

IN THE HIGH COURT AT CALCUTTA
(Civil Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

FMA No. 1010 of 2011
with
CAN 1 of 2011
(Old CAN 1753 of 2011)
with
CAN 4 of 2023

Sri Manindra Nath Bhunia & Ors.
Vs
Sri Sunil Kar & Ors.

With
FMA 1012 of 2011
with
CAN 1 of 2011
(Old CAN 1754 of 2011)
with
CAN 4 of 2023
with
CAN 5 of 2024

Sri Manindra Nath Bhunia & Ors.
Vs.
Sri Sunil Kar & Ors.

For the Appellants : Mr. Sounak Bhattacharyya,
Mr. Manish Kumar Das.

For the Respondents : Mr. Swarup Banerjee,
Mr. Sajal Kumar Ghosh,
Mr. Subham Biswas.

Hearing concluded on : 14.08.2024

Judgment on : 11.09.2024

Shampa Dutt (Paul), J.:

1. The present appeal has been preferred by the respective parties against the Judgment and Decree dated 07.12.2010 and 09.12.2010 respectively passed by Learned Civil Judge (Senior Division), 1st Court, Contai, Purba Medinipur in Title Appeal No. 28 of 2009 (heard analogously with Title Appeal No. 29 of 2009) thereby reversing the Judgment and Decree dated 22.07.2009 and 27.07.2009 respectively passed by Learned Civil Judge (Junior Division), 2nd Court, Contai, Purba Medinipur in Title Suit No. 237 of 2000 (heard analogously with Title Suit No. 245 of 2000) and sending back the case on remand.
2. The trial court being the court of learned Civil Judge (Junior Division), 2nd Court, Contai, Purba Medinipur in Title Suit 237 of 2000 (heard analogously with Title Suit No. 245 of 2000), decreed T.S. 237 of 2000, declaring the title of the plaintiff therein in the 'Ka' schedule property and dismissed T.S. 245 of 2000, on holding that the Plaintiffs therein had no right/title in the said property.
3. On two appeals being preferred by the parties being T.A. 28/2009 and T.A. 29/2009, the Court of first appeal, considering an application under **Order 41 Rule 27 of CPC** filed by the plaintiff whose suit stood dismissed, held as follows :-

".....After considering the entire evidence on record, the court below decided the suit no. 237/2000 in favour of the plaintiff and decreed the same and consequently dismissed the suit no. 245/2000. I find that the Court below has appreciated the arguments advanced by both the sided and analyzed the evidence to reach a

significant decision. While discussing, in its page no. 12 and 13, the Court reflected that “...the defendants in suit no. 237/00 and plaintiffs of 245/00 states that the entire Ka suit property was settled in their favor by the Maharaja of Bardhaman. However no such documentary evidence has come before this court and the defendants or plaintiffs of T.S. 245/2000 flatly stated that the deed is destroyed in the flood of 1349 B.S.” It is further found in the judgment that “this court further finds that the defendants of this suit and plaintiff of T.S. 245/00 have claimed the suit property to be their personal and individual property. However there is no title document to prove such contention of the defendants. “Now the defendants/appellants filed application under O-41 r-27 of CPC for adducing additional evidence which they claimed to be a document of ‘Bondobosto’ in their favour by the Maharaja of Bardhaman which they failed to find out during the trial before the court below. It is further submitted that for proper adjudication of the suit, such document is necessary. It is further submitted that the Appellant /Defendants has also filed one application under O-6 r-17 of CPC for amendment of the plaint in T.S. 245 of 2000.

I have heard argument. In my view, for proper adjudication of the suit and for the interest of justice it is necessary to consider such applications filed by the Appellant/Defendants by the Court below and as such the suit must be heard afresh after considering only the said two applications in accordance with law keeping the other evidence intact. I find that the petition U/O-6, r-17 of C.P.C. and O-41 r-27 of CPC must be heard on merit by the Learned Court below and the respondent/plaintiff must get an opportunity to submit written objection and additional w/s to that effect in the suit. Therefore, in my considered view, the instant appeal must be admitted and allowed and the suit may be remanded back to the concerned Court below for further hearing in terms of the discussion made above.....”

4. Being aggrieved both the parties have filed the respective appeals.
5. The successful plaintiffs in their written notes have stated that the Learned Civil Judge (Senior Division), 1st Court at Contai while passing

the Order failed to take into consideration that at the time of evidence before the Learned Trial Court, the respondents clearly stated that they have no documentary evidence of the Suit plot settled in favour of them by the Maharaja of Bardhaman as the deed is destroyed in the Flood of 1349 B.S. It was further stated by the respondents that they have no idea of such deed.

That such evidence was taken into consideration by the Learned Appellate Court but came to an erroneous conclusion.

