

(2018) 03 OHC CK 0092
In the Orissa High Court
Case No : S.A.No.106 of 2000

Ganesh Prasad Dubey .dead. through his L.Rs. and others APPELLANT
Vs
Premlata Dei alias Pani and others RESPONDENT

Date of Decision : 30-03-2018

Acts Referred:

Code of Civil Procedure, 1908 — Section 107, Order 41 Rule 27, Order 41 Rule 25,
Order 41 Rule 23, Order 41 Rule 27(1)

Citation : (2018) 03 OHC CK 0092

Hon'ble Judges : DR. A.K. RATH

Bench : Single Bench

Advocate : Sanjeev Udgata, Satyabrata Udgata, J.R.Dash

Final Decision : Dismissed

Judgement

Dr.A.K.RATH, J.

1. This is a defendantsâ?? appeal against confirming judgment.
2. Plaintiffs-respondents 1 and 2 instituted the suit for declaration of title, confirmation of possession or in the alternative recovery of possession, in the event they are dispossessed during pendency of the suit and permanent injunction. The case of the plaintiffs was that one Chaina Jena wife of Chintamani Jena was the absolute owner of the suit land. She died leaving behind her daughters, Chandri and Dukhi. After death of the parents, the daughters succeeded to the suit property. Chandri and Dukhi were in possession of the suit property. Chandri died issueless in the year 1982. Thereafter, Dukhi became the absolute owner. Dukhi died in the year 1989. After her death, her sons and daughter, plaintiffs 1 and 2 and defendants 4 and 5 succeeded to the property. On 6.3.1991 defendants 1 to 3 claimed that Chandri had gifted Schedule-B property to them. Chandri became

feeble and weak because of her old age. Before her death, she was in coma. Chandri had not executed any gift deed at any point of time. The alleged

gift deeds are inoperative and void. The suit property had not been partitioned between Chandri and Dukhi. With this factual scenario, they instituted

the suit seeking the reliefs mentioned supra.

3. Defendants 1 to 3 filed written statement denying the assertions made in the plaint. According to them, plaintiffs 1 and 2 and proforma defendants 4

and 5 are not the daughters of Dukhi. It was pleaded that the suit property described in Lot no.1 of Schedule A was the self-acquired property of

Chandri. Lot nos.2 & 3 were self- acquired properties of Chintamani. After death of Chintamani, both Chandri and Dukhi became owners of Lot

nos.2 & 3 of Schedule-A property. After death of Dukhi, Chandri became the owner of the properties. On 5.8.1982, Chandri executed a registered

gift deed in respect of Lot nos.1 & 2 of Schedule-A property in favour of defendant no.1. She had also executed a gift deed of plot no.1548 in favour

of defendant no.2 and delivered possession. It was further pleaded that plaintiff no.1 was the maid servant of Chandri and Dukhi. She was residing in

their house. The plaintiffs as well as proforma defendants had no semblance of right, title and interest over the suit property.

4. Stemming on the pleadings of the parties, learned trial court framed five issues. Parties led evidence, oral and documentary, to substantiate their

case. Learned trial court came to hold that the gift deed nos. 443/82 and 444/82 are inoperative and void. The plaintiffs and proforma defendants 4

and 5 have right, title, interest and possession over the suit land. The defendants 1 to 3 have no right, title, interest and possession over the suit

property. Defendants 1 to 3 are trespassers over Schedule-B property. Held so, it decreed the suit. The unsuccessful defendants appealed before the

learned District Judge, Sambalpur, which was subsequently transferred to the court of the learned Additional District Judge, Samablpur and

renumbered as Title Appeal No.46/2 of 93-97. During pendency of the appeal, an application under Order 41 Rule 27 CPC was filed to admit the

certified copy of the gift deed no.444 of 1982 as evidence. It was stated that an advocate was engaged by the defendants. During trial, he was gained

over by the plaintiffs. He had not filed any application to declare D.W.3 hostile and cross-examine him. The said advocate acted against the interest of

the defendants. He had not advised the defendants to examine the attesting witness and scribe of the gift deeds. The same amounts to professional misconduct. The learned appellate court came to hold that appeal was filed in the year 1993. The application for additional evidence was filed four years after filing of the appeal. The Court is not competent to decide the question of misconduct of the counsel. There was no justifiable ground to admit the document as additional evidence. The application had been filed to patch up lacuna. Thereafter, it scanned the evidence on record, pleadings, concurred with the findings of the learned trial court and dismissed the appeal. It is apt to state here that during pendency of this appeal, appellants 1 & 3 died, whereafter their legal heirs have been substituted.

