

AKHILESH SINGH @ AKHILESHWAR SINGH

A

v.

LAL BABU SINGH & ORS.

(Civil Appeal No. 2108 of 2018)

B

FEBRUARY 21, 2018

[A. K. SIKRI AND ASHOK BHUSHAN, JJ.]

Code of Civil Procedure, 1908:

Or. LXI, r.2 proviso and r.27 – Additional evidence – In appellate court – Accepted and simultaneously judgment pronounced in the main case, without giving opportunity to the opposite party to lead evidence in rebuttal or to give an opportunity to explain – Held: Proviso to r. 2 of Order LXI engrafts rule of natural justice and fair play, by providing that the court is obliged to grant a sufficient opportunity to the contesting party, if any new ground is allowed, which may affect the contesting party – In the present case High Court (appellate court) in the interest of justice, was obliged to grant opportunity to the respondents in the appeal either to lead evidence in rebuttal or to explain the alleged admissions in the additional documents – Matter remitted to High Court to decide the appeal afresh after giving opportunity to opposite party to lead evidence in rebuttal – Principles of Natural Justice.

C

D

E

Allowing the appeal, the Court

HELD: 1. Order LXI, Rule 27 of the CPC, which deals with the provision of additional evidence in Appellate Court provides for the grounds and circumstances on which the Appellate Court may allow such evidence or documents or witnesses to be examined. Order LXI, Rule 27 sub-rule(2) further provides that wherever additional evidence is allowed to be produced by an Appellate Court, the court shall record a reason for its admission. Order LXI, Rule 27 is silent as to the procedure to be adopted by the High court after admission of additional evidence. Whether after admission of additional evidence, it is necessary for the Appellate Court to grant opportunity to the other party to lead evidence in rebuttal or to

F

G

H

A give any opportunity is not expressly provided in Order LXI, Rule 27. [Para 11] [1092-A-C]

2. Order LXI, Rule 2 CPC provides that the appellant shall not, except by leave of the court, be allowed to urge any ground in the appeal, which is not set forth in the memorandum of appeal.

B The proviso to Order LXI, Rule 2 engrafts a rule, which obliged the Court to grant a sufficient opportunity to the contesting party, if any new ground is allowed to be urged by another party, which may affect the contesting party. The provision engrafts rule of natural justice and fair play that contesting party should be given opportunity to meet any new ground sought to be urged. When
C Appellate Court admits the additional evidence under Order LXI, Rule 27, there is no reason for not following the same course of granting an opportunity to the contesting party, which may be affected by acceptance of additional evidence. [Para 13] [1092-F-G]

D 3. In the present case, additional evidence, which were brought on the record were registered sale deeds, which were executed by present appellant and his other co-sharers and what was relied before the High Court was that the appellant admitted in the sale deeds that the partition has been taken place in the family. The main issue in the First Appeal before the High Court
E was as to whether the finding of the trial court that no partition by metes and bounds taken place in the family is correct or not. The additional evidence which was admitted has been relied by the High Court while allowing the appeal. It was in the interest of justice that High Court ought to have allowed opportunity to
F the plaintiffs, who were respondents to the First Appeal to either lead an evidence in rebuttal or to explain the alleged admissions as relied by the defendants. [Para 13] [1093-A-B]

4. The mere fact that no counter affidavit was filed to the I.A.s was not decisive. Since I.A.s having not been admitted,
G occasion for counter affidavit did not arise at any earlier point of time. The High Court on the same day, has allowed the I.A.s as well as the First Appeal. The fact that contesting respondents to the First Appeal, were not represented at the time of hearing of the First Appeal, was not a reason for not giving opportunity to them to lead evidence in rebuttal. [Para 13] [1093-C-D]

