

(2019) 08 JH CK 0039

In the Jharkhand High Court

Case No : Writ Petition (c) No. 1868, 2868 Of 2019

Shyamapada Kumbhkar And Ors

APPELLANT

Vs

Parmeshwar Kumbhkar And Ors

RESPONDENT

Date of Decision : 22-08-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 41 Rule 27, Order 41 Order 41 Rule 27(1)(a),
Order 41 Rule 27(1)(aa), Rule 27(1)(b)
Constitution Of India, 1950 — Article 227

Citation : (2019) 08 JH CK 0039

Hon'ble Judges : Sujit Narayan Prasad, J

Bench : Single Bench

Advocate : P.K. Mukhopadhyay, Sudhir Kumar Sharma

Final Decision : Dismissed

Judgement

1. Both the writ petitions pertain to an order passed under Order XLI Rule 27 of the Code of Civil Procedure in Civil Appeal No. 101 of 2015 and as such both have been directed to be heard together and accordingly heard together and are being disposed of by this common order.

2. In W.P.(C) No. 1868 of 2019, the order dated 19.03.2019 has been assailed by which the petition dated 06.03.2019 filed by the appellant/judgment debtor under Order XLI Rule 27 of the Code of Civil Procedure has been disposed of with an observation to take care of the additional document (Sale Deed No. 9298 dated 07.08.1953) at the time of final argument.

3. In W.P.(C) No. 2868 of 2019, the order dated 25.05.2019 passed in the aforesaid appeal has been assailed by which the Sale Deed No. 352 dated 10.02.1928 and Sale Deed No. 9298 dated 07.08.1953 have been marked as Ext. A and Ext. A/1.

4. The brief facts of the case is that a declaratory suit has been filed being Title Suit No. 262 of 2011 before the Civil Judge, Senior Division-II, Dhanbad in which

the decree has been passed in favour of the petitioner and against the defendant in terms of the judgment dated 16.12.2015 by which it has been declared that the defendant/respondent has got no right, title and interest upon the same. The defendant/judgment debtor, being aggrieved with the said judgment, has preferred an appeal being Civil Appeal No. 101 of 2015. The judgment debtor/defendant/respondent herein has filed a petition on 01.03.2017 under Order XLI Rule 27 of the Code of Civil Procedure for adducing the Sale Deed No. 352 dated 10.02.1928 by way of additional evidence but was rejected by the appellate court vide order dated 08.06.2017 passed in Title Appeal No. 101 of 2015, being aggrieved with the said order, the respondent/judgment debtor has preferred a writ petition before this Court being W.P.(C) No. 5040 of 2017 which was dismissed vide order dated 01.10.2018. The respondent/judgment debtor thereafter has again filed a petition on 06.03.2019 under Order XLI Rule 27 of the Code of Civil Procedure for adducing Sale Deed of the year 1928 as also the Sale Deed of the year 1953 by way of additional evidence which has been objected by the respondent/deed holder by filing rejoinder on 15.03.2019 but the appellate court, after hearing the parties and considering the materials available on record, has disposed of the petition dated 06.03.2019 vide order dated 19.03.2019 with an observation that if the court will require the additional document (Sale Deed) to be looked into, the same shall be taken care of at the time of final argument of the appeal, the said order is the subject matter of W.P. (C) No. 1868 of 2019. The judgment debtor/respondent has filed another petition on 22.05.2019 under Order XLI Rule 27(1)(b) of the Code of Civil Procedure for allowing the aforesaid two Sale Deeds dated 10.02.1928 and 07.08.1953 in evidence marking the same as exhibits in Civil Appeal No. 101 of 2015 which was allowed vide order dated 25.05.2019 by taking the said documents by way of marking as exhibits which has been assailed in W.P.(C) No. 2868 of 2019.

5. The petitioners have raised the issue that when the appellate court on one occasion has passed an order on 19.03.2019 to look into the sale deed at the time of final argument, there was no occasion to again pass an order on 25.05.2019 by marking the same as exhibit that too without assigning any reason for doing so as has been laid down by the Hon'ble Supreme Court in the judgment rendered in the case of Union of India Vs. Ibrahim Uddin and Another reported in (2012) 8 SCC 148.

