

(2014) 09 CAL CK 0131**Calcutta High Court****Case No:** C.O. No. 3869 of 2013

Lachman Kumar Agarwala

APPELLANT

Vs

Pawan Kumar Agarwala

RESPONDENT

Date of Decision: Sept. 3, 2014**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 7, Order 41 Rule 27
- Constitution of India, 1950 - Article 227

Hon'ble Judges: Ranjit Kumar Bag, J

Bench: Single Bench

Advocate: Souradipta Banerjee and Subhojit Mullick, Advocate for the Appellant;
Siddhartha Banerjee, Victor Dutta and Abhisek Baran Das, Advocate for the Respondent

Final Decision: Dismissed

Judgement

R.K. Bag, J.

The affidavit-of-service filed on behalf of the petitioner is kept with the record. The petitioner has preferred this application under Article 227 of the Constitution of India challenging the Order No. 42 dated 11th March, 2013 passed by learned Judge, 13th Bench, City Civil Court, Calcutta in Title Appeal No. 35 of 2009, by which learned Judge of the First Appellate Court rejected the application under Order 41 Rule 27 of the CPC filed by the petitioner.

2. The petitioner is the appellant before the First Appellate Court. The opposite party nos. 1 and 2 are the respondents before the First Appellate Court. It appears from the materials on record that the opposite parties/plaintiffs instituted the Ejectment Suit No. 2597 of 2000 against the petitioner/defendant in the Court of learned Judge, 6th Court, Presidency Small Causes Court, Calcutta for eviction, recovery of khas possession on the ground of reasonable requirement, default etc. Learned Judge of the Presidency Small Causes Court decreed the said suit on 26th May, 2009 and the petitioner/appellant preferred Title Appeal No. 35 of 2009 before the City Civil Court,

Calcutta. On 3rd September, 2010 the petitioner/appellant filed an application under Order 41 Rule 27 of the CPC before the Appellate Court for adducing additional evidence to establish that the opposite parties/respondents have suitable alternative accommodation. Thereafter, on 10th November, 2010 the petitioner/appellant filed another application under Order 39 Rule 7 of the CPC praying for local inspection of the premises alleged to have been under the possession of the opposite parties/respondents. The several orders passed by learned Judge of the First Appellate Court, were challenged by the petitioner before the High Court in C.O. No. 4042 of 2010. It appears from order dated 17th January, 2011 passed by this Court in C.O. No. 4042 of 2010 that this High Court observed that the appeal along with the application under Order 41 Rule 27 of the CPC may be heard together and learned Appellate Court is free to dispose of the application under Order 39 Rule 7 of the CPC independently. It is also observed in the said order that learned Judge of the First Appellate Court shall proceed with the appeal along with application under Order 41 Rule 27 of the CPC and the appeal shall be disposed of within a period of three months from the date of communication of the order. The order, by which learned Judge of the First Appellate Court disposed of the application under Order 39 Rule 7 of the Code of Civil Procedure, was again challenged by the petitioner before this Court in C.O. No. 1752 of 2011. It appears from the order dated 23rd September, 2011 passed in C.O. No. 1752 of 2011 that this Court observed that the application under Order 39 Rule 7 of the CPC is premature unless and until the fate of the application for production of additional evidence under Order 41 Rule 27 of the CPC is decided. It is also observed in the said order that in course of hearing of the appeal and the application for production of additional evidence under Order 41 Rule 27 of the CPC in terms of earlier direction of this Court, the Lower Appellate Court may, if satisfied, be inclined to allow the application under Order 41 Rule 27 of the CPC and permit the petitioner to produce additional evidence. Lastly, it is observed in the said order that in the event the Lower Appellate Court allows the application under Order 41 Rule 27 of the Code, the petitioner shall be entitled to apply for local inspection of the premises in question, provided such application is preferred by the petitioner. Thereafter, First Appellate Court took up the application under Order 41 Rule 27 of the CPC for hearing and rejected the said application after hearing both the parties by the impugned order which is under challenge in this revision.

3. With the above factual matrix, Mr. Souradipta Banerjee, learned counsel appearing on behalf of the petitioner submits that learned Judge of the First Appellate Court has taken up the application under Order 41 Rule 27 of the CPC for hearing independently of the appeal and thereby the order passed by the High Court in C.O. No. 4042 of 2010 has been violated. Mr. Banerjee, also submits that learned Judge of the Court below has relied on the photocopy of some documents produced on behalf of the opposite parties/respondents and decided that the premises in question under occupation of the opposite parties/respondents is

tenanted accommodation and used for the purpose of business of the opposite parties/respondents and thereby learned Judge of the Court below has pre-judged the entire appeal which is yet to be heard. The specific contention of Mr. Banerjee is that the application under Order 41 Rule 27 of the CPC should have been heard along with the appeal. Mr. Banerjee has relied on the decisions reported in (2001) 10 Supreme Court Cases 619 and the decision reported in (2008) 8 Supreme Court Cases 511 in support of his above contention.

