

(2009) 07 CAL CK 0014

Calcutta High Court

Case No: C.O. No. 881 of 2005

Bela Mondal and Others

APPELLANT

Vs

Badresaman Khan and Others

RESPONDENT

Date of Decision: July 8, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 115, 151
- Constitution of India, 1950 - Article 227

Hon'ble Judges: Tapan Mukherjee, J

Bench: Single Bench

Advocate: Partha Pratim Roy, for the Appellant; Pratip Kumar Chatterjee, for the Respondent

Final Decision: Dismissed

Judgement

Tapan Mukherjee, J.

The Judgment of the Court was as follows:

1. Heard the learned Counsel for both the parties.
2. This revisional application is directed against the order dated 8.2.2005 passed by the "learned First Appellate Court in Title Appeal No. 11 012003 allowing the prayer of the appellants for producing barga certificates in evidence under Order 41 Rule 27 read with Section 151 of C.P.C.
3. During pendency of the hearing of the said title appeal before the learned First Appellate, Court, the appellants filed such application under Order 41 Rule 27 for accepting two barga certificates in their favour on the grounds that those barga certificates were deposited with the bank and the same could not be produced earlier.

4. The learned First Appellate Court by the impugned order allowed the said prayer on contest.
5. Being aggrieved by the said order of the learned First Appellate Court, the respondents in appeal have come in revision by filing application under Article 227 of the Constitution of India.
6. It has been contended by the learned Lawyer for the appellants that despite exercise of due diligence, the appellants could not produce those two barga certificates during hearing of the suit as those were deposited with the bank and so those certificates could not be collected earlier. Learned Counsel submits that there are sufficient grounds for not producing those documents during trial.
7. He has further contended that under the provision of Order 41 Rule 27(aa) of the C.P.C., 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 of the learned trial Court was passed. So the grounds for receiving the additional evidence have been established by the appellants and as such the appellants were allowed to produce the additional evidence.
8. He has further contended that the question whether such acceptance of additional evidence under Order 41 Rule 27 of C.P.C. was legal or not, could be raised by the respondents in the second appeal if the decision went in favour of the appellants and at the interim stage, the respondents should not have challenged the order by filing revisional application in the teeth of the fact that the appeal was pending for final hearing before the learned First Appellate Court.
9. Learned Lawyer for opposite party/appellants has placed reliance upon the ruling reported in [Gurdev Singh and others Vs. Mehnga Ram and another](#), and also a decision of the learned Single Judge of this Court reported in 1998(1) CHN 486 passed in C.O. NO. 1737 of 1993 following the said decision of the Supreme Court.
10. Learned Counsel for the petitioners/revisionists has contended that the petition under Order 41 Rule 27 of the C.P.C should be heard along with the appeal and in view of the issues in the suit as to whether the plaintiffs had title to the suit property on the basis of Patta, the production of the said barga certificates in the suit was unnecessary and unjustified.
11. He has placed reliance upon the ruling of the Supreme Court reported in 2007(14) SCC 257, State of Rajasthan v. T.N. Sahani and Ors., (2001) 10 SCC 619 and also a decision of the Division Bench of this High Court reported in 1994 (2) Cal LJ 114.
12. In the case reported in [Gurdev Singh and others Vs. Mehnga Ram and another](#), a revision was filed against the order of the Appellate Court allowing additional evidence when the appeal was pending for final hearing. The High Court took the

view that the order of the learned Appellate Court could not be sustained. The Supreme Court held that the approach of the High Court in revision at that interim stage when the appeal was pending for final hearing before the learned Additional District Judge was not justified and the High Court should not have interfered with the order which was within the jurisdiction of the Appellate Court. The reason is obvious. The Appellate Court hearing the matter finally could exercise jurisdiction one way or the other under Order 41 Rule 27 specially Clause (b). If the order was wrong on merits, it would always be open for the respondent to challenge the same in accordance with law if an occasion arises to carry the matter in second appeal, after an appellate decree is passed. But at this interim stage, the High Court should not have felt itself convinced that the order was without jurisdiction and the appeal was allowed by the Supreme Court and the order of the High Court interfering with the order of the learned First Appellate Court receiving additional evidence was set aside and the learned Additional District Judge was asked to decide the appeal on its own merits.

13. In the case reported in 1998(1) CHN 486, this Court also held that the First Appellate Court can pass order on application under Order 41 Rule 27 in one way or the other and the revisional Court u/s 115 of C.P.C. should not interfere the same and order passed by the Lower Court under Order 41 Rule 27 can be challenged in second appeal.

14. In the decision reported in State of Rajasthan v. T.N. Sahani and Ors., (2001) 10 SCC 619 , the case related to the acceptance of the evidence under Order 41 Rule 27(b) of C.P.C. and the Supreme Court held that the said application should have been decided along with the appeal, because at the time of hearing of the appeal, the Court will be in a position to enable whether those documents are required for pronouncing the judgment.

15. In the case reported in 2007(14) SCC 257 it was held that provisions of Order 41 Rule 27 cannot be invoked to pass order to patch up the weakness of the evidence of the unsuccessful party, but it will be different if the Court itself requires the evidence to do justice between the parties.

16. The decision reported in 1994 (2) Cal LJ 114 was referred in the case of this Court reported in 1998(1) CHN 486.

17. So, the decisions cited by the learned Counsel for the petitioners do not help him. On the contrary, the decision reported in [Gurdev Singh and others Vs. Mehnga Ram and another](#), which was followed by this Court in the case reported in 1998(1) CHN 486 supports the learned Counsel for the opposite parties.

18. In the present case also the appeal is pending for final hearing and at the interim stage an order was passed under Order 41 Rule 27 of C.P.C. should not be interfered with. If the, said order is not interfered with, the petitioners will not be prejudiced because they will be at liberty to challenge the said order in the second

appeal if the opposite parties become successful in the first appeal.

19. Under such circumstances, the impugned order passed by the learned First Appellate Court in Title Appeal No. 11 of 2003 cannot be interfered with.

20. The instant revisional application being C.O. No. 881 of 2005, thus, stands dismissed.

Urgent xerox certified copy of this order, if applied for, be given to the parties as early as possible.