

(2017) 07 AHC CK 0062
ALLAHABAD HIGH COURT
Case No: 4468 of 2017

Vinod Kumar
(Unsound Mind) And
Another

APPELLANT

Vs

Tarachand And Others

RESPONDENT

Date of Decision: July 28, 2017

Acts Referred:

- Code of Civil Procedure, 1908, Section 107, Section 107, Section 107, Section 107, Section 107, Order 41 Rule 27, Order 41 Rule 27, Order 41 Rule 27, Order 41 Rule 27, Order 41 Rule 27, Order 32 Rule 15, Order 32 Rule 15, Order 32 Rule 15, Order 32 Rule 15, Order 32 Rule 15 - Powers of Appellate Court - Powers of Appellate Court - Powers of Appellate Court - Powers of Appellate Court - Powers of Appellate Court

Hon'ble Judges: Sunita Agarwal

Bench: Single Bench

Advocate: Tripathi B.G. Bhai, Bhanu Prakash Verma

Judgement

1. The order dated 19.07.2017 passed by the 9th Additional District Judge, Mathura in Civil Appeal no.155 of 2016 (Vinod Kumar & others Vs. Tarachan & others) in rejecting the application 35-Ga dated 18.07.2017 is under challenge in the present petition. The said application was filed under Order 41 Rule 27 of the Code of Civil Procedure with the request to permit the appellant to bring on record the prescription of the treatment of plaintiff no.1 Vinod Kumar with list 24 and further to permit the appellant to produce oral evidence to prove those documents. The said application has been filed allegedly in the light of the order dated 31.03.2017 passed by the first appellate court under Order 32 Rule 15 of the Code of Civil Procedure to make enquiry whether the plaintiff no.1 was suffering from any mental infirmity or he being a person of unsound mind was incapable of protecting his interest before the court of law.

2. In the order impugned, it is recorded by the first appellate court that pursuant to the directions given in the order dated 31.03.2017, Sri Vinod Kumar, plaintiff no.1 had appeared in the court and the documents filed with list paper no.24-Ga have been admitted in evidence by order dated 06.07.2017. Some enquiry was made by the Court from Sri Vinod kumar, the plaintiff no.1 when he appeared in person. The appeal was heard on merits and 11.07.2017 was fixed for further arguments. At this stage, the application 35-Ga was moved by the appellant for allowing her to lead oral evidence which was rejected being unjustifiable.

3. Learned counsel for the petitioner vehemently argued that by the order dated 02.03.2017 the application 17-Ga moved by the petitioners praying the appellate court to examine the mental condition of plaintiff no.1, was rejected. In petition under Article 227 No.1546 of 2017 (Vinod Kumar & another Vs. Tarachand & others), this court though refused to interfere in the said order dated 02.03.2017 on the ground that the appeal had been finally heard and a date had been fixed for delivery of judgement, however, it was left open for the petitioners to challenge the validity of order dated 02.03.2017 in an appeal filed against the appellate decree. As a consequence thereof, the rejection order dated 02.03.2017 had been recalled by the appellate court vide order dated 31.03.2017 and the petitioner No.2/appellant No.2 was given opportunity to produce appellant no.1 namely Vinod Kumar alongwith documentary evidences of his treatment so as to make an enquiry regarding his mental condition.

4. Submission is that in compliance of the directions of the first appellate court, Sri Vinod Kumar, the appellant no.1 was produced in the court and the documentary evidences have been filed. However, as the court having no expertes to examine the mental conditions of the appellant no.1, in support of the documentary evidences taken on record, oral evidence of the Doctor who issued medical certificate and prescription, was necessary. At the stage of enquiry under Order 32 Rule 15, initiated as per the directions of this Court, the petitioner cannot be denied opportunity to lead evidence. It is not disputed by the petitioner that the documentary evidence filed by the appellant with list paper no.24-Ga have been placed on record.

5. Reliance is placed upon the judgement of Apex Court in Sharda Vs. Dharmpal, reported in 2003 (4) SCC 493 to submit that when a question arises whether a person is mentally ill or not, the Court is under obligation to call for expert report i.e. to get the concerned party examined by a qualified doctor. It was, therefore, necessary for the court to allow the petitioner to lead evidence of the doctor as examination of the mental condition of the appellant no.1 by the Court on its own is of no relevance.

