

IN THE HIGH COURT OF JHARKHAND AT RANCHI
C.M.P. No.406 of 2023

1. Motilal Agarwal, aged about 75 years

2. Dr. Sachidanand Agarwal, aged about 71 years

Both sons of Late Raghu Nandan Prasad Agarwal, residents of Mission Chowk, Lohardaga, P.O. & P.S. Lohardaga, District Lohardaga (Petitioner No.2 is at present resident at Bariyatu Road, Karamtoli, P.O. & P.S. Bariyatu, District Ranchi

..... Respondents/ Petitioners

Versus

1. Ram Babu Sharma

2. Dhyanchand Sharma

3. Ram Govind Sharma

4. Ratan Sharma

5. Ram Sagar Sharma

6. Ramawtar Sharma

All sons of Late Ram Prasad Sharma, resident of Mission Chowk, Lohardaga, P.O. & P.S. Lohardaga, District Lohardaga.

..... Applicants/ Opposite Parties

CORAM: HON'BLE MR. JUSTICE SUBHASH CHAND

For the Petitioners : Ms. Rahul Gupta, Advocate
Mr. Surya Prakash, Advocate
Mr. Rakesh Singh, Advocate

For the Opposite Parties : Mr. Pradip Modi, Advocate
Mr. Sarvendra Kumar, Advocate
Ms. Amrita Kumari, Advocate

Order No.14/ Dated: 2nd December, 2024

1. Learned counsel for the petitioners and learned counsel for the opposite parties are present.

2. The instant Civil Miscellaneous Petition has been preferred on behalf of the petitioners dissatisfied with the impugned order dated 27.02.2023 passed by the learned District Judge-III, Lohardaga in M.C.A. No.09 of 2020 only to the extent whereby the application of the applicant under Order XLI Rule 27 of 29.11.2017 was allowed.

3. Learned counsel for the petitioners has submitted that he has filed the

original suit for declaration of right, title and interest in the property in suit and also for permanent injunction restraining the defendants not to make interference in the possession of the very suit, which was decreed by the learned Trial Court and in that suit, the plaintiff had averred his rights in the property in suit on the basis of sale deed, which had been executed in his favour in the year 1973 by the mother of the defendant, namely, Ramwati Devi and dissatisfied with the decree passed in Title Suit No.31 of 2015, the appeal was preferred on behalf of the respondent, which is pending now. During pendency of the very appeal, the defendants-appellants got the death certificate of their mother and that certificate was sought to be adduced by way of an application under Order XLI Rule 27 of C.P.C. In that appeal, an objection as raised on behalf of the respondents of the appeal before the appellate court but the learned Appellate court has allowed the application vide order dated 27.02.2023, which is based on adverse finding.

4. Per contra, learned counsel for the opposite parties opposed the contentions made by the learned counsel for the petitioners and contended that the learned Trial Court while taking this document on record has given the finding that the evidentiary value of the document was not to be considered at this stage and the document, which was sought to be adduced on record was the public document. As such, the impugned order passed by the learned Trial Court bears no infirmity.

5. I have heard the learned counsel for the parties and perused the materials available on record.

6. The copy of plaint is Annexure-1 of this C.M.P. From very perusal of the same, it is found that the plaintiff Motilal Agrawal, the petitioner herein had instituted the suit against Ram Babu Sharma & Ors. with these

averments that the property as shown was in ownership and possession of Ramwati Devi, who had executed the sale deed in favour of the plaintiff Motilal Agarwal and the proforma defendant No.7-Dr. Sachidanand Agarwal on 05.03.1973 and on the basis of the sale deed, the plaintiffs and the proforma defendant No.7 both were the owner and also in possession of the same. Subsequently, the mutual partition also took place between the plaintiff Motilal Agarwal and the proforma defendant No.7-Dr. Sachidanand Agarwal in regard to the property in suit. Thereafter, the defendant Nos.1 to 6, who were sons of Ramwati Devi who were claiming to be the sons and legal heirs of Ramwati Devi had begun to keep their furnitures in that very land because the boundary wall of the same was not erected from one side and taking the advantage of the same, they began to keep the furniture therein. Subsequently, they began to claim their right, title and interest thereon and when the plaintiff wanted to raise the construction thereon, the same was obstructed by the defendant, hence there was no way out except to file this suit, the copy of this plaint is made Annexure-1 to this C.M.P.

