore, according to learned



counsel for the petitioner order passed by the trial court merged in the order passed by the High Court in Civil Revision No. 2025 of 2006. By way of additional evidence, the respondent is now again trying to examine the said witnesses and accordingly, he had filed the application under Order 41 Rule 27 C.P.C. and the court below without considering that the order earlier passed by the trial court has been merged in the order passed by the High Court has allowed the application only on the ground that because evidence was rejected by the trial court. As such, Order 41 Rule 27 C.P.C. is applicable.

4. On the other hand learned counsel appearing for the respondent submitted that after amendment, new facts were brought on by the plaintiff-petitioner and, therefore, it necessitated to examine the witnesses. Considering this facts, the respondent filed application before the trial court with a permission to reopen the case and for giving chance to examine the witnesses. While withdrawing the civil revision application, the High Court granted liberty to the petitioner to avail remedy available under the law. As such, this is the remedy which respondent is availing before the trial court under Order 41 Rule 27 C.P.C.

5. Perused the impugned order, it appears that the court below recorded finding that in appeal, ordinarily, the parties are



not allowed to adduce additional evidence but if the trial court has refused to admit any evidence then in appeal, additional evidence can be permitted to be adduced and in the present case, the written statement allowed to be amended but no opportunity was granted to prove new fact, which was allowed to be amended, therefore, the appellant is entitled for the relief under Order 41 Rule 27 C.P.C.

6. Order 41 Rule 27 C.P.C. (1)(a) C.P.C. provides that the Court from whose decree, the appeal is preferred has refused to admit the evidence which ought to have been admitted then the appellate court may permit to adduce additional evidence. In the present case, it is not the case of the appellant that the evidence, which was refused by the trial court ought to have been received by the trial court. Moreover, the order passed by the trial court has merged in the order passed by the High Court. In the impugned order also, the trial court nowhere held that the trial court ought to have allowed the appellant of the title appeal to examine further witnesses. Now, if the order is allowed to stand then it will amount to modification of the order of the High Court passed in exercise of revisional jurisdiction, which is, admittedly, a part of the appellate jurisdiction.

7. This Court in the case of *Nityanand Sharma Versus*



M/s. Aditya Co-operative reported in ***2011 (3) PLJR 728*** has held that revisional jurisdiction of the High Court is a part of the general appellate jurisdiction of the High Court as a superior Court. Principle of the merger of orders of inferior Court in the superior Court cannot be legally affected by marking any distinction between an appeal and revision. Dismissal of the civil revision in any manner whatever by default or withdrawal simplicitor or by dismissal of any preliminary matter, would naturally amount to confirmation of the order.

8. In the present case, admittedly, the plaintiff-petitioner has filed the suit for specific performance of contract. The defence is that the plaintiff did not pay the balance of consideration amount within the period prescribed in the agreement. Therefore, the defendant is not liable to execute the sale deed with respect to the suit property. Therefore, this question and issues relating to this question were tried and the trial court has decreed the suit. It is not the case of the parties that no sufficient evidence was adduced in support of the fact pleaded by the plaintiff or by the defendant. What type of amendment was allowed and what evidences were sought to be adduced in support of the amendment is, therefore, immaterial here. The question has not been considered by the trial court. The trial court has only held that



since the witness was refused to be examined, Order 41 Rule 27 is applicable. In my opinion, therefore, when the order passed by the trial court earlier has already merged in the order of the High Court, the lower appellate court should not have allowed the application under Order 41 Rule 27 C.P.C. Thus, this writ application is allowed. The impugned order is set aside. The application filed by the defendant-appellant-respondent under Order 41 Rule 27 C.P.C. is hereby rejected.

Brajesh/-

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(Mungeshwar Sahoo, J)