6. With reference to the judgement of this Court in Prabhat Sharma & another Vs. Hari Shankar Srivastava & others reported in 1988 ALL. LJ 436 it is reiterated that in case where a question arises for enquiry under Order 32 Rule 15 of the Code of Civil Procedure regarding the person being of unsound mind or of weak mind, the Court must hold a judicial inquiry to come to a definite conclusion regarding his mental state. The inquiry so held should consist not only of the examination of the witness produced by either parties or examination of the alleged lunatic himself, rather as a matter of precaution the evidence of medical expert should be taken as the courts are generally presided over by a layman in the medical field. The opinion of doctor like opinion of any other expert under section 45 of the Evidence Act is relevant piece of evidence.

7. With reference to a pronouncement of High Court of Madras in the case of S. Chattanatha Karayalar Vs. Vaikuntarama Karayalar reported in 1968 AIR (Mad) 346, it was submitted that the enquiry under Order 32 Rule 15 of the Code of Civil Procedure can be done even at the appellate stage where the question of unsoundness of mind of a person arises as one of the issues in the suit. The appellate court has ample jurisdiction to enter into that question and for that purpose it can seek opinion of experts. Further reliance is placed upon the judgement of Apex Court in North Eastern Railway Administration Gorakhpur Vs. Bhagwan Das (D) By L.R.s reported in AIR 2008 SC 2139 to submit that it is permissible for the appellate court to allow a party to adduce additional evidence under Order 41 Rule 27 of the Code of Civil Procedure which are necessary to decide the lis between the parties and are required to pronounce the judgement in the appeal in a more satisfactory manner.

8. Learned counsel Sri B.P. Verma appearing for the respondents in the petition no.4468 of 2017 and for the petitioner in the connected petition no.3194 of 2017, on the other hand, submits that the petitioner herein is making all efforts to protract the proceedings of the appeal. A transfer application under section 24 of the Code of Civil Procedure was moved by the petitioner which was dismissed vide order dated 20.05.2017 passed by the District Judge, Mathura. The order passed by the District Judge, Mathura dated 20.05.2017 was challenged in a Transfer application (Civil) no.270 of 2017 which was dismissed by this Court with the cost of Rs.10,000/-. It had been categorically recorded in the order of the District Judge dated 20.05.2017 i.e. the order of rejection of transfer application and the judgement and order dated 05.07.2017 passed by this Court that the petitioners/applicants had failed to disclose any good reason for transferring the appeal rather an adverse remarks has been made regarding the conduct of the petitioner herein of delaying the disposal of appeal by abusing the process of the Court. It is further submitted by the learned counsel for the respondents that the connected petition no.3194 of 2017 filed against the order dated 31.03.2017 has been rendered infructuous for the reason that the appellate court had examined the plaintiff no.1 namely Vinod Kumar

and proceeded with the hearing of the appeal.

9. It has been urged that the first appellate court has recorded a categorical finding that the appellants/petitioners herein had failed to establish that the additional evidence sought to be brought on record was not within their knowledge or could not be produced despite the exercise of due diligence at the time when the decree was passed against them. The discretion exercised by the first appellate court refusing to allow oral evidence of the Doctor at the stage of final disposal of first appeal is a discretion exercised judiciously circumscribed by the conditions and limitations provided under Order 41 Rule 27 of the Code of Civil Procedure and may not be interfered by this Court in the supervisory jurisdiction under Article 227 of the Constitution of India.

10. Heard learned counsel for the parties and perused the record. In order to appreciate the controversy raised herein, it would be appropriate to go through the relevant provisions of the Code of Civil Procedure pressed by the learned counsel for the petitioner. Order 32 Rule 1 to 15 of the Code of Civil Procedure is relevant and is quoted herein:- Suits by or Against Minors and Persons of Unsound Mind.

"1. Minor to sue by next friend.- Every suit by a minor shall be Instituted in his name by a person who in such suit shall be called the next friend of the minor.

2. Where suit is instituted without next friend, plaint to be taken off the file

(1) Where a suit is instituted by or behalf or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

(2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any) may make such order in the matter as it thinks fit.

[2A. Security to be furnished by next friend when so ordered (1) Where a suit has been instituted on behalf of the minor by his next friend, the Court may, at any stage of the suit, either of its own motion or on the application of any defendant, and for reasons to be recorded, order the next friend to give security for the payment of all costs incurred or likely to be incurred by the defendant.