H

5. The submission of the learned counsel for the respondents that execution of sale deeds was never denied by the present appellant before the High Court, hence no error has been committed by the High Court in relying on the contents in the sale deed cannot be accepted. Even if, execution of sale deeds was not denied, the Appellate Court before which any statement in sale deeds is relied, ought to have given an opportunity to lead evidence in rebuttal or to explain the admission. Opportunity to explain the admission contained in the sale deeds was necessary to be given to the contesting party in the facts of the present case. The High Court erred in simultaneously proceeding with the hearing of the appeal after admitting additional evidence on record. The High Court ought to have given opportunity to contesting respondents in the First Appeal to lead evidence in rebuttal or to explain the alleged admission as contained in the sale deed, which having not been done, the order and judgment of the High Court deserves to be set aside. [Para 16] [1095-A-C]

Land Acquisition Officer, City Improvement Trust Board v. H. Narayaniah & Ors. (1976) 4 SCC 9 : [1977] 1 SCR 178 ; Shalimar Chemical Works Limited v. Surendra Oil and Dal Mills (Refineries) & Ors. (2010) 8 SCC 423 : [2010] 10 SCR 703 – relied on.

Case Law Reference

[1977] 1 SCR 178	relied on	Para 14	F
[2010] 10 SCR 703	relied on	Para 15	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2108 of 2018.

From the Judgment and Order dated 08.03.2017 of the High Court of Judicature at Patna in First Appeal No.704 of 1976.

Moni Cinmoy, Arvind Kr. Pandey, Rakesh Kr. Singh, Ashok Anand, Advs for the appearing parties.

H

A The Judgment of the Court was delivered by

ASHOK BHUSHAN, J. 1. This appeal has been filed against the judgment of Patna High Court dated 08.03.2017 in First Appeal No. 704/1976 by which the First Appeal filed by defendants to the suit has been allowed setting aside the judgment and decree of the trial court
B decreeing the partition suit.

2. The brief facts of the case which need to be noted for deciding this appeal are:-

C Title Suit No. 406/1973 was filed by one Sheo Prasad Singh (Grandfather of appellant before us) and his three sons seeking partition of their 1/4th share in joint family properties described in Schedule B, C and D of the plaint. In the plaint, it was pleaded that plaintiffs and defendants are descendants of a common ancestor. Kalpoo Singh had four sons. Plaintiffs represented branch of Sheo Prasad Singh whereas
D defendants represented other three branches.

It was pleaded that there was a disruption in the joint family in or around 1963. Whereafter, all the branches of Kalpoo Singh separated in their mess, business and worship but cultureable land and residential houses remained joint. Order passed by Commissioner, Patna Division arising out of a proceeding for mutation on respective land was also in
E question. Trial court *vide* its judgment and decree dated 10.08.1976 decreed the suit of the plaintiff declaring 1/4th share of the plaintiff in the properties described in Schedule B, C and D. The defendants Lal Babu Singh & Ors. filed First Appeal No. 704 of 1976 against the judgment and decree of the trial court. During pendency of the First Appeal, the
F defendants-respondents, who were appellant in First Appeal, filed various applications under Order LXI Rule 27 Code of Civil Procedure for acceptance of additional evidence in the First Appeal. The first application under Order LXI Rule 27 was filed on 27.10.1997 for accepting a Sale Deed dated 27.08.1992 on the record. Other applications filed for accepting additional evidence were I.A. No. 6457 of 1998, I.A. No.
G 3731 of 2011 and I.A. No. 5195 of 2016. High Court has passed an order on the I.A.s that applications shall be heard at the time of hearing of the appeal. The First Appeal came to be heard by the High Court on 08.03.2017. At the time of hearing, unfortunately, nobody appeared on behalf of appellant, who was respondent in the First Appeal. The High
H Court after hearing the learned counsel for the defendants-respondents

allowed I.A. No. 6457 of 1998, I.A. No. 3731 of 2011 and I.A. No. 5195 of 2016 by accepting the additional evidence, which was sought to be brought on record. Simultaneously, the High Court proceeded with the hearing of the appeal and relying on additional evidence allowed the First Appeal setting aside the judgment and decree of the trial court. The appellant aggrieved by the judgment of the High court has come up in this appeal.

