

(2012) 04 GAU CK 0004
In the Gauhati High Court
Case No : C.R.P. (C) No. 87 of 2011

Shri Ranjit Kumar Sarkar and Others APPELLANT
Vs
Shri Hiralal Sarkar and Others RESPONDENT

Date of Decision : 04-04-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 17, Order 18 Rule 18, Order 41 Rule 25, 151
Criminal Procedure Code, 1973 (CrPC) — Section 144
Limitation Act, 1963 — Section 27

Citation : (2012) 2 GLD 842

Hon'ble Judges : Utpalendu Bikas Saha, J

Bench : Single Bench

Advocate : D. Chakraborty, for the Appellant; S.M. Chakraborty and Ms. S. Bhattacharjee, for the Respondent

Final Decision : Dismissed

Judgement

U.B. Saha, J.—In this revision petition, challenge is to the order dated 26th August, 2011 in Title Suit No. 01/1991 passed by the learned Civil Judge, (Jr. Div.) Sabroom, South Tripura wherein the learned Civil Judge had given opportunity to the DW 2 to depose on the additional issue framed and rejected the petition filed by the petitioners, under Order XVIII, Rule 17 of the CPC (for short, "Code") praying for rejecting the examination-in-chief of DW 2 as additional evidence. Heard Mr. D Chakraborty, Learned Counsel for the plaintiff-petitioners as well as Mr. S.M. Chakraborty, learned senior counsel assisted by Mr. S. Bhattacharjee, Learned Counsel appearing for the defendant-respondents.

2. The facts relevant for disposal of the instant revision petition are as follows :--

The predecessors of the plaintiff-petitioners, Lt. Adhir Ranjan Sarkar instituted the above referred Title Suit in the Court of Munsiff, re-designated as Civil Judge (Sr. Division) Sabroom, South Tripura (hereinafter referred to as "Trial Court") as plaintiff against the defendant-respondents for declaration of right, title and

interest over the suit land measuring 0.51 acres of the Mouja Doulburi under Khatian No. 413, (Jer Khatian No. 409, Plot No. 1239) more particularly, described in the schedule of the plaint which was owned by and was in the possession of the aforesaid predecessor of the plaintiff-petitioners. The predecessor of the plaintiff-petitioners" inherited 50%, (0.25 1/2 acre) of the suit land as a legal heir of his father late Hriday Krishna Sarkar and the remaining 50% (0.25 1/2 acre) of the suit land was received by him from his full blood brother Sri Himangshu Bikash Sarkar under a registered deed No. 503 dated 05.03.1973. the predecessor of the plaintiff-petitioners had been possessing the suit land by producing two crops both Aman and Aoush Paddy, without any disturbances from any corner. Since 1986, the defendants (respondents herein) were disturbing the plaintiff in his peaceful possession of the suit land. The matter was settled in 1987 at the intervention of the neighbours but the defendant-respondents in the month of January and February, 1991 again tried to dispossess the predecessor of the plaintiff- petitioners from the suit land and then the predecessor of the plaintiff-petitioners filed a case in the Court of learned Sub- Divisional Judicial Magistrate which was registered as NGR Case No. 2/1991 u/s 144, Cr PC and in that case the learned Magistrate passed an order on 25.02.1991 restraining both the parties. Since the defendant-respondents denied the title of the predecessor of the plaintiff-petitioner and tried to dispossess the predecessor of the plaintiff-petitioner from the suit land, "the predecessor of the plaintiff-petitioner filed the above referred suit praying for a decree declaring his title in the suit land and of permanent injunction against the defendants restraining them from disturbing the plaintiff in his peaceful possession of the suit land and for cost of the suit.

3. The defendant-respondents contested the suit by way of filing written statement jointly wherein they have stated, inter alia, that they (defendants) have possessed the suit land continuously since 1st January, 1975 AD after ousting the plaintiff from the suit land. They have possessed the suit land openly, adversely and independently by constructing a kitchen measuring 7X5 cubits and other structures for latrine and urinal. The defendant-respondent No. 4, namely, Narayan Sarkar has been using the said kitchen, latrine and urinal which are standing on the eastern part of the suit land. The defendant-respondents have planted and grown coconut, bettle nut trees and banana, pine apple plant on the part of the suit land and have been enjoying the fruits of those trees jointly. They have been utilizing the vacant space of the suit land by growing vegetables, potato as winter crops and growing paddy seedling in about 3 kanis of suit land. They are also growing Aush paddy in 1 kani of the suit land and have been enjoying usufructs thereof within the knowledge of the predecessor of the plaintiff-petitioners and other local people. According to the respondent-defendants, the right, title and interest of the plaintiff on the suit land was extinguished u/s 27 of the Limitation Act since the predecessor of the plaintiff-petitioners was forcibly ousted by the defendant-respondent and thus they have acquired the right, title and interest of the suit land by such continuous adverse

possession for more than 12 years.

