

(2002) 04 RAJ CK 0005

In the Rajasthan High Court

Case No : Civil Revision Petition No's. 300 and 301 of 2002

Arjun Mal

APPELLANT

Vs

Smt. Mohini Devi

RESPONDENT

Date of Decision : 04-04-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 41 Rule 27(1), Order 6 Rule 17

Rajasthan Premises (Control of Rent and Eviction) Act, 1950 — Section 13(1), 13(1)(6)

Citation : (2003) 1 RLW 190 : (2002) 3 WLN 557

Hon'ble Judges : B.S. Chauhan, J

Bench : Single Bench

Advocate : Dinesh Maheshwari, for the Appellant;

Judgement

Chauhan, J.—Both these petitions have been filed against the common judgment and order of the Court below dated 15.2.2002 passed in Civil Appeal No. 32/1994, rejecting the applications of the petitioner under Order 41 Rule 27 and Order 6 Rule 17 of the Code of Civil Procedure, 1908 (for short, "the Code") for taking additional evidence on record and seeking amendment of the pleadings.

2. The suit was filed in 1988 by the non-petitioner for eviction of the petitioner-tenant on the ground of bonafide personal necessity and nuisance under the provisions of Section 13(1)(h) and Section 13(1)(b) of the Rajasthan Premises (Control of Rent & Eviction) Act, 1950 (for short, "the Act, 1950"). The suit was decreed in 1994. Being aggrieved and dissatisfied, petitioner preferred first appeal, in which he filed an application for amendment as he wanted to urge additional ground that the non-petitioner/plaintiff had other premises vacant and rented it out, but that application was rejected. Against the same, petitioner filed a Revision Petition No. 76/1997, which was rejected by this Court, vide order dated 12.10.2001. While disposing of the said revision, this Court directed the learned appellate Court to dispose of the appeal expeditiously. Petitioner filed the aforesaid applications when the matter came up for final hearing on the ground

that the non-petitioner/plaintiff had raised the issue of applicability of Section 13(1)(i) of the Act, 1950, also i.e. that petitioner had acquired a residential house in the city and hence those applications were necessary. Both these applications were necessary. Both these application have been rejected on the ground that this was an admitted fact before the trial Court that petitioner-defendant had a house in the city and both the applications were not necessary as there had been an issue before the trial Court regarding comparative hardship of the landlord and the tenant and everything could be argued on that issue. However, the learned Appellate Court made certain observations, i.e. whether the ground of Section 13(1)(i) of the Act, 1950 is available or not, would be seen at a later stage. Hence these revisions.

3. So far as the application for adducing additional evidence under Order 41 Rule 27 is concerned, petitioner found it necessary to meet the argument if the provisions of Section 13(1) (1) of the Act, 1950 are found to be attracted in the case. Though there are no pleadings by the parties in respect of applicability of that provision, nor any evidence has been adduced in this respect. Petitioner wanted to bring the documents on record, particularly the documents relating to sanction of water and electric supply and allotment letter etc.

4. The law of taking the additional evidence on record at an appellate stage has been reiterated by the Hon"ble Supreme Court from time to time. The provisions of Order 41 Rule 27 of the Code have been considered elaborately in Arjan Singh v. Kartar Singh, (1951) 2 SCR 258 wherein the Hon"ble Apex Court held that the said provisions are applicable when some inherent lacuna of defect becomes apparent while examining the case and are not applicable where a discovery is made outside the Court of fresh evidence and application is made to import it. The true test to allow the application is as to whether the appellate court is able to pronounce judgment on the material before it without taking into consideration the additional evidence sought to be adduced. While deciding the said case, the Hon"ble Supreme Court placed reliance upon two judgments of the Privy Council in Kessowji v. G.P.P. Railway 1934 Ind. App. 115 and AIR 1931 143 (Privy Council)

5. A Five Judges Bench of the Hon"ble Supreme Court, in K. Venkataramiah Vs. A. Seetharama Reddy and Others, considering the said provisions, held as under :-

".....The Appellate Court has the power to allow additional evidence not only if it requires such evidence to enable it to pronounce judgment but also for "any other substantial cause." There may well be cases where even though the Court finds that it is able to pronounce judgment on the set of the record as it is and so it cannot strictly say that it requires additional evidence "to enable it to pronounce judgment", it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. It is easy to see that such requirement of the Court to enable it to pronounce judgment or for any other substantial cause is

not likely to arise ordinarily unless some inherent lacuna or defect becomes apparent on an examination of the evidence. Thus, it made it clear that the object of the said provision is to ask a party to adduce additional evidence."

