
(2013) 09 AHC CK 0240

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 49523 of 2013

Rais Ahmad

APPELLANT

Vs

Satpal Singh Chhabra and Another

RESPONDENT

Date of Decision : 12-09-2013

Acts Referred:

Citation : (2013) 8 ADJ 645 : (2013) 101 ALR 1 : (2014) 1 AWC 54 : (2013) 121 RD 373

Hon'ble Judges : Sanjay Misra, J

Bench : Single Bench

Advocate : Ashish Kumar Singh and Ajay Kumar Singh, for the Appellant;
Swetashwa Agarwal, for the Respondent

Judgement

Sanjay Misra, J.—Heard Sri Ashish Kumar Singh learned counsel for the plaintiff petitioner and Sri Swetashwa Agarwal who has appeared on behalf of both the defendant respondents. Since all the parties are represented with the consent of learned counsel for the parties this writ petition is being decided finally today itself. This writ petition is directed against the order dated 23.7.2013 passed by the District Judge, Saharanpur in Civil Appeal No. 05 of 2013 (Satpal Singh Chhabra and another v. Rais Ahmad) whereby the appellate Court at the appellate stage has allowed the Application Paper No. 34-C(1) filed under Order XLI Rule 27 CPC by the defendant appellant No. 1 to produce defendant appellant No. 2 Pawandeep Singh as a witness in this case.

2. Learned counsel for the petitioner has submitted that the provisions of Order XLI Rule 27 CPC are not meant to be exercised by the appellate Court for the purpose of permitting the appellant to fill up the lacuna in his case after judgment of the Trial Court when he had sufficient opportunity to produce such evidence before the Trial Court itself. He states that the defendant appellant No. 2 Pawandeep Singh was a defendant of the suit but he stayed mute and he did not come forward to give his evidence before the Trial Court therefore the mere fact that at the appellate stage the Application 34-C(1) of the defendant

appellant No. 1 namely Satpal Singh to call the defendant appellant No. 2 Pawandeep Singh as a witness is an attempt to fill in the lacuna of the defendants case after judgment has been passed by the Trial Court. He further states that the reason given by the defendant appellant No. 1 for moving the application under Order XLI Rule 27 CPC was that his earlier counsel at the trial stage did not advise him to produce the defendant appellant No. 2 as witness but at the appellate stage his other counsel advised him of this lacuna and hence he has moved the application. Learned counsel for the plaintiff petitioner submits that such was not permissible under Order XLI Rule 27 CPC and hence the impugned order is liable to be set aside.

3. He further states that second part of the impugned order is a consequence of the reasoning given in the first part of the order and the appellate Court has committed an illegality in remitting the matter back to the Trial Court by framing a new issue under Order XLI Rule 25 CPC with a direction to the Trial Court to take the evidence of defendant appellant No. 2 Pawandeep Singh and decide the issue No. 2 alongwith newly framed issue afresh. He states that the said order purported to have been passed under Order XLI Rule 25 CPC is an unreasoned order because the reason given while considering the application under Order XLI Rule 27 CPC of the defendant appellant No. 1 were not reasons which could be sufficient for accepting additional evidence at the appellate stage. He has placed reliance on a decision of the Supreme Court in the case of Union of India (UOI) Vs. Ibrahim Uddin and Another, and places reliance on paragraphs 39 to 41 therein.

4. Sri Agarwal for the defendant respondent has contested the submission of learned counsel for the petitioner and while going through the first part of the impugned order has submitted that apart from the reasons given in the application by the defendants under Order XLI Rule 27 CPC the Court has itself found that even if the defendant No. 2 had remained mute at the time of trial before the Trial Court and he can bring on record certain important facts so as to arrive at real conclusion of the issue then the Court can compel for deposition as evidence of such a witness. According to him the first part of the impugned order has been passed under Order XLI Rule 27(1)(b) CPC and therefore to say that the application under Order XLI Rule 27 has been allowed only for the reason of wrong advise of the counsel of the defendant is incorrect.

5. He places reliance on the second part of the impugned order to state that it is an order passed by the Court under Order XLI Rule 25 CPC. According to him the power available with the appellate Court under Order XLI Rule 25 CPC is absolute and in case the appellate Court has given sufficient reasons and found that in order to arrive at on a right decision of issue required to be framed he can refer the same to the Court after framing such issue and give a direction to the Trial Court to take additional evidence as required. He therefore submits that when the impugned order has been passed under Order XLI Rule 27(1)(b) and Rule 25 CPC the submission of learned counsel for the petitioner are incorrect.

6. Having considered the submission of learned counsel for the parties and perused the record no doubt the Application 34-C made by the defendant appellant No. 1 to produce defendant appellant No. 2 as a witness in the case at the appellate stage was titled as under Order XLI Rule 27 CPC but the first part of the impugned order has not been passed under Order XLI Rule 27(aa) CPC. The provisions of Order XLI Rule 27 CPC are quoted here under:

(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 ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that 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) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

7. Clause (b) quoted herein above provides that when the appellate Court requires any document to be produced or any witness to be examined to enable 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. The appellate Court is required to record reasons for admission of such evidence.

