IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

289

CR-1745-2022 (O&M)
Reserved on : 23.10.2024
Pronounced on : 20.12.2024

Gurdev Singh and others ...... Petitioners

versus

Harbans Singh and others ...… Respondents

CORAM : HON'BLE MR. JUSTICE PANKAJ JAIN

Present: Mr. Puneet Jindal, Senior Advocate with
Ms. Malvi Aggarwal, Advocate
for the petitioners.

Mr. Sumeet Mahajan, Senior Advocate with
Ms. Shruti Singla, Advocate
Mr. Shrey Sachdeva, Advocate and
Mr. Saksham Mahajan, Advocate
for respondents No.1 to 7.

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PANKAJ JAIN, J. (Oral)

1. Present revision petition is directed against the order dated 05.02.2020 passed by Additional District Judge, Ludhiana. The Appellate Court framed additional issue and after setting aside the judgment and decree dated 18.11.2017 passed by Trial Court remanded the matter back to the Trial Court to decide afresh.

2. Plaintiffs filed suit for possession of the suit land as described in the head note of the plaint, claiming that the real owner of the land in question Babu Singh grand father of the plaintiffs bequeathed the land in their favour by way of a registered Will. The defendants who are in possession of the adjoining land comprising khasra No.90//4/2 have encroached upon the land comprised in khasra No.90//4/1 owned

by the plaintiffs.

3. Suit was contested by defendants No.1 to 3 claiming that the property was never owned by Babu Singh or Mukhtiar Singh. The property in question was owned by Arjun Singh, the predecessor-in-interest of the defendants. The present suit has been filed as a counter blast to the civil suit filed by defendants pending before Civil Judge (Junior Division), Ludhiana. It was further claimed by the defendants that the land in question was in possession of Arjun Singh and thereafter came in possession of defendants. Their possession is open, defiant, continuous and uninterrupted to the knowledge of the plaintiffs and thus, they have acquired title thereto by prescription. Defendant No.4 to 14 opposed the suit filed by the plaintiffs claiming themselves to be bonafide purchasers for consideration. Suit filed by the plaintiffs was put to trial by the Court of first instance framing following issues:-

> *"1. Whether the plaintiffs are entitled to the relief of possession as prayed for? OPP*
> *2. Whether the plaintiffs are entitled to the relief of permanent injunction as prayed for? OPP*
> *3. Whether the suit is not maintainable in the present form? OPD*
> *4. Relief."*

4. Deciding issue No.1 and 2, Trial Court held that though the plaintiffs proved family settlement Ex.P-1, however, the same is not a document of title. Plaintiffs having failed to prove the ownership of Babu Singh qua the suit land by leading any cogent evidence, cannot claim title over the suit land.

5. In the absence of evidence, issue No.3 was decided in favour of the plaintiffs. As a consequence, the suit was dismissed.

6. Plaintiffs filed appeal alongwith an application under Order 41 Rule 27 CPC, seeking permission to lead additional evidence in appeal. The plaintiffs sought permission to tender revenue record i.e. copy of jamabandis for the year 1981-82, 1986-87 and the copy of mutation bearing No.2941 regarding inheritance of Babu Singh and copies of jamabandi for the years 2006-07, 1991-92, 1996-97 and 2002-03. Lower Appellate Court allowed the application holding that as per version of the applicants, the evidence sought to be produced by invoking provisions under Order 41 Rule 27, could not be tendered due to lack of knowledge and lapse of counsel.

7. Relying upon ratio of law laid down by this Court in ***Joginder Singh vs. Shangara Singh and others*** reported as 2020(1) RCR (Civil) 364, Lower Appellate Court held that the endeavour of the Court should always be to impart justice and not to non-suit the litigant on technical ground. Trial Court further held that from analysis of the pleading and evidence of the parties, it is evident that the defendants in their written statement, specifically pleaded adverse possession and no issue with respect to the same was framed. Trial Court having omitted to frame the said issue, erred resulting in miscarriage of justice. Lower Appellate Court framed additional issue and remanded the matter back to the Trial Court to record the findings on the said issue after giving both the parties three effective opportunities to lead fresh evidence and to pass fresh judgment in accordance with law.