4. Upon consideration of the respective pleadings and submission of the Learned Counsel for the parties, the learned trial Court framed issues and examined two PWs and four DWs and recorded their evidence on oath. The predecessor of the plaintiff- petitioners, who instituted the suit, produced some documents which were marked as Exhibit P5. The defendant-respondents did not submit any document in support of their case. After perusal of the evidence of the PWs and exhibited documents and on hearing the Learned Counsel for the parties the learned trial Court dismissed the suit filed by the predecessor of the plaintiff-petitioners.

5. Being aggrieved and dissatisfied with the judgment and decree of the trial Court, the predecessor of the plaintiff-petitioners preferred Title Appeal No. 09/1993 before the learned District Judge, south Tripura, Udaipur and on receipt of the said appeal, the same was transferred to the learned Addl. District Judge, South Tripura, Udaipur who in his turn vide judgment and order dated 25.09.1999 remitted the suit to the trial Court with a direction that the trial judge would frame additional issue on the pleadings of the parties "Whether the defendants have been possessing the land adversely since 1975 (sic) after ousting the plaintiff there from and rehear the case afresh on all the issues already framed and on the additional issue after giving an opportunity to the parties to adduce and produce evidence, and decide the case afresh in accordance with law, without being biased by an observation made by it.

6. Against the order of remand the respondents preferred RSA No. 05 of 2000 before the Hon''ble High Court and the Hon''ble High Court dismissed the Second Appeal by a judgment dated 28.07.2010 affirming the order of. remand passed by the learned Addl. District Judge.

7. During the pendency of the Second appeal, the original plaintiff, i.e. the predecessor of the plaintiff-petitioners herein, died and the present petitioners were substituted as plaintiffs". Before dismissal of the original suit by the trial Court the original plaintiff, i.e. the predecessor of the plaintiff-petitioners herein, adduced two witnesses, namely, Sri Adhir Ranjan Sarkar as PW 1 and Sri Jogendra Kumar Roy as PW 2 and the respondent side also adduced four witnesses, namely, Sri Narayan Ch. Sarkar, defendant- respondent No. 4 as DW 1, Sri Hiralal Sarkar, defendant- respondent No. 1 as DW 2, Sri Tarini Das as DW 3 and Sri Jogendra Das as DW 4. On examination and cross-examination of all the witnesses, the evidence of both parties was closed and on the basis of that evidence learned trial Court dismissed the suit.

8. After remand of the suit by the first appellate Court, the petitioner adduced two witnesses in support the additional issue framed by the first appellate Court namely, Sri Ranjit Sarkar, plaintiff-petitioner No. 1 herein as PW 3 and Sri Paresh Ch. Roy Choudhury as PW 4 and both the aforesaid witnesses were also cross examined by the respondents and the evidence of the petitioners was closed.

9. On closure of the evidence of the plaintiff's side, the defendant-respondents filed examination-in-chief by way of affidavit of two witnesses in support of the additional issue framed by the first appellate Court namely, Sri Ananta Das and Sri Babul Das as DW 5 and DW 6, respectively. While the plaintiff-petitioners side was ready to cross-examine DW 5 and DW 6, DW 2 i.e. defendant No. 1 Sri Hiralal Sarkar filed further examination-in-chief by way of an additional affidavit and the plaintiff-petitioners filed an objection before the trial Court on 08.08.2011 against the filing of the said additional affidavit, on the ground that he was examined in chief in the original suit on 06.07.1993 and also had been cross-examined by the plaintiff-petitioners side and his evidence was closed. Thus, he has no right to file the subsequent examination-in-chief as the same is beyond the scope of Order XVIII, Rule 17 of Code. In the said objection, it is stated, inter alia, that after remand of the suit while defendants filed Additional written statement that was rejected by the trial Court on 10.01.2011 and the said fact has been brought by the defendant No. 1 in the form of additional affidavit and as such the defendant No. 1 tried to make out a case indirectly which cannot be done directly due to the rejection of the prayer for filing of the additional written statement. The aforesaid objection of the plaintiff-petitioners was heard by the learned trial Court on 26.08.2011 and ultimately rejected it by way of allowing the respondent-defendant No. 1 to adduce further evidence.