7. On behalf of the defendants, the written statement was filed, which is Annexure-2 to this C.M.P. From very perusal of this written statement of the defendant Nos.1 to 6, wherein it is evident that in para 7, it has been specifically stated that Ramwati Devi wife of Ram Prasad Sharma, the mother of defendant Nos.4 and 6 had the absolute right, title and possession over the land in question under Khata No.85, Plot No.1774/2539 corresponding to M.S. Plot No.2780 measuring an area 47 kari/dec. situated under Ward No.19, P.S. No.194, P.S. and Distt. Lohardaga by way of execution of registered sale deed No.2064 dated 29.12.1958.

7.1 In para-10, it has been averred that the plaintiffs are to prove strictly

the averment made in para-3 of the plaint whether Ramwati Devi had sold any land in favour of plaintiff and performa defendant by way of registered sale deed No.793 dated 05.03.1973 for an area 21 kari. **As such, in the written statement, the defendant Nos.1 to 6 have not denied the execution of sale deed by their mother on 05.03.1973 and this very suit of the plaintiff was decreed by the learned Trial Court vide judgment dated 12.10.2018 for all the reliefs sought by the plaintiff in the plaint. The copy of the same is made Annexure-3 to this C.M.P.**

8. Aggrieved from the impugned judgment dated 12.10.2018 and the decree dated 16.11.2018, the appeal was preferred on behalf of Ram Babu Sharma, which was registered as Civil Appeal No.32 of 2018 and the very appeal is pending in the Court of learned District Judge-III, Lohardaga.

8.1 In that appeal, **an application was moved on behalf of the appellant under Order XLI Rule 27 (1)(aa) read with Section 151 of Cr.P.C. to take the death certificate of Ramwati Devi on record** with these averments that Ramwati Devi had died on 15.03.1970 entry of the same was made in Nagar Parishad Lohardaga. The said document was in their possession and after due diligence the same was obtained. Therefore, the very document could not be produced at the earliest stage. The document is public document and prayed to take the same on record in order to pronounce the appropriate judgment in appeal. **The same petition is made Annexure-4 to this C.M.P.**

9. Against this application, the objection/ rejoinder was filed on behalf of the respondent, which is Annexure-5 to this C.M.P.

10. Herein it would be pertinent to give statutory provisions of Order XLI Rule 27 of C.P.C. which reads as under:

“O.XLI R.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.”

10.1 This plea has been taken in this application to produce the death certificate of Ramwati Devi belated that the death certificate was not in possession of them and entry in regard to the death has already been made in Municipal records and the death certificate was public document.

10.2 From the very perusal of death certificate, it is found that **the date of death was registered for the first time on 20.12.2018, in which, date of death is given as 15.07.1970. This death certificate was issued on 12.12.2018. In this death certificate itself, nowhere it has been mentioned what was the basis of date of death of Ramwati Devi.**

10.3 On behalf of the opposite parties, **Annexure-8 has been filed, which is part of this C.M.P. From the very perusal of the same, it is found that in the Right to Information Act, this information as sought by the petitioner, in which, this question was raised that the death certificate of Ramwati Devi was issued on what basis and who were the applicant of the same? In reply of the same, it has been stated that the death certificate was sought by the petitioner and it has been stated that the applicant for issuance of the death certificate was Ram Dhyan Sharma who had also filed the affidavit and further on the very affidavit of Ram**

Dhyan Sharma, the enquiry was made and it was apprised by the local persons of the locality that Ramwati Devi had died 40-45 years ago while Ram Dhyan Sharma has deposed the date of death on 15.07.1970; but in the enquiry report no such date was given rather tentatively stated 40-45 years ago and this report is dated 30.11.2018.