8. Learned senior counsel appearing for the petitioners submits that the approach of the Lower Appellate Court in allowing the application under Order 41 Rule 27 CPC, is erroneous and cannot be sustained in the eyes of law. The application seeking permission to lead additional evidence in appeal can only be allowed in the circumstances as enumerated under Order 41 Rule 27 CPC. The plaintiffs having failed to lead evidence, cannot be allowed to invoke provision of Order 41 Rule 27, which is available only to the party that exercises due diligence. It has been further contented that Lower Appellate Court further erred in remanding the matter after framing additional issue and setting aside the judgment and decree passed by the Trial Court. It has been argued that the impugned order can neither be said to have been passed under Order 41 Rule 25, nor under Order 41 Rule 23-A, the same being unsustainable in the eyes of law deserves to be quashed. In order to hammer forth his contention, learned senior counsel relies upon ***Union of India vs. Ibrahim Uddian (2012) 8 SCC 148, Jagdish Prasad Patel (Dead) Through Legal Representatives and another vs. Shivnath and others (2019) 6 Supreme Court Cases 8, P. Purushottam Reddy and another vs. Pratap Steels Ltd. (2002) 2 Supreme Court Cases 686 and Joginder Singh and another vs. Harbans and others 2006(2) PLR 394.***

9. *Per contra*, learned senior counsel appearing for respondents, however, submits that once the Appellate Court while hearing the appeal came to the conclusion that the evidence was required for effective adjudication of the matter in hand, the Court was well within its power to allow application under Order 41 Rule 27. He

relies upon ratio of law laid down by Supreme Court in the case of ***Union of India vs. Ibrahim Uddian (2012) 8 SCC 148,*** to submit that the words 'for any substantial cause' need to be read with the word 'requires'. When the Appellate Court admits additional evidence for the proper adjudication of the matter in hand and to pass a satisfactory judgment, it cannot be said that the Court has not assigned the reason. The Court having judicially exercised its discretion by recording reasons, inference by this Court in revision would be beyond the scope of Article 227. He further submits that Order 41 Rule 23-A CPC enables the Appellate Court to remand the case to the Trial Court when it finds that though the Trial Court has disposed off the suit on all the issues, but on reversal of the decree retrial is considered necessary. Under Order 41 Rule 25, Appellate Court is clothed with the power to frame the issue and refer the same to the Trial Court. Lower Appellate Court thus, rightly ordered remand of the suit and no fault can be found with the remand order passed by the Lower Appellate Court. In order to substantiate his plea, he relies upon ***Sanjay Kumar Singh vs. State of Jharkhand (2022) 7 Supreme Court Cases 247, Union of India vs. Ibrahim Uddian (2012) 8 SCC 148, J. Balaji Singh vs. Diwakar Cole and others (2017) 14 Supreme Court Cases 207, Syed Abdul Khader vs. Rami Reddy and others (1979) 2 Supreme Court Cases 601 and Uttaradi Mutt vs. Raghavendra Swamy Mutt (2018) 10 SCC 484.***

10. I have heard counsel for the parties and have carefully gone through the records of the case.

11. Two issues that arise for the consideration of this Court are that:-

> *"(i) Whether Lower Appellate Court rightly allowed the application filed by the respondents under Order 41 Rule 27 CPC?*
>
> *(ii) Whether the order of remand passed by the Lower Appellate Court can be sustained?"*

12. In order to appreciate the rival contentions, it would be apt to peruse the provision as contained under Order 41 Rule 23, 23-A, 25 and 27 CPC. The same read as under:-

> "**23.*****Remand of case by appellate court*****.—**Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the appellate court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the court from whose decree the appeal is preferred, with directions to readmit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.
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> **23-A. *Remand in other cases*.—**Where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the appellate court shall have the same powers as it has under Rule 23.
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> **25. Where Appellate Court may frame issues and refer them for trial to court whose decree appealed from —**
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> Where the court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the court from whose decree the appeal is preferred and in such case shall direct such court to take the additional evidence required; and such court shall proceed to try such issues, and shall return the evidence to the Appellate Court

together with its findings thereon and the reasons there for within such time as may be fixed by the Appellate Court or extended by it from time to time.