6. Relying upon **Order 41 Rule 27(aa) CPC**, it has been stated by the said appellant that in this case Sub-Section (aa) will not be applicable because at the time of evidence before the Learned Trial Court, the respondents stated that they had no knowledge of any deed and that the Deed was destroyed in the Flood of 1349 B.S. That such Additional Evidence being the Deed of 'Bondobosto' cannot be allowed to sustain in law.

The appellants referred to a decision (2014)15 SCC 686 where the Apex Court held that parties to an appeal shall not be entitled to produce Additional Evidence in the Appellate Court unless the conditions stipulated under **Order 41 Rule 27 of CPC** are satisfied and as the respondents have failed to fulfill the condition stipulated under **Order 41 Rule 27 of CPC**, the Learned Appellate Court has erroneously accepted the same which cannot be allowed to sustain in law.

7. The evidence of D.W.1 is relied upon, wherein he has stated:-

“.....The Bardhaman Maharaja did not execute any deed in respect of the Mandir, in favour of my predecessors.” L.R.ROR. R.S.R.O.R. and Tax receipts were produced by this witness (marked Ext 1 to 4).....”

8. It has thus been submitted that as the witness has stated that there was no deed executed, the Appellate Court, erroneously allowed the application under **Order 41 Rule 27 CPC**.
9. The Appellant who suffered a decree of dismissal, has filed the application under **Order 41 Rule 27 CPC** to bring additional evidence on record, which as per their statement ***“Could not be produced in spite of exercise of due diligence”*** Order 41 Rule 27(aa)CPC.
10. It is further submitted that 13 years have passed since these appeals were filed and the order of remand, by the order under appeal will not prejudice the opposite parties as the parties have a claim and a counter claim.
11. **From the materials on record it appears that the Appellate Court while considering the application under Order 41 Rule 27 CPC, observed that the trial court had held as follows :-**

“....the defendants in suit no. 237/00 and plaintiffs of 245/00 states that the entire Ka suit property was settled in their favor by the Maharaja of Bardhman. However no such documentary evidence has come before this court and the defendants or plaintiffs of T.S. 245/2000 flatly stated that the deed is destroyed in the flood of 1349 B.S.....”

12. In **Satish Chand Surana Vs. Raj Kumar Meshram, in Civil Appeal No(S). 7446 OF 2021, decided on December 6, 2021**, the Supreme

Court held:-

*“.....(8) It is well-settled that, ordinarily, the Appellate Court should not travel beyond the record of the lower court. Section 107 of the CPC carves out an exception to this general rule, enabling the Appellate Court to take additional evidence subject to the conditions prescribed in Order 41 Rule 27 of the CPC. Thus, grant or refusal of the opportunity for production of additional evidence at the appellate stage is within the discretion of the appellate court. **Dismissal of the main appeal without deciding the application for additional evidence would result in miscarriage of justice. The First Appellate court, being the last court of facts and evidence, should permit the production of additional evidence where the explanation furnished by the party is satisfactory and the documents in question are vital to establish the case.***

(9) It is also necessary to observe here that the application for permission to file additional evidence should contain the list of documents giving full particulars thereof and copies sought to be filed as additional evidence should be served on the other side. However, the High Court cannot completely ignore the application filed by the appellant and pronounce the judgment. If the appellant makes out a case for allowing the application, the material produced along with the application has to be considered at the time of final disposal of the appeal in accordance with law.....”

13. In **Namdeo S/o Bapurao Bansod Vs Tukaram S/o Marotrao Jadhav, in Civil Appeal No. 5185 OF 2008, decided on August 18, 2008**, the Supreme Court held:-

“.....3. The first appellate Court allowed the application for amendment by order dated 20.4.2002. By another order dated 20.4.2002, the first appellate Court permitted production of documents. Ultimately, the

first appellate Court dismissed the appeal by order dated 19.6.2006. While doing so, it did not refer to or consider the documents, production of which was permitted. The second appeal filed by the appellant was also dismissed by the High Court. Dealing with the contention of the appellant that the first appellate court ought to have considered and taken into account the additional evidence, the High Court held that it was not sufficient for the appellant to merely file an application under Order 41 Rule 27 CPC; **that he ought to have specifically requested the first appellate court to remit the matter to the trial Court for further evidence; and that in the absence of such prayer, the first appellate Court was justified in ignoring the said documents.**

