

(1981) 10 OHC CK 0006
In the Orissa High Court
Case No : Civil Revision No. 662 of 1979

State Bank of India

APPELLANT

Vs

Ashok Stores and Others

RESPONDENT

Date of Decision : 26-10-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27(1)

Citation : AIR 1982 Ori 34 : (1982) 53 CLT 552

Hon'ble Judges : R.C. Patnaik, J

Bench : Single Bench

Advocate : S.N. Sinha, for the Appellant; A. Mukherjee, A.K. Misra and S.C. Das, for the Respondent

Final Decision : Allowed

Judgement

R.C. Patnaik, J.—An order of the Subordinate Judge, Bhubaneswar, rejecting the prayer of the petitioner for adducing additional evidence has given rise to this revision.

2. The opposite parties having obtained a cash credit accommodation to the extent of Rs. 5,000/- secured a loan from the petitioner-Bank. When they failed to clear up the dues, the petitioner filed the suit for realisation of the amount outstanding against the opposite parties. The trial court decreed the suit in part holding the balance to have been barred by limitation. The petitioner filed an appeal and therein filed an application under Order 41, Rule 27 of the Civil P. C. for acceptance of certain documents, namely, statement of accounts with certificate under the Bankers' Books of Evidence Act and certain cash credit pay-in-slips of different dates as additional evidence, petitioner's case was that on 18-9-76 while the case was taken up for hearing, it was not ready and filed an application for time. Its prayer for adjournment having been rejected, the case was taken up and in such circumstances, if could not file the documents though the documents were in its possession. The petitioner also contended that under confusion of law, appropriate steps for proving the documents were not taken

earlier. Its prayer before the trial court made belatedly for re-examination of its witnesses to prove the documents was refused. According to the petitioner, the documents would prove acknowledgment of liability by the opposite parties and so, no part of its claim would be barred by limitation. Against the aforesaid background, the petitioner filed its application for reception of additional evidence. The appellate court rejected the petition holding as follows "I find that the present petition does not come under any of these three categories. It was not a case where the lower court refused to admit the evidence. Since the documents now sought to be produced were in possession and knowledge of the petitioner it has no excuse not to produce it before the lower court. For pronouncing the judgment in appeal, this appellate court does not require the documents. Thus I find the plaintiff's petition does not come within the ambit of Order 41, Rule 27, C.P.C....."

No exception can be taken that in the facts and circumstances of the case, Clauses (a) and (aa) of Sub-rule (1) of Rule 27 of Order 41, C. P. C. were not attracted. Mr. Sinha, learned counsel for the petitioner, however, joins issue on the observation of the appellate judge that the appellate court did not require the documents. He submits that the case came within the ambit of Clause (b) of Sub-rule (1) which could still apply despite non-applicability of Clauses (a) and (aa). He further submits that the stage, when the appellate court should decide whether the document is required by it, is reached after the commencement of the hearing of the appeal when the court apprises itself of the facts and circumstances of the case. At that stage only the appellate court would be in a position to adjudge the requirement. The record of the appeal does not disclose that the appellate court had by the time of disposal of the application filed by the petitioner for adducing additional evidence apprised itself of the facts of the case. He submits that the order of the appellate court rejecting the petition of the petitioner for additional evidence is unsustainable.

3. The provisions contained in Order 41, Rule 27 of the Civil P. C. are clearly not intended to allow the litigant who has been unsuccessful in the lower court to patch up the weak parts of his case and fill up the omissions in the court of appeal. Under Clause (1) (b) it is only where the appellate court requires it that additional evidence can be admitted. It may be required "to enable the court to pronounce the judgment or for any other substantial cause", but in either case it must be the court that requires it. The legitimate occasion for the exercise of his discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but "when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent". Such was the view of their Lordships of the Privy Council in AIR 1931 143 (Privy Council) expressing themselves strongly while approving the observations made by Lord Robertson in *Kessowji's case* ILR (1907) Bom 381. Their Lordships further observed :--

"It may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the

requirement of the Court upon its appreciation of the evidence as it stands." (underlining supplied)

AIR 1931 143 (Privy Council) .

The Supreme Court in Arjan Singh v. Kartar Singh, (1951) 2 SCR 258 approved the rule laid down in Kessowji's case as reiterated in Parsotim's case and held :--

"The true test, therefore, is whether the appellate court is able to pronounce the judgment on the materials before it without taking into consideration the additional evidence sought to be adduced." (underlining supplied)

The necessity can be adjudged upon examining the evidence which is ordinarily done after the commencement of the hearing.

