

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.373 of 2008**

1. Chandra Bhushan Shukla S/o. Late Ram Achal Shukla,
Aged about 57 years,

Smt. Bachchi Devi Wd/o. Late Ram Achal Shukla, Aged
about 87 years, (since died)

Both above R/o. Mohalla Darripara, Ambikapur,
District Surguja (CG)

----- Appellants/Plaintiffs

Versus

1. Surmila (Dead) through LR's

1A. Subhash Cherwa S/o. Ramsharan Cherwa, aged about
36 years, R/o Mohalla Darripara, Thana & Tehsil-
Ambikapur, Distt. Surguja

2. State of Chhattisgarh, through: Collector, Surguja,
Ambikapur (CG)

----- Respondents/Defendants

For Appellants/Plaintiffs :	Mr. Manoj Paranjape, Advocate
For Respondent No.1A :	None present though served
For Respondent No.2/State :	Mr. Martin Siddiqui, Dy.A.G.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

24.02.2020

1. The substantial question of law involved, formulated
and to be answered in the second appeal preferred by
the plaintiffs is as under:-

“Whether the first appellate Court was
justified in rejecting an application filed
under Order 41 Rule 27 of the Code of Civil
Procedure, 1908 by the appellants on
13.06.2005 without hearing the appeal on

merits as the said application is to be considered at the time of hearing of appeal on merits ?"

[For the sake of convenience, the parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court].

2. The plaintiff's suit for declaration of title and permanent injunction was dismissed by the trial Court by the judgment and decree dated 27.4.2005, against which, he preferred first appeal under Section 96 of the Code of Civil Procedure, 1908 along with an application under Order 41 Rule 27 of the CPC. That application was rejected by the first appellate Court without hearing the appeal on merits on 14.7.2008 and thereafter fixed the date for final hearing on 9.7.2008 and ultimately heard the appeal on 28.8.2008 and dismissed the appeal by its judgment and dated 25.9.2008. Questioning the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellants/plaintiffs, in which substantial question of law has been framed by this Court, which has been set-out in the opening paragraph of this judgment.

3. Mr. Manoj Paranjape, learned counsel appearing for the appellants/plaintiffs would submit that the first appellate court was absolutely unjustified in rejecting their application filed under Order 41 Rule 27 of the CPC before hearing the appeal on merits as the said application has to be considered at the time of hearing of the appeal on merits. He would further submit that the first appellate Court has committed grave legal error in rejecting the application before hearing the appeal on merits and, thereafter proceeding to hear the appeal, as such order dated 14.7.2008 as well as the judgment and decree dated 25.9.2008 passed by the first appellate Court deserve to be set aside on this singular ground.

4. None present for respondent NO.1A though served.

5. I have heard learned counsel for the appellants and considered submissions made hereinabove and also went through the records with utmost circumscription.

6. 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, 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 may allow such evidence or document to be produced, or witness to be examined.

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

7. 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.

8. In the matter of State of Rajasthan v. T.N. Sahani and others¹, 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:-

¹ (2001) 10 SCC 619

"This is entirely for the court to consider at the time of hearing of the appeal on merits whether looking into to 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."

9. Similarly in the matter of Eastern Equipment & Sales Limited v. ING. Yash Kumar Khanna², 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.

10. In the matter of Union of India v. Ibrahim Uddin 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

² (2008) 12 SCC 739

³ (2012) 8 SCC 148

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."

11. Similarly, in Khemchand Mulchand v. Government, of Madhya Pradesh, Bhopal⁴, The Madhya Pradesh High Court has clearly held 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:--

"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."

12. 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 Naik⁵, 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.

13. 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

5 (2001) Civil J.L. 70

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.

14. Applying the principles of law laid down in the above-cited judgments (supra), if the facts of the case are examined, it is quite vivid that the first appellate Court had taken up the application filed under Order 41 Rule 27 of the CPC for consideration prior to hearing the first appeal on merits and rejected the said application by order dated 14.7.2008 and thereafter heard the appeal on merits on 28.8.2008 and pronounced the judgment on 25.9.2008. Such procedure adopted by the first appellate Court is in teeth of the object and scheme of Order 41 Rule 27 of the CPC as well as binding decisions rendered by Their Lordships of the Supreme Court in the aforesaid judgments (supra).

15. In the light of the aforesaid discussion, I am of the considered opinion that the order passed by the first appellate Court on 14.07.2008 rejecting

the application filed under Order 41 Rule 27 of the CPC before hearing the appeal on merits, is unsustainable and contrary to law and consequently, the order dated 14.7.2008 as well as the judgment and decree passed by the first appellate Court on 25.9.2008 deserve to be set aside. Thus the substantial question of law is answered in the manner indicated hereinabove.

- 16.** Accordingly, the second appeal is allowed and the order passed by the first appellate Court dated 14.7.2008 and the impugned judgment and decree is hereby set aside. The first appeal as well as the application under Order 41 Rule 27 CPC is restored to its original number in the said court for hearing and disposal in accordance with law. Taking note of the fact that the first appeal is of year 2008, the said court is directed to hear and decide the appeal within three months from the date of receipt of copy of this order. Parties are directed to appear before the first appellate Court on 17.03.2020. Records of the Courts below be sent back forthwith. A decree be drawn up accordingly. No order as to cost(s).

Sd/-

(Sanjay K.Agrawal)
Judge

B/-