4. It is true that the first appellate Court only allowed "production of documents" and did not make any order receiving them as additional evidence. The documents produced by the appellant were all certified copies of crops statement, record of rights, index of lands and revenue proceedings. The appellant was apparently under the impression that his application for additional evidence had been allowed and the documents had been accepted as evidence. Order 41 Rule 27 CPC contemplates that wherever additional evidence is allowed to be produced by the appellate Court, the court should record reasons for its admission. We find that the first appellate Court did not reject the application under Order 41 Rule 27 CPC, nor did it assign any reasons while recording that only production of the documents was allowed. We are of the view that the procedure adopted was incorrect. **The first appellate Court ought to have passed an order in respect of the application under Order 41 Rule 27 CPC, either allowing or rejecting the application. The first appellate Court has considered the application as if it was one under Order 13 Rule 1 CPC and not under Order 41 Rule 27 CPC. The High Court ought to have therefore interfered in the matter by raising an appropriate question of law. It failed to do so. The judgments, therefore, call for interference.**

5. We, therefore, allow this appeal and set aside the judgment and decree of the High Court and first

appellate Court and remand the matter to the first appellate Court with a direction to consider and dispose of the application under Order 41 Rule 27 CPC in accordance with law and then decide the first appeal.....”

14. In *Sanjay Kumar Singh Vs. The State of Jharkhand*, in Civil Appeal No. 1760 of 2022, decided on March 10, 2022, the Supreme Court held:-

*“.....4. 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. It may also be true that the appellate court may permit additional evidence if the conditions laid down in this Rule are found to exist and the parties are not entitled, as of right, to the admission of such evidence. **However, at the same time, where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed.** Even, one of the circumstances in which the production of additional evidence under Order 41 Rule 27 CPC by the appellate court is to be considered is, whether or not the appellate court requires the additional evidence so as to enable it to pronouncement judgment or for any other substantial cause of like nature. As observed and held by this Court in the case of *A. Andisamy Chettiar v. A. Subburaj Chettiar*, reported in (2015) 17 SCC 713, 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 is 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.

5. *Applying the law laid down by this Court in the aforesaid decision to the facts of the case on hand, we are of the opinion that while considering the application for additional evidence, the High Court has not at all adverted to the aforesaid relevant consideration, i.e., whether the additional evidence sought to be adduced would have a direct bearing on pronouncing the judgment or for any other substantial cause. As observed hereinabove, except sale deed 29.12.1987, which as such was rejected, there was no other material available on record to arrive at a fair market value of the acquired land. Therefore, in the facts and circumstances of the case, the High Court ought to have allowed the application for additional evidence. However, at the same time, even after permitting to adduce the additional evidence, the applicant has to prove the existence, authenticity and genuineness of the documents including contents thereof, in accordance with law and for the aforesaid purpose, the matter is to be remanded to the Reference Court.*

6. *In view of the above discussion and for the reasons stated above, the present appeal is partly allowed. Order passed by the High Court rejecting IA No. 1384/2019 for adducing additional evidence to bring on record the documents mentioned in the said application is hereby quashed and set aside. IA No. 1384/2019 filed before the High Court for adducing additional evidence under Order 41 Rule 27 CPC is hereby allowed. The appellant herein is permitted to bring on record the documents mentioned in IA No. 1384/2019 as additional evidence. However, as observed and held by this Court in the case of *Uttaradi Mutt v. Raghavendra Swamy Mutt*, (2018) 10 SCC 484, allowing the application filed under Order 41 Rule 27 CPC does not lead to the result that the additional documents/additional evidence can be straightway exhibited rather, the applicant would have to not only prove the existence, authenticity and genuineness of the said documents but also the contents thereof, in accordance with law. It is observed that thus the documents which are permitted to be brought on record as additional evidence have to be proved by the appellant before the Reference Court, in accordance with law and only thereafter and after proving the existence, authenticity and genuineness of the said documents*

including contents thereof, the same can be taken into consideration by the Reference Court.....”

15. In the present case, the document of ‘Bondobosto’ by the Maharaja of Bardhaman which could not be traced during trial, has rightly been directed by the First Appellate Court to be admitted in evidence and to prove the existence, authenticity and genuineness of the document including contents thereof, in accordance with law, has also rightly remanded the matter to the trial court on the finding that the additional evidence sought to be adduced would have a direct bearing on pronouncing the Judgment. ***(Sanjay Kumar Singh Vs. The State Of Jharkhand (Supra))***
16. The judgment and order under appeals being accordance with law requires no interference and thus **is affirmed.**
17. **T.A No. 28 of 2009 and T.A. 29 of 2009 stands dismissed.**
18. **The trial court is directed to conclude the trial in this case on remand within six months from the date of communication of this order.**
19. All connected applications, if any, stand disposed of.
20. There will be no order as to costs.
21. Interim order, if any, stands vacated.
22. Copy of this judgment be sent to the Learned Civil Judge (Senior Division), 1st Court, Contai, Purba Medinipur (Appeal Court) and to the

Learned Civil Judge (Junior Division), 2nd Court, Contai, Purba Medinipur (Trial Court), for compliance.

- 23.** Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)