

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1846 of 2018

1. Mahesh Ram, son of Late Ramprit Ram,
 2. Krishn Ram, son of Late Ramprit Ram,
 3. Nirmala Kumari, daughter of Late Ramprit Ram,
 4. Radha Devi, daughter of Late Ramprit Ram,
 5. Mostt. Premiya, wife of Late Ramprit Rai,
- All are residents of Village- Bhagwanpur, P.S.- Thawe, District- Gopalganj.

... .. Petitioner/s

Versus

1. Chandrika Ram, son of Mohram Ram,
2. Shivratan Ram, son of Chandrika Ram,
3. Samarjiya, daughter of Mohram Ram, all resident of Village- Bhagwanpur, P.S.- Thawe, District- Gopalganj.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Ranjan Kumar Dubey, Advocate
For the Respondent/s	:	Mr. Prabhat Kumar Sharan, Advocate
		Mr. Hemant Kumar Sharan, Advocate
		Mr. Jayant Kumar Sharan, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT

Date : 21-02-2024

Heard learned counsel for the parties on the point of admission and I intend to dispose of the instant petition at the stage of admission itself.

2. The instant petition has been filed under Article 227 of the Constitution of India by the petitioners for setting aside the order dated 31.08.2018 passed in Title Appeal No.39 of 2007 by the learned 1st Additional District Judge, Gopalganj whereby and whereunder the application under Order 41 Rule 27 of the Code of Civil Procedure, 1908 (hereinafter referred to



as 'the Code') filed by the petitioners for inclusion of the two voter list of Bhagwanpur Mauza as additional evidence has been rejected.

3. Shorn of unnecessary details, the facts of the case are that father of the petitioner nos. 1 to 4 and husband of petitioner no.5 filed Title Suit No. 201 of 2001 for declaration of half share in Schedule 1 to 3 land of plaint and also sought declaration of title of petitioner no. 5 over 10 decimals 9.5 dhurs of the land in the same scheduled land, and at the same time, seeking possession of the suit land. Permanent injunction was also sought on the suit land till the disposal of the suit. The defendants/respondents appeared upon notice and filed the written statement contradicting the claim of the plaintiffs/petitioners and after deposition of witnesses and production of documentary evidence, the learned trial court decreed the suit. The learned trial court declared the respective shares of the petitioners as well as the respondents and directed for appointment of Pleader Commissioner. But the petitioners/appellants being aggrieved and dissatisfied with the decree dated 21.12.2006 filed Title Appeal No.39/2007 before the court of learned District Judge, Gopalganj, raising their grievance before the appellate court that the learned trial court



did not declare their shares according to their prayer in the suit. During the pendency of the title appeal, the petitioners/appellants filed a petition dated 07.02.2011 before the learned first appellate court for admission of additional evidence, namely, the voter lists of the family of the parties for the year 1966 and 1971 under Order 41 Rule 27 of the Code. The respondents filed their rejoinder dated 09.02.2011 denying the averments made in the petition dated 07.02.2011 and stating it to be false and concocted. The learned appellate court after hearing the parties concluded that the petition dated 07.02.2011 could not be accepted as its acceptance would change the nature of pleadings and held the petition to be not maintainable and disposed of the petition dated 07.02.2011 by the impugned order dated 31.08.2018.

4. The learned counsel for the petitioners submits that Gajadhar was common ancestor, who had three sons, namely, Jivdhan, Virjhan and Shivdhan. Shivdhan died issue-less and his share in property devolved upon Jivdhan and Virjhan. Yadunandan was the son of Virjhan and Yadunandan had a son namely, Vishwanath. Virjhan and Vishwanath sold their share to Mohar, son of Jivdhan. Jivdhan had two sons, namely, Mohar and Shivnandan and five daughters. Mohar had two sons,



namely, Chandrika and Ramprit. Shivnandan died leaving behind his wife, namely, Matishri in 1951. Matishari executed a gift deed dated 19.07.1997 in favour of plaintiff no.2/respondent no.5. The learned counsel further submits that the plaintiffs and defendants separated 16-17 years prior to filing of the suit, but the partition did not take place by metes and bounds and as the dispute arose between the parties, the partition suit was filed by the plaintiffs.