(2) Where such a suit is instituted by an indigent person, the security shall include the court-fees payable to the Government.

(3) The provisions of rule 2 of Order XXV shall, so far as may be, apply to a suit where the Court makes an order under this rule directing security to be furnished.]

3. Guardian for the suit to be appointed by Court for minor defendant

(1) Where the defendant is a minor the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) Order shall be made on any application under this rule except upon notice [***] to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, [upon notice to the father or where there is no father or mother, to other natural guardian], of the minor, or, where there is [no father, mother or other natural guardian], to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

[(4A) The Court may, in any case, if it thinks fit, issue notice under sub-rule (4) to the minor also.]

[(5) A person appointed under sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any Appellate or Revisional Court and any proceedings in the execution of a decree.

[3A. Decree against minor not to be set aside unless prejudice has been caused to his interests (1) No decree passed against a minor shall be set aside merely on the ground that the next friend or guardian for the suit of the minor had an interest in the subject-matter of the suit adverse to that of the minor, but the fact that by reason of such adverse interest of the next friend or guardian for the suit, prejudice has been caused to the interests of the minor, shall be a ground for setting aside the decree.

(2) Nothing in this rule shall preclude the minor from obtaining any relief available under any law by reason of the misconduct or gross negligence on the part of the next friend or guardian for the suit resulting in prejudice to the interests of the minor.

4. Who may act as next friend or be appointed guardian for the suit

(1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit: Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) No person shall without his consent [in writing] be appointed guardian for the suit.

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested 43[or out of the property of the minor], and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

5. Representation of minor by next friend or guardian for the suit

(1) Every application to the Court on behalf of a minor, other than an application under rule 10, sub-rule (2), shall be made by his next friend or by his guardian for the suit.

(2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

6. Receipt by next friend or guardian for the suit of property under decree for minor(1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other movable property on behalf of a minor either(a) by way of compromise before decree or order, or (b) under a decree or order in favour of the minor. (2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other movable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste. and ensure its proper application: [Provided that the Court may, for reasons to be recorded, dispense with such security while granting leave to the next friend or guardian for the suit to receive money or other movable property under a decree or order where such next friend or guardian(a) is the manager of a Hindu undivided family and the decree or order relates to the property business of the family; or (b) is the parent of the minor.]

7. Agreement or compromise by next friend or guardian for the suit (1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. [(1A) An application for leave under sub-rule (1) shall be accompanied by an affidavit of the next friend or the guardian for the suit, as the case may be, and also, if the minor is represented by a pleader, by the certificate of the pleader, to the effect that the agreement or compromise proposed is, in his opinion, for the benefit of the minor : Provided that the opinion so expressed, whether in the affidavit or in the certificate shall not preclude the Court from examining whether the agreement or compromise proposed is for the benefit of the minor.]

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor.

8. Retirement of next friend(1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred. (2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed and also that he has no interest adverse to that of the minor.

9. Removal of next friend (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty, or during the pendency of the suit, ceases to reside within 7 [India], or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit. (2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit.

10. Stay of proceedings on removal, etc., of next friend(1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place (2) Where the pleader of such minor omits, within a reasonable time, to take steps to get a new friend appointed, any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.

11. Retirement, removal or death of guardian for the suit(1) Where the guardian for the suit desire to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit. (2) Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the court shall appoint a new guardian in his place.

12. Course to be followed by minor plaintiff or applicant or attaining majority

(1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

(2) Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read henceforth thus: "A.B., late a minor, by C. D., his next friend, but now having attained majority."

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

(5) Any application under this rule may be made ex parte but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend.

13. Where minor co-plaintiff attaining majority desires to repudiate suit (1) Where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit. (2) Notice of the application shall be served on the next friend, on any co-plaintiff and on the defendant. (3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs. (4) Where the applicant is a necessary party to the suit, the Court may direct him to be made a defendant.

14. Unreasonable or improper suit (1) A minor on attaining majority may, if a sole plaintiff, apply that a suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper. (2) Notice of the application shall be served on all the parties concerned; and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything

done in the suit, or make such other order as it thinks fit.

15. Rules 1 to 14 (except rule 2A) to apply to persons of unsound mindRules 1 to 14 (except rule 2A) shall, so far as may be, apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who, though not so adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being sued.]"

