

**(1999) 06 GUJ CK 0025**  
**In the Gujarat High Court**

**Case No :** Civil Revision Application No. 964 of 1996

Saiyed Sahejadmiya Sulemanmiya (dead) through heirs  
Sahedabegum and Others APPELLANT

Vs

Abdul Razak Isabhai Memon and Others RESPONDENT

---

**Date of Decision :** 24-06-1999

**Acts Referred:**

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

**Citation :** AIR 1999 Guj 295 : (2000) 4 GLR 818

**Hon'ble Judges :** J.R. Vora, J

**Bench :** Single Bench

**Advocate :** M.B. Gandhi, for the Appellant; K.H. Basi, for the Respondent

**Final Decision :** Dismissed

---

## Judgement

J.R. Vora, J.—The present petitioners had filed a Civil Suit against the present respondents, who are the tenants of the plaintiffs, for the eviction of the premises in question. The suit was decreed by Small Cause Court. Against which the present respondents-defendants filed an appeal being Civil Appeal No. 86/86 before the Appellate Bench of Small Causes Court at Ahmedabad in which an application Exhibit 64 was moved by the appellants i.e. present respondents original defendants to adduce additional evidence under Order 41, Rule 27.

2. The trial Court decreed the suit mainly on the ground of sub-tenancy. As against that, the case of the defendants i.e. present respondents was that in the suit premises, they are carrying on business of partnership and the suit premises was not sublet to any third party.

3. The appellate Bench of the Small Cause Court, vide its order dated 25th April, 1996, allowed Exhibit 64 and the appellants i.e. the present defendants were permitted to lead additional evidence. Against which, this Civil Revision Application is filed by the petitioners i.e. the original plaintiffs-respondents in Civil Appeal No. 86/86 before the appellate Bench of Small Cause Court.

4. Learned Counsel Mr. M. B. Gandhi on behalf of the petitioners and learned Counsel Mr. K. H. Baxi on behalf of the respondents are heard at length.

5. The question is on the background of the above mentioned facts, whether the Small Cause Court has committed an error of law in permitting the present respondents-defendants to produce additional evidence in Appeal and that too at a later stage when the Appeal was almost heard.

6. Order 41, Rule 27 permits the production of additional evidence in Appellate Court (i) when the court from where decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or (2) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was 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 (3) when the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or (4) for any other substantial cause.

7. The case of the plaintiffs, present opponents, in the lower appellate Court was that the defendants were liable to eviction because they had sub-let the suit premises. As against that defendants pleaded that a partnership firm in which defendants were partners, were carrying on business. A partnership deed was produced by the defendants, but however, the trial Court held that the deed of partnership was sham, bogus and camouflage to cover the sub-tenancy and hence the trial Court drawn adverse inference against the defendants and mainly on the ground of subtenancy, the suit was decreed. Further, it was the case of the defendants that they were not given any chance to produce documents to prove that in fact in the suit premises a partnership business was running. It was the case of the defendants that they understood that the partnership deed was sufficient weapon to defend the attack of sub-tenancy and, therefore, those documents which are sought to be produced at appellate stage could not be produced before trial Court. The documents like Sales Tax Returns of the business, Accounts Books and other statutory documents, defendants sought to be produced at appellate stage.

8. Learned Appellate Bench of Small Causes Court allowed the application stating that these documents were necessary for the proper adjudication of the matter between the parties and since adverse inference was drawn by the trial Court against the defendants, production of these documents in the interest of justice could be permitted to set at rest the controversy.

9. Learned Advocate for the petitioners Mr. Gandhi argued that the case does not fall within Clause (a) and Clause (aa) of Rule 27 of Order 41. He has drawn my attention to the copy of the application Exhibit 64 filed by the defendants before the appellate Bench and the decision of the appellate Bench. It is clear that the documents which are sought to be produced were in the possession of the parties when the suit was proceeded with and now under the guise of substantial

cause of justice or under the guise of enabling a Court to pronounce its judgment, the original defendants cannot be permitted to fill up lacuna in the evidence. Mr. Gandhi also urged that the application -- Exhibit 64 was preferred at later stage when the hearing of the appeal was over. Learned counsel Mr. Gandhi has placed heavy reliance on the decision of this Court in the matter of Patel Nanji Bhovan Dudhatra Vs. Patel Naran Mitha Sukhadiya and Another, , wherein it has been held that where a party has failed to discharge his duty, the power under the rule cannot be invoked to fill up the lacuna.

10. While Mr. Baxi on behalf of the respondents has urged that an adverse inference has been drawn against the present defendants and the documents which are sought to be produced are necessary for the adjudication of the dispute between the parties. He supported the decision of the appellate Bench of the Small Causes Court.

11. Having regard to the rival contentions, the question arises, when and under what circumstances, appellate Court can permit a party to produce additional evidence. Rule 27 of Order 41 sets out three circumstances under which appellate Court is empowered to permit a party to produce additional evidence. Those circumstances are mentioned hereinabove.