3. Learned counsel for the appellant contended that in event the High Court decided to admit the additional evidence under Order XLI Rule 27 CPC, the High Court ought to have given opportunity to the plaintiff-respondent to rebut the additional evidence brought on record by the defendants. The High Court having not given any such opportunity to plaintiff has committed serious error of procedure, which has caused great prejudice to present appellant vitiating the entire judgment of the High Court. It is submitted that the High Court in the additional evidence has relied on certain admissions by the appellant and other co-sharers whereas the appellant was not given any opportunity by the Court to lead evidence in rebuttal and explain the additional evidence relied by defendants-respondents. Learned counsel submits that the reliance on such additional evidence without giving opportunity to lead evidence in rebuttal had vitiated the entire procedure adopted by the High Court, vitiating the judgment and decree of the High Court.

4. Learned counsel for the respondents refuting the submission of the counsel for appellant contends that the High Court has rightly relied on the admissions contained in the additional evidence, which was admitted by the High Court since although respective I.A.s were filed long before but neither any counter affidavit to the I.A.s nor any explanations were ever submitted by the plaintiff appellant. The High Court thus has no choice except to proceed to decide appeals relying on the additional evidence admitted in the Court. It is submitted that the execution of sale deeds which were relied, was never disputed nor the statements contained in the sale deeds were even disputed by plaintiff-appellant before the High Court. Hence, no error has been committed by the High Court in relying on the additional evidence. He submits that the High Court itself has noticed in the order that I.A.s filed by defendants-respondents for accepting additional evidence were never objected by filing a counter affidavit by the plaintiff.

H

A 5. Learned counsel further submits that there being clear admissions in the sale deeds, which were brought on the record that there has been partition in the family, suit of the plaintiff for partition has rightly been dismissed.

B 6. We have considered the submissions of the learned counsel for the parties and perused the records.

C 7. The submission which has been pressed before us by the learned counsel for the appellant that the High Court ought to have granted opportunity to the plaintiffs-appellants, who were respondents in the First Appeal before the High Court after accepting the additional evidence as prayed by defendant-appellant in the First Appeal; we thus confine our consideration to this issue alone.

D 8. The record reveals that additional evidence, which was sought to be taken on record by the defendants, who were appellants before the High Court were all the evidences, which came into existence after the decree of the trial court. The applications filed under Order LXI Rule 27 CPC have been considered by the High Court in Paragraphs 22 to 25 of its judgment. The application dated 27.10.1997 having been rejected by the High Court, no further comment is needed. After referring to the other I.A.s in Paragraphs 23, 24 and 25 of the judgment, the High Court allowed the three I.A.s, namely, I.A. No. 6457 of 1998, I.A. No. 3731 of 2011 and I.A. No. 5195 of 2016 and relying on the additional evidence, brought on the record and referring to admissions in the said documents, the High Court has allowed the First Appeal by setting aside the judgment and decree of the trial court. In Para 26, 30 and 31, following has been stated:-

F “26. It may be mentioned here that all these documents were not available during the trial and moreover, these documents are the documents of the plaintiffs-respondents and the appellants had no knowledge earlier. During the pendency of this appeal, these documents have been executed by the plaintiffs-respondents wherein they clearly admitted the previous partition between four branches i.e. sons of Kalpoo Singh and even they admitted inter se partition between themselves. It is not their statement in the sale deeds or the plaint or the application that partition is effected after disposal of partition suit. In all the sale deeds, the application, the plaintiffs

H

themselves admitted previous partition between the parties i.e. prior to institution of the suit for partition. The appellants claimed previous partition in the year 1958-59 whereas the plaintiffs admitted in the plaint filed by them for inter se partition that there had already been partition between four brothers in 1965. Now, therefore, only dispute between the parties is in which year partition took place. It may be mentioned here that this partition suit is of the year 1973. Therefore, whether partition took place in 1958-59 or in the year 1965, it is irrelevant because prior to the present partition suit the parties have already partitioned the suit property.

30. In view of my above discussion, the three I.As. filed by the appellants