11. Order 32 of Code of Civil Procedure deals with the mode and manner in which the suit by or against the minors or persons of unsound minds would be dealt with and the mode and manner of appointment of guardian or next friend to institute or contest such suit. Rule 1 to Rule 14 of Order 32 of the Code of Civil Procedure provides the procedure for the inquiry to be made by the Court before appointment of next friend or guardian to pursue the interest of the minor and removal thereof. The said provisions confer jurisdiction upon the Court to make a suo-moto enquiry regarding the interest of a minor even if, no application is made before it for appointment of guardian or next friend, who is not represented properly before it. Similarly in a case where such person though is represented, but the Court is satisfied that the interest of the person so appointed is adverse to that of the minor or lunatic so as to make it unlikely that the property of such person be protected, it can make an enquiry.

12. Rule 15 further provides that the manner of inquiry provided under Rule 1 to 14 (except Rule2-A) of Order 32 would apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to such persons who are found by the court on enquiry to be incapable to protect their interest when suing or being sued, by reason of any mental infirmity, however, not so adjudged. Meaning thereby, that the Court is also empowered to protect the interest of a persons of unsound mind before it in a suit, who has not been adjudged so, by a competent court or authority and is not properly represented before the Court.

13. Considering the scope of enquiry under Order 32 Rule 1 to 15 of the Code of Civil Procedure, this Court finds that the said provisions would apply in a case where the suit has been filed by a person of unsound mind or a minor through a next friend or guardian or such person has been impleaded as defendant in the suit before the Court and there is no guardian or next friend of that person to protect his interest in the court proceeding.

14. The enquiry as required under order 32 Rule 1 to 15 of the Code of Civil Procedure, however, is not attracted in the instant case. The reason being that the

Original suit no.1088 of 2002 (Vinod Kumar & another Vs. Taranchand & others) had been filed by two persons namely Vindod Kumar son of Raghunath (mentioned as person of unsound mind) and Smt. Radha Sharma wife of Sri Vinod kumar with the averments in paragraph no.17 of the plaint which read as under:-

"VERNACULR MATTER OMITTED"

15. The relief sought in the said suit is of cancellation of the registered sale deed dated 16.07.2002 and the correction deed dated 10.09.2002 being null and void. The ground for cancellation of registered deed taken therein is that the plaintiff no.1 i.e. Vinod Kumar was suffering from mental infirmity and was being treated in Agra Mental Hospital since 19.10.2000 and his treatment had continued in the year 2002. And as such he was not capable of understanding and protecting his interest in the suit property. The sale deed in question was got executed by the defendants no.1 and his accomplices by taking benefit of the mental condition of Vinod Kumar, the plaintiff no.1.

16. In view of the own admission of the plaintiff/petitioner no.2 in the plaint that she had instituted the suit for cancellation of sale deed in the year 2012 being next friend of plaintiff no.1 as noted above, this Court is of the view that no further enquiry was required to be made by the Court under Order 32 Rule 1 to 15 of the Code of Civil Procedure. The scope of enquiry under the provisions of Order 32 Rule 1 to 15 is limited for the purpose of appointment of next friend to represent a plaintiff. Plaintiff no.1 is properly represented by his wife. As per the plaint avements, plaintiff no.2 (wife) is capable of protecting the interest of the plaintiff no.1 (her husband) and her interest in the subject matter of suit cannot be said to be adverse to that of the plaintiff no.1.

17. In view of the above discussion, the argument of learned counsel for the petitioner that the enquiry required to be made under Order 32 Rule 15 (Rule 1 to 15) of the Code of Civil Procedure has not been done by the Court below, is wholly misconceived.

18. Now, the only question left adjudication before the Court is whether the first appellate court had erred in rejecting the prayer of the petitioners/appellants to lead oral evidence in appeal as additional evidence under Order 41 Rule 27 of the Code of Civil Procedure.

19. The power of the first appellate court to admit additional evidence under Order 41 Rule 27 of the Code of Civil Procedure has been discussed by the Apex court from time to time. The Constitution bench of the Apex Court in K.Venkataramiah vs A.