10.4 In view of this report, the date of death of Ramwati Devi 45 years ago from 2018 will be 1973. If the average of 40-45 years is taken then it will be much after 1973. Even then, the death certificate was issued by the Registrar, Birth & Death solely relying on the affidavit of Ram Dhyan Sharma, who was the defendant of original suit and the appellant in Civil Appeal No.32 of 2018. **This affidavit was given for the first time by Ram Dhyan Sharma on 12.11.2018, which was very much after the judgment and decree passed in Original Suit. Though, herein the evidentiary value of this document is not to be assessed by this Court, yet only thing which is crucial before taking the document on record is required whether there is pleading to that effect of the parties?**

10.5 In the written statement itself, the defendants have admitted impliedly the execution of the sale deed by their mother in the year 1973 in favour of the plaintiffs. But there is no pleading of defendant that the mother of defendant had died prior to execution of sale deed by her in favour of plaintiff of the original suit.

10.6 It is the settled law that no party can be permitted to adduce evidence beyond pleadings. The Hon'ble Apex Court in the case of *Satish Kumar Gupta Vs. State of Haryana* reported in (2017) 4 SCC 760 held at paragraph Nos. 19 and 20, which read as under:

“19. The other part of the impugned order permitting additional evidence and remanding the case for fresh decision is uncalled for. No case was made out for permitting additional evidence on settled principles under Order 41 Rule 27 CPC. The provision is reproduced below:

“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.”

20. It is clear that neither the trial court has refused to receive the evidence nor it could be said that the evidence sought to be adduced was not available despite the exercise of due diligence nor it could be held to be necessary to pronounce the judgment. Additional evidence cannot be permitted to fill in the lacunae or to patch up the weak points in the case. There was no ground for remand in these circumstances.”

10.7 The Hon’ble Apex Court in the case of *Kirpa Ram Vs. Surendra Deo*

Gaur reported in (2021) 13 SCC 57 held at paragraph No. 17, which reads as under:

“17. Furthermore, the application under Order 41 Rule 27 of the Code was in respect of revenue documents in respect of Village Basai Darapur. Admittedly, the appellants have no claim on any part of the land of Village Basai Darapur. The appellants are asserting their possession relating to Khasra No. 79 of Village Shakarpur. The appellants have sought such revenue record in the additional evidence as the same was not in their knowledge and that no issue was also framed as to the correctness of the area of Khasra No. 238 of Village Basai Darapur. The plaintiffs have asserted their possession and title over Khasra No. 238 of Village Basai Darapur whereas Defendant 4 averred that the land in dispute bears Khasra No. 79 situated in Village Shakarpur, Delhi. It is to be noted that Issues 3, 4 and 5 were related to ownership and possession of Khasra No. 238 and whether the land in dispute formed a part of Khasra No. 79 of Village Shakarpur. Therefore, the entire argument that no issue was framed in respect of correctness of area of Khasra No. 238 is untenable. The parties have understood the case about the area of Khasra No. 238

falling in Basai Darapur or in Khasra No. 79 of Village Shakarpur. Once the parties have understood the said controversy and had adduced evidence before the trial court, the appellant cannot be permitted to produce additional evidence in the first appeal. Thus, the additional documents cannot be permitted to be produced as they are not relevant to the plea raised by the appellant.”

10.8 The Hon’ble Apex Court in the case of ***K.R. Mohan Reddy Vs. Net Work Inc.*** reported in **(2007) 14 SCC 257** held at paragraph Nos. 15, 16, 17 and 19, which read as under:

“15. The High Court, in our opinion, failed to apply the provisions of Order 41 Rule 27 CPC in its correct perspective. Clauses (a), (aa) and (b) of sub-rule (1) of Rule 27 of Order 41 refer to three different situations. Power of the appellate court to pass any order thereunder is limited. For exercising its jurisdiction thereunder, the appellate court must arrive at a finding that one or the other conditions enumerated thereunder is satisfied. A good reason must also be shown as to why the evidence was not produced in the trial court.

