

(2019) 08 JH CK 0055

In the Jharkhand High Court

Case No : Writ Petition (C) No. 5180 of 2017

Electrosteel Steels Limited

APPELLANT

Vs

Divisional Forest Officer, Dhanbad And Ors

RESPONDENT

Date of Decision : 27-08-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 1 Rule 10, Order 40 Rule 27, Order 41 Rule 27, Order 41 Rule 27(1)(a), Order 41 Rule 27(1)(aa), Order 41 Rule 27(1)(b), Order 41 Rule 28
Constitution Of India, 1950 — Article 227

Citation : (2019) 08 JH CK 0055

Hon'ble Judges : Sujit Narayan Prasad, J

Bench : Single Bench

Advocate : Indrajit Sinha, Bibhash Sinha, Anup Kumar Agarwal

Final Decision : Allowed

Judgement

1. This writ petition since has been filed under Article 227 of the Constitution of the India, wherein two orders, order dated 03.05.2017 (Annexure 3) and order dated 04.05.2017 (Annexure 2), passed in Title Appeal No. 33 of 2007 have been challenged, Mr. Indrajit Sinha, learned counsel for the petitioner has submitted that under Article 227 of the Constitution of India only one order ought to have been assailed, as such he is confining this writ petition only with respect to order dated 04.05.2017 whereby prayer for making exhibit, certified copy of notification dated 15th November, 1948 and certified copy of petition dated 26.09.2013 which was filed by the petitioner, has been rejected.

2. The brief facts of the case of the petitioner, as per the pleadings made in the writ petition, is that the petitioner/decreed holder has purchased the suit property from respondent no. 3 and 4 and their mother-Smt. Sumitra Bala Devi (since deceased), who had filed Title Suit No. 25 of 1996 before the competent Court of Civil jurisdiction for declaration of permanent occupancy, raityati rights over Schedule-A and Schedule-B properties, which has been decreed in their favour,

against which, appeal has been filed by the District Forest Officer (DFO) and at that stage, the petitioner has made an application for impleadment, which has been allowed and he has been impleaded as party to the aforesaid appeal and now is contesting since after purchase of the suit property from the plaintiff of the Title Suit No. 25 of 1996.

The contesting respondent-DFO, Bokaro has filed petition under Order XLI Rule 27 of the Code of Civil Procedure (CPC) for adducing additional evidence, which has been allowed by the appellate Court, however, it was assailed by the petitioner by filing W.P.(C) No. 6767 of 2013, which was disposed of as withdrawn giving liberty to the petitioner to make prayer for rebuttal of the additional evidence. With the liberty aforesaid, the petitioner vide application dated 15.02.2016 praying for grant of opportunity for rebuttal of the additional documents, which was rejected vide order dated 13.04.2016, thereafter, the same was challenged by the petitioner by filing W.P. (C) No. 2340 of 2016, which was allowed vide order dated 05.01.2017 making an observation that if the appellate Court allows opportunity to a party to adduce additional evidence under Order XLI Rule 27 of the CPC, the other party has to be granted opportunity of rebuttal.

3. The petitioner in terms of the aforesaid order has filed a petition dated 03.05.2017 praying inter alia to allow the petitioner to adduce additional evidence for rebuttal of the additional evidence adduced by the respondent-DFO since according to the petitioner the notification dated 15.11.1948 which has been marked as Exhibit E/3 has been allowed to be adduced as additional evidence in exercise of power conferred under Order XLI Rule 27 CPC but the said document is not complete one and, therefore, the other document that is the communication dated 11.01.1949 with respect to the notification dated 15.11.1948 and the certified copy of order pertaining to proceeding of Case No. 50/1948, has been sought to be brought on record in rebuttal, but the same has been rejected, hence the present writ petition has been filed.

4. Mr. Indrajit Sinha, learned counsel for the petitioner has submitted that the trial Court has passed the order without assigning any reason of rejection and on going through the impugned order, it would reflect that merely since the judgment debtor has opposed the petition filed by the petitioner by taking a ground that name of the witness by whom he intends to get the aforesaid document exhibited in rebuttal, has not been mentioned.