Seetharama Reddy & Ors reported in AIR, 1963 SC 1523, while reiterating the observation of the Privy Council in Parsotim Thakur vs Lal Mohar Thakur reported in AIR 1931 PC 143, has held that such power is not intended to allow a litigant who has been unsuccessful in the lower court to patch up the weak parts of his case and fill omissions in the court of appeal. The appellate court has power to allow additional evidence only if it requires such evidence, "to enable it to pronounce judgement" or "for any other substantial cause" i.e. if it considers that in the interest of justice something much remained obscure should be filled up so that it can pronounce its judgement in a more satisfactory manner. These are the principles to be kept in mind while dealing with the application under Order 41 Rule 27 of the Code of Civil Procedure.

20. Even in the Apex Court report in North Eastern Railway Administration (supra) relied upon by the learned counsel for the petitioner, it has been held in paragraph no.12 as under:-

"12.Though the general rule is that ordinarily the appellate court should not travel outside the record of the lower court and additional evidence, whether oral or documentary is not admitted but Section 107 C.P.C., which carves out an exception to the general rule, enables an appellate court to take additional evidence or to require such evidence to be taken subject to such conditions and limitations as may be prescribed. These conditions are prescribed under Order 41 Rule 27 C.P.C. Nevertheless, the additional evidence can be admitted only when the circumstances as stipulated in the said rule are found to exist. The circumstances under which additional evidence can be adduced are :

(i) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, (clause (a) of sub rule (1)) or

(ii) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within the knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, (clause aa, inserted by Act 104 of 1976) or

(iii) 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. (clause (b) of sub rule (1))."

21. The judgements of Privy Council of the Apex Court and the Constitution Bench as referred above have been noted and followed by the Apex Court in the above report. Thus the legal position regarding exercise of discretion under Order 41 Rule 27 of the Code of Civil Procedure is fairly well settled. The discretion exercised by the appellate court to take additional evidence or to require such evidence to be taken is circumscribed by the conditions and limitations as prescribed under Order 41 Rule 27 of the Code of Civil Procedure. The party seeking to adduce additional evidence has to establish that despite exercise of due diligence, the evidence could not be produced before the Court whose decree has been challenged in appeal or that such evidence was not within the knowledge of the said party. As a general rule, ordinarily, the appellate court is not empowered to take additional evidence.

22. However, as to the stage of the taking such evidence on record, it has been held in the case of Northern Eastern Railway Administration (supra) in paragraph no.13 as under:-

"13.The legitimate occasion for the exercise of this 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."

It is further held by the Apex Court in the case of Union of India Vs. Ibrahim Uddin & another reported in 2012 (8) SCC 148 in paragraph no.49 as under:-

"49. An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: Arjan Singh v. Kartar Singh & Ors., AIR 1951 SC 193; and Natha Singh & Ors. v. The Financial Commissioner, Taxation.

23. In the instant case, the appellate court has considered the prayer of the appellant to adduce additional oral evidence of Doctor at the stage of final argument in appeal and has opined that the documentary evidences filed by the appellant during the course of hearing in the appeal had already been taken on record vide order dated 06.07.2017. In view of the available evidence taken on record, there was no further requirement of additional oral evidence of Doctor. Further, an enquiry has already been made by the first appellate court regarding the mental condition of Sri Vinod Kumar (plaintiff no.1) who was present before it on 06.07.2017. The exercise of discretion by the first appellate court at the stage of final disposal of the appeal in holding that no further evidence was required, cannot be said to be an improper exercise of judicial discretion.24. Moreover, in exercise of supervisory jurisdiction of this Court under Article 227 of the Constitution of India, this Court cannot act as a court of appeal so as to substitute its opinion for the opinion formed by the first appellate court, even if, another view is possible.

24. It is always open for the party concerned, to challenge the validity of order of rejection of Order 41 Rule 27 of the Code of Civil Procedure application in an appeal against the appellate decree.

25. In view of the above discussion, the petition No.4468 of 2017 (Vinod Kumar (Unsound Mind) & another Vs. Tarachand & others) is found devoid of merit and hence dismissed.

26. As far as the connected Petition under Article 227 no.3194 of 2017 (Tarachand & others Vs. Vinod Kumar & others) is concerned, the same is rendered infructuous in view of the statement of the learned counsel for the petitioner therein.

27. The record reflects that the proceedings of appeal have been protracted for a long time in view of the repeated applications moved by both the parties. The first appellate court is, therefore, directed to make an endeavour to decide the appeal expeditiously.