Order 41 Rule 27, of the Civil Procedure Code of 1908 specifies the conditions under which the court may permit parties to the appeal to present evidence at the appellate stage. These conditions are:

1. If the trial court that rendered the decree refused to accept evidence that should have been accepted, or;
2. If the appellant is successful in proving that the evidence in question was not known to him, or;
3. If the party appealing is able to prove that, despite his best efforts, he was unable to produce the evidence when the trial court issued the decree being appealed;
4. If an appellate court requires a document be produced or a witness be questioned in order to reach a decision, or;
5. If the appellate court requests the production of any documents or the cross-examination of any witnesses for any other substantial cause."

13. Order 41 Rule 27 was interpreted by Privy Council in the case of ***Parsotim Thakur vs. Lal Mohar Thakur 68 IA 254,*** observing as under:-

"xx xx xx

The provisions of Section 107 of the Civil Procedure Code, as elucidated by Order XLI, Rule 27, are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of Appeal.

. ....Under Rule 27, Clause (1)(a), has no application in the present case. Under (1)(b) it is only where the appellate Court "requires" it (i.e., finds it needful)… the legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but " when on examining the evidence as it stands, some inherent lacuua or defect becomes apparent".

…. I<u>t may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the</u>

> Court upon its appreciation of the evidence as it stands. Wherever the Court adopts this procedure it is bound by Rule 27(2) to record its reasons for so doing, and under Rule 29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified. Their Lordships regret to find that, so far as the record discloses, none of these conditions. was complied with in the present case."

14. In ***K. Venkataramiah v. A. Seetharama Reddy*** reported as ***AIR 1963 SC 1526***, the provision as contained under Order 47 Rule 27 read with Section 107 was considered by five judges bench observing as under:-

> "10. Section 107 of the Code of Civil Procedure' empowers the appellate court "to take additional evidence or to require such evidence to be taken," "subject to such conditions and limitations as may be prescribed." Rule 27 of Order 41 of the Code of Civil Procedure prescribes the conditions and limitations in the matter. The Rule first lays down that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. It then proceeds to lay down two classes of cases where the appellate court may allow additional evidence to be produced. One class is where the Court appealed from has refused to admit evidence which ought to have been admitted. The other class is where the appellate court requires such additional evidence for itself-either to enable it to pronounce judgment or for any other substantial cause. The second class of the rule requires that when additional evidence is allowed to be produced by an appellate court the Court shall record the reason for its admission.
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> 13. It is very much to be desired that the courts of appeal should not overlook the provisions of cl. (2) of the Rule and should record their reasons for admitting additional evidence. We are not prepared, however, to accept the contention of the appellant that the omission to record the reason vitiates the admission of the evidence. Clearly, the object of the provision is to keep a clear record of what weighed with the appellate

court in allowing the additional evidence to be produced- whether this was done on the ground (i) that the court appealed from had refused to admit evidence which ought to have been admitted, or (ii) it allowed it because it required it to enable it to pronounce judgment in the appeal or (iii) it allowed this for any other substantial cause. Where a further appeal lies from the decision of the appellate court such recording of the reasons is necessary and useful also to the court of further appeal for deciding whether the discretion under the rule has been judicially exercised by the court below. The omission to record the reason must therefore be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory. For, it does not seem reasonable to think that the legislature intended that even though in the circumstances of a particular case it could be definitely ascertained from the record why the appellate court allowed additional evidence and it is clear that the power was properly exercised within the limitation imposed by the first clause of the Rule all that should be set at naught merely because the provision in the second clause was not complied with. It may be mentioned that as early as 1885 when considering a similar provision in the corresponding section of the Code of 1882, viz., s. 586, the High Court of Calcutta held that this provision for recording reasons is merely directory and not imperative vide Gopal Singh v. Jhakri Rai [ILR 12 Cal 37]. We are aware of no case in which the correctness of this view has been doubted. It is worth noticing that when the 1908 Code was framed and Or. 41 r. 27 took the. place of the old section 568, the legislature was content to leave the provision as it was and did not think it necessary to say anything to make the requirement of recording reasons imperative. It is true that the word "'shall" is used in Rule 27 (2); but that by itself does not make it mandatory. We are therefore of opinion that the omission of the High Court to record reasons for allowing additional evidence does not vitiate such admission.

