
(2018) 12 UK CK 0023

In the Uttarakhand High Court

Case No : Writ Petition (M/S) No. 3609 Of 2018

Sanjay Eric Helms

APPELLANT

Vs

Kishore Singh Negi And Others

RESPONDENT

Date of Decision : 03-12-2018

Acts Referred:

Code of Civil Procedure, 1908 — Order 41 Rule 27

Citation : (2018) 12 UK CK 0023

Hon'ble Judges : Sharad Kumar Sharma, J

Bench : Single Bench

Advocate : Rakesh Thapliyal, Monika Pant

Final Decision : Dismissed

Judgement

Sharad Kumar Sharma, J

1. The petitioner in this Writ Petition happens to be a plaintiff in the Suit No. 49 of 2003 'Sanjay Eric Helms vs. Kishore Singh Negi & Others', which was instituted by him on 18.07.2003 for the decree of declaration, declaring sale deed dated 06.11.1986 executed by the plaintiff's father as forged, as well, it was a Suit for permanent prohibitory injunction. The Suit in question proceeded and ultimately the same has been dismissed as against plaintiff/petitioner by judgment and decree dated 15.07.2017.

2. At the time when the Suit was proceeding the learned Trial court had passed an order, whereby, by an order dated 12.11.2013 the opportunity of plaintiff/petitioner to adduce the evidence was closed. Consequent thereto, the petitioner, who was a plaintiff, had filed an application for recall of the said order dated 12.11.2013 of closure of an opportunity to lead evidence, which too was rejected on 19.11.2013. Thereafter, the petitioner preferred a Revision being Revision No. 81 of 2013, which was dismissed on 23.07.2016 with a cost of Rs.1,000/- and ultimately these orders thus passed by the Trial Court closing the opportunity to lead evidence of the petitioner stood affirmed by the judgment rendered by this

Court in the Writ Petition being Writ Petition No. 2221/2016 (M/S) 'Shri Kishore Singh Negi and Others vs. Sanjay Eric Helms' as the same was dismissed by the judgment dated 23.07.2016 and which on a challenge before the Hon'ble Apex Court was affirmed by the Hon'ble Apex Court with the dismissal of the SLP. The resultant effect was that the principle order of closure of opportunity to lead the evidence by the order dated 12.11.2013 has attained finality upto the Hon'ble Apex Court.

3. As against the dismissal of the Suit on 15.07.2017 the plaintiff/petitioner has preferred a Civil Appeal No. 26/2017 'Sanjay Eric Helms vs. Kishore Singh Negi'. While the Appeal was pending the appellant had moved an application invoking Order 41 Rule 27 of C.P.C. praying for adducing certain additional evidence, which is said to have been brought to the knowledge when they were going through the old records, which was lying in their home. In the application thus filed, the petitioner in paragraph-3 the petitioner had made the following pleadings:

"3. that the plaintiff was renovating his house in Lucknow in the first week of August 2018, then from the old documents of his father, some registered documents and unregistered documents were traced out which are of the decades of 80,s contemporary to the date of alleged sale deed. These documents have also bearing the original signature of the Father of the plaintiff, by which by naked eye it reveals that the signature of the father of the plaintiff in the documents to which the appellant want to file are totally different for the signature of sale deed dated 6.11.86 which is subject matter of the suit."

4. The only reason, which has been attributed in the application filed under Order 41 Rule 27 dated 21.08.2018 was lack of knowledge of the documents, which were lying within their custody and in their residence. Court cannot be oblivious of the fact that Suit was filed as back as in July 2003, the theory of discovering the document by filing Order 41 Rule 27 was raised for first time only on 20.08.2018, after a lapse of 14 years of institution of Suit. The Appellate Court has rejected the application by the impugned order dated 30.10.2018, which is under challenge before this Court.

5. Learned counsel for the petitioner has raised two fold arguments:

(i) That the reason, which has been assigned in the impugned order being the conclusion of the proceedings upto the Hon'ble Apex Court against the closure of his opportunity to lead evidence upto the Apex Court . Learned counsel submits that the same has not to be borrowed for the purposes while considering the application under Order 41 Rule 27.

(ii) Secondly, the application under Order 41 Rule 27 has to be dealt with independently and that is why the law has provided an independent provisions i.e. Order 41 Rule 27 to be made applicable before the appellate proceedings.

