

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.208 of 2017**

1. Yagya Nath Pandey and Anr Son of late Ganpat Pandey
 2. Meera Devi Pandey Wife of Yagya Nath Pandey Both residents of Mohalla - Gandhi Chowk, Ward No. 14 ii, P.S. - Kishanganj, District - Kishanganj.
- Petitioner/s

Versus

1. Soumendra Bahadur Singh and Anr Son of late Rai Bahadur Singh
 2. Anima Rani Singh Wife of late Rai Bahadur Singh Both residents of Mohalla - Gandhi Chowk, Ward No. 14 ii, P.S. - Kishanganj, District - Kishanganj.
- Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Raj Kumar, Advocate
For the Respondent No. 1 & 2	:	Mr. S.N. P. Singh, Sr. Advocate Mr. Surendra Prasad Singh, Advocate

**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT**

Date : 01-04-2024

Heard learned senior counsel for the petitioners and learned counsel for the respondents and I intend to dispose of the present civil miscellaneous petition at the stage of admission itself.

2. The present petition has been filed for quashing the order dated 02.12.2016 passed by the learned Additional District Judge-II, Kishanganj in Title Appeal no. 13 of 2013 whereby and where under the petition filed by the appellants/ petitioners under Order 41 Rule 27 of the Code of Civil Procedure (in short 'the Code') for allowing him to get himself examined as witness as well as to produce the gift deed dated



18.01.1977 as additional evidence has been rejected.

3. Learned counsel for the petitioners submits that plaintiffs/respondents filed Title Eviction Suit No. 2 of 2009 in the Court of learned Munsif-II, Kishanganj with a prayer for issuance of decree in their favour and against the defendants that the defendants are trespasser in the schedule premises since 08.08.2008. Further, relief has been sought for to direct the defendants to vacate the schedule premises and hand over vacant possession to the plaintiffs within a time frame fixed by the Court.

4. Learned counsel further submits that the plaintiffs/respondents claimed themselves to be the landlord of the premises as detailed in Schedule of the plaint. They further claimed that father of defendant No. 1 was engaged as 'purohit' by them. In lieu thereof, he was allowed to live in the schedule house as a licensee on payment of nominal rent. In year 2006 the defendant No. 1 moved from the suit premises to some other house and the plaintiffs took over the possession of the said house which was in a dilapidated condition. The plaintiffs even applied before the Municipality for demolition of the suit premises so that they could construct a new house on the said land. All of a sudden on 08.08.2008, the defendant Nos. 1



and 2 wrongly broke open the lock of the suit house and entered forcefully into it and took possession of the suit house without consent of the plaintiff. Learned counsel further submits that the defendants appeared and filed their written statement controverting the averments made by the plaintiffs/respondents. They claimed that father of the defendant No. 1 was initially inducted as tenant in the schedule house by the brother of plaintiff No. 1 who subsequently on 18.01.1977 executed a gift deed with respect to the said property in favour of father of defendant No. 1 and since then the defendants are residing continuously in the said premises in capacity of owners of that premises. The defendants have denied the claims of the plaintiffs that they are residing in the suit premises illegally as trespassers. The learned Trial Court on 30.01.2013 finally decreed the suit and directed the petitioners to vacate the suit premises within 60 days. Learned counsel further submits that as the defendants did not get sufficient opportunity to get themselves examined as witness, on 26.11.2012 they filed a petition seeking permission to adduce further evidence which was refused and finally the suit was decided on 31.03.2013. The defendants preferred an appeal before the learned District Judge, Kishangaj against the judgment and decree dated



31.03.2013 which is pending adjudication before the learned Additional District Judge, Kishanganj as Title Appeal No. 13 of 2013. In the said appeal, the defendants filed a petition on 11.09.2014 under Order 41 Rule 27 of the Code seeking permission to allow the appellants/defendants to examine themselves as witnesses and further to produce the gift deed dated 18.01.1977 as additional evidence. A rejoinder was filed on 10.10.2014 to the aforesaid petition by the plaintiffs/respondents. The learned 1st Appellate Court by order dated 02.12.2016 dismissed the petition filed by the petitioners/defendants/appellants.

5. Learned counsel for the petitioners submits that the learned 1st Appellate Court has misconstrued the ambit and scope of Order 41 Rule 27 of the Code. The learned 1st Appellate Court ought to have considered the fact that suit property has been gifted to the father of the defendant No. 1 by their landlord in the year 1977 by way of a gift deed which was reduced in writing though not registered and the learned Trial Court failed to consider the said gift deed. In Paragraph No. 11(iii) of the written statement, the defendants/appellants have made specific averment with regard to the gift deed dated 18.01.1977 and the learned Appellate Court has committed an



apparent error of record in observing that in the written statement there is no such pleading. Learned counsel further submits that the defendants have explained the situation in which the said gift deed could not be traced out earlier and produced before the learned Trial Court and still the learned Trial Court did not consider the said fact and also did not consider whether the said document was relevant for resolving the dispute in question. The learned Appellate Court adopted a hyper technical approach while rejecting the petition filed by the defendants. Learned counsel further submits that the reasoning adopted by the learned 1st Appellate Court could not be held to be proper and reasonable ground for not considering the question under Order 41 Rule 27 of the Code. Thus, the learned counsel submits that the impugned order be set aside and the defendants/petitioners be allowed to adduce evidence both oral as well as documentary.

6. Learned senior counsel appearing on behalf of the respondents vehemently opposes the submissions made on behalf of the petitioners and submits that sufficient opportunity was given to the defendants for adducing their evidence and this fact is clear from the operative part of the order sheet in which discussion has been made about the conduct of the



defendants who were given 5-6 dates for adducing their evidence and after giving final opportunity, the evidence of the defendants was closed. Learned senior counsel further submits that the eviction suit was filed in 2009 and the title appeal is pending since 2013. The learned senior counsel further submits that the claim of the defendants is based on an unregistered gift deed which has got no legal sanctity since as per Section 17 of the Registration Act, such documents are compulsorily registrable and under Section 49 such documents cannot be received as an evidence. Learned senior counsel further submits that the defendants did not challenge the order dated 26.11.2012 by which the application of the defendants for producing the evidence had been rejected. and the said order attained finality and the defendants are raising the same issue again and again. Thus, learned senior counsel submits that there is no merit in such petition and the same be dismissed.

7. I have given my thoughtful consideration to the rival submissions and different aspect of the matter.

Now Order 41 Rule 27 of the Code provides as under :

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 exam med.

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

8. The case of the petitioner is that he tried to bring the evidence on record before the learned Trial Court and the same was denied. Further, the defendants/petitioners claim that despite due diligence, they could not bring the said evidence before the learned Trial Court and want that the learned



Appellate Court to allow them to adduce that additional evidence. In the present case, unregistered gift deed is being sought to be brought as evidence. When it was all along in the knowledge of the defendants, they could have brought the same on record at the first instance before the learned 1st Appellate Court. It also appears from the impugned order that sufficient opportunity was given to the defendants to adduce their evidence which was not availed by them. Thus, in the totality of the circumstance, I am not convinced that the petitioners/defendants were not given ample opportunity to adduce the evidence or bring on record the document they claimed they were in possession since 1977. The petitioners further failed to show due diligence. The said document sought to be brought on record is an unregistered deed of gift and it is subject to number of restrictions for making it an admissible evidence.

9. Considering the aforesaid facts and circumstances, I do not find any merit in the present petition and the same is dismissed.

(Arun Kumar Jha, J)

Prakash/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	
Transmission Date	NA