He, therefore, submits that the petitioner is seeking an opportunity to rebut the documents which has been inserted by judgment debtor and therefore, the trial Court while disposing of the petition of the petitioner dated 03.05.2017 ought to have passed a reasoned order without taking into consideration the observation made by this Court in W.P.(C) No. 2340 of 2016, which has been disposed of vide order dated 05.01.2017, by which the petitioner was granted opportunity of rebuttal, but has not been do so, hence the trial Court has committed error in passing the impugned order.

5. Mr. Anup Kumar Agarwal, A.C to learned G.A V appearing for the respondent-DFO and State functionaries of the State of Jharkhand has submitted that there is no infirmity in the impugned order and the trial Court after taking into consideration the fact that the name of witness has not been furnished for exhibiting the documents as also no formal petition under Order XLI Rule 27 CPC has been filed, hence no error has been committed by the trial Court in passing the impugned order.

6. Having heard learned counsel for the respective parties and after appreciating the rival submissions, this Court deem it fit and proper to deal with Order XLI Rule 27 of the Code of Civil Procedure, as per which the condition stipulated under provision is to be complied with before taking aid of the said provision that is condition stipulated under Order XLI Rule 27 (1) (a), 27 (1) (aa) and 27 (1) (b). So far as condition stipulated under Order XLI Rule 27 (1) (b) is concerned that condition can be exercised by the party if the condition as stipulated under Order XLI 27 (1) (a) and 27 (1) (aa) is not meted out reason being that the appellate Court after appreciating the evidence and reasons recorded by the original Court if deem it fit and proper for consideration of the additional evidence for proper adjudication of the case, the same can be considered after leading the evidences and before pronouncement of judgments.

7. This Court at this juncture deem it fit and proper to refer to the provisions of law as also the authoritative pronouncements of the Hon'ble Apex Court in this regard.

Order XLI Rule 27 as also Rule 28 of the Code of Civil Procedure reads as under:

"27.Production of additional evidence in Appellate Court.-(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a)the Court from whose decree the appeal is preferred has refused to admit evidence which out 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)Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

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."

8. The Hon'ble Apex Court in the case of K. R. Mohan Reddy vs. Net Work Inc represented through MD reported in (2007)14 SCC 257 has made following observations:

"It is now a trite law that the conditions precedent for application of clause (aa) of sub-rule (1) of Rule 27 of Order 41 is different from that of clause (b). In the event the former is to be applied, it would be for the applicant to show that the ingredients or conditions precedent mentioned therein are satisfied. On the other hand if clause (b) to sub-rule (1) of Rule 27 of Order 41 CPC is to be taken recourse to, the appellate court is bound to consider the entire evidence on record and come to an independent finding for arriving at a just decision; adduction of additional evidence as has been prayed by the appellant was necessary."

9. The Hon'ble Apex Court in the case of Union of India vs. Ibrahim Uddin And Another reported in (2012) 8 SCC 148 has made following observations:

"An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find out whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. 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."

10. In the decision reported in (2013) 7MLJ 471 reported in Jayamoorthy & Ors. vs. Palani & Ors. the Hon'ble Madras High Court has held as under:

"15. As per the above said rule, the additional evidence can be taken either by the appellate court itself or the appellate court can direct the lower court from which appeal has come or any other court subordinate to it to take evidence and transmit the same to the appellate court for being considered in the appeal. In either case, the appellate court has to indicate in its order allowing the application under Order XLI Rule 27, the points on which the additional evidence is to be adduced. A reading of the paragraph extracted from the judgment of the lower appellate court will show that the learned lower appellate judge, either in ignorance of the said provision or in utter disregard for the same, has omitted to follow the procedure. Therefore, this court does have no hesitation in coming to the conclusion that the learned lower appellate judge has committed an error in not following the procedure contemplated under Order 41 Rule 27 and Rule 28 CPC in dealing with an application seeking permission to adduce additional evidence in the appellate stage. This court also holds that the learned lower appellate judge has committed a grave error in law in simply marking the documents produced by the first respondent herein (appellant before the lower

appellate court) giving them exhibit numbers and referring them in the judgment of the lower appellate court. It is obvious that the admissibility, genuineness and reliability of the documents produced along with the application filed under Order 41 Rule 27 were challenged by the opposite parties.