6. The Court further made it clear that though the provisions provide for recording the reasons for accepting or rejecting the application under the provisions but it is not mandatory.

7. In *Soonda Ram and Another Vs. Shri Rameshwarlal and Another*, the Hon''ble Supreme Court considered the case under the said provisions of the Rajasthan Act, 1950 and held that if the issue can be decided on the basis of the evidence on record and there was no defect in the pleadings of such a nature that would enable the Court to obliterate and ignore the evidence adduced on the points involved, the application under Order 41 Rule 27 should not be allowed.

8. In *Natha Singh and Others Vs. The Financial Commissioner, Taxation, Punjab and Others*, , the Hon''ble Apex Court held that unless additional evidence is necessary to pronounce the judgment, it should not be permitted to be adduced as "the discretion given to the Appellate Court to receive and admit additional evidence, is not an arbitrary one but it is judicial one circumscribed by the limitation specified in Order 41 Rule 27 of the Code. If the additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence, it will be a case of improper exercise of discretion and the additional evidence, so brought on record, has to be ignored.

9. Reiterating the same view in the *The Land Acquisition Officer, City Improvement Trust Board Vs. H. Narayanaiah and Others*, the Apex Court further observed that for allowing the application, the Appellate Court must record reasons to show that it had considered the requirement of Order 41 Rule 27 of the Code so that it may be examined as how the Appellate Court found the admission of such evidence to be necessary for some substantial reason and if it finds it necessary to admit it, an opportunity should be given to the other side to rebut any inference arising from its existence by leading other evidence.

10. In *Syed Abdul Khader Vs. Rami Reddy and Others*, the Hon''ble Supreme Court considered its large number of earlier judgments and held that the provisions of Order 41 Rule 27 of the Code do not confer a right on the party to adduce additional evidence, but if the Court hearing the action requires any document so as to enable it to pronounce judgment, it has the jurisdiction to permit additional evidence to be adduced and in case the appellate court has given cogent reasons on such application and order has been passed in the interest of justice, it does not require any interference.

11. In *Smt. Pramod Kumari Bhatia Vs. Om Prakash Bhatia and Others*, the Hon''ble Supreme Court held that there can be no jurisdiction to entertain the application under Order 41 Rule 27 at a belated stage and it deserves to be rejected on this count alone.

12. Similarly, in *Sirajuddin alias Siraj Vs. State of Karnataka*, the Hon''ble Supreme Court held that the said provisions are meant for adducing additional evidence "inviting the Court's attention to a subsequent event of wide importance cutting at the root of the plaintiff's right to continue the action."

13. In *Shivajirao Nilangekar Patil Vs. Dr Mahesh Madhav Gosavi and Others*, the Apex Court held that if the application unnecessarily prolongs the disposal of the case and not directly connected with the immediate issue, it deserves rejection. Party filing such an application has to establish that with the best efforts, such additional evidence could not have been adduced at the first instance. Secondly, the party affected by the admission of additional evidence should have an opportunity to rebut such evidence and thirdly, the additional evidence was relevant for determination of the issue.

14. In *Mahaveer Singh and Ors. v. Naresh Chandra and Anr.* AIR 2001 SC 134, the Apex Court considered the issue elaborately and observed as under :-

"Principle to be observed ordinarily is that the Appellate Court should not travel outside the record of the lower Court and cannot take evidence in appeal. However, Section 107(d) CPC is an exception to the general rule and an additional evidence can be taken only when the conditions and limitations laid down in the said rule are found to exist. The Court is not bound under the circumstances mentioned under the rule to permit additional evidence and the parties are not entitled, as a right, to the admission of such evidence and the matter is entirely in the discretion of the Court, which is, of course, to be exercised judiciously and sparingly."

15. While deciding the said case, the Hon''ble Supreme Court placed reliance upon large number of its earlier judgments, including the *Municipal Corporation for Greater Bombay Vs. Lala Pancham of Bombay and Others*, wherein it has been held that a mere defect in coming to a decision is not sufficient for admission of evidence under the rule.

16. In the case of *Mahaveer Singh (supra)*, by the time the Hon''ble Supreme Court decided the case, the additional evidence had been taken on record. The Court rejected the prayer that the evidence already taken on record may be considered by the Court below, while making the final decision as the provisions could become un-ending and additional evidence can be taken only in the circumstances prescribed under Order 41 Rule 27 of the Code.

