

(2001) 05 CHH CK 0005
In the Chhattisgarh High Court
Case No : Civil Revision No. 262 of 2001

Mohammad Hanif Qureshi	Vs	APPELLANT
Kailashchand and Others		RESPONDENT

Date of Decision : 09-05-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1, Order 18 Rule 1, Order 18 Rule 2, Order 41 Rule 27, Order 41 Rule 27(1)
Evidence Act, 1872 — Section 110

Citation : (2002) 1 MPHT 27

Hon'ble Judges : R.S. Garg, J

Bench : Division Bench

Advocate : Prashant Mishra, for the Appellant; Shrivastava, for the Respondent

Final Decision : Allowed

Judgement

R.S. Garg, J.—The present applicant Hazi Mohammad Hanif Qureshi filed a civil suit in the Court of Civil Judge, Class-II, Sakti. The said civil suit was registered as Civil Suit No. 86-A/1993. In the said suit, the plaintiff claimed a declaration, a decree for possession, mesne profits etc. The non-applicants/defendants contested the suit on all possible grounds inter alia pleading that the sale-deed executed in favour of the plaintiff was illegal. They, however, did not plead that the sale deed was executed by a minor in favour of the plaintiff.

2. After recording the evidence and hearing the parties, the Trial Court dismissed the suit. Being aggrieved by the said dismissal, the plaintiff took up the matter in the appeal. In the said appeal, the defendant Nos. 1 and 2 made an application under Order 41, Rule 27, CPC and filed a certificate showing that the date of birth of the vendor of the plaintiff was 11-7-1960, In the said application, it was further contended that the document was necessary to be taken on records as additional evidence. The said application was opposed by the plaintiff, but the Appellate Court by its order dated 22-3-2001 granted the application, cast an additional issue, remitted the matter to the Trial Court and required the Trial

Court to submit the evidence and its findings before the Appellate Court. The plaintiff being aggrieved by the said order has filed this revision petition.

3. Shri Prashant Mishra, learned counsel for the applicant has challenged the order on two counts, firstly that the application could not be allowed without hearing the parties on the merits of the matter and secondly that in absence of the pleadings relating to minority of the plaintiffs vendor, an enquiry into the said minority of the plaintiffs vendor could not be directed by the First Appellate Court. According to him, an application under Order 41 Rule 27 can be allowed in particular contingencies as provided under Order 41 Rule 27 and in absence of the pleadings even if the evidence is brought on record the same cannot be considered. Contending contrary to the said submission, Shri Shrivastava, learned counsel for respondent Nos. 1 & 2 submits that the defendants had clearly stated in their written statement that the sale deed executed in favour of the plaintiff was illegal, therefore, the said plea would include the question of minority of the vendor of the plaintiff. He also submits that if the Court is of the opinion that admission of the additional evidence is required by the Court for just and fair disposal of the suit, then, the Court can admit such evidence on record.

4. Order 8 Rule 1 of the CPC clearly provides that apart from denying the material pleadings raised by the plaintiff the defendant would be entitled to set up his own defence and raise his independent pleadings to non-suit the plaintiff. Order 14 Rule 1 of CPC provides that:-- (1) issues arisen when a material proposition of the fact or law is affirmed by the one party and denied by the other; (2) the material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence; (3) each material propositions affirmed by the one party and denied by the other shall form the subject of a distinct issue. For raising or casting an issue, the condition precedent is that a material proposition of fact or law is affirmed by one party and denied by the other. The question of minority of the vendor of the plaintiff is not a question of law, but is a question of fact and if the fact is proved, only then, it would have its legal effect. In the present case, the defendants did not raise the very factual foundation in their written statement by saying that as the vendor of the plaintiff was minor on the date of the execution of the sale deed, the plaintiff could not acquire any title. In absence of such a material proposition, it cannot be said that the defendants were raising a plea in order to constitute their defences.

5. Order 18 Rule 2 provides that on the day fixed for hearing of the suit or any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove. Order 18 Rule 1 provides that the plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin. In the present case, the burden of proof that

the plaintiff is the owner of the property is on the plaintiff. But if there was a plea that on the date of sale, the vendor of plaintiff was a minor then the burden to prove this issue would have been on the defendant.

6. In absence of a pleading, an issue cannot be cast and if there is no issue or pleading then any evidence brought on the record cannot be looked into. Unfortunately, the Appellate Court has lost sight of this principle of law. While granting an application or taking the additional evidence on record, the First Appellate Court can cast an issue and at the same time remit the matter to the Trial Court for submission of the evidence and its findings. In the opinion of this Court even otherwise the approach of the First Appellate Court in the present case is patently illegal and is contrary to law because it is trite law that the additional evidence can be taken on record in particular contingency as provided under Clause (a), (aa) or (b) of Sub-rule (1) of Order 41 Rule 27. Such an application for taking additional evidence on record cannot be allowed just for the sake of asking. First of all a Court is required to hear the parties on the merits and if it comes to the conclusion that the evidence is material for just proper disposal of the matter, only then, the Court can admit the additional evidence, if it comes to the conclusion that the Trial Court had refused to admit the evidence which ought to have been admitted and/or the parties seeking to produce additional evidence establishes that notwithstanding the exercise of due diligence, such evidence was not within the knowledge of the said party or could not, after the exercise of the due diligence, be produced by him at the time when the decree appealed against was passed or 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.

7. When a Court hears the parties on merits of the matter, it is also required to hear the application submitted under Order 41 Rule 27, CPC to know whether the additional evidence submitted before the Court, in fact, is necessary or not. If the Court comes to the conclusion that such additional evidence if admitted on record would affect the merits of the matter, then, after recording a finding in relation to Clause (a), (aa) or (b) of Order 41 Rule 27(1) the Court may admit such additional evidence. From the order passed by the Court below, it does not appear that the Court below had heard the parties on merits, instead, it appears that it heard the parties on the application and granted the same.

8. Neither on the facts nor on the legal foundation or procedural law, the order passed by the Court below can be upheld. The order passed by the Court below deserves to and is accordingly set aside. At this stage, learned counsel for the respondent Nos. 1 and 2 submits that the Court below be directed to hear and decide the application at the time of final hearing of the matter and the defendants be permitted to make an application for amendment of the pleadings. The prayer appears to be justifiable. While setting aside the order passed by the Court below, I am bound to restore the application to its original number. I am also obliged to require the learned First Appellate Court to hear and decide the

application alongwith the merits of the matter. If the defendants make an application for amendment of the written statement, then, the application for amendment and the application for admission of additional evidence on record shall be heard and be decided on their own merits without being influenced by the first order of the grant or by this order under which, the order of the Court below has been set aside. The revision is allowed.

9. The parties are directed to bear their own costs.

10. Civil Revision allowed.