6. The respondent has appeared through counsel namely Mr. Sudhir Kumar Sharma who has submitted that there is no infirmity in the impugned order since both the documents are necessary for proper adjudication of the issue and that is the reason the appellate court after taking consideration the implication of the provision of Order XLI Rule 27 of the Code of Civil Procedure and considering further the fact that these two documents are necessary for proper adjudication of the issue, has rightly allowed the petition by passing an order on 25.05.2019. He, by refuting the argument advanced by learned counsel for the petitioner that before passing an order for adducing additional evidence in exercise of power conferred under Order XLI Rule 27 of the Code of Civil Procedure the reason is to

be assigned, has submitted that the trial court came with the specific reason while passing the order which would be evident from the impugned order itself wherein it has been recorded that the appellate court is of the opinion that both the above mentioned sale deeds are necessary for just decision of the case, the opinion having been expressed by the appellate court, does suggest that the trial court has appreciated the entire aspect of the matter which led the appellate court to come to the finding by meting out opinion about the relevance and necessity of the documents which is for proper adjudication of the issues.

7. Heard learned counsel for the parties and on appreciation of their rival submissions it would be evident that some facts which needs to be recorded is that the appellant being the judgment debtor has filed a petition on 01.03.2017 under Order XLI Rule 27 which was rejected by the appellate court vide order dated 08.06.2017 rejecting the prayer of the petitioner for adducing the sale deed dated 10.02.1928 on record by way of additional evidence which, having been assailed, has been declared to be un-interfered with by this Court in exercise of power conferred under Article 227 of the Constitution of India by order passed on 01.10.2018 in W.P.(C) No. 5040 of 2017.

Thereafter the petitioners have again filed a petition on 06.03.2019 again seeking prayer for adducing additional evidence by invoking the jurisdiction of the appellate court as conferred under Order XLI Rule 27 of the Code of Civil Procedure wherein the appellate court has disposed of the petition on 19.03.2019 by not marking the said documents rather, the petition was disposed of with an observation that if the court will require the additional document (sale deed) to be looked into, the same shall be taken care of at the time of final argument.

8. The petitioner has again file a petition on 22.05.2019 under Order XLI Rule 27(1)(b) of the Code of Civil Procedure and the same has been allowed by marking these two very documents as exhibits as Ext. A and Ext. A/1. It is evident that the earlier petitions have been filed under Order XLI Rule 27 of the Code of Civil Procedure but the petition dated 22.05.2019 has been filed under Order XLI Rule 27(1)(b) of the Code of Civil Procedure.

9. This Court, therefore, is of the view that Order XLI Rule 27 needs to be referred to herein, which reads hereunder as:-

ORDER XLI-APPEALS FROM ORIGINAL DECREES

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.

It is evident from the provision of Order XLI Rule 27 that additional evidence shall not be allowed in appellate court unless one of these conditions are satisfied :

(a) improper refusal of evidence by trial court which ought to have been admitted; or

(b) non-production of evidence notwithstanding exercise of due diligence; or

(c) requirement of the appellate court itself for pronouncing judgment, i.e. impossibility to pronounce judgment without the additional evidence; or

(d) any other substantial cause.

10. The condition stipulated under Order XLI Rule 27 of the Code of Civil Procedure does suggest that if the conditions stipulated therein are being complied with, appropriate order would be passed by the appellate court in accepting the additional evidence at the appellate stage. If the condition is not being satisfied with as contained under Order XLI Rule 27 (1)(a) and (aa) of the Code of Civil Procedure, it is up to the appellate court that if it 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 issue of Order XLI Rule 27 of the Code of Civil Procedure fell for consideration in the case of Union of India Vs. Ibrahim Uddin (Supra) wherein the Hon'ble Apex Court while elaborately dealing with the scope, object and requirement to be involved by exercising the aforesaid power has laid down the ratio that the additional evidence can be adduced at the appellate stage subject to the fulfillment of conditions stipulated therein. So far as the requirement of the court to consider the document for proper adjudication it has been laid down at Para 52 that an application for taking additional evidence on record at the appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of the final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, the application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not,

remains inconsequential/inexecutable and is liable to be ignored. Paragraph 52 of the said judgment reads hereunder as :-

"52. Thus, from the above, it is crystal clear that an application for taking additional evidence on record at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of the final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, the application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/inexecutable and is liable to be ignored."