17. In *N. Kamalam (Dead) and Another Vs. Ayyasamy and Another*, the Hon''ble Supreme Court held as under :-

Needless to record that the Court shall have to be conscious and must always act with great circumspection in dealing with the claims for letting in additional evidence, particularly in the form of oral evidence at the appellate stage and that too, after a long lapse of time. In our view, a plain reading of Order 41 Rule 27 would depict that rejection of the claim for production of additional evidence

after a period of ten years from the date of filing of the appeal, as noticed above, cannot be permitted to be erroneous or an illegal exercise of discretion; The three limbs of Rule 27 do not stand attracted."

18. In *Vasanth Viswanthan and Others Vs. V.K. Elayalwar and Others*, , the Hon"ble Supreme Court observed that while considering an application for additional evidence, the Court should keep in mind that the said evidence was not put t the other side while he was deposing as a witness in the suit. Therefore, the application under the said provisions should not be accepted in a routine manner.

19. In *P. Purushottam Reddy and Another Vs. Pratap Steels Ltd.*, the Apex Court examined a case wherein the High Court had remanded the case to the trial Court to take additional evidence and decide the case afresh. The Court came to the conclusion that such a view was not permissible in the fact situation of that case, thus, the order of remand was set-aside observing as under :-

".....Although the order of remand has been set-aside....yet it should not be understood as depriving the High Court of its power to require any document to be produced or any witnesses to be examined to enable it to pronounce judgment, or for any other substantial cause, within the meaning of Clause (b) of Sub-rule (1) of Rule 27 of Order 41. That power inheres in the Court and the Court alone which is hearing the appeal. It is the requirement of the Court (and not of any of the parties) and the conscience of the Court feeling inhibits in satisfactory disposal of the lis which rule the exercise of this power."

20. Thus, in view of the above, if the case is examined in the light of the above settled legal proposition, the learned trial Court has held that already there is an issue regarding the comparative hardship, on which evidence has been led and the trial Court has recorded its finding. The suit was filed in 1988 and the appeal was pending since 1994. Earlier the revision against the rejection of amendment application had been filed which stood rejected by this Court vide order dated 20.10.2000 directing the Appellate Court to decide the appeal expeditiously. The application under Order 41 Rule 27 has been found without any merit by the First Appellate Court, though observations have been made that so far as the issue relating to attraction of provisions of Section 13(1)(i) was concerned, there had been no pleading by the parties, nor there was any issue and it was not a stage to consider whether that issue can be raised and petitioner wanted to add that he had purchased the house in Pratap Nagar prior to taking of the demised property on rent with certain further explanation. As the existence of the house of petitioner had never been in dispute and the learned trial Court was very much alive of this fact and had taken it into consideration while trying the suit, no fault can be found with the impugned order.

21. It may also be pertinent to mention here that Mr. Maheshwari, learned counsel for petitioner, has vehemently submitted that the order of the First Appellate Court suffers from material irregularity of jurisdiction as there was no

occasion for the Appellate Court to decide the application under Order 41 Rule 27 at this stage and it should have been decided only after appreciating the entire evidence on record while hearing the appeal. In support of his submission, Mr. Maheshwari has placed reliance upon the judgments of this Court in Rampal Garg v. Shrimad Dayanand Orphanage and Ors. ILR 1971 Raj. 506: 1970 RLW 106, wherein this Court held that an application under Order 41 Rule 27 should be considered by the Appellate Court, when appeal is being heard on merit after appreciating the evidence on record as it is only at that stage that the Court can examine as to whether judgment can be pronounced without additional evidence or it was required for any other substantial cause.

22. Similar view has been reiterated in Bhika Ram and Anr. v. Shantilal 1998 WLC (UC) 740, wherein this Court held as under :-

"The legitimate occasion for admitting additional evidence is when on examining the case, an inherent defect is found. The Appellate Court will be placed in a better position to appreciate the matter when it considers the prayer of appellant made under Order 41 Rule 27 CPC when the appeal is considered on merits. It is, therefore, correct that ordinarily it is not desirable to hear an application for further evidence till Appellate Court has heard the appeal and considered the evidence already on record."

23. Similar view has been reiterated in Mohan Das v. Bachan Lal 2000 WLC (UC) 228.

24. Be that as it may, the appeal was taken up by the First Appellate Court for hearing. Petitioner filed the application and made submissions on merit. In spite of repeatedly being asked by the Court as to whether this objection was raised before the trial Court, Mr. Maheshwari could not furnish any explanation except submitting that as the Court had committed a jurisdictional error, it required correction. Even if there is some substance in his submission, the Court should not lose sight of the fact as what could have been the consequence had petitioner's application been allowed and why the petitioner should be permitted to take the benefit of his own mistake of not raising this plea before the trial Court.