10. Hence, the instant revision petition.

11. Mr. Chakraborty, Learned Counsel for the petitioner while urging for setting aside the order impugned would contend that the trial Court is not empowered to entertain the evidence in examination-in-chief as additional evidence filed by the DW 2, i.e. defendant No. 1 without exhaustion of the procedure laid down under Order XVIII, Rule 17 of the Code. He further submits that a witness can be recalled either suo moto by the Court or by an application. In the instant case, neither the trial Court recalled the DW 2 suo moto nor has the defendant No. 1, i.e. DW 2 filed any application for adducing additional evidence. Thus, acceptance of the additional affidavit is beyond the jurisdiction of the trial Court. In support of his aforesaid contention, he placed reliance on two decisions of the Punjab and Haryana High Court in Kulwant Singh Vs. Makhan Singh, and Surinder Kaur Vs. Karanbir Singh, , respectively. He again contended that the appellate Court has no power to direct the trial Court to accept the additional evidence of the witnesses produced by the parties beyond the prescription made in the provisions of the Code.

12. Mr. S.M. Chakraborty, learned senior counsel for the respondents while resisting the submission of the Learned Counsel for the petitioner contended that Order XVIII, Rule 17 is the power of original Court but here the trial Court acted on the basis of the "direction of the appellate Court as the appellate Court remitted the suit, directing the trial Court to frame additional issue as to "Whether the defendants have been possessing the suit land adversely since 1995 AD after ousting the plaintiffs there from", and to rehear the case afresh on

all the issue already framed and on the additional issue after giving opportunity to the parties to adduce and produce evidence and decide the case afresh in accordance with law, without being biased by any observation made by the appellate Court and the said order of the appellate Court was never challenged by the plaintiff-petitioner at any point of time. Thus, parties are bound by the decision of the appellate Court.

13. He also contended that when the appellate Court allowed the parties to adduce evidence on the additional issue, no further application either by the plaintiff or by the defendant is required for recalling a witness. He also submits that the trial Court had no option except to comply with the appellate Court's order and in this case the order impugned is in conformity with the order of the appellate Court. Thus, learned trial Court did not commit any wrong accepting the evidence in examination-in-chief as additional evidence, particularly, to depose on the additional issue framed. He finally contended that when the appellate Court in its order, while allowing the appeal, directed the trial Court to provide opportunity to the parties for adducing and producing evidence on additional issue and the said order was passed as on earlier occasion neither of the parties got opportunity to adduce any evidence on the additional "issue framed subsequently.

14. In *Kulwant Singh (supra)* learned Single Judge of Punjab and Haryana High Court, while considering the order of the Addl. Sr. Sub Judge, Ajnala dated 5th of February, 1992 whereby an application filed on behalf of the plaintiff under Order XVIII, Rule 17 and Section 151 of the Code Civil Procedure seeking permission of the Court to lead additional evidence for the purpose of producing handwriting expert was dismissed, noted in that case that, "by no stretch of imagination it can be reasonably inferred that the plaintiff was unaware of his duty to produce Hand-writing expert to prove the due execution of the pronote and the receipt in question when, he initially led evidence in rebuttal. Nor there is any allegation that he could not produce such evidence at the relevant time. The plaintiff thus cannot be permitted to produce Handwriting expert at this late stage" and ultimately dismissed the application filed by plaintiff-petitioner, According to this Court, the said case has no application in the instant case as in that case the suit was not remitted under order XLI rule 25 of the Code and there was no direction to the trial Court either to frame additional issue or to rehear the parties providing them opportunity to adduce fresh evidence on the additional issue.

15. In *Smt. Surinder Kuar (supra)*, as relied upon by Mr. Mr. Chakraborty, an application was filed by the defendant, Surinder Kaur with an averment that since the land allegedly owned by the plaintiff had been acquired, and the plaintiff had sold more than his share after the acquisition and the aforesaid fact was not put to the plaintiff during his cross-examination and similarly PW 3 Sant pal Singh also could not be cross- examined with regard to the aforesaid fact, a request was made to allow further cross-examination of the aforesaid two witnesses and the said application of the defendant was contested by the plaintiff

therein, stating inter alia, that the defendant was trying to prolong the case and on an earlier litigation the entire controversy between the parties have been decided and thus the defendant was not entitled to raise any point beyond the scope of the earlier order dated February 18, 1997 "passed by the High Court. It was also stated by the plaintiff that PW 3 had been duly cross-examined, therefore, no further right of cross-examination could be afforded to the defendant. The trial Court after considering the entire matter has dismissed the aforesaid application filed by the defendant No. 1 and being aggrieved by such an order defendant No. 1 has approached the High Court. The High Court considering the provisions of Order XVIII, Rule 17 of the Code held that from the perusal of the aforesaid provision it is apparent that it is only the requirement of the Court that it may at any stage of the suit recall any witness who has been examined earlier and put to him such questions at it may deem fit. The said provision does not permit a party to re-examine any witness to fill the lacuna in the case. Such a provision is merely an enabling provision for the convenience of the Court, and ultimately dismissed the application filed by the defendant therein.