The judgment rendered recently in the case of Jagdish Prasad Patel (Dead) through Legal Representatives and Another Vs. Shivnath and Others reported in (2019) 6 SCC 82 wherein it has been laid down at paragraph 29 and 30 that before exercising the aforesaid power the condition stipulated under the provision of Order XLI Rule 27 of the Code of Civil Procedure is to be meted out. Paragraphs 29 and 30 read hereunder as :-

"29. Under Order 41 Rule 27 CPC, production of additional evidence, whether oral or documentary, is permitted only under three circumstances which are:

(I) Where the trial Court had refused to admit the evidence though it ought to have been admitted;

(II) the evidence was not available to the party despite exercise of due diligence; and

(III) the appellate Court required the additional evidence so as to enable it to pronounce judgment or for any other substantial cause of like nature. An application for production of additional evidence cannot be allowed if the appellant was not diligent in producing the relevant documents in the lower court. However, in the interest of justice and when satisfactory reasons are given, court can receive additional documents.

30. In Union of India v. Ibrahim Uddin, this Court held as under:-

"36. The general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is

only a judicial discretion circumscribed by the limitation specified in the Rule itself.

37. The appellate court should not ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment.

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this Rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed."

11. It is evident from the provision as contained under Order XLI Rule 27 of the Code of Civil Procedure and as has been laid down in the judgment referred hereinabove that even if the condition as stipulated under provision of Order XLI Rule 27(1)(a) and 1(aa), the appellate court can consider the document if it is found by the appellate court that the said document is necessary for proper adjudication of the issue and while doing so the reason has to be assigned and the order to that effect is to be passed after appreciation of the evidence on record and if the court reaches to conclusion that additional evidence was required to be taken on record in order to pronounce the judgment as has been laid down by the Hon'ble Apex Court in the case of Union of India Vs. Ibrahim Uddin (Supra).

So far as the facts of this case are concerned, admittedly a petition was filed by the judgment debtor on 01.03.2017 under Order XLI Rule 27 but was dismissed on 08.06.2017 which has also been declined to be interfered with, however, it has been observed in the order passed by this Court in W.P.(C) No. 5040 of 2017 as would appear from paragraph 3 thereof which is at Annexure-2 to writ petition W.P.(C) No. 1868 of 2019 to the effect that no doubt under sub-rule 1(b) to Rule 27 Order XLI of the Code of Civil Procedure the appellate court can permit additional evidence for any substantial cause, but this power has to be exercised in the context of the limitations provided under Rule 27 of the Code of Civil Procedure.

The judgment debtor has again filed a petition on 06.03.2019 again seeking leave of the appellate court to allow him to adduce the additional evidence by filing certified copy of registered sale deed No. 9298 dated 07.08.1953 executed

by Smitra Kumbharain in favour of Bhim Kumbhkar and while disposing of the said petition vide order dated 19.03.2019, the appellate court by taking aid of the judgment rendered by the Hon'ble Apex Court in the case of Union of India Vs. Ibrahim Uddin (Supra) has passed an order to the effect by directing the appellant to argue the appeal on merit and if the appellate court will require the additional evidence (sale deed) to be looked into, the same shall be taken care of at the time of final argument.

12. The said order dated 19.03.2019 has not been assailed by the party and the same will also be said to be in consonance with the provisions made under Order XLI Rule 27(1)(b) as also in pursuance to the ratio laid down at paragraph-52 in the case of Union of India Vs. Ibrahim Uddin (supra) since in the said judgment Hon'ble Apex Court has been pleased to hold that the appellate court at the time of final hearing of the appeal and after appreciating the evidence on record if reaches to the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause, the appellate court while disposing of the petition dated 06.03.2019 vide order dated 19.03.2019 has rightly passed the order by directing the appellant to argue the appeal on merit and if it will require the additional document (sale deed) to be looked into, the same shall be taken care of at the time of final argument.