6. In support of his contention the learned counsel for the petitioner has placed

reliance on a judgment ' A. Andisamy Chettiar vs. A . Subburaj Chettiar' reported in (2015) 17 Supreme Court Cases 713. Paragraph-16 of the said judgment is quoted hereunder:

"16. In Union of India v. Ibrahim Uddin and another[4], this Court has held as under: -

"49. An application under Order 41 Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find out whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced."

7. Rather paragraph-16 of the said judgment has in turn placed reliance on the judgment Union of India vs. Ibrahim Uddin' reported in 2010 (8) SCC 148. The judgment, which has been placed reliance by the petitioner is based on a ratio that in a appellate proceedings, wherever there happens to be an application under Order 41 Rule 27, the same has to be considered at the time of hearing of the Appeal on its merit because the necessity of Order 41 Rule 27 is not to enable a party to file a document but rather the consideration for the Appellate Court whether at all the document would be necessary and relevant for decision making process in Appeal. That is why provision says its not an entitlement of a party to adduce additional evidence, that is why it also creates a bar in filing of additional evidence, so as to draw a logical conclusion as to whether at all the documents, which are sought to be adduced by way of evidence was relevant for adjudicating the Appeal or not.

8. The ratio as propounded in the judgment 'Union of India vs. Ibrahim Uddin' having gone through the two judgments, this Court is of the view that the judgments relied upon by the petitioner cannot be made applicable in the given set of circumstances of the present case, the reason being, those were the cases where the Court has to deal with the propriety of the application under Order 41 Rule 27 to be considered at the final stage of hearing, where Court felt necessary to consider the aspect as to whether document is required for deciding the Appeal and the basic intention as laid down by the said judgment that the proceedings may not be installed and the relevance of the document has to be considered at the final stage. Reference is made to the paragraph-49 of the judgment, i.e. 'Union of India vs. Ibrahim Uddin (Supra).

9. Having gone through the two judgments in these two judgments it was not dealing with a situation, which is involved in the present case where there was

already an order of rejection and a closure of an opportunity of the appellant/petitioner herein to lead the evidence, by invoking Order 41 Rule 27 before the Appellate Court, if the permission as sought for to lead an evidence by invoking Order 41 Rule 27 is permitted to be carried it will have an effect of sitting over the closure of opportunity to lead evidence, which otherwise have attained finality upto the Hon'ble Apex Court and it will be leading to the beginning of a new chapter altogether with regards to the issues, which has already closed. There is another aspect of the matter if we see propriety of the provisions contained under Order 41 Rule 27, as a matter of fact, the provisions contained therein provides that the parties to the Appeal may not be entitled to produce additional evidence rather the said provisions started with the non-obstinate clause and the latitude granted for adducing evidence it should be within the purview of the permissible conditions if are fulfilled. Fulfillment of those conditions would be depending upon the pleadings, which has been raised in the application.

10. Hon'ble Apex Court in the judgment rendered in A. Andisamy Chettiar vs. A. Subburaj Chettiar reported in (2015) 7 Supreme Court Cases 713 held as under:

"12. From the opening words of sub-rule (1) of Rule 27, quoted above, it is clear that the parties are not entitled to produce additional evidence whether oral or documentary in the appellate court, but for the three situations mentioned above. The parties are not allowed to fill the lacunae at the appellate stage. It is against the spirit of the Code to allow a party to adduce additional evidence without fulfillment of either of the three conditions mentioned in Rule 27. In the case at hand, no application was moved before the trial court seeking scientific examination of the document (Ex.A-4), nor can it be said that the plaintiff with due diligence could not have moved such an application to get proved the documents relied upon by him. Now it is to be seen whether the third condition, i.e. one contained in clause (b) of sub-rule (1) of Rule 27 is fulfilled or not."

11. In the present case, if we go through the pleading of the application as preferred by the present petitioner under Order 41 Rule 27 it does not satisfy the condition as contemplated under Order 41 Rule 27 because the fact, which has been reflected is that the document, which was sought to be brought by way of invocation of Order 41 Rule 27, were very much available in their own residence and there is no plea to the effect that despite of exercise of due diligence the documents could not be placed before the learned Trial Court or was not in their knowledge. Hence, this Court is of the view that there is no error committed by the Trial Court in the impugned order dated 30.10.2018. This Writ Petition fails and is dismissed.

12. There will be no order as to cost.