That being so, the learned lower appellate judge should not have chosen to simply mark the documents as exhibits on the side of the plaintiff and proceed with the disposal of the appeal. The procedure for taking additional evidence in the appellate stage has not been followed. Hence this court answers both the substantial questions of law in favour of the appellants."

11. The factual aspect in the case in hand is that declaratory suit has been filed by the vendors of the petitioner (respondent no. 3 and 4), in which, the decree has been passed in their favour, appealed by the DFO, Bokaro.

In the meanwhile, the petitioner has purchased the suit property which occasioned for filing a petition under Order I Rule 10 C.P.C for impleadment of the party in proceeding, the same has been allowed thereby the petitioner entered into the appeal to contest the appeal.

12. The judgment debtor/DFO, Bokaro has filed a petition under Order XLI Rule 27 CPC for adducing additional evidence by seeking leave of the appellate Court of necessary document that is notification dated 15.11.1948 and document i.e order passed in Forest Settlement Case No. 50 of 1948, which has been exhibited E to E/7. The petitioner being aggrieved has approached this Court by invoking the jurisdiction of this Court under Article 227 of the Constitution of India by filing W.P.(C) No. 6767 of 2013, however, later on it was withdrawn with liberty to make prayer before Court below for giving opportunity for rebuttal of the additional evidence. In terms of the aforesaid order, the petitioner has filed application before the Court below, which was rejected.

Aggrieved thereof, the petitioner filed W.P. (C) No. 2340 of 2016, which was allowed vide order dated 01.05.2017 with an observation that on being satisfied the Appellate Court allows opportunity to a party to adduce additional evidence under Order XL Rule 27 of the Code of Civil Procedure, the other party has to be granted opportunity of rebuttal. With the liberty aforesaid, the petitioner filed petition dated 03.05.2017 before the Court below, which was rejected vide order dated 4.5.2017, which is the subject matter of this writ petition.

13. It is settled position of law that if one party is afforded opportunity to adduce additional evidence and the other party is not allowed opportunity to rebut such evidence, it is nothing but a serious prejudice to other party who have been denied the opportunity of rebuttal, since the opportunity of rebuttal directly goes to the root of providing an opportunity to defend.

14. Herein the petition has been filed by the decree holder on 3.5.2017 although without invoking the jurisdiction of the appellate Court by making reference of Order XL Rule 27 CPC as also by not disclosing the name of the witness by whom

the aforesaid document sought to be exhibited in rebuttal to the documents which has been allowed to be adduced as an additional evidence on these grounds, the petition has been rejected.

15. This Court is of the view that merely not making the provision of law, although the said ground has not been taken in the impugned order, the content of the petition is to be seen and the Court of law is supposed to pass an order in the ends of justice.

It is not the case of the judgment debtor-contesting respondent that no petition has been filed for inserting evidence in rebuttal, their case is that, as has been stated in the rejoinder which has been referred in the impugned order that the respondent no. 7 should have filed petition under Order XLI Rule 27 for adducing additional evidence in rebuttal to the Exhibits E to E/7.

16. According to this Court even if the petition has been filed without any reference of Order XLI Rule 27, the appellate Court ought to have considered its content before taking any decision as per the law and not merely by going and not perusing the provisions of law.

So far as other reason as has been shown by the appellate Court that the name of the witness who is supposed to exhibit the documents has not been disclosed, as would appear from the impugned order that the appellate Court has not appreciated the fact about the judgment of providing of opportunity to rebut, as has been observed in W.P.(C) No. 2340 of 2016 rather merely going across the petition and the rejoinder petitioner dated 3.5.2017 has been rejected, which according to this Court cannot be said to be proper.

17. In view thereof, the order dated 4.5.2017 is found to be suffer from error, therefore, is not sustainable in the eye of law and hence, set aside.

18. The matter is remitted to the appellate Court to pass a fresh order on the petition dated 3.5.2017 within a period of two weeks' from the date of receipt/production of copy of this order.

19. With the aforesaid observations and directions, the writ petition stands allowed.