17. It is easy to see that such requirement of the 'Court to enable it to pronounce judgement or for any other substantial cause is not likely to arise ordinarily unless some inherent lacuna or defect become apparent on an examination of the

evidence. That is why in Parsotim's case (1), the Privy Council while discussing whether additional evidence can be admitted observed:-

> "It may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but "when on examining the evidence as it stands,. some inherent lacuna or defect becomes apparent."

18. As the Privy Council proceeded to point out:-

"It may well be that the defect may be pointed out by a party, or that a party, may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands."

15. Supreme Court in the case of ***K.R. Mohan Reddy vs. Net Work Inc. (2007) 14 SCC 257*** held that 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. The species of 'difficulty' was explained by Supreme Court in the case of ***Jayaramdas & sons vs. Mirza Rafatullah Baig, 2004(10) SCC 507*** observing as under:-

"8. It is true that additional evidence, whether oral or documentary, is not to be admitted in Appellate Court unless a case for admission thereof is made out by reference to clause (*a*) or (*aa*) of sub-rule (1) of Rule 27 or unless the Appellate Court requires such evidence to enable it to pronounce judgment or for any other substantial cause within the meaning of clause (b). A perusal of the documents, brought to our notice by the learned counsel for the appellants and their comparison with the documents already available on record, clearly goes to show that the two are at variance and the effect of such variance determined either way would have a material bearing on the crucial issue arising for decision between the parties.

9. As already pointed out both the sets of documents are certified copies of public documents. The appellants would not ordinarily suspect or doubt the documents where the certified copies of public documents were secured from the public officer having the custody of such public documents. It is only when it came to their knowledge that the certified copies were at variance with the originals or were not complete copies that they thought of securing another set of certified copies and then seeking leave of the Court for producing the certified copies obtained by them as an additional evidence in Appellate Court. The case of the appellants for production of additional evidence falls within clause (aa) of sub-rule (1), abovesaid. It would have been better if such ground was set out specifically in the application so that the opposite party could have had an opportunity of meeting the plea and the First Appellate Court could also have had the provisions of clause (*aa*) of sub-rule (1) in its mind for dealing with the appellants' application. However, still we feel that the ends of justice demand the additional evidence being allowed to be produced *dehors* the deficiency in the application filed by the appellants."

16. Similarly, Supreme Court in the case of ***Uttaradi Mutt vs. Raghavendra Swamy Mutt (2018) 10 SCC 484*** held as under:-

"18. In the present case, the High Court has not recorded any special reasons as to why the parties should be relegated before the "trial Court" to re-decide the suit. The only reason, which, presumably, weighed with the High Court, is that it was necessary to find out the truth, as it is the duty of the Court. That could be done even by directing the First Appellate Court to record evidence, which it was competent to do while hearing the first appeal, had it allowed the applications under Order 41 Rule 27 CPC by the respondent/defendant. For that, as per Rule 25 of Order 41 of the CPC, the High Court could have framed the issues and referred them for adjudication before the First Appellate Court, against whose decree the second appeal was preferred before the High Court. It may be useful to advert to Rules 28

& 29 of Order 41 of CPC. The same read thus:

> ***"28. Mode of taking additional evidence.-*** Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court."
>
> ***29. Points to be defined and recorded.-*** Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified."

19. The High Court could have issued directions to the First Appellate Court to determine any question of fact including the existence and genuineness of the additional evidence or for that matter, whether the contents of the said documents had been duly proved by the party relying thereon. After recording the evidence in support of such relevant matters as the High Court may have directed, the First Appellate Court could proceed to try such issues and return the evidence to the High Court together with its findings thereon within the prescribed time. Such a course was permissible in terms of Rule 28 of Order 41 of CPC. And on receipt of the report, the High Court could then consider the substantial questions of law already framed while admitting the second appeal and finally decide the same on all issues."