16. The fact of the case in hand is totally different from the case of Smt, Surinder Kaur (supra). In the instant case, it is the trial Court which has remitted the suit directing the appellate Court to frame additional issue as suggested by it and also to provide opportunity to the parties for adducing and producing evidence in support of their case, particularly on the additional issue. Thus, neither of the parties was aware regarding the said additional issue prior to the decision of the appellate Court and thus there right to adduce further/additional evidence accrued only after the remittance of the suit and not prior to that. Hence, the aforesaid decision in the case of Smt. Surinder Kaur also has no direct bearing in the instant case.

17. Before dealing with the submission of the Learned Counsel for the parties, it would be proper to reproduce the provisions of Order XVIII, Rule 17 of the Code, as question arises for decision, whether after direction of the appellate Court, to provide opportunity to the parties to adduce fresh evidence on the additional issue, Order XVIII, Rule 17 has any application or not? Accordingly, the same is reproduced herein below.

ORDER XVIII

HEARING OF THE SUIT AND EXAMINATION OF WITNESSES

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R. 17. Court may recall and examine witness.--The Court may at any stage of a suit recall any witness who has been examined and may (subject to law of evidence for the time being in force) put such question to him as the Court thinks fit.

18. It appears from the aforesaid provision of Order XVIII, Rule 47 of the Code that the legislature has provided jurisdiction to the Court for recalling and

examining a witness at any stage either suo moto or on an application filed by the parties when a witness has been examined earlier subject to when the Court thinks that his examination is necessary for the interest of justice. But the aforesaid provision has no direct bearing in a case where the appellate Court, in exercise of its jurisdiction under Order XLI, Rule 25, has given a direction to the trial Court, *inter alia*, to frame additional issue and to rehear the case afresh providing opportunity to the parties to adduce evidence on the additional issue as may be framed by the trial Court. For better appreciation it would be proper to reproduce Rule 25 of Order XLI of the Code. Accordingly, the same is reproduced herein below :--

ORDER XLI

APPEALS FROM ORIGINAL DECREES

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R. 25. Where the appellate Court may frame issues and refer them for trial to Court whose decree appealed from.--Where the Court from whose decree the appeal is preferred has omitted to frame, or try any issue, or to determine any question of fact, the merits, the Appellate Court may, if "necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;

And such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor [within such time as may be fixed by the Appellate Court or extended by it from time to time].

19. When additional issue is proposed by the appellate Court and the suit is remitted to the trial Court in exercise of its power under Order XLI, Rule 25, the parties have to be given opportunity of producing evidence and in the instant case admittedly the appellate Court while remitting the suit directed the trial Court to frame additional issue and also to rehear the case afresh on all the issues already framed and on the additional issue after giving opportunity to the parties to adduce and produce their respective evidence and decide the case afresh in accordance with law and the said order of the appellate Court has not been challenged by either of the parties at any point of time and thus became final and due to finality of the aforesaid order of the appellate authority, the defendants are entitled to adduce additional evidence. It is by this time settled that additional evidence can only be permitted if parties satisfy the Court that in spite of due diligence evidence suo moto be produced was not within its knowledge or if it was within its knowledge but the same could not be produced with due diligence. In the instant Case, while DW 2, i.e. Defendant No. 1 was examined and cross-examined and the evidence of the defendants was closed, at that time the additional issue was not before the trial Court. Thus, the question of adducing evidence before the remittance of the suit by the appellate Court on the

additional issue does not arise at all. On framing of additional issue when the parties are entitled to adduce evidence afresh in view of the order of the appellate Court, the trial Court cannot deprive such a party from adducing evidence in the name of exercising its power under Order XVIII, Rule 17 of the Code, as raised by the petitioner plaintiff, in view of the direction of the appellate Court; as such direction is binding on the trial Court, more so, the Court is established to render substantial justice to the justice seeker, not to defeat justice on mere technical grounds taking aid of procedural law.

20. In the instant case, the DW 2 by way of submitting examination-in-chief only tried to adduce evidence on additional issue as he is entitled to in view of the order of the appellate Court. Thus, the trial Court did not commit any wrong while providing opportunity to DW 2 to depose on the additional issue framed and rejecting the objection of the plaintiff-petitioner vide his order dated 26.08.2011 as impugned herein.

21. Had the trial Court not allowed DW 2 to adduce evidence then he would have committed injustice to the defendant as he did not get opportunity to adduce evidence on earlier occasion while he was examined to depose on the issue subsequently framed by the appellate Court as additional issue. In view of the above, the learned trial Court did not commit any error allowing the examination-in-chief of the DW 2. In the result, the revision petition is dismissed being devoid of merit.