

19.1.2023
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Ct. no. 652
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CO 526 of 2012

**Sri Ratan Kumar Majumder
Vs.
Sri Subhas Majumder & Anr.**

Ms. Debolina Lahiri
Mr. Mrinmoy Chatterjee
Ms. Teresa Chetri ...for the petitioner

Mr. Nirmalendu Bera
Mr. Raja Biswas
Mr. Abhijit Sarkar ...for the Opposite parties

Being aggrieved and dissatisfied with the order no. 11 dated 8.12.2011 passed by the learned Civil Judge (Senior Division), Ranaghat, Nadia in Title Appeal no. 08 of 2010, the present application under Article 227 of the Constitution of India has been preferred.

The petitioner contended that petitioner had filed a suit being title suit no. 13 of 2007 before the court of learned Civil Judge (Junior Division), 1st Court, Ranaghat, Nadia seeking relief inter alia for temporary and permanent injunction restraining the defendants from illegally dispossessing the plaintiff from the suit shop and from closing down the business of the plaintiff from the suit shop. Learned trial court dismissed the suit against which the plaintiff/petitioner has preferred aforesaid appeal being Title Appeal no. 08 of 2010.

Ms. Lahiri, learned advocate for the petitioner submits where possession of the plaintiff is admitted and

the plaintiff is in settled possessions, such possession cannot be disturbed without adopting due legal process and learned court should have decreed the suit by granting injunction to protect the possession of the plaintiff in the suit property. During pendency of the aforesaid Title Appeal no. 8 of 2010, the plaintiff/petitioner filed a petition under Order XLI rule 27 read with Section 151 of the Code for adducing evidence in the interest of justice, on the ground that during the trial in the trial court, the appellant could not submit some relevant documents as the same were misplaced and recently found, which were kept in an old wooden almirah and some documents were in the custody of the petitioner/appellant, which are required to be produced and proved to adjudicate dispute between the parties completely and effectively and for pronouncing judgment by the appellate court.

Learned first appellate court was pleased to reject the said application under Order XLI Rule 27 on the ground that the plaintiff appellant did not pray before the trial court and he took sufficient time for searching documents but did not find and court delivered the judgment. The plaintiff/appellant did not take any step for three years before the date of judgment and he was not at all diligent till judgment and it is not the case of the petitioner that lower court refused to accept plaintiff's documents or has not granted time to file the

documents. Moreover, some of the documents, plaintiff/petitioner wants to prove, were executed after the judgment has been passed by the trial court and accordingly those documents are not relevant for the adjudication of the suit or the appeal.

Learned counsel for the petitioner in this context further submits that the court below has erred in rejecting the prayer for additional evidence because all those documents are very much required to support the plaintiffs case of settled possession in the suit shoproom till date. She further submits that the question of refusal by the learned trial court to accept the documents does not arise as the documents came to the hands of plaintiff on subsequent dates. Learned trial court should have considered the nature of the additional evidence prayed to be adduced and that such additional evidence would not introduce any new case against the defendant/respondent and accordingly the order impugned is arbitrary, whimsical and perverse.

Learned counsel for the opposite party supports the impugned order and contended that the learned first appellate court has rightly held that plaintiff did not pray before the trial court and he took sufficient time for searching the documents but did not produce the same before delivery of judgment. The plaintiff was not at all diligent till delivery of judgment and such prayer cannot be allowed at this stage as it is not the case of the plaintiff

that the court below refused to admit those documents. He also pointed out showing list of documents that some of the documents were executed after delivery of judgment and some are undated. So it is not ascertainable from the undated documents as to whether they were issued before or after judgment. As the plaintiff was not at all diligent, so plaintiff is not entitled to pray for additional evidence before the appellate court.

I have considered the submissions made by both the parties.

It is the case of plaintiff that the mother of the parties namely, Arati Majumder got the property from trust committee represented by its Secretary, Makhan Lal Debnath which fact has not been denied by the defendants. From the prayer portion of the plaint, it appears that the plaintiff has only prayed for an injunction restraining defendants from dispossessing the plaintiff from the suit property. It further appears that the defendant has not disputed the plaintiff's possession in the suit property. Learned trial court while delivering judgment and while disposing issue no. 3 and 4 was pleased to observe that on perusal of the documents filed by the plaintiff, it does not appear that the property is trust property and at what footing property was handed over, though it is admitted by both the parties that their mother was the title holder of the suit shoproom. She further observed that from the documents it also reveals

that the plaintiff had taken loans but Exhibit 5 does not support that loan was taken by mortgaging suit property. Learned trial court held that no document filed by plaintiff showing his title alone so on the basis of plaintiff's deposition only, it cannot be said that the plaintiff is the owner of the suit property. There is nothing to show that the suit shoproom exist on plot no. 502. Accordingly, the trial court came to the conclusion that it is a cardinal principle of law that plaintiff will have to prove his own case and also his sole ownership in the property over plot no. 502 measuring 10ft/8ft and/or three parted shop. So the trial court came to the conclusion that the plaintiff have not succeeded in proving the case and suit was accordingly dismissed.

