

24.03.2022
Item No.22
Ct. No.7
CHC
(disposed of)

**C.O.448 of 2022
(Physical Hearing)**

**Sunil Kumar Burman
Vs.
Rajesh Barman & ors.**

Ms. Sudeshna Basu Thakur
...for the petitioner

Mr. Santanu Chatterjee,
Ms. A. Chakraborty
Mr. Rajendra Kr. Nandi
...for the opposite parties

Petitioner assails the order dated 24th January, 2022, passed by learned Civil Judge (Senior Division), 1st Court, at Asansol, in Title Appeal No.10 of 2019, rejecting a petition under Order 41 Rule 27 C.P.C. filed by the petitioner/appellant.

Admittedly, a suit for eviction of a licensee was filed by the petitioner/plaintiff against the opposite parties/defendants. The petitioner/plaintiff lost the suit as the learned court below dismissed the suit *ex parte*. The appeal was then carried against the *ex parte* dismissal of the suit and in connection with appeal a petition under Order 41 Rule 27 C.P.C. was filed, which was rejected by the order impugned.

Ms. Sudeshna Basu Thakur, learned advocate appearing for the petitioner upon adverting to the copy of affidavit-in-chief of P.W.1 under Order 18 Rule 4

C.P.C, annexed with the instant revisional application at page 14, marked as Annexure-‘B’, submits that the reference of the deed of gift was very much disclosed in the affidavit-in-chief in paragraph-‘7’ of such affidavit-in-chief. But it is due to some inadvertent mistake on the part of the conducting learned advocate, the same could not be marked exhibit resulting serious prejudice to the petitioner/plaintiff.

Mr. Chatterjee, learned advocate appearing for the opposite parties disputes with the submission advanced by the learned advocate for the petitioner submitting *inter alia* that without fulfillment of the conditions embodied in Order 41 Rule 27 C.P.C, there cannot be a blanket order favourable to the purpose of the petitioner in aid of Order 41 Rule 27 C.P.C.

It is strongly contended by Mr. Chatterjee that the deed of gift sought to be marked exhibit cannot be automatically marked exhibit without making due adherence to the provisions of the law and more so, there was deliberate suppression to get the same tendered in evidence at the appropriate time of trial.

Upon perusal of the affidavit-in-chief of P.W.1, it appears that in paragraph-‘7’, the petitioner already disclosed the certified copy of deed of gift no.3242 of the year 1993 of ADSR Office at Asansol requiring proof in evidence so as to mark it exhibited. Therefore,

the relevant document, sought to be marked exhibit, was disclosed at the time of trial.

Having considered the submission of both sides, it appears that when the document sought to be marked exhibit was disclosed in affidavit-in-chief of P.W.1, the impugned order rejecting the application under Order 41 Rule 27 C.P.C. is not sustainable.

It is true that the general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances.

Reference may be drawn to a decision of Apex Court delivered in the case of **A. Andisamy Chettiar v. A. Subburaj Chettiar, reported in (2015) 17 SCC 713**, that 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 of the additional evidence sought to be adduced.

Such test needs to be considered by first lower appellate court.

Accordingly, the same is set aside with the direction upon the learned Civil Judge (Senior Division), 1st Court, at Asansol in Title Appeal No.10 of 2019 to hear afresh the application under Order 41 Rule 27 C.P.C. in context with the matters disclosed in affidavit-in-chief of P.W.1, filed in Title Suit No.13 of 2015.

This Court however, clarifies that this order would not cause automatic marking of the document as exhibit, unless the required provisions of law are not strictly adhered to.

With this direction/observation, the instant revisional application stands disposed of.

Urgent certified photostat copy of this order, if applied for, be given to the parties as expeditiously as possible on compliance of all necessary formalities.

(Subhasis Dasgupta, J.)