But, the appellant thereafter has again filed a petition on 22.05.2019 and this time by specifically referring to the provision of Order XLI Rule 27 (1)(b) of the Code of Civil Procedure, the appellate court has allowed the petition on 25.05.2019 by marking the sale deed No. 352 dated 10.02.1928 as Ext. A and sale deed No. 9298 dated 07.08.1953 as Ext. A/1.

13. The question herein is that when the appellate court has already passed order on 19.03.2019 while dealing with the petition dated 06.03.2019 which has been filed for adducing the additional evidence by taking the certified copy of the registered sale deed No. 9298 dated 07.08.1953 and further the petition dated 01.03.2017 wherein the sale deed No. 352 dated 10.02.1928 has been sought to be inserted by way of additional evidence but the same has been rejected which has been denied to be interfered with but again a petition has been filed on 22.05.2019 and the appellate court has passed order by marking the said documents as Ext. A and Ext. A/1 which is evident from the order dated 25.05.2019. Although the same has been filed under the provision of Order XLI Rule 27(1)(b) of the Code of Civil Procedure but the nature of the order which has been passed on 19.03.2019 as has been annexed in W.P.(C) No. 1868 of 2019, impugned in the said writ petition, the appellate court ought to have taken into consideration the operation of the order dated 19.03.2019 before dealing with the petition dated 22.05.2019 but having no done so, the appellate court has committed gross illegality, it is for the reason that the appellate court itself has sat over upon its own order passed on 19.03.2019 that too without assigning any reason as has been dealt with and discussed at Paragraph 44 to the judgment

rendered in the case of Union of India Vs. Ibrahim Uddin (supra) and further without considering the condition stipulated under the provision of Order XLI Rule 27 as also the finding recorded by the Hon'ble Apex Court in the Ibrahim's case at paragraph-52.

14. This Court also needs to refer the judgment rendered in the case of Jayamoorthy and others Vs. Palani and Others reported in 2013 (7) MLJ 471. It has been held therein which reads hereunder as :

"15. As per the above said rule, the additional evidence can be taken either by the appellate court itself or the appellate court can direct the lower court from which appeal has come or any other court subordinate to it to take evidence and transmit the same to the appellate court for being considered in the appeal. In either case, the appellate court has to indicate in its order allowing the application under Order XLI Rule 27 the points on which the additional evidence is to be adduced....."

The Hon'ble Madras High Court has been pleased to hold that the process to be adopted by the appellate judge in marking the document produced by the judgment debtor giving them exhibit numbers and referring them in the judgment of the lower appellate court. The appellate judge should not have chosen to simply mark the document as exhibits on the side of the plaintiff and for disposal of the appeal. The procedure for taking additional evidence in the appellate stage has not been followed.

15. It is evident from the provision as contained under Order XLI Rule 27 of the Code of Civil Procedure as also by going across the judgment referred hereinabove that the principle governing the application under Order XLI Rule 27 of the Code of Civil Procedure is to hear the application along with the appeal and considering the same together with entire evidence adduced before the court below to find out whether the case falls under sub-clause (b) of Rule 27(1) under Order XLI of the Code of Civil Procedure.

16. This Court after taking into consideration the aforesaid aspect of the matter and taking into consideration the provision of law as contained under Order XLI Rule 27 as also the judgment of the Hon'ble Apex Court referred to hereinabove, is of the view that the order passed by the appellate court dated 25.05.2019 suffers from infirmity being not passed in pursuance to the provision of law and as per the judgment rendered by the Hon'ble Apex Court in the case of Union of India Vs. Ibrahim Uddin (supra), therefore, the same deserves to be set aside by this Court in exercise of power conferred under Article 227 of the Constitution of India. Accordingly, the order dated 25.05.2019 impugned in W.P.(C) No. 2868 of 2019 is set aside.

So far as order dated 19.03.2019 impugned in W.P.(C) No. 1868 of 2019 is concerned, this Court is of the view that the same needs no interference. Accordingly, W.P.(C) No.1868 of 2019 is dismissed.

17. Both the writ petitions stand disposed of.