17. Both the counsels have placed reliance upon ***Union of India vs. Ibrahim Uddain (supra).*** Supreme Court in the said case held as under:-

> "36. 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. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such

evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide *K. Venkataramiah v. A. Seetharama Reddy* [AIR 1963 SC 1526], *Municipal Corp. of Greater Bombay v. Lala Pancham* [AIR 1965 SC 1008], *Soonda Ram v. Rameshwarlal* [(1975) 3 SCC 698 : AIR 1975 SC 479] and *Syed Abdul Khader v. Rami Reddy* [(1979) 2 SCC 601 : AIR 1979 SC 553]).

37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: *Haji Mohammed Ishaq v. Mohd. Iqbal and Mohd. Ali and Co.* [(1978) 2 SCC 493 : AIR 1978 SC 798]).

38. Under Order 41 Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: *Lala Pancham* [AIR 1965 SC 1008].)

39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence

of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: *State of U.P. v. Manbodhan Lal Srivastava*, AIR 1957 SC 912; and *S. Rajagopal v. C.M. Armugam* [AIR 1969 SC 101].)

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.

42. Whenever the appellate Court admits additional evidence it *should record its reasons* for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. *The omission to record the reasons must, therefore, be treated as a serious defect.* But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.

43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the

additional evidence, is not enough comp1iance with the requirement as to recording of reasons.

47. 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.

48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.

Stage of Consideration :

49. An application under Order 41 Rule 27 CPC *is to be considered at the time of hearing of appeal on merits* so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. 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. 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. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: *Arjan Singh v. Kartar Singh* [1951 SCC 178 : AIR 1951 SC 193] and *Natha Singh v. Financial Commr., Taxation* [(1976) 3 SCC 28 : AIR 1976 SC 1053].)

50. In *Parsotim Thakur v. Lal Mohar Thakur* [(1931) 34 LW 76 : AIR 1931 PC 143], it was held: (LW pp. 86-87)

"….The provisions of Section 107, Civil Procedure Code, as elucidated by Order 41, Rule 27, are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal.

…. Under Rule 27, clause (1)(*b*), it is only where the appellate Court 'requires' it (i.e. finds it needful). …… *The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but 'when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent'*,

…. it may well be that the defect may be pointed out by a party, or that a party may move the Court to apply the defect, but the *requirement must be the requirement of the court upon its appreciation of evidence as it stands*. Wherever the Court adopts this procedure it is bound by Rule 27(2) to record its reasons for so doing, and under Rule 29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified. … *the power so conferred* upon the Court by the Code ought *to be very sparingly exercised,* and one requirement at least of any new evidence to be adduced should be that it should have a *direct and important bearing on a main issue in the case."* (emphasis added)

(See also: *Indirajit Pratab Sahi v. Amar Singh* [(1922-23) 50 IA 183 : AIR 1928 PC 128].)

51. In Arjan Singh v. Kartar Singh [1951 SCC 178 : AIR 1951 SC 193] this Court held: (AIR pp. 195-96, paras 7-8)

"7. ....If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of *improper exercise of* *discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it was non-existent…*

8. ...The order allowing the appellant to call the additional evidence is dated 17-8-1942. The appeal was heard on 24-4-1942. There was thus no examination of the evidence on the record and a decision reached that the evidence as it stood disclosed a lacuna which the court required to be filled up for pronouncing the judgment"

(emphasis added)

52. Thus, from the above, it is crystal clear that application for taking additional evidence on record 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 at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/inexecutable and is liable to be ignored."

18. Guided by the aforesaid ratios, it can be thus safely held that:-

"(i) Provision as contained under Order 41 Rule 27 CPC is an exception to general principle that the Appellate Court should not travel outside the record of the Lower Court and cannot take evidence in appeal.

(ii) Provision as contained under Order 41 Rule 27 CPC can be invoked only in exceptional circumstances.

(iii) The Appellate Court may permit additional evidence only if the conditions enumerated in Order 41 Rule 27 are satisfied.

(iv) Applicant seeking permission to lead additional evidence under Order 41 Rule 27 must establish that:

a) the evidence sought to be produced was refused to be admitted in evidence by the Lower Court wrongly; or

b) that the evidence was not within his knowledge or could not be produced by him before the court of first instance despite exercise of due diligence;

(v) where the Appellate Court requires the evidence to enable it to pronounce judgment or for any other substantial cause, application under Order 41 Rule 27 be allowed. The Privy council in ***Parsotim's case (supra)*** summarised the need of the Court observing that "it may well be that the defect may be pointed out by the party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands."

