**HIGH COURT OF JAMMU & KASHMIR AND LADAKH**
**AT SRINAGAR**

Reserved on : 21.11.2022
Pronounced on: 01.02.2023

OWP No. 670/2017

Mohammad Maqbool Regu and ors. …..Appellant(s)/Petitioner(s)

Through: Mr. Mohd. Ayoub Bhat, Advocate with
Ms. Mehjabeena, Advocate.

**Vs**

Hilal Ahmad and ors. ….. Respondent(s)

Through: Mr. Manzoor A. Dar, Advocate.

**Coram: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE**

**JUDGMENT**

**01.** Supervisory jurisdiction under Article 227 of the Constitution is being invoked by the petitioners in the instant petition seeking setting aside of order dated 22.4.2017 (for short impugned order) passed by the Additional District Judge, Pulwama (for short court below) in case titled as **Ali Mohd. Regu vs. Mst. Zeba and anr.**

**02.** The facts emanating from the petition would reveal that a suit for permanent injunction came to be filed by the plaintiff/predecessor-in-interest of the petitioners herein against the predecessor-in-interest of the defendants/respondents herein before the Court of Munsiff, Pulwama on 24.09.2005 which came to be dismissed in terms of judgment and decree dated 16.11.2013. The judgment and decree dated 16.11.2013 came to be assailed by

the plaintiff-predecessor-in-interest of the petitioners herein in an appeal before the Court below on 11.12.2013.

**03.** During the pendency of the appeal, the predecessor-in-interest of the petitioners herein filed an application for placing on record an agreement to sell dated 05.02.1980 and to adduce additional evidence to prove the same and the said application came to be dismissed by the Court below in terms of the impugned order.

The impugned order is being assailed on multiple grounds *inter alia* including the one that the Court below while passing impugned order ignored the legal principles while making contrary and inconsistent opinions, thus, committed an error apparent on the face of the record and did not properly consider the judgments relied upon inasmuch as mis-appreciated the same resulting into injustice and passing of the impugned order.

**Heard counsel for the parties and perused the record.**

**04.** Perusal of record tends to show that the appeal filed by the petitioners herein before the Court below stands dismissed in default on 25.02.2019, yet notwithstanding the same, this Court will proceed to test the legal validity or otherwise of the impugned order.

**05.** Perusal of the record reveals that the case set up by the plaintiff/predecessor-in-interest of the petitioners before the trial court relates to securing of an injunction against the predecessor-in-interest of the defendant/respondents herein, contending therein that the plaintiff secured possession and ownership in respect of the land measuring 07 marlas on the strength of an agreement to sell executed in his favour way back in the year 1980 and that his father has raised two shops in front of the land and on the backside of the shops, around 02 marlas of land was left vacant which came to

be encroached by the defendant with muscle power while dumping building material and constructing a plinth thereon. The plaintiff also claimed adverse possession over the strip of the land.

As against the case set up by the plaintiff, the defendant had contended that they are in possession and ownership of land measuring 07 marlas together with a two storied residential shopping complex on the strength of a sale deed executed by one Maheshwar Nath Bhat S/o Late Shiv Ram Bhat R/o Village Khrew Tehsil Pampore (Migrant) after obtaining requisite permission for alienation of sale under the relevant Act and post execution of the said sale dated 16.12.2003, construction of two storied additional structure adjacent to the existing one came to be sought and that during the raising of the construction of the said structure, the plaintiff filed the suit for injunction.

**06.** Perusal of the record reveals that the trial court after the trial of the case dismissed the suit vide judgment and decree dated 16.11.2013 which came to be questioned in appeal by the plaintiff on 11.12.2013.

**07.** Perusal of the record further tends to show that during the pendency of the said appeal, after a period of more than three years, the plaintiff-appellant filed an application before the Court below for placing on record agreement to sell dated 05.02.1980 and also to adduce the evidence to prove the same while invoking the provisions of Order XVI Rule 27 of the Code of Civil Procedure.

**08.** The perusal of the application would reveal that following two fold submissions came to be averred in the application:

(i) The document, if allowed to be produced, will be beneficial for just decision of the appeal and

(ii) That the document could not be produced earlier because Ali Mohd. Rigoo (original plaintiff-appellant) had passed away during the pendency of the appeal and prior to his death, he was seriously ill.