25. The Privy Council in Jagarnath Prasad v. Hanuman Prasad 1936 IA 221, held that when additional evidence is taken with the consent of the other side or no objection is taken at that time, it is not open to a party to lodge complaint in this respect at a later stage. The said judgment was approved and followed by the Constitution Bench of the Hon'ble Supreme Court in K. Venketramiah (supra). Once the petitioner made submissions on the application of his free will, how can he be permitted to raise the plea after meeting the Waterloo.

26. In Mahaveer Singh (supra), an issue as to whether application under Order 41 Rule 27 of the Code can be heard prior to disposal of the appeal, was agitated before the Hon'ble Supreme Court, but the Court did not consider it proper to answer the submission, rather by-passed it, making an observation that it would

be open to the parties to urge that aspect of the case in an appeal, that may arise after disposal of the matter by the First Appellate Court. The fact-situation warrant the same treatment here.

27. The case has to be examined from another angle also, i.e. while examining whether the Court below has committed a jurisdictional error in deciding the application, this Court itself, entertaining the revision against the said order, should not commit a jurisdictional error as in *Gurdev Singh and others Vs. Mehnga Ram and another*, the Hon"ble Supreme Court examined the scope of exercise of power u/s 115 of the Code on an order passed in an application filed under Order 41 Rule 27 and held that the High Court could not interfere with such an order for the reason that the whole appeal was not before the Court and the first appellate court was satisfied that the additional evidence was not required, there was no occasion for the High Court to interfere with the order. In *Mahaveer Singh (supra)* the Hon"ble Supreme Court deprecated the practice adopted by the High Court brushing aside the said judgment and interfering with such an order in exercise of its revisional jurisdiction, observing as under :-

"When this decision was cited before the High Court the same was brushed aside by stating that the principle set therein is not applicable to the facts of this case. We do not think so. The High Court ought not to have interfered with such an order."

28. The Court further held that if the order is wrong on merit, it is always open for the parties to challenge the same in accordance with law if an occasion arises to carry the matter in second appeal after an appellate decree is passed.

29. Thus, in view of the above, the judicial discipline and the mandate of Article 141 of the Constitution require no interference with the impugned order and revision petition against the order rejecting the application for taking additional evidence on record, is liable to be dismissed.

30. Filing the application for amendment of pleadings under Order 6 Rule 17 of the Code was found necessary in view of the arguments advanced by the non-petitioner before the Appellate Court attracting the provisions of Section 13(1)(i) of the Act, 1950. In fact, this had already been in the pleadings of the petitioner-tenant, who was having an accommodation and in view of that, issue No. 6 had been framed in the suit while examining the comparative hardship and by amendment petitioner-tenant wanted to add that the said accommodation, though was in his possession since 1973-74 but was not suitable for his occupation, i.e. medical practice and his two sons had shifted to that house after attaining majority and petitioner-tenant was residing in the suit premises alongwith his wife and daughter and carrying the profession of medical practice therein. Thus, I am of the considered opinion that the issue of comparative hardship is so wide that it can cover up all these grounds of pleadings and it was necessary for the petitioner to bring all these facts on record even before the trial Court. Moreso, petitioner does not state that these were the subsequent

events which were necessary to be brought to the notice of the Court and the same are pleaded without furnishing any explanation as how these facts could not be explained before the trial Court while adducing evidence on the issue of comparative hardship. Thus, the said application has also rightly been rejected and no case is made out that the first appellate court has committed material irregularity in exercise of its jurisdiction warranting interference in revisional jurisdiction by this Court. The Court has to consider these aspects in the light of the provisions of Rule 27(1)(aa) which were added by Amendment in 1976. Without meeting that requirement, if an application is allowed and additional evidence is taken on record, it would render the provision of Clause (aa) in the said rule nugatory for the reason that it cannot be said even by stretch of imagination that these facts could not have been brought on record even for decision on the issue of comparative hardship without having any application of the provisions of Section 13(1)(i) of the Act, 1950.

31. Before parting with the case, it may be pertinent to clarify that any observation made hereinabove shall not affect the merit of the appeal and the petitioner shall be entitled to agitate the issue of not allowing the application under Order 41 Rule 27 of the Code in case the occasion arises to file second appeal.

32. In view of the above, the revision petitions are accordingly dismissed without notice to the other side. As the case is pending since 1988 and appeal is pending since 1994, this Court has earlier asked the appellate court to dispose of the appeal finally, considering the fact that the non-petitioner is a senior citizen over 80 years of age, the first appellate court is requested to dispose of the appeal as early as possible.