

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WP227 No. 346 of 2016**

Shobhit Ram @ Shobharam, aged 63 years, S/o Puran, Caste-Suryawanshi, R/o Khadpadipara, Janjgir, Tahsil-Janjgir, District Janjgir Champa (C.G.)

---- Petitioner

Versus

1. Bajrang Lal, S/o Shankar Lal Agrawal, R/o near Bhima Talab, Bajar Para, Janjgir, Tahsil- Janjgir, District Janjgir-Champa (C.G.)
2. State of Chhattisgarh, through the Collector, Distt. Janjgir-Champa (C.G.)
3. Kailash, S/o Shankarlal, aged 48 years,
4. Kiran, D/o Shankar Lal, aged 40 years,
5. Santoshi, D/o Shankarlal, aged 35 years,
6. Santoshi, D/o Shankarlal, age 35 years,

No. 3 to 5 are R/o Janjgir, Tahsil – Janjgir, District Janjgir-Champa (C.G.)

---- Respondents

For Petitioner : Shri Devershi Thakur, Advocate.
 For Respondent No. 1 : Shri Paras Mani Shriwas, Advocate.
 For Respondent No.2 : Smt. Astha Shukla, PL

Hon'ble Shri Justice Sanjay K. Agrawal**Order On Board****28/11/2016**

(1) The plaintiff's suit for permanent injunction was dismissed by the trial Court on 17.08.2015. The petitioner/plaintiff preferred first appeal there-against before the first appellate Court on 08.09.2015 and thereafter also filed an application under Section 41 Rule 27 of the

CPC .

(2) The First Appellate Court, by its impugned order dated 14.03.2016, rejected the application filed under Order 41 Rule 27 CPC by separate order without hearing the appeal on merits, against which the instant writ petition under Article 227 of the Constitution of India has been filed by the petitioner.

(3) Learned counsel for the petitioner would submit that application under Order 41 Rule 27 CPC has to be decided after hearing the appeal on merits as such the order passed on that application deserves to be set aside *whereas* learned counsel appearing for respondent No.1 would support the impugned order.

(4) I have heard learned counsel appearing for the parties and perused the order impugned with utmost circumspection.

(5) Order 41, Rule 27 CPC, provides as under:--

"Order 41, Rule 27. *Production of additional evidence in Appellate Court.*-- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) [***]

[(aa) the party seeking to produce additional evidence, established 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 may allow such evidence or document to be produced, or, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced, by an Appellate Court, the court shall record the reason for its admission."

(6) A careful reading of sub-rule (aa) of the aforesaid Order 41 Rule 27 of the CPC would show that the object of the rule is to provide an opportunity to the party who was not able to produce the evidence in the

trial Court and thereby to provide an opportunity to produce the same in the appellate Court. In order to produce the documents, the conditions mentioned in sub-rule (aa) of Order 41 Rule 27 of the CPC must be satisfied to exist.

(7) In the matter of State of **Rajasthan v. T.N. Sahani and others**¹, their Lordships of the Supreme Court have held that the Order 41 Rule 27 of the CPC has to be considered at the time of hearing of the appeal on merits and as such the application should be decided along with appeal and held as under:--

"This is entirely for the court to consider at the time of hearing of the appeal on merits whether looking into the documents which are sought to be filed as additional evidence, need be looked into to pronounce its judgment in a more satisfactory manner. If that be so, it is always open to the court to look into the documents and for that purpose amended provision of Order 41 Rule 27 (b) CPC can be invoked. So the application under Order 41 Rule 27 should have been decided along with the appeal. Had the Court found the documents necessary to pronounce the judgment in the appeal in a more satisfactory manner, it would have allowed the same; if not, the same would have been dismissed at that stage. But taking a view on the application before hearing of the appeal, in our view, would be appropriate. Further, the reason given for the dismissal of the application is untenable. The order under challenge cannot, therefore, be sustained. It is accordingly, set aside. The application is restored to its file. The High Court will now consider the appeal and the application and decide the matter afresh, in accordance with law."