8. The first part of the impugned order has not been passed by the appellate Court under Order XLI Rule 1(aa) CPC. It has been passed under Order XLI Rule 1(b) CPC as is quite apparent from a reading of the same. The fact that the reasons given by the defendant appellant No. 1 in his application titled as Order XLI Rule 27 CPC were not sufficient to enable the appellate Court to permit production of additional evidence at the appellate stage would lose significance if the order is passed by the appellate Court under Order XLI Rule 1(b) CPC but it has to record reasons in allowing additional evidence to be produced at the appellate stage.

9. What has to be seen in the impugned order is whether the appellate Court has given any reasons which are justifiable for exercising his power under Order XLI Rule 27(1)(b) CPC. Since the appellate Court has not passed the impugned order under Order XLI Rule 27(1)(aa) CPC the impugned order has not to be judged on the scope of the provisions of Order XLI Rule 27(1)(aa) CPC.

10. The reasons recorded by the appellate Court in the first part of its order

which relates to exercise of the power by the appellate Court under Order XLI Rule 27(1)(b) CPC is quoted here under:

There are two appellants; one appellant advanced or given money to the plaintiff-respondent and in lieu of that he got executed one sale-deed in favour of the second appellant, who has come with a prayer to be produced as a witness to defend his case and he was estopped by doing so as per not advise of previous counsel and feels to witness the matter as per advise of the counsel in appeal. The circumstances of the case the judgment given by the lower Court rests on one point and that is whether the transaction between one appellant and the plaintiff-respondents was a sale transaction or a loan transaction, or the other point was why the sale-deed was executed in favour of second appellant instead of first appellant and the lower Court decreed the suit for specific performance on the count that second appellant in whose name the sale-deed stands, did not appear in Court to certify the facts relating to him and the suit was decreed. It is at the time of appeal that the counsel advised that this second appellant should have been produced before the matter shall remain always dormant in relation to this second appellant because he did not turn up in evidence in lower Court. A judgment cannot be based on incomplete evidence by any Judge and it is not sufficient that the defendant, if required in the case for the just decision, was not produced in evidence. It is well-settled law that it is the bounded duty of the Court to arrive at a conclusion on the basis of factual and legal position of the case. The factual point was not available to the Court as to why the second defendant or the second appellant Pawandeep Singh was not called in the Court as a witness because his evidence as a sale-deed holder was necessary to enlighten the Court on the facts that why he was beneficiary of this transaction of the shape of sale-deed and why this sale-deed was not got executed by the first appellant in his favour when the advanced money to the plaintiff as the consideration to the transaction of contract of sale-deed. So justice demands that a party might have been mute at the time of trial in the lower Court but he can tell certain important facts to a Judge to arrive at a real and actual conclusion of the issue before the Court. Then the Court should compel for the deposition of evidence of such a witness or a person before the Court to arrive at a just decision. This is not the mere filling of lacuna because until the full story of the facts is not brought out the judgment is incomplete. Hence it was necessary and it is necessary that the in the interest of justice the evidence of Pawandeep Singh is required for the just decision of the case as in consonance of Order 41 Rule 27(1)(b) C.P.C. It is also true that the other party will certainly suffer from hardship. Hence Rs. 1000/-costs should be awarded to plaintiff-respondent for meeting this urge of coming to the justice in the case and this application of the appellant stands to be accepted on costs of Rs. 1000/- to be paid within 15 days.

11. From a perusal of the aforesaid reasoning it is quite apparent that the appellate Court was of the view that a judgment should not be pronounced which is based on incomplete evidence. He found that the complete evidence was not produced by the defendant No. 1 and questioned why the second defendant

Pawandeep Singh was not called in Court as a witness because his evidence as a sale holder was necessary to enlighten the Court on the facts as to why he was beneficiary of a transaction which was not executed in favour of the first defendant when it was the first defendant who has advanced money to the plaintiff as consideration of the transaction of the sale-deed. The aforesaid recitation is the reason given by the appellate Court to exercise its power under Order XLI Rule 27(1)(b) CPC. It is therefore incorrect to say that the power was exercised under Order XLI Rule 27(1)(aa) CPC at the instance of the parties and it is also false to say that it was exercised on a ground of non advise of the counsel.

12. The second part of the impugned order is an order passed by the appellate Court under Order XLI Rule 25 CPC. Order XLI Rule 25 CPC is quoted here under:

Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.--Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.

13. Under this provision when the appellate Court finds that an issue has been omitted to be framed or tried which appears to the appellate Court to be essential to the right decision of the suit on merits it may frame issues and refer the same to the Trial Court and direct the Trial Court to take additional evidence as required.

14. Second part of the impugned order has been passed under Order XLI Rule 25 CPC where the appellate Court has found that the issue No. 2 has to be re-examined in view of the evidence that defendant appellant No. 1 Satpal Singh who was the person who had advanced the money to the plaintiff for the sale-deed but the sale-deed was executed in favour of defendant No. 2 Pawandeep Singh. The appellate Court has therefore framed fresh issue 2-A and has directed the Trial Court to take the evidence of defendant appellant No. 2 Pawandeep Singh and decide issue No. 2 afresh on the basis of such evidence.

15. Clearly the reasoning given by the appellate Court in the second part of the impugned order has no relationship or connection with the reasons given in the application under Order XLI Rule 27 CPC by the defendant No. 1 relating to non advise of his counsel at the trial stage. Under such circumstances the power exercised by the appellate Court under Order XLI Rule 25 CPC and the order passed thereon being based on valid reasons cannot be held to be illegal. The impugned order does not require any interference.

16. The writ petition has no merit. It is accordingly dismissed. No order is passed as to costs.