

**THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY**

**CIVIL REVISION PETITION No.4530 OF 2012**

**ORDER:**

1 This Civil Revision Petition, under Article 227 of the Constitution of India, is filed challenging the order dated 06.08.2012 passed in I.A.No.456 of 2012 in A.S.No.87 of 2009 on the file of the Court of the V Additional District Judge, Tirupati, wherein and whereby the petition filed by the petitioners under Order 41 Rule 27 CPC, to receive additional evidence by condoning the delay in filing the petition, was dismissed.

2 Sri K.Maheswar Rao, the learned counsel for the petitioner would submit that the appellate Court ought not to have disposed of I.A.No.456 of 2012 independently in isolation of A.S.No.87 of 2009. He further submitted that the appellate Court dismissed the petition on erroneous and untenable grounds. It is his further submission that the appellate Court ought to have disposed of the I.A.No.456 of 2012 along with A.S.No.87 of 2009 in view of the underlying object of Order 41 Rule 27 CPC. He lastly submitted that if the order of the appellate Court is allowed to stand, it would amount to miscarriage of justice.

3 *Per contra*, the learned counsel for the first respondent submitted that there is no bar to dispose of the petition filed under Order 41 Rule 27 CPC independently during the pendency of the appeal. He further submitted that the appellate court considered the scope of Order 41 Rule 27 CPC in right perspective and dismissed the petition. He further submitted that there is no illegality or irregularity in the impugned order, which warrants interference of this Court under Article 227 of the Constitution of India.

4 The facts which are relevant for disposal of the Civil Revision Petition are as follows:

5 The first respondent herein filed O.S.No.141 of 2005 on the file of the Principal Senior Civil Judge, Tirupati against the second respondent and one A. Ramakrishnaiah for specific performance basing on an agreement of sale dated 05.08.2004 purported to have been executed by the second respondent in favour of the first respondent. The second respondent and the said Ramakrishnaiah filed their written statements denying the case of the first respondent. During the pendency of the suit Ramakrishnaiah died and his legal representatives were brought on record as defendant Nos.3 to 6. Basing on the pleadings, the trial Court framed relevant issues. To substantiate the case, on behalf of the first respondent P.Ws.1 to 3 were examined and Exs.A.1 to A.9 were marked. On behalf of the petitioners, who are defendant Nos.3 to 6, D.Ws.1 to 4 were examined and Exs.B.1 to B.6 were marked. The second respondent himself examined as D.W.4.

6 After having a thoughtful consideration to the oral, documentary evidence and other material available on record, the trial Court decreed the suit directing the second respondent to receive the balance consideration of Rs.50,000/- from the first respondent and execute a sale deed along with petitioners herein within one month from the date of judgment. Feeling aggrieved by the judgment and decree of the trial Court dated 16.07.2009, the petitioners herein, who are defendant Nos.3 to 6, preferred A.S.No.87 of 2009 on the file of the V Additional District Judge, Tirupati. During the pendency of the appeal, the petitioners filed I.A.No.456 of 2012 under Order 41 Rule 27 CPC to receive additional evidence. The appellate Court, after

affording a reasonable opportunity to both sides, dismissed the petition. Hence the present Civil Revision Petition.

7 The point that arises for consideration in this Civil Revision Petition is 'whether the appellate court is justified in disposing of I.A.No.456 of 2012 pending the appeal?

8 It is not in dispute that pending appeal the appellate court disposed of I.A.No.456 of 2012. As per the finding recorded by the appellate Court, the petitioners have failed to satisfy the ingredients of Order 41 Rule 27 CPC.

9 The learned counsel for the petitioners strenuously submitted that the appellate Court ought to have disposed of I.A.No.456 of 2012 along with A.S.No.87 of 2009.

10 To substantiate the argument, the learned counsel for the petitioner has drawn the attention of this court to the following judgments:

***State of Rajasthan v. T.N.Sahani***<sup>1</sup> wherein the Hon'ble apex Court held at Para No.4 as follows:

4. It may be pointed out that this Court as long back as in 1963 in *K. Venkataramiah v. Seetharama Reddy* AIR 1963 SC 1526, pointed out the scope of unamended provision of Order 41, Rule 27 (c) that though there might well be cases where even though the Court found that it was able to pronounce the judgment on the State of the record as it was, and so, it could not be required additional evidence to enable it to pronounce the judgment, it still considered that in the interest of justice something which remained obscure should be filled up so that it could pronounce its judgment in a more satisfactory manner. 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 be Court to look into the documents and for that purpose amended provision of Order 41, Rule 27(b), Code of Civil Procedure can be invoked. So the application under Order 41, Rule 27

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<sup>1</sup> (2001) 10 SCC 619

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 inappropriate. 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 not consider the appeal and the application and decide the matter afresh in accordance with law.