5. The Second Appeal was admitted on the following substantial questions of law :

â??i) Whether the appellate court can allow additional evidence to pronounce judgment or for any other substantial cause ?

ii) Whether the appellate court is correct in rejecting the application under Order 41 Rule 27 of the Code of Civil Procedure Code without any reason

while the appellants have suffered due to the laches on the part of their counsel ?
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6. Heard Mr.Sanjeev Udgata, learned Advocate along with Mr.Satyabrata Udgata, learned Advocate for the appellants and Mr.J.R.Dash, learned

Advocate for the respondents.

7. Mr.Udgata, learned Advocate for the appellants submitted that the advocate of defendants had not conducted the suit properly. D.W.3 was hostile,

but then he had not filed the application to declare the witness hostile. The registered gift deed is a relevant document and can be admitted as

additional evidence. The appellate court is within its jurisdiction to entertain the material documents sought to be taken as additional evidence. The

appellate court can allow the evidence to pronounce the judgment or any other substantial cause. For the laches of the lawyer, the party should not

suffer. He placed reliance on the decisions of the apex Court in Union of India v. K.V.Lakshman and others, AIR 2016 SC 3139 and this Court in

Sankar Pradhan v. Premananda Pradhan (dead) and others, 2016(I) ILR-CUT-1151.

8. Per contra, Mr.Dash, learned Advocate for the respondents submitted that the

defendants have made unnecessary allegations against their counsel.

No petition was filed in the trial court to disengage him. Rather the counsel conducted the case on their behalf. Three numbers of witnesses including

the attesting witness had been examined by defendants 1 and 2. D.W.3 did not support the case of defendants 1 and 2. Further eleven documents

including gift deed no.443/82 had been exhibited. After lapse of four years in filing of the appeal, application for additional evidence was filed to patch

up lacuna. Provisions of Order 41, Rule 27 C.P.C. are not designed to help parties to patch up weak points. He relied on a decision of the apex Court

in the case of N.Kamalam (Dead) and another v. Ayyasamy and another, (2001) 7 SCC 503. Â

9. In K.Venkataramiah v. A.Seetharma Reddy and others, AIR 1963 SC 1526, Order 41, Rule 27 C.P.C. was the subject-matter of interpretation

before the apex Court. The Constitution Bench of the apex Court held that 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 Or.

41 of the Code of Civil Procedure prescribe 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. It was further held that 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 state 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. Such a case will be one for allowing additional evidence ""for any other substantial cause"" under R.27 (1) (b) of the Code.

10. Another Constitution Bench of the apex Court in the case of *Municipal Corporation of Greater Bombay v. Lala Pancham and others*, AIR 1965

SC 1008 held that under Rule 27, the High Court has the power to allow a document to be produced and a witness to be examined. But the

requirement of the High Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce

judgment. The provision does not entitle the High 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. The

power under clause (b) of sub-rule (1) of Rule 27 cannot be exercised for adding to the evidence already on record except upon one of the ground

specified in the provision. If the documents on record are relevant on the issue, the court could well proceed to consider them and decide the issue. It

further held that the appellate cannot order a fresh trial. Such a course is not permissible under Order 41, Rule 27 C.P.C., when it has not proceeded

under Order 41 Rule 25 or remanded the case under Order 41 Rule 23.

11. In *N.Kamalam (dead) (supra)*, the apex Court held that the provisions of Order 41 Rule 27 have not been engrafted in the Code so as to patch up

the weak points in the case and to fill up the omission in the court of appeal-it does not authorize any lacunae or gaps in evidence to be filled up.

12. Reverting to the facts of the case and keeping in view the enunciation of law laid down by the apex Court in the decisions cited *supra*, this Court

finds that three witnesses had been examined on behalf of defendants 1 and 2. The gift deed no.443 of 1982 was not proved. There is no material on

record that gift deed no.444 of 1982 was handed over to the counsel for the defendants. Attributing misconduct on the part of the counsel per se is not

a ground to admit the additional evidence. Four years after filing of the appeal, an application for additional evidence was filed. The provisions

contained in Order 41 Rule 27 C.P.C. are not intended to patch up lacuna. The

substantial questions of law are accordingly.

13. K.V.Lakshman (supra) and Sankar Pradhan (supra) are distinguishable on facts. In K.V.Lakshman (supra), an application for additional evidence

was filed. The same was not opposed by the respondents. Since the application contained necessary averment as to why additional evidence was

necessary to decide real controversy involved in appeal, the apex Court allowed the same. In Sankar Pradhan (supra), this Court placed reliance on

the oft quoted decision of the Privy Council in the case of Persotim Thakur v. Lal Mohar Thakur and others, AIR 1931 P.C.143 and held that 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”. Â

14. A priori, the appeal fails and is dismissed. No costs.