In the case of K. Venkataramiah Vs. A. Seetharama Reddy and Others, it was held (at p. 1530) :

"Under Rule 27 (i), the appellate court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment", but also for "any other substantial cause". There may well be cases where even though the court finds that it is able to pronounce judgment on the state of record as it is, and so it cannot strictly say that it requires additional evidence "to enable it to pronounce the judgment, it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence for any other substantial cause under Rule 27 (1) (b) of the Code."

This view modified and extended the rule laid down in Arjan Singh v. Kartar Singh, (1951) 2 SCR 258 , namely, that even if the court is able to pronounce the judgment, still in the interest of justice it can receive additional evidence. From the aforesaid, it is obvious that the provisions contained in Clause (b) can be applied despite inapplicability of Clauses (a) and (aa).

In the case of Chunilal Ojha Vs. Mul Shankar Ojha and Others, , a Division Bench of this Court found want of due diligence on the part of the plaintiff who sought reception of additional evidence, but held (at p. 171) :--

"they came within the scope of "any other substantial cause" referred to in Clause (c) of Rule 27 (1) of Order 41" (Orissa Amendment).

In AIR 1962 Orissa 9 (Banchhanidhi Behera v. Ananta Upadhaya), it was held (at p. 10) :--

"Where the case of the appellant for adducing additional evidence, could not be covered either by Clauses (a) or (b) of Sub-rule (1) of Order 41, Rule 27 (Patna Amendment), under Clause (c) it is competent for the court, after going through the whole case, to say that the document in question was necessary to enable the court to pronounce the judgment. But before hearing the case on merits, the

court cannot be in a position to decide whether such document is necessary or not" (underlining supplied)

In Mahammad Baboo's case (1971) 2 CWR 357, the trial court had not refused to admit the documents or notwithstanding exercise of due diligence, the document was not within the knowledge of the party or could not be produced at the time the judgment was passed. Even then this Court considered whether the conditions mentioned in Clause (c) (Orissa Amendment) could be applied and held :--

".....It is essential that the court should require such additional evidence to enable it to pronounce judgment or for other substantial cause which occasion will arise only during the course of hearing of the appeal or on examination of the evidence. Before that stage, it is not possible for the court to come to a finding that without this additional evidence it will be. unable to pronounce judgment or other substantial cause exists.....Without going through the evidence and finding out if there is any lacuna or otherwise, the court could not have arrived at the conclusion that it will help for a just adjudication." (underlining supplied).

4. The observations, contained in the various decisions, referred to above, indicate that the provisions of Clause (b) can be resorted to notwithstanding the fact that the facts of the particular case do not satisfy the requirements of Clause (a) or (aa) of Rule 27 (1). I find it difficult to accept the contention of Mr. Mukherjee that the provisions contained in Clause (b) cannot be applied where the provisions contained in Clauses (a) and (aa) are not satisfied. The answer to this contention lies in the contention itself, namely, that if the requirements of either Clause (a) or Clause (aa) are satisfied, there would be no need to resort to the provisions contained in Clause (b). That apart, as authoritatively stated by the Privy Council and the Supreme Court, the cause of ends of justice is paramount and that is the justification for enacting the provisions contained in Clause (b).

5. Mr. Mukherjee, learned counsel for the opposite parties, relied upon a decision in the case of Deputy Registrar, Co-operative Societies, U.P., Lucknow Vs. Chaudhari Sarfaraz-un-Zaman and Another, and contended that a decision to admit additional evidence under Rule 27 (1) (b) can as well be taken before hearing of the appeal and consideration of such question need not be contemporaneous with or subsequent to the hearing of the appeal itself. There is no conflict between the Allahabad case and the cases decided by this Court. In Mohammad Baboo's case (1971) 2 CWR 357 this Court said :

"The occasion for admitting additional evidence under Clause (c) will arise only during the course of hearing of the appeal or on examination of the evidence."

6. Inasmuch as the hearing of the appeal in the present case had not commenced before the appellate court nor did the appellate court examine the evidence to adjudge the requirements of the provisions of Clause (b), it was

inappropriate to deal with the application for additional evidence. The order of rejection is, therefore, not sustainable and is set aside. The appellate court is directed to re-hear the application for reception of additional evidence filed by the petitioner at the appropriate stage and deal with the same according to law.

In the result, the revision is allowed but without costs.