The Court below after elaborate discussion and considering the material facts and contentions raised dismissed the application primarily on the ground that the application filed does not qualify the test and parameters fixed under Order XVI Rule 27 of the Code of Civil Procedure, which provides and reads as under:-

> **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**
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> **01. 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.**

A bare perusal of the aforesaid provisions would reveal that for invoking the said provision, the parameters set out therein have not only to be set up but as well fulfilled.

**09.** What emerges from the plaint and the application filed by the plaintiff/appellant before the Court below is that there is a complete mismatch insofar as the agreement to sell in question is concerned. While in para 6 of the plaint, it comes to fore that the plaintiff while placing reliance on the said agreement to sell had averred that a copy of the same is annexed with the plaint whereas, in the application, it is being averred that the said document could not be produced earlier by the plaintiff/appellant as he passed away during the

pendency of the appeal and was seriously ill prior to his death. The application nowhere spells out any reason as to what prevented the plaintiff/appellant from placing on record the said agreement to sell earlier either during the pendency of the suit or else the appeal. No plausible reason or an exceptional circumstance has been spelt out in the application which would have persuaded the Court below to exercise discretion. Not even a single ground or reason is detailed out in the application, so much so, the perusal of the statement made by the plaintiff/appellant during the course of his cross-examination before the trial Court would reveal that he made a clean breast admission that he is in possession of the said agreement to sell.

**10.** The impugned order would reveal that in exercise of the discretion by the Court below, no illegality or irregularity has been committed and the order under challenge is based on sound judicial norms circumscribed by the limitations specified in Order XLI Rule 27 of the Code of Civil Procedure. No fault can be found from the findings recorded by the Court below in particular with the finding recorded that it would be in a position to pronounce judgment without allowing the said agreement to sell to be placed on record which otherwise has no evidentiary value. The inadvertence as pleaded by the petitioners herein cannot be construed as a substantial cause within the meaning of Rule 27 of Order XLI of the Code of Civil Procedure as the mere fact that certain evidence is important *per se* is not in itself a sufficient ground for admitting that evidence in appeal. A reference in this regard to the judgment of the Apex court passed in a case titled **Union of India vs. Ibrahim Uddin and anr reported in (2012) 8 SCC 148** becomes imperative herein whereunder paras 36 to 48 provide as under:-

**"36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwaralal & Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy & Ors., AIR 1979 SC 553).**

**37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798).**

**38. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra) ].**

**39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal**

**Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).**

**40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realize the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.**

**41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.**

**42. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.**

**43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough comp1iance with the requirement as to recording of reasons.**

**44. It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice – delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every**

**conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: State of Orissa v. Dhaniram Luhar, AIR 2004 SC 1794; State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi, AIR 2008 SC 2026; The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors., AIR 2010 SC 1285; and Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors., (2010) 13 SCC 336).**

**45. In City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc., AIR 1976 SC 2403, while dealing with the issue, a three judge Bench of this Court held as under:**

> **"We are of the opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason. And if it found it necessary to admit it an opportunity should have been given to the appellant to rebut any inference arising from its insistence by leading other evidence." (Emphasis added)**

**A similar view has been reiterated by this Court in Basayya I. Mathad v. Rudrayya S. Mathad and Ors., AIR 2008 SC 1108.**

**46. A Constitution Bench of this Court in K. Venkataramiah (Supra), while dealing with the same issue held:**

> **"It is very much to be desired that the courts of appeal should not overlook the provisions of cl. (2) of the Rule and should record their reasons for admitting additional evidence….. The omission to record reason must, therefore, be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory." (Emphasis added)**
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> **In the said case, the court after examining the record of the case came to the conclusion that the appeal was heard for a long time and the application for taking additional evidence on record was filed during the final hearing of the appeal. In such a fact-situation, the order allowing such application did not vitiate for want of reasons.**

**47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the**

**main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record such application may be allowed.**

**48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.**

**11.** Having regard to the aforesaid facts and circumstances as also the legal position noticed, this Court is not inclined to exercise supervisory jurisdiction in the matter in the light of the parameters laid down by the Apex Court in case titled as "**Shalini Shyam Shetty and anr vs. Rajendra Shankar Patil (2010) 8 SCC 329".**

**12.** For the aforesaid reasons, the petition is found to be without any merit and is accordingly ***dismissed***.

**(Javed Iqbal Wani)**
**Judge**

**SRINAGAR**

NARESH/PS

**Whether the judgment is speaking: Yes**
**Whether the judgment is reportable:Yes**