

(1985) 09 AHC CK 0029

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 1044 of 1985

Shasi Nath Pathak

APPELLANT

Vs

Smt. Phool Mani Devi and Others

RESPONDENT

Date of Decision : 03-09-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 42 Rule 1
Constitution of India, 1950 — Article 226

Citation : (1985) AWC 841

Hon'ble Judges : S.D. Agarwala, J

Bench : Single Bench

Advocate : Rajendra Kuamr, for the Appellant; Ajai Kumar Misra, for the Respondent

Final Decision : Dismissed

Judgement

S.D. Agarwala, J.—This is a petition under Article 226 of the Constitution of India. The dispute relates to mutation proceedings in respect of house No. D-36/229, 230 and 233 situate in Mohalla August Hunda, Varanasi. Originally house No. 36/229, 36/230 were entered in the name of one Bindeshri Pathak in the municipal records. House No. 36/233 was recorded in the name of deity. Bindeshri Pathak died. Respondent No. 1 applied for mutation on her name in respect of the aforesaid properties on the ground that she is the sole heir of the deceased on the basis of a will dated 7-6-1982. The Petitioner contested this proceeding and his case was that in fact, he is the only legal heir of the deceased.

2. The Nagar Mahapalika, Varanasi allowed the application of the Respondent No. 1. Aggrieved, the Petitioner filed an appeal before the Judge Small Cause Court, Varanasi. The Judge Small Causes Court, Varanasi allowed the appeal and set aside the order of the Nagar Mahapalika. Against the order of the Judge Small Causes Court a second appeal was filed by the Respondent No. 1 in the Court of District Judge, Varanasi being mutation second appeal No. 60 of 1983. During the pendency of the appeal, the Appellant Smt. Phoolmani Devi moved on

application under Order 41 Rule 27 of the CPC for admitting certain papers on the ground that the Appellant is a widow and could not file certain papers in the lower appellate court. It was also submitted that certain papers in the custody of the Appellant's son-in-law, who mostly resided out of station, had been misplaced and the said papers were traced out and were being filed as additional evidence. The Additional District Judge, Varanasi before whom the appeal is pending, allowed the application under Order 41 Rule 27 CPC by an order dated 29-11-1984. This order dated 29-11-1984 has been impugned in the present petition.

3. I have heard (he Learned Counsel for the parties. Learned Counsel for the Petitioner has contended that it was not open to the appellate court at the stage of second appeal to permit additional evidence to be taken. It has been further urged that no reasons have been given for accepting the documents sought to be produced as additional evidence and as such the order is vitiated.

4. In so far as the first contention of the Learned Counsel is concerned, under Order 41 Rule 27 Code of Civil Procedure, the appellate court is entitled to allow additional evidence or document to be produced in the circumstances mentioned in the said Rule. Order 41-A has been added by the Allahabad High Court as additional Order in the Code of Civil Procedure. Order 41-A Rule 1 provides as follows:

1. Extent:- The rules contained in this Order shall apply to appeals in the High Court notwithstanding anything to the contrary contained in Order XII or any other Order and the rules contained in Order XLI shall be deemed to have been modified or repealed in their application to such appeals to the extent of their inconsistency or repugnancy or as indicated herein.

The above mentioned rule of Order 41-A clearly contemplates that the rules contained in Order 41 shall be deemed to have been modified or repealed in their application to second appeals to the extent of their inconsistency or repugnancy or as indicated in Order 41-A but otherwise the rules of Order 41 would apply in the case of second appeals also.

5. Order 42 Rule 1 of the CPC lays down that the rules of Order 41 shall apply, so far as may be, to appeals filed from appellate decree. On a reading of Order 41-A Rule 1 of the CPC added by this Court and Order 42 Rule 1, it is clear that the Rules contained in Order 41 would be applicable to second appeals also. In the circumstances it cannot be said that the second appellate court: has no jurisdiction to entertain the application under Order 41 Rule 27 of the CPC and to pass orders thereon. The first submission of the Learned Counsel for the Petitioner, consequently, in my opinion, is not substantiated.

6. In regard to the second submission of the Learned Counsel, the court has considered the circumstances why it has permitted the additional evidence to be taken. The explanation given by the Respondent No. 1 for filing the additional evidence had been accepted. It has been further stated that the affidavits which

have been filed before the Nagar Mahapalika had been discarded simply on technical grounds and as such it was necessary in the interest of justice to permit fresh affidavits of the attesting witnesses to be filed. In my opinion, the judgment contains reasons for admitting additional evidence. The order cannot be challenged on the ground as alleged by the Learned Counsel for the Petitioner.

7. By the impugned order the court has permitted the Petitioner also to file documents in rebuttal. In the circumstances no prejudice has been caused to the Petitioner by the order dated 29th November, 1984. In fact the court rightly allowed the application as it is in the interest of justice that both the parties be permitted to produce evidence on merits in order that the court may come to a correct conclusion. No interference, therefore, is called for under Article 226 of the Constitution of India on this ground also.

8. In the result, I do not find any merit in this petition. It is accordingly dismissed but in the circumstances of the case, the parties are directed to bear their own costs. The interim order dated 17-1-1985 is hereby vacated.