4. Mr. Siddhartha Banerjee, learned counsel appearing on behalf of the opposite parties has referred to the relevant portion of the orders passed by this Court in C.O. No. 4042 of 2010 and C.O. No. 1752 of 2011 in order to submit that there is no specific direction of this Court for hearing of the application under Order 41 Rule 27 of the CPC along with the appeal pending before the First Appellate Court. Mr. Banerjee also submits that the suit for eviction of the petitioner/appellant was instituted on 7th July, 1982 and almost after 28 years on 3rd September, 2010, the petitioner filed the application under Order 41 Rule 27 of the CPC before the Appellate Court to adduce additional evidence to establish that the opposite parties/respondents have suitable alternative accommodation which is a tenanted premises of the opposite parties and the same is used not for the residence but for the business of the opposite parties. According to Mr. Banerjee, the petitioner has taken dilatory tactics by filing frivolous application before the learned Court below.

5. Having heard learned counsels of the respective parties and on consideration of the orders passed by this Court in C.O. 4042 of 2010 and C.O. 1752 of 2011, I am of the view that this Court has not given any mandate to the First Appellate Court to hear the application under Order 41 Rule 27 of the CPC along with the application. It is true that this Court has observed that the appeal along with the application under Order 41 Rule 27 of the CPC may be heard. Since it does not appear from the impugned order dated 11th March, 2013 that the appellant/petitioner pointed out before the learned Court below that the application under Order 41 Rule 27 of the CPC cannot be disposed of without hearing the appeal, I do not find any substance in the submission that learned Judge of the Court below has violated the order of this Court by disposing of the application under Order 41 Rule 27 of the CPC independently without hearing the appeal.

6. On perusal of the decision of State of Rajasthan Vs. T. Sahani and Others, it appears that in paragraph 4, the Supreme Court has observed in the fact situation of the said case that the application under Order 41 Rule 27 should have been decided along with the appeal. In the reported case the appellant wanted to adduce documentary evidence after making amendment of the memorandum of appeal which was rejected by the High Court. The said order of the High Court was set aside by the Supreme Court by making observation that this is entirely for the Court to consider at the time of hearing of the appeal on merits whether looking into the documents which are sought to be filed as additional evidence, need be looked into

to pronounce its judgment in a more satisfactory manner. In the instant case, the petitioner/appellant has not produced any document before the Appellate Court to establish that the opposite parties/respondents have acquired alternative suitable accommodation. Since the reported case relates to production of additional documentary evidence and since the petitioner/appellant has not produced any document before the Appellate Court, I am of the view that the ratio of the decision of State of Rajasthan Vs. T. Sahani and Others, will not be applicable in the facts of the present case. In North Eastern Railway Administration, Gorakhpur Vs. Bhagwan Das (D) by Lrs., the Supreme Court has observed in paragraph 20 that the Appellate Court is bound to consider the application for adducing additional evidence before taking up the appeal. So this decision of the Supreme Court does not help the petitioner/appellant in this case.

7. It is relevant to quote the provision of Order 41 Rule 27 of the Code of Civil Procedure, which is as follows:

" 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 appears from the above provision of law that the appellant seeking to produce additional evidence before the Appellate Court must establish 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. In the instant case the petitioner/appellant has stated in paragraphs 11 and 12 of the application under Order 41 Rule 27 of the CPC that the petitioner came to learn from his friends during casual conversation on 20th August, 2010 that the opposite parties/respondents have their own accommodation at Premises No. 22, Radha Kanta Jew Street, Police

Station-Ultadanga, Kolkata-700004. The petitioner/appellant has not disclosed the names of the friends from whom he came to know about the said accommodation. Nor has the petitioner/appellant produced any document in support of the statement that the opposite parties/respondents have acquired the said premises and they have been permanently settled there along with the members of their family.

8. Under the above facts and circumstances, no reasonable man of ordinary prudence can come to the conclusion that the petitioner/appellant could not produce the above aspect of additional evidence before the Trial Court after due diligence, particularly when the parties are related with each other as submitted by learned counsel for the opposite parties/respondents.

9. In view of my above findings, I cannot persuade myself to interfere in the order dated 11th March, 2013 passed by learned Judge of the Court below in Title Appeal No. 35 of 2013. Accordingly, I am of the opinion that there is no merit in this civil revision, which is disposed of. There will be no order as to costs.

The department is directed to send down a copy of this judgment to the learned Court below for favour of information and necessary action.

Urgent certified Photostat copies of this order may be supplied to the parties, if applied for, after compliance with all necessary formalities.