12. Mr. Gandhi has placed heavy reliance on the above mentioned case of Patel Nanji Bhovan, wherein a principle has been laid down that the provisions of Order 41, Rule 27(b) does not apply merely to permit a defaulting party to fill in the lacunae by producing evidence at appellate stage which had otherwise not been produced in the trial Court, nor does the necessity of Court to require additional evidence for enabling it to pronounce judgment takes within its ambit requirement of Court to pronounce judgment in a particular manner. The enabling power under Clause (b) of Order 41, Rule 27 cannot be exercised merely to overcome the difficulty of defaulting party indirectly what cannot be done directly under Clauses (a) and (aa) of the rule. The requirements of the Court to enable it to pronounce judgment cannot be equated with enabling a party to produce evidence which he could produce but has failed to produce to prove his case to enable the appellate Court to announce judgment, otherwise. Mere fact that party has failed to produce evidence which it could have produced to prove the case set up by it does not amount to a lacuna in evidence. It leads the Court to conclusion that party has failed to prove case set up by it, and the Court is in a position to announce its judgment on that basis.

13. This principle has sought support in two more decisions referred to in the above mentioned case of Patel Nanji Bhovan and those decisions are Municipal Corporation for Greater Bombay Vs. Lala Pancham of Bombay and Others, and Mrs. Indira Bhalchandra Gokhale (deceased by LRs) Vs. Union of India and Another, .

14. It is true that the principle is appellate Courts are not empowered to permit production of additional documents to fill up the lacuna in the evidence. Clause

(b) of Rule 27 of Order 41 of the CPC also cannot be used to achieve which cannot be achieved by Clause (a) and Clause (aa).

15. The above mentioned principle was applied in the Patel Nanji Bhovan's case (supra) in the context of the circumstances of that case and order of lower appellate Court permitting production was set aside. In that case, plaintiff had produced some documents on record which were marked as 28/1 and 28/2. It was the duty of the plaintiff to prove those documents. When the plaintiff failed to prove those documents, the suit was dismissed. The plaintiff preferred appeal before the lower appellate Court and in which the plaintiff moved an application under Order 41, Rule 27 for permitting him to lead additional evidence for proving documents marked as 28/1 and 28/2. It had already been filed by him during the suit proceedings. The lower appellate Court allowed the application and in these circumstances, in the above mentioned case, while setting aside the order of lower appellate Court, the High Court upheld the above mentioned principle.

16. In this case, the circumstances are altogether different from the case of Patel Nanji Bhovan. The suit in this case was filed by the plaintiffs present applicants alleging the subtenancy against which a partnership was pleaded by defendants and document of partnership deed was also produced and proved, but however, the trial Court held that the deed of partnership was a camouflage to cover the sub-tenancy and drawn adverse inference against the present respondents i.e. original defendants. Though this case would not fall in Clause (a) and (aa) of Rule 27 of Order 41, but the case would fall under Clause (b) of Rule 27 of Order 41. In a suit where subtenancy is alleged, burden lies on the plaintiffs to prove that sub-tenancy. When this sub-tenancy is proved satisfactorily by evidence, then the onus shifts on the defendant to prove or disprove of the same. It is not clear that whether plaintiffs discharged its duty to prove sub-tenancy. Unless this burden is discharged by the plaintiffs, onus never shifts on the defendants to prove or disprove of fact. Initial burden always remains upon the plaintiff to prove the sub-tenancy. From the judgment of the lower appellate Court, it clearly emerges that even then a document of partnership was produced by the defendants. In spite of this, in this case, unfortunately, the trial Court has drawn an adverse inference against the defendants, against whom, the burden never lies to disprove the sub-tenancy and, therefore, real, controversy in the matter was "sub-tenancy" or "running a partnership business". In these circumstances, to adjudicate upon the real dispute between the parties, the defendants at the appellate stage can always be permitted to produce additional evidence.

17. Lower Appellate Bench has recorded in the order that these documents are necessary and relevant in to pronounce effective judgment. Recording of this observation denotes that the lower Appellate Bench has felt that the material on record is insufficient for the pronouncement of the judgment i.e. the Appellate Court has found its inability to pronounce its judgment so as to resolve the crucial controversy between the parties regarding sub-tenancy and hence the

Appellate Bench has permitted the defendants to produce the above mentioned document. Lower Appellate Bench has also recorded that in the interest of justice to adjudicate upon the real controversy, the production of the document is necessary.

18. The real test or real criteria is whether the Appellate Court, on examination of evidence, has found it necessary the production of additional evidence in view of some inherent lacuna or defect and in the context and the circumstances of the case, the decision of the lower Appellate Bench stands to the above mentioned test particularly when the trial Court has drawn an adverse inference against the defendants for not producing the evidence of running of business by partnership firm and who were not duty bound to prove a fact of sub-tenancy. Therefore, the above mentioned case of Patel Nanji Bhovan is not helpful to the present petitioners. Albeit, the principle is that Clause (b) of Rule 27 of Order 41 cannot be used to fill up a lacuna in the evidence or to enable the Appellate Court to pronounce judgment in a particular manner. In the facts and circumstances of this case, while arriving at a decision of production of additional evidence for substantial cause, the lower Appellate Bench has not at all fallen in error to law.

19. In view of this matter, the Revision Application is rejected. Notice is discharged. The interim relief granted earlier stands vacated. No order as to costs.

20. At this juncture, Mr. M.B. Gandhi mentions that he wants to approach the higher forum and the order requires to be stayed. However, in the interest of justice, the Appellate Bench of Small Cause Court, Ahmedabad, is directed not to proceed any further with the matter of First Appeal No. 86/86 pending before it till 31st July, 1999.