

(2016) 11 AHC CK 0053

In the Allahabad High Court

Case No : Writ Petition No. 24829 (MS) of 2016.

**Shiv Karan and Others - Petitioners @HASH Special Judge E.C. Act, Lko
and another - Opposite Parties**

Date of Decision : 15-11-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Section 107(1)(d)
Constitution of India, 1950 — Article 227

Citation : (2016) 11 ADJ 65 : (2017) 1 AILLJ 265 : (2016) 6 AllWC 6441 :
(2017) 121 ALR 685 : (2017) 1 ARC 928 : (2017) 1 ICC 612 : (2017) 134 RD 589

Hon'ble Judges : Dr. Devendra Kumar Arora, J.

Bench : Single Bench

Final Decision : Dismissed

Judgement

Dr. Devendra Kumar Arora, J. - Heard learned Counsel for the petitioner and peruse the record of the writ petition.

2. This writ petition under Article 227 of the Constitution arises out of the order dated 15.9.2016 passed by Special Judge, E.C. Act in Civil Appeal No. 83 of 2009; Sant Bux v. Bindeshwari, whereby the application moved by the petitioners under Order 41, Rule 27 of the Code of Civil Procedure for receiving additional evidence in the appeal has been rejected.

3. A perusal of the record reveals that petitioners' father, namely, Sant Bux had preferred a suit for permanent injunction against the opposite party no.2 in the Court of Munsif (Hawali), Lucknow bearing Regular Suit No. 253 of 1988. Opposite Party No.2/Smt. Bindeshwari, wife of Ram Khelawan also filed a suit for possession against Sant Bux, which was registered as Regular Suit No. 294 of 1997. Both the suits were clubbed together and decided by II Additional Civil Judge (Junior Division), Lucknow, by the judgment and order dated 26.3.2009 whereby the suit filed by the father of the petitioners was dismissed and the suit filed by opposite party no.2 was decreed. Aggrieved by the judgment and order dated 26.3.2009, petitioners' father filed two Civil Appeals in the Court of District Judge bearing number Civil Appeal No. 82 of 2009 against the judgment

and decree passed in R.S. No. 294 of 1997 and other as Civil Appeal No. 832 of 2009 against the judgment and decree passed in R.S. No. 253 of 1988.

4. In the aforesaid appeal, petitioners moved an application on 9.7.2015 under Order XXXI Rule 27 of the Code of Civil Procedure for receiving additional evidence with a view to adduce oral evidence in the appeals and to produce at least a marginal witness of the Will dated 28.4.1985.

5. As a general rule, the Appellate Court should not admit additional evidence for the purpose of the disposal of an appeal, and the parties are not entitled to produce additional evidence, whether oral or documentary in the appellate court. The Code, however under this rule empowers an appellate court to take additional evidence subject to certain conditions. The power is discretionary and must be exercised on sound judicial principles and in the interest of justice. Additional evidence does not mean evidence over and above the evidence led by the party in the lower court. The basic principles for the admission of the additional evidence are;

(i) The party seeking the admission of additional evidence should be able to establish that such additional evidence could not have been adduced at the first instance with the best efforts;

(ii) The party affected by the admission of additional evidence should have an opportunity to rebut it;

(iii) The additional evidence must be relevant for the determination of the issue.

6. For entertaining an application for the production of additional evidence in an appeal, any one or more of the conditions as enumerated in Rule 27 of the Code have to be fulfilled. Under the scheme of Code, whether oral or documentary, it is the trial court before whom parties are required to adduce their evidence. But in three exceptional circumstances, additional evidence can be adduced before the appellate court, as provided under Section 107(1)(d) read with Rule 27 of the Code of Civil Procedure. Order 41, Rule 27 reads as follows:-

"27. Production of additional evidence in Appellate Court. - (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 notwithstanding the exercise of due diligence, such evidence was not 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. Having considered the material on record and keeping in mind the settled position of law on the issue, I am of considered opinion that a party cannot be allowed to fill the lacunae in their evidence at the appellate stage. It is against the spirit of the Code to allow a party to adduce additional evidence without fulfilment of either of the three conditions mentioned in Rule 27. In *R. Mohan Reddy v. Net Work Inc.*, (2007) 14 SCC 257 the Apex Court has held that appellate court should not pass an order so as to patch up the weakness of the evidence of the unsuccessful party before the trial court, but it will be different if the court itself requires the evidence to do justice between the parties. The ability to pronounce judgment is to be understood as the ability to pronounce judgment satisfactorily to the mind of the court. But mere difficulty is not sufficient to issue such direction to the appellate court.

8. In the case at hand, undisputedly, no application was moved before the trial court seeking examination of marginal witness nor can it be said that the plaintiff with due diligence could not have moved such an application to get examine the marginal witnesses.

9. The court below rightly observed after relying upon the law as laid down in *Ramchandra v. Brijlal*; 2008 (105) RD 219 that the suit was filed in the year 1997 whereas the appeal was filed against the order of the Trial Court in the year 2009, but no application at any stage was moved and now after considerable long lapse of time, the said application has been moved, which is not justified as giving an opportunity at this stage would mean to allow for filling the lacunae.

10. For the reasons aforesaid, I do not find any perversity or illegality in the impugned order. Accordingly, the writ petition is dismissed at the admission itself. However, it is provided that as the Appeal is pending since the year 2009, the Appellate Court shall make an earnest endeavour to decide the appeals preferred by the petitioners expeditiously, say within six months, if possible.