

(2007) 09 AHC CK 0063
In the Allahabad High Court

Louis Paiva

APPELLANT

Vs

Nagar Palika Parishad and Another

RESPONDENT

Date of Decision : 21-09-2007

Acts Referred:

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

Citation : (2007) 4 AWC 4169

Hon'ble Judges : Ashok Bhushan, J

Bench : Single Bench

Judgement

Ashok Bhushan, J.—Heard Sri M. K. Gupta, counsel for the petitioner and Sri C.K. Parekh appearing for the respondent No. 1. Learned Counsel for the petitioner submits that the respondent Nos. 2 and 3 are only proforma respondents and no notices need be issued to them. Learned Counsel for the parties have agreed that the writ petition be disposed of finally without inviting counter-affidavit.

2. By this writ petition the petitioner has prayed for quashing the order dated 23.8.2007, passed by the Additional District Judge by which the affidavit filed by the petitioner annexing certain Government orders and other papers have been refused to be accepted.

3. Brief facts necessary for deciding the writ petition are:

The proceedings under the U.P. Public Premises (Eviction of Unauthorised Occupants) Act, 1972 (hereinafter to be referred as the Act, 1972) were initiated against the petitioner and by an order dated 23.8.2007 the petitioner was directed to be evicted before the property in question. In the appeal filed u/s 9 of the Act the petitioner filed an affidavit alongwith copy of the Government orders, copy of sale deed dated 26.6.2003 and the copy of the receipt of deposit of rent. The said application came before the appellate court who rejected the same. The appellate court while rejecting the affidavit and application has observed that since the appellant did not appear in the lower court despite service of notice, there is no reason for allowing the appellant to file additional affidavit in the

appeal. The entire reasons given by the appellate court for rejecting the application are as follows:

...As he did not avail his right to contest the case by appearing himself in the lower court and filing evidence I do not find any satisfactory reason for allowing him to file additional evidence in appeal and, therefore, his application, in this regard is rejected.

Put up on 30.9.2007 for arguments.

4. Learned Counsel for the petitioner challenging the order contended that the affidavit and application of the petitioner has been wrongly refused to be accepted. He submits that the mere fact that the petitioner could not appear before the Estate Officer, was not relevant factor for refusing acceptance of the affidavit and additional documents. Learned Counsel for the petitioner has placed reliance on the judgment of the Apex Court in Jaipur Development Authority Vs. Smt. Kailashwati Devi,

5. Sri C.K. Parekh appearing for the respondent No. 1 refuting the submissions of counsel for the petitioner, contended that the petitioner having not satisfied the conditions for admitting the additional evidence as laid down under Order XLI, Rule 27 of the Civil Procedure Code, no error has been committed by the District Judge in rejecting the application. He further submits that the petitioner did not appear before the Estate Officer hence he has no right to adduce evidence. He submits that the appeal be decided on merits. He submits that it is only at the time of final decision of the appeal, the question of accepting evidence can be looked into.

6. I have considered the submissions of counsel for the parties and perused the record.

The power of the prescribed authority has been provided u/s 8 of the Act. An appeal to the District Judge is contemplated u/s 9 of the Act. Section 8 of the Act is quoted below:

8. Powers of the prescribed authority.?The prescribed authority and the appellate officer shall, for the purpose of holding any inquiry or hearing any appeal under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters, namely-

- (a) summoning and enforcing the attendance of any person and examining him on oath ;
- (b) requiring the discovery and production of documents;
- (c) any other matter which may be prescribed.