***Union of India v. Ibrahim Uddin***<sup>2</sup> wherein the Hon'ble apex

Court held at Para Nos.49, 52 and 53 as follows:

**Stage of Consideration:**

49. An application under Order XLI Rule 27 Code of Civil Procedure is to be considered at the time of hearing of appeal on merits so as to find 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 evidence 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 becomes apparent to the Court. (Vide: Arjan Singh v. Kartar Singh and Ors. AIR 1951 SC 193; and Natha Singh and Ors. v. The Financial Commissioner, Taxation, Punjab and Ors. AIR 1976 SC 1053).

52. Thus, from the above, it is crystal clear that 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 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, 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/in executable and is liable to be ignored.

53. In the instant case, the application under Order XLI Rule 27 Code of Civil Procedure was filed on 6.4.1998 and it was allowed on 28.4.1999 though the first appeal was heard and disposed of on 15.10.1999. In view of law referred to hereinabove, the order dated 28.4.1999 is just to be ignored.

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<sup>2</sup> (2012) 8 SCC 148

***Md. Yousufuddin v. Md. Masiuddin***<sup>3</sup> wherein this Court held at Para No.4 as follows:

4. In view of the above, therefore, without going into the merits of the additional evidence and its relevancy, the impugned order is set aside. The application I.A. No. 829 of 2010 shall stand restored and shall be considered by the lower appellate Court along with the appeal and the lower appellate Court shall also pass appropriate orders in the appeal either accepting or rejecting the additional evidence depending upon its satisfaction with regard to Order 41 Rule 27 Code of Civil Procedure as well as the relevancy of the additional evidence now sought to be produced.

11 On the other hand, the learned counsel for the first respondent has drawn the attention of this Court to the following judgments:

***Nandam Rama Rao v. Battu Rama Rao***<sup>4</sup> wherein this court at para Nos.11, 12 and 15 held as follows:

11. A reading of the impugned order indicates that while considering the I.A. No. 711 of 2009 filed under Order 41 Rule 27 of C.P.C., in paragraphs 6 to 14, the Court below had gone into the merits of the appeal also to some extent and thereafter it had considered whether the application filed by the respondent comes within the purview of Order 41 Rule 27 of C.P.C. There is nothing on record to show that the Court was considering the appeal also along with the application filed under Order 41 Rule 27 of C.P.C.

12. In T.N. Sahani and others (2001) 10 SCC 619 (supra), the Supreme Court held that an application under Order 41 Rule 27 of C.P.C. should be decided along with the appeal and cannot be taken up independently without taking up the appeal. Prima facie, therefore, the Court below erred in considering the application under Order 41 Rule 27 C.P.C. filed by the respondent in isolation without considering the same along with the appeal.

15. Therefore, the Civil Revision Petition is allowed and the impugned order dt. 18.08.2010 in I.A. No. 711 of 2009 in A.S. No. 14 of 2009 of the Additional Senior Civil Judge, Tenali, is set aside and the said I.A. is dismissed. No costs. The miscellaneous petitions, if any pending in this Revision, shall stand closed.

***Daya Ram Soni v. Smt. Gyarsi Bai Khandelwal***<sup>5</sup> wherein the Chhattisgarh High Court held at Para Nos.11, 43 and 44 as follows:

11. Before entering into the merits of the Appeal, we shall first decide the application under Order 41, Rule 27, CPC.

43. In view of the aforesaid facts and circumstances of the case and taking note of the decisions of the Supreme Court

<sup>3</sup> 2011 (4) ALD 210

<sup>4</sup> 2013 (6) ALD 754

<sup>5</sup> AIR 2016 CHHATTISGARH 73

referred to in the foregoing paragraph, this Court is of the opinion that, no illegality or infirmity has been committed by the trial Judge while rejecting the plaintiff's suit for specific performance.

44. The appeal fails and is accordingly dismissed affirming the judgment and decree passed by the trial Court.

12 A perusal of the above decisions clearly indicates that the High Court decided the petition filed under Order 41 Rule 27 CPC along with the main appeal.

***Malayalam Plantations Limited vs. State of Kerala***<sup>6</sup>

wherein the Hon'ble apex Court at para Nos.16 to 19 held as follows:

16. If any petition is filed under Order 41 Rule 27 in an appeal, it is incumbent on the part of the appellate Court to consider at the time of hearing the appeal on merits so as to find out whether the documents or evidence sought to be adduced have any relevance/bearing in the issues involved. It is trite to observe that under Order 41, Rule 27, additional evidence could be adduced in one of the three situations, namely, (a) whether the trial Court has illegally refused the evidence although it ought to have been permitted; (b) whether the evidence sought to be adduced by the party was not available to it despite the exercise of due diligence; (c) whether additional evidence was necessary in order to enable the Appellate Court to pronounce the judgment or any other substantial cause of similar nature.

17. 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 points in the case. 12. Adducing additional evidence is in the interest of justice. Evidence relating to subsequent happening or events which are relevant for disposal of the appeal, however, it is not open to any party, at the stage of appeal, to make fresh allegations and call upon the other side to admit or deny the same. Any such attempt is contrary to the requirements of Order 41 Rule 27 of CPC. Additional evidence cannot be permitted at the Appellate stage in order to enable other party to remove certain lacunae present in that case.