As has already been stated that the plaintiff had filed aforesaid suit only for injunction and there is no prayer for declaration of title. It is also not in dispute that the plaintiff is in possession of the property. The settled position of law is that a person who is in possession, is not liable to be dispossessed without taking due course of law. On perusal of the documents which were sought to be proved by way of additional evidence, goes to show that all those documents relate to plaintiff's attempt to prove that he is in settled possession of the property in question. As plaintiff's case is that he is in settled possession and prayed for restraining defendants from disturbing his settled possession without taking due

course of law, the observation of trial court, that plaintiff failed to prove his sole ownership, is perverse and trial court has confused plaintiff's possessory right with plaintiff's sole ownership.

The first appellate court held that the additional evidence can be permitted to be given by court in four circumstances, out of which one condition is for "any other substantial cause". The appellate court held that as he does not find due diligence on the part of the plaintiff/appellant to produce and prove those documents at the time of trial and as some documents have been executed after passing the decree so such documents cannot be permitted to be adduced in evidence.

Now the subject matter of determination of the present suit is whether the plaintiff's possession in the property is liable to be disturbed by the defendants or not, if he is in settled possession and whether he is entitled to get the order of injunction as sought for or not. In the light of above, the court below is required to judge while adjudicating appellant's petition under order XLI rule 1 whether the documents sought to be proved by way of additional evidence would determine the fate of the suit and fate of the appeal. The word "or for any substantial cause" used in Order XLI rule 27 came up for interpretation before the Hon'ble Supreme Court and it was held by the Apex Court in ***Andisamy Chettiar Vs.***

Subburaj Chettair reported in **(2015) 17 SCC 713** in paragraph 18 as follows:

“18. We have considered the argument advanced on behalf of the appellant and also perused the law laid down by this Court as to the exercise of revisional power under Section 115 of the Code in such matters. In *Mahavir Singh v. Naresh Chandra* [*Mahavir Singh v. Naresh Chandra*, (2001) 1 SCC 309], explaining the scope of revision in the matters of acceptance of additional evidence by the lower appellate court interpreting expression “or for any other substantial cause” in Rule 27 of Order 41, this Court has held as under: (SCC p. 314, para 5)

“5. ... The words ‘or for any other substantial cause’ must be read with the word ‘requires’, which is set out at the commencement of the provision, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this rule would apply as noticed by the Privy Council in *Kessowji Issur v. Great Indian Peninsula Railway Co.* [*Kessowji Issur v. Great Indian Peninsula Railway Co.*, 1907 SCC OnLine PC 9 : (1906-07) 34 IA 115 : ILR (1907) 31 Bom 381] It is under these circumstances such a power could be exercised. Therefore, when the first appellate court did not find the necessity to allow the application, we fail to understand as to how the High Court [*Naresh Chandra v. Mahavir Singh*, 2000 SCC OnLine P&H 610 : (2001) 2 ICC 273] could, in exercise of its power under Section 115 CPC, have interfered with such an order, particularly when the whole appeal is not before the Court. It is only in the circumstances when the appellate court requires such evidence to pronounce the judgment the necessity to adduce additional evidence would arise and not in any other circumstances. When the first appellate court passed the order on the application filed under Order 41 Rule 27 CPC, the whole appeal was before it and if the first appellate court is satisfied that additional evidence was not required, we fail to understand as to how the High Court could interfere with such an order under Section 115 CPC.”

From the said judgment it is clear that it is only in the circumstances when the appellate court requires the additional evidence for pronouncing judgment, the prayer for adducing evidence would be allowed. Here for the pronouncement of judgment by the appellate court what is required to be ascertained by the appellate court, is the appellant/plaintiff's possession in the property and for that purpose whether he is entitled to get injunction or not. In this context, it can be said that though it is the general rule that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal and order permitting the appellant to adduce additional evidence is allowed only in exceptional

cases but the true test is whether the documents which are sought to be proved has a direct and important bearing on the real controversy in the suit and whether or not the appellate court requires the additional evidence so as to enable it to pronounce judgment. In the case of ***Andisamy Chettiar Vs. Subburaj Chettair*** reported in **(2015)17 SCC 713** it was clearly held 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. It was further observed that 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.

In view of the aforesaid discussions and to complete justice to the parties, I think that it would be just and proper to direct the first appellate court to decide the application for additional evidence afresh in the light of observations made by this court regarding principles on which such application for additional evidence can be allowed or rejected. The case is remanded back to the appellate court namely, learned Civil Judge (Senior Division), Ranaghat, Nadia to consider afresh the

application under order XLI rule 27 of the code in the light of aforesaid observations regarding principle applicable for disposal of such application made in the body of this judgment within a period of 12 weeks from the date of communication of the order.

C.O. 526 of 2012 is accordingly disposed of.

Urgent photostat certified copy of this order, duly applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)