5. The learned counsel for the petitioners further submits that the defendants filed their written statement claiming that Jivdhan died leaving behind not only two sons, but also his second wife Gaudi and five daughters. Gaudi got the same rights in the property of Jivdhan like his sons and after death of Gaudi, the daughters of Gaudi came into title and possession of her property. On the other hand, the plaintiffs have claimed that the daughters of Jivdhan had no right to execute the gift deed in favour of defendants on the basis of which the defendants have been claiming title over the suit property. The defendants claimed that the daughters of Jivdhan executed the registered gift dated 22.07.1997 and 30.07.1997, respectively of their share in favour of defendant no.2.

6. The learned counsel for the petitioners further



submits that the documents sought to be brought on record, namely, the voter lists of 1966 and 1971, are quite relevant document for showing the status of the family of Jivdhan Ram. Since the defendants/respondents have pleaded in paragraph 8 of the written statement that Jivdhan died leaving behind his second wife Gaudi and further in paragraph 20 they have written that Gaudhi died in 1988, but the voter lists do not reflect any such thing.

7. The learned counsel for the petitioners further submits that the plaintiffs/petitioners have challenged the existence of second wife of Jivdhan Ram, whereas the defendants have based their claim on property being coming into the title and possession of second wife of Jivdhan after his death and she becoming its absolute owner after 1956.

8. Thus, learned counsel for the petitioners submits that the learned trial court did not take into consideration the fact that the petitioners have established *prima facie* case over the suit land and if certain documents could not be filed before the learned trial court, the same should be allowed to be brought on record as additional evidence before the learned first appellate court. The learned trial court has also not considered that notwithstanding the exercise of due diligence, such



evidence was not within the knowledge of the plaintiffs when the trial of the suit was in progress. The learned trial court acted in arbitrary manner and by a cryptic order rejected the prayer in an arbitrary manner and exceeded its jurisdiction. The learned counsel further submits that while rejecting the petition of the appellants/petitioners, the learned first appellate court has not recorded its reasons for rejection of the petition and it makes the impugned order bad in the eye of law.

9. The learned counsel for the petitioners referred to a decision of Hon'ble Apex Court in the case of *Union of India vs. Ibrahim Uddin & Anr.*, reported in *2013 (1) PLJR (SC) 48* to submit that the application for taking additional evidence at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of final hearing of the appeal and the same could not be disposed of prior to the final stage of hearing of the appeal. The learned counsel further placed reliance on the decision of the Hon'ble Supreme Court in the case of *Union of India Vs. K.V. Lakshman & Ors.*, reported in *2016 4 PLJR (SC) 40* on the point that the additional evidence being the nature of public documents and if there are justifiable reasons for not filing such document at the trial stage and that the additional evidence is relevant material for deciding the



rights of the parties which are subject matter of *lis*, the Court should allow the parties to file such additional evidence. Thus, learned counsel submits that as the order has been passed against the law on this point rejecting the additional evidence, the order impugned is not sustainable and the same may be set aside and the application dated 07.02.2011 may be allowed.

10. Per contra, learned counsel appearing on behalf of the respondents vehemently contended that there is no infirmity in the impugned order as the same has been passed after consideration of the material available on record. The learned counsel further submits that the additional evidence could be allowed only in terms of Order 41 Rule 27 of the Code, if the three conditions prescribed therein are satisfied. The learned counsel further submits that admittedly the learned trial court has not refused to admit evidence. Further, the petitioners have failed to show that notwithstanding the exercise of due diligence, such evidence would not be within the knowledge of the petitioners or could not after the exercise of due diligence be produced by them when the decree appealed against was passed. The learned counsel further submits that the voter list of 1966 and 1971 had been in public domain and were available even on the date when the Title Suit No.201/2001 was filed by the



plaintiffs. Further, the title appeal was filed in the year 2007 and the application for bringing on record the additional evidence was filed on 07.02.2011. From bare perusal of the copy of the voter lists of 1966 and 1971, it is obvious that the copies were supplied to the petitioners on 19.04.2007. For about 4 years, the petitioners did not take any steps to bring the documents on record as additional evidence, rather it shows the petitioners were sleeping over the document and they wanted to linger on the matter. The learned counsel further submits that the learned appellate court did not direct for bringing the documents on record. The learned counsel further submits that the voter lists are not such documents which could be said to be relevant for the purpose of adjudication of dispute between the parties. The learned first appellate court took the correct decision when it refused to accept the prayer of the petitioners holding that admitting the aforesaid documents would change the nature of whole pleadings. The learned counsel relied on the decision of Hon'ble Supreme Court in the case of **A. Andisamy Chettiar v. A. Subburaj Chettiar**, reported in, **(2015) 17 SCC 713** placing his reliance on paragraph 12 which reads thus :