18. In the light of the separate application filed under Order 41 Rule 27 of 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.

19. For the reasons aforesaid, the impugned judgment of the High Court is set aside. We make it clear that we have not gone into the merits as to whether application for reception of additional evidence under Order 41 Rule 27 of the CPC should be allowed or not, which shall be decided by the High Court in accordance with law. We also make it clear

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<sup>6</sup> (2010) 13 SCC 487

that we have not gone into the merits of the claim made by both parties except the reasons indicated in the earlier paragraphs.

**A. Andisamy Chettiar v. A.Subburaj Chettiar**<sup>7</sup> wherein the

Hon'ble apex Court held at Para Nos.16 and 19 as follows:

16. In *Union of India v. Ibrahim Uddin and Anr.* (2012) 8 SCC 148, this Court has held as under:

“49. An application under Order 41 Rule 27 Code of Civil Procedure is to be *considered at the time of hearing of appeal on merits* 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 evidence sought to be adduced....”

19. In *Gurdev Singh and Ors. v. Mehnga Ram and Anr.* (1997) 6 SCC 507, this Court, on similar issue, has expressed the view as under:

“We have heard learned Counsel for the parties. The grievance of the Appellants before us is that in an appeal filed by them before the learned Additional District Judge, Ferozepur, in an application under Order XLI, Rule 27(b), Code of Civil Procedure (Code of Civil Procedure) the learned Additional District Judge at the final hearing of the appeal wrongly felt that additional evidence was required to be produced as requested by the Appellants by way of examination of a handwriting expert. The High Court in the impugned order exercising jurisdiction Under Section 115 Code of Civil Procedure took the view that the order of the appellate court could not be sustained. In our view the approach of the High Court in revision at that interim stage when the appeal was pending for final hearing before the learned Additional District Judge was not justified and the High Court should not have interfered with the order which was within the jurisdiction of the appellate court. The reason is obvious. The appellate court hearing the matter finally could exercise jurisdiction one way or the other under Order XLI, Rule 27 specially Clause (b). If the order was wrong on merits, it would always be open for the Respondent to challenge the same in accordance with law if an occasion arises to carry the matter in second appeal after an appellate decree is passed. But at this interim stage, the High Court should not have felt itself convinced that the order was without jurisdiction. Only on this short question, without expressing any opinion on the merits of the controversy involved and on the legality of the contentions advanced by both the learned Counsel for the parties regarding additional

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<sup>7</sup> AIR 2016 SC 79

evidence, we allow this appeal, set aside the order of the High Court.”

***Satish Kumar Gupta and Ors. vs. State of Haryana***<sup>8</sup>

wherein the Hon’ble apex Court at para No.19 held as follows:

19. The other part of the impugned order permitting additional evidence and remanding the case for fresh decision is uncalled for. No case was made out for permitting additional evidence on settled principles under Order XLI Rule 27 of Code of Civil Procedure. The provision is reproduced below:

“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) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes 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 requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

The Appellate Court may allow such evidence or document to be produced, or witness to be examined.

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

13 As per the principle enunciated in the cases cited supra, the petition filed under Order 41 Rule 27 CPC has to be disposed of along with the appeal. Further, establishment of conditions stipulated under Order 41 Rule 27 CPC by the petitioner is condition precedent to allow the petition. The Court shall not allow such application in a routine manner. In the present case, the petitioner filed I.A.No.456 of 2012 under Order 41 Rule 27 CPC to receive additional evidence. The appellate Court disposed of the said I.A. during the pendency of the appeal, which is not permissible under law in view of the principle enunciated in the cases cited supra. If the appellate Court fails to exercise the discretion vested in it, or exceeds its jurisdiction, this

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<sup>8</sup> AIR 2017 SC 1072

Court while exercising supervisory jurisdiction under Article 227 of the Constitution of India, can certainly interfere with the orders passed by the appellate Court. The appellate court instead of deciding I.A.No.456 of 2012 along with the main appeal, disposed of the I.A. independently in isolation of the appeal. If the order of the appellate court is allowed to stand, it would certainly amount to miscarriage of justice. Therefore, this Court is of the considered view that the impugned order is liable to be set aside. This Court is not inclined to express any opinion as to whether the petitioners have satisfied the ingredients of Order 41 Rule 27 CPC. This aspect has to be decided by the appellate Court while disposing of the appeal without being influenced by any of the observations made in I.A.No.456 of 2012.

14 In the result, the Civil Revision Petition is allowed, setting aside the order dated 06.08.2012 passed in I.A.No.456 of 2012 in A.S.No.87 of 2009 on the file of the Court of the V Additional District Judge, Tirupati. Consequently, I.A.No.456 of 2012 is restored to file. The appellate court is hereby directed to dispose of the I.A.No.456 of 2012 along with the main appeal in the light of Order 41 Rule 27 CPC. No order as to costs. As a sequel, miscellaneous petitions, if any pending in this Civil Revision Petition shall stand closed.

**T. SUNIL CHOWDARY, J.**

Date:28-04-2017.

**Kvsn**