

20.09.2022
Item No.1
Ct. No.7
CHC
(disposed of)

C.O.1497 of 2022

**Sri Jaga Ghorui & ors.
Vs.
Smt. Ujjala Sanyal**

Mr. Tapas Kumar Majumder,
Mr. Partha Pratim Bhattacharjee
...for the petitioners

Mr. Nilanjan Pal
...for the opposite party

The subject-matter of challenge in this case is against the order dated 25th March, 2022, passed by learned Additional District Judge, 15th Court, Alipore, South 24 Parganas, in Title Appeal No.19 of 2009, rejecting the prayer for adducing additional evidence under Order 41 Rule 27 C.P.C., together with a separate application for amendment.

Admittedly, suit for eviction of a licensee [Title Suit No.88 of 1993 of learned Civil Judge (Junior Division), 4th Court, Alipore], instituted by the petitioners, was dismissed by the trial court. An appeal was then preferred by the petitioners/plaintiffs being aggrieved with the dismissal of the suit.

Further admitted position is that such appeal was preferred in 2009.

Adverting to page 31 of instant revisional application, Mr. Tapas Kumar Majumder, learned advocate appearing for the petitioners, submits that on

9th August, 2018, during the pendency of this appeal, petitioners could collect one RTI information, disclosing that one Anil Chandra Ghorui is the thika claimant over 22/1A Rani Shankari Lane, Kolkata, with a further disclosure that such thika started from 18th January, 1982. Petitioners invited an application for amendment intending to incorporate such facts, as obtained by way of RTI information from the office of the Controller Kolkata Thika Tenancy. A separate application for adducing additional evidence was also filed. By the order impugned, both the prayers for amendment, and the prayer for adducing additional evidence have been rejected.

Learned advocate appearing for the petitioners contends that such document, and the information obtained by petitioners from the office of the Controller Kolkata Thika Tenancy, in August, 2016, was not in the possession of the petitioners either at the time of institution of the suit or during adducing evidence before the trial court. Ultimately, for the non production of any document pertaining to the claim of thika tenancy, the suit was dismissed by trial court upon consideration of all the grounds, mentioned in the pleadings.

It is thus submitted by the petitioners that such document would be absolutely necessary to unfold the controversy surfaced at the moment, without which,

there cannot be any effective adjudication to set the dispute at rest.

Per contra, Mr. Nilanjan Pal, learned advocate appearing for the opposite party submits that such point was not disclosed in any of the averments, taken in the plaint. More so, the petitioners are not at all thika tenant. Whatever information, the petitioners have gathered by way of RTI information, from office of the Controller Kolkata Thika Tenancy, is relatable to a fact that one Anil Chandra Ghorui is the thika claimant, which is obviously distinct from the thika tenant, learned advocate for the opposite party argues.

It is also submitted by the opposite party that there was nothing to reveal that petitioners exercised their due diligence to produce such documents at the appropriate point of time though, such documents may not be in their custody. But to collect the same, petitioners did not endeavour to produce such document during the course of the trial. The conduct of the petitioners is not at all supportive to allow the prayer for adducing additional evidence under Order 41 Rule 27 C.P.C.

Moreover, the entire exercise taken by the petitioners is to correct the defects already revealed in the findings, reached by the trial court, while dismissing the suit, and it is simply to correct those defects.

Having considered the submission of both sides, it appears that by the order impugned, the court below in appeal was not convinced that there has been adequate exercise of due diligence by the petitioners to cause production of the document, sought to be tendered in evidence in aid of Order 41 Rule 27 C.P.C.

Upon consideration of such conduct of the petitioners, the prayer for adducing additional evidence together with the proposed amendment was rejected.

The general principle is that appellate court ordinarily should not travel outside the record of the lower court, and take evidence in appeal. Order 41 Rule 27 C.P.C. speaks for an exception, stating that the appellate court may permit additional evidence to be taken in exceptional circumstances. It is for the appellate court to decide, whether the additional evidence, as has been sought to be adduced, would remove the cloud of doubt over a particular case, and the evidence, required to be adduced, has a direct and important bearing on the main issue in the suit, and interest of justice would render an imperative, that the prayer may be allowed to unfold the controversy presented before the court. Therefore, true test, as has been addressed by the Apex Court in **Civil Appeal No.1760 of 2022**, in the case of **Sanjay Kumar Singh versus The State of Jharkhand** 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 or not.

This is a case, wherein during the cross-examination of plaintiff it is specifically disclosed that he has some documents relatable to his claim of thika tenancy, but such documents were not in his custody at the moment. However, he asserted that he had some documents pertaining to his claim of thika tenancy.

Whether the petitioners are thika claimants or thika tenants, it is however, left to be decided by the court below during the appeal hearing, and the opposite party is free to agitate such issue at the time of hearing of this appeal.

Upon perusal of the impugned order, it appears that the test thus prescribed in the ratio of the decision, referred hereinabove, has not been applied by the first lower appellate court, while rejecting the prayer for adducing additional evidence together with the proposed amendment.

The document thus sought to be produced may have some bearings on the issue disclosed in the pleadings, and has direct contribution to remove the cloud of doubt, that surfaced at the moment touching the controversy presented before the court.

Since there has been delay caused in collecting the document, sought to be produced, which has unnecessarily resulted hardship and harassment to

the opposite party, that must be taken care of upon saddling costs.

No further elaboration is felt necessary.

The impugned order dated 25th March, 2022, passed by learned Additional District Judge, 15th Court, Alipore, South 24 Parganas, in Title Appeal No.19 of 2009 is thus set aside with a cost of Rs.15,000/- (Rupees Fifteen Thousand Only) to be paid by petitioners to opposite party within fortnight after reopening of Puja Vacation of the court below together with a further direction to rehear those two applications for amendment and prayer for adducing additional evidence under Order 41 Rule 27 C.P.C. within three weeks after deposition of the cost.

It is, however, clarified that this order has got no reference to the later part of the impugned order dealing with the repairing of the suit property.

It is further clarified that the court below in appeal may proceed to hear the appeal along with application for Order 41 Rule 27 C.P.C. and the proposed amendment, providing sufficient opportunity of hearing to either of the parties to this case, but without granting any unnecessary adjournment, unless it is extremely unavoidable.

Petitioners are directed to make communication of this order to the learned court below.

With this observation/direction, the 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.)