(8) Similarly in the matter of **Eastern Equipment & Sales Limited v. ING. Yash Kumar Khanna**², their Lordships of the Supreme Court clearly held that the application filed under Order 41 Rule 27 of the CPC has to be decided along with the appeal

(9) Quite recently in the matter of **Union of India v. Ibrahim Uddin**

1 (2001) 10 SCC 619

2 (2008) 12 SCC 739

and another³ , their Lordships of the Supreme Court have considered the stage, in which the application filed under Order 41 Rule 27 of CPC has to be considered and held as under:--

"49. An application under Order 41 Rule 27 CPC is to be considered at the time of hearing of appeal on merit so as to find out whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of - additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage, or not, but it depends upon whether or not the appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial Cause. The true test, therefore, is whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect become apparent to the court.

52. Thus, from the above, it is crystal clear an application for taking additional evidence on record at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of the final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, the application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record, to pronounce the judgment or not, remains inconsequential/inexecutable and is liable to be ignored."

(10) Similarly, in **Khemchand Mulchand v. Government, of Madhya Pradesh, Bhopal**⁴, Madhya Pradesh High Court has clearly held that the that the application for admitting the additional documents filed at an appellate stage should be decided only after hearing of the appeal on merits and held as under:--

3 (2012) 8 SCC 148

4 1972 MPLJ 524

"4. Even though the position that an appellate Court is not in a position to decide whether additional evidence should be allowed in the appeal unless it is first heard on merits is clear enough on the wording of Order 41, rule 27 (1) itself, the practice has grown up in the lower appellate Courts of deciding , an application under Order 41, rule 27(1) immediately after it is moved and even before hearing the appeal on merits; It is beyond comprehension how the appellate Courts are able to decide such applications when they have no idea whatsoever of the merits of the appeal. This practice must stop forthwith and no lower appellate Court should yield to the request of any party to consider its application under Order 41, rule 27(1) before the hearing of the appeal itself. The appeal must first be heard on the merits and then the lower appellate Court Should decide whether the application for production of additional evidence should or should not be allowed. If the application is allowed, then, no doubt, the appeal has to be heard again on merits after the reception of additional evidence for final disposal.

5. What has been said in relation to an application under Order 41, rule 27 (1) applies equally to the disposal of an application for amendment of pleadings made at the appellate stage. The question whether a party should or should not be allowed to amend its pleadings at the appellate stage cannot in its very nature be decided unless the appeal is first heard on merits. The order of the Additional District Judge, Chhindwara, permitting the non-applicants Nos. 4 and 5 to produce additional evidence and to amend their written statement must, therefore, be set aside and the Additional District Judge must be directed to consider the said non applicants' application under Order 41, rule 27 and the application for amendment of the written statement after hearing the appeal on merits."

(11) The principle of law enunciated in case of **Khemchand** (supra) has been followed by the same court in the matter of **Abhay Kumar Nathu Lal Jain v. Santosh Kumar Madan Lal Naik**⁵ , in which it has been held the application filed under Order 41 Rule 27 of the CPC should be decided at the time of final hearing. The reason is that if the Appellate Court comes to the conclusion that it should exercise its power under Order 41 Rule 27 of the CPC, then it is incumbent upon the Appellate Court to stay the delivery of judgment and record the reasons

for admitting the application under Order 41 Rule 27 of the CPC and after admitting the additional evidence, the question of deciding the case on merit shall arise.

(12) Thus on the basis of aforesaid analysis, it is held that the application under Order 41 Rule 27 of the CPC filed during pendency of the first appeal should not be decided before hearing the appeal on merits. The appeal must be heard first on merits and then lower appellate court should consider as to whether application for production of additional evidence should be allowed or not. If the application is allowed then the appeal has to be heard again on merits after reception of additional evidence in order to decide the appeal finally.

(13) In view of aforesaid legal position, the impugned order dated 14.03.2016 is set aside and restored to the file of first appellate Court; and the first appellate Court is directed to consider the application under Order 41 Rule 27 CPC after hearing the appeal on merits.

(14) Accordingly, the writ petition is allowed to the extent indicated hereinabove.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-