
(2012) 09 AHC CK 0307

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 47087 of 2012

Rajendra Kumar Bajpai

APPELLANT

Vs

Shailesh Kumar Shukla and Another

RESPONDENT

Date of Decision : 17-09-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 43 Rule 2, 107

Citation : (2013) 6 ADJ 363

Hon'ble Judges : Pankaj Mithal, J

Bench : Single Bench

Advocate : S.K. Nigam, for the Appellant;

Final Decision : Dismissed

Judgement

Pankaj Mithal, J.—Heard learned counsel for the petitioner.

This writ petition is directed against the order dated 27.7.2012 rejecting petitioner's application for additional evidence in misc. appeal arising out of an interim injunction order.

The submission of learned counsel for the petitioner is that additional evidence in appeal is permissible under Order 41 Rule 27 C.P.C.

The above misc. appeal is directed against the order dated 11.8.2006 passed by the Court of first instance. The Court of first instance on an application for interim injunction instead of granting an ex parte order directed for issuing notices to the other side and posted the application for consideration thereafter vide order dated 11.8.2006. The said appeal is not against any final order which determines the rights of the parties on the basis of any evidence. Therefore, in appeal also only the matter with regard to grant of any interim injunction has to be considered on the basis of the pleadings and the material on record without any aid of evidence. Any evidence adduced in such misc. appeal will not be part of evidence in the suit. Therefore, even if the provisions of Order 41 C.P.C. as a whole have been made applicable to misc. appeals filed under Order 43 by virtue

of Rule 2 of Order 43 C.P.C., it would not be applicable for the purposes of adducing additional evidence.

2. Similarly, the power of the appellate Court to take additional evidence as contemplated by Section 107 C.P.C. would not come into play in a misc. appeal especially one arising from an order passed on interim injunction application as the question of additional evidence arises only when evidence had been previously recorded in the suit.

3. The provisions of Order 41 Rule 27 C.P.C. are applicable in three contingencies where the trial Court has refused to admit evidence which ought to have been admitted; the additional evidence sought to be produced could not be produced despite due diligence before the trial Court; and/or where the appellate Court requires any evidence to enable it to pronounce judgment or for any substantial cause. The question of adducing the evidence would only arise where some evidence has already been adduced. The stage for adducing additional evidence has not arrived in appeal as the evidence has so far not recorded by the trial Court.

4. In view of the aforesaid facts and circumstances, I am of the opinion that the provisions of Order 41 Rule 27 C.P.C. permitting additional evidence cannot be applied to misc. appeals from an interlocutory order passed on the interim injunction application.

5. His Lordships of this in Kailash Nath Singh Vs. The District Judge, Mirzapur and another, , held that the appellate Court while hearing an appeal arising out of misc. proceedings is not supposed to entertain an application for the amendment of the plaint and the only course open is to direct moving of the amendment application before the trial Court or for its consideration by the trial Court on disposal of the appeal on merits. It is only on a regular appeal filed that the appellate Court exercises the jurisdiction of the trial Court and is competent to take evidence which is not the position when the appellate Court is hearing a misc. appeal.

In view of totality of the facts and circumstances, I am of the opinion that the application for additional evidence before the appellate Court below that was seized with the misc. appeal was not maintainable and the Court below has not committed any error of law in rejecting the same.

The writ petition is devoid of merits and is dismissed.