16. The respondent in its application categorically stated that the books of accounts had been misplaced and the same were discovered a few days prior to the filing of the said application while the office was being shifted. The High Court, unfortunately did not enter into the said questions at all. As indicated hereinbefore, the High Court proceeded on the basis as if clause (b) of sub-rule (1) of Rule 27 of Order 41 CPC was applicable.

17. It is now a trite law that the conditions precedent for application of clause (aa) of sub-rule (1) of Rule 27 of Order 41 is different from that of clause (b). In the event the former is to be applied, it would be for the applicant to show that the ingredients or conditions precedent mentioned therein are satisfied. On the other hand if clause (b) to sub-rule (1) of Rule 27 of Order 41 CPC is to be taken recourse to, the appellate court is bound to consider the entire evidence on record and come to an independent finding for arriving at a just decision; adduction of additional evidence as has been prayed by the appellant was necessary. The fact that the High Court failed to do so, in our opinion, amounts to misdirection in law. Furthermore, if the High Court is correct in its view that the respondent-plaintiff had proceeded on the basis that the suit is entirely based on a cheque, wherefor, it was not necessary for it to file the books of accounts before the trial court, finding contrary thereto could not have been arrived at that the same was in fact required to be proved so as to enable the appellate court to arrive at a just conclusion.

19. The appellate court should not pass an order so as to patch up the weakness of the evidence of the unsuccessful party before the trial court, but it will be different if the court itself requires the evidence to do justice between the parties. The ability to pronounce judgment is to be understood as the ability to pronounce judgment satisfactorily to the mind of the court. But mere difficulty is not sufficient to issue such direction. While saying so, however, we do not mean that the court at an appropriate stage would be precluded from considering the applicability of clause (b).

10.9 The Hon'ble Apex Court in the case of ***Bondar Singh & Ors. Vs. Nihal Singh & Ors.*** reported in ***2003 AIR SCW 1383*** held at paragraph No.7, which reads as under:

*“7.As regards the plea of sub-tenancy (shikmi) argued on behalf of the defendants by their learned counsel, first we may note that this plea was never taken in the written statement the way it has been put forth now. The written statement is totally vague and lacking in material particulars on this aspect. There is nothing to support this plea except some alleged revenue entries. **It is settled law that in the absence of a plea no amount of evidence led in relation thereto can be looked into.** Therefore, in the absence of a clear plea regarding sub-tenancy (shikmi) the defendants cannot be allowed to build up a case of sub-tenancy (shikmi). Had the defendants taken such a plea it would have found place as an issue in the suit. We have perused the issues framed in the suit. There is no issue on the point.”*

10.10 The Hon'ble Apex Court in the case of ***Prataprai N. Kothari Vs. John Braganza*** reported in ***AIR 1999 SC 1666*** held at paragraph No.10, which reads as under:

*“10.Reliance was sought to be placed on the additional evidence admitted by the learned single Judge during the pendency of the appeals to prove that the appellant had title to the property. **It is settled law that in the absence of any plea, no evidence is admissible.** The single Judge of the High Court overlooked that when there was no plea or issue on the question of title, no evidence whatever was admissible regarding the same. He acted beyond his jurisdiction in permitting additional evidence to be filed in appeals.”*

11. Even if this document, which is public document issued on the individual information of the applicant/ defendant after the judgment and decree passed in the original suit, this public document itself cannot be taken on record because there is no pleading to that effect on record on behalf of the defendants in regard to the date of death of their mother Ramwati Devi and there is no plea that Ramwati Devi had not executed sale deed in favour of plaintiff prior to her death.

12. In view of the above, the impugned order passed by the learned Court below bears infirmity and needs interference up to the extent of allowing the

application under Order XLI Rule 27 of C.P.C. of the appellant.

13. Accordingly, this C.M.P. stands **allowed** and the impugned order dated 27.02.2023 passed by the learned District Judge-III, Lohardaga in M.C.A. No.09 of 2020 is set aside up to the extent of allowing the application of the appellant under Order XLI Rule 27 of C.P.C.

14. Pending Interlocutory Application, if any, also disposed of.

(Subhash Chand, J.)

Madhav/- **A.F.R.**