(v) The patch work sought to enure benefit by a party is different from the lacuna found by the Court which is a handicap in pronouncing judgment.

19. Testing the present case on the touchstone of the aforesaid parameters, it is evident that the document sought to be produced by way of additional evidence by the respondents before the Appellate Court were well in existence and their knowledge. The only reason assigned for not producing the same, is lack of knowledge to produce the same. From the reason assigned in the application, it is evident that the plaintiffs want to patch up their evidence by adducing additional evidence in appeal. The same is beyond the scope of Order 41 Rule 27.

20. In view of above, this Court finds that the Lower Appellate Court erred in allowing the application filed by the plaintiffs under Order 41 Rule 27 to lead additional evidence.

21. So far as remand is concerned, Mr. Jindal, senior counsel for the petitioners is not in a position to dispute that specific plea with respect to adverse possession was raised by the defendants. No issue was framed. Thus, no fault can be found with the Lower Appellate Court in remanding the matter back to the Trial Court after framing additional issue. The question now remains is whether Lower Appellate Court ought to have set aside the judgment and decree or could have remanded back the matter only for recording findings on the additional issue framed. Explaining the difference between the three provisions as contained under Order 41 Rule 23, 23-A and 25, Supreme Court in the case of ***J. Balaji Singh vs. Diwakar Cole (supra)*** observed as under:-

> 14. There are three provisions in the Code which deal with the power of the Appellate Court to remand the case to the Trial Court. These provisions are Order 41 Rules 23, 23-A, and 25.
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> 14.1. So far as Order 41 Rule 23 is concerned, it enables the Appellate Court to remand the case to the Trial Court when it finds that the Trial Court has disposed of the suit upon a preliminary point. The Appellate Court in such cases is empowered to direct the Trial Court to decide all the issues on evidence on record.
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> 14.2. So far as Rule 23-A is concerned, it enables the Appellate Court to remand the case to the Trial Court when it finds that though the Trial Court has disposed of the suit on all the issues but on reversal of the decree in appeal, a re-trial is considered necessary by the Appellate Court.
>
> 14.3. So far as Rule 25 is concerned, it enables the Appellate Court to frame or try the issue if it finds that it is essential to the right decision of the suit and was not framed by the Trial

> Court. The Appellate Court in such case may, accordingly, frame the issues and refer the same to the Trial Court to take the evidence and record the findings on such issues and return to the Appellate Court for deciding the appeal. In such cases, the Appellate Court retains the appeal to itself."

22. In the present case, the matter was not disposed off on the preliminary issue. Thus, Order 41 Rule 23 is not attracted. Since the Lower Appellate Court remanded the matter back after framing additional issue, the power invoked is relatable to Order 41 Rule 25. Thus, Appellate Court ought not have set aside the judgment and decree passed by the Trial Court, but should have referred the additional issue framed to the Trial Court to take evidence and record the findings on the said issue and returned the matter back to the Appellate Court for deciding the appeal and should have retained the appeal to itself.

23. In view of the above, this Court finds that the impugned order is not sustainable and needs to be quashed in part. Application filed by the plaintiffs under Order 41 Rule 27 of the Code seeking permission to lead additional evidence is ordered to be dismissed. Remand order passed by the Appellate Court after framing additional issue is modified to the extent that the appeal filed by the plaintiffs shall be retained by the Lower Appellate Court. Remand order shall only be in terms of Order 41 Rule 25 in form a reference to the Trial Court to take evidence and record findings on the additional issue No.3-A framed by the Lower Appellate Court.

24. Trial Court after recording the findings on issue No.3-A shall send back the matter back to the Appellate Court for deciding the main appeal.

25. With the aforesaid observations, the present revision petition is disposed off.

26. Since the main case has been decided, pending miscellaneous application, if any, shall also stands disposed off.

(PANKAJ JAIN)
JUDGE

20.12.2024
Dinesh

Whether speaking/reasoned : Yes

Whether Reportable : Yes