“12. From the opening words of sub-rule (1) of Rule 27, quoted above, it is clear that the parties are not entitled to produce additional evidence



whether oral or documentary in the appellate court, but for the three situations mentioned above. The parties are not allowed to fill the lacunae at the appellate stage. It is against the spirit of the Code to allow a party to adduce additional evidence without fulfilment of either of the three conditions mentioned in Rule 27. In the case at hand, no application was moved before the trial court seeking scientific examination of the document (Ext. A-4), nor can it be said that the plaintiff with due diligence could not have moved such an application to get proved the documents relied upon by him. Now it is to be seen whether the third condition i.e. one contained in clause (b) of sub-rule (1) of Rule 27 is fulfilled or not”.

11. Thus, learned counsel for the respondents submits that the petition of the petitioners has got no merit and the same may be dismissed.

12. Having regard to the rival contention of the parties, it would be appropriate to consider the law on the point. Order 41 Rule 27 of the Code reads thus :

“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 examined.

(2) Wherever additional evidence is allowed to be produced by an appellate court, the court shall record the reason for its admission.”

13. From bare reading of the provision, it could be seen that it is not a case of the petitioners that the learned trial court has refused to admit the documents which was sought to be brought on record at the appellate stage. Furthermore, the documents were all along in the public domain and if the petitioners were diligent, they could have brought these documents at the very beginning before the learned trial court. The petitioners sought to bring on record the documents only at the appellate stage and that too, after four years of filing of the first appeal. In these circumstances, natural inference is that the



documents have been brought only to fill the lacunae in the case of the petitioners. The Hon'ble Supreme Court in the case of **A. Andisamy Chettiar (supra)** has held that it is against the spirit of the Code to allow a party to adduce additional evidence without fulfilment of either of the three conditions mentioned in Rule 27 of Order 41 of the Code. Reference could also be made to the case of **K.R. Mohan Reddy v. Net Work Inc.**, reported in **(2007) 14 SCC 257** wherein the Hon'ble Supreme Court in paragraph 19 held as under :

“19. The appellate court should not pass an order so as to patch up the weakness of the evidence of the unsuccessful party before the trial court, but it will be different if the court itself requires the evidence to do justice between the parties. The ability to pronounce judgment is to be understood as the ability to pronounce judgment satisfactorily to the mind of the court. But mere difficulty is not sufficient to issue such direction.”

14. To the same effect is the decision of the Hon'ble Supreme Court in the case of **N. Kamalam (dead) and another v. Ayyasamy and another** reported in **(2001) 7 SCC 503**. It will be relevant to quote paragraph 19 of the said judgment.

“19. ... the provisions of Order 41 Rule 27 have not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the court of appeal— it does not authorise any



lacunae or gaps in the evidence to be filled up. The authority and jurisdiction as conferred on to the appellate court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way.”

15. So, it is very much clear that the petitioners have failed to bring their case under any of the conditions as mentioned in Rule 27 of the Code and their whole effort seems to be clutching at straws.

16. However, I find some merit in the contention of the learned counsel for the petitioners that the application under Order 41 Rule 27 of the Code is to be considered at the time of final hearing of appeal and the learned first appellate court erred on this point. But from the facts of the case, it is evident that the appeal has been filed in the year 2007 and the petition was rejected on 31.08.2018 and the learned first appellate court did get ample opportunity to consider the merits of the case and it has also observed that it went through the facts and the records while disposing of the petition dated 07.02.2011. Moreover, the aforesaid proposition has been prescribed so as to enable the appellate court to see whether it requires the evidence sought to be adduced to enable it to pronounce the judgment or for any other substantial cause. In the instant case, the petitioners failed to show any such exigency and their submission on this aspect



of the matter are devoid of merit. So, the contention of the learned counsel for the petitioners on this account is also not sustainable.

17. In view of the aforesaid discussion, I do not find the impugned order suffers from any infirmity as the same has been passed after due consideration and, therefore, the same is affirmed.

18. Hence, I do not find any merit in the instant petition and, accordingly, the same is dismissed.

(Arun Kumar Jha, J)

V.K.Pandey/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	29.02.2024
Transmission Date	NA