7. The rules have been framed, namely, the U.P. Public Premises (Eviction of Unauthorised Occupants) Rules, 1973. Rule 10 of the Rules which is relevant for

the present case is as follows:

10. Power under the Code of Civil Procedure, 1908 : Section 8 (c).--The prescribed authority or the appellate officer shall, for the purpose of holding an inquiry or hearing any appeal under the Act, shall have the same powers as are vested in the civil court under the Code of Civil Procedure, 1908, when trying a suit, in respect of the following matters, namely:

(a) the power to dismiss an application or appeal for default and to restore it for sufficient cause;

(b) the power to proceed ex parte and set aside, for sufficient cause an order passed ex parte;

(c) the power to order attachment before judgment;

(d) the power referred to in Section 151 of the Code of Civil Procedure, 1908, to make any order for the ends of justice or to prevent the abuse of process of the authority concerned; and

(e) the power to accept affidavits in proceedings pending before him and to issue commissions in suitable cases.

8. According to Rule 10, the prescribed authority as well as the appellate authority shall have same powers as are vested in the civil court when trying a suit in respect of the matters. Sub-clause (e) of Rule 10 specifically empowers the prescribed authority as well as the appellate authority to accept evidence in proceedings pending before them and to issue Commission in suitable cases. Power to accept the affidavit and obtain evidence by Commission having been expressly granted to the Courts of the prescribed authority and the appellate authority the submission of the learned Counsel for the respondents that there is no power can be conceded to accept the additional evidence, cannot be accepted. It is also not necessary to express any opinion in the present case as to whether the additional evidence has to be accepted by the appellate authority in accordance with Order XLI, Rule 27 of the CPC and since in the present case the question was of accepting the affidavit alongwith which certain Government orders and sale-deeds were filed. The power to accept affidavit; having been specifically conferred by Rule 10(e), it is not necessary to consider the issue any further.

9. Now comes the reasons for rejection of the affidavit of the petitioner as noted above. The only reason given by the appellate court for rejecting affidavit and application was that the petitioner did not appear before the lower court. The right of appeal is a statutory right given to the aggrieved person u/s 9 of the Act. In case a person against whom an order is passed ex parte is denied right before the appellate authority to bring on record any material evidence or affidavit only because he did not appear in the lower court, the same shall be negation of the right of appeal. The right of appeal is a right of appeal against the judgment of the lower court both on facts and law. Unless there is specific bar prohibiting

acceptance of additional evidence or affidavit, the appellant cannot be prohibited from filing any evidence or document in the appellate court. The submission of the learned Counsel for the respondents that since the appellant did not appear in the lower court, he cannot file any evidence, cannot be accepted. The judgment relied by counsel for the petitioner fully support his contention. In the case before the Apex Court in Jaipur Development Authority v. Kailashwati Devi (Smt.) (supra), the application under Order XLI, Rule 27 of the CPC was rejected by the High Court on the ground that the appellant-defendant had not adduced any evidence in the trial court. The Apex Court allowing the appeal laid down following in paragraphs 5 and 6:

5. The provisions of Rule 27 of Order XLI, in so far as they are relevant read as follows:

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) * * * * * (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 may allow such evidence or document to be produced or witness to be examined.

(Emphasis supplied)

6. The intention of the Sub-rule, in our view, is that a party who, for the reasons mentioned in the sub-clause, was unable to produce the evidence in the trial court, should be enabled to produce the same in the appellate court. The sub-rule mentions the conditions which must be complied with by the party producing the additional evidence, namely, 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" in the trial court. It is not one of the conditions that the party seeking to introduce additional evidence must have also been one who has led some evidence in the trial court. Such a view amounts to introducing an additional condition not contemplated by the sub-rule. No distinction was intended by the sub-rule between a party who has produced some evidence in the trial court and one who has adduced no evidence in the trial court. All that is required is that the conditions mentioned in the body of the sub-rule must be proved to exist. It is not permissible to restrict Clause (aa) for the benefit of only those who have adduced some evidence in the trial court.

10. In view of the foregoing discussions the order of the appellate court dated 23.8.2007 cannot be sustained. There was no reason for rejecting the evidence of the petitioner to be accepted by the appellate authority. The order of the Additional District Judge dated 23.8.2007 is set aside. The application 160C of

the petitioner stands allowed. The appellate court may proceed to decide the appeal in accordance with law on merits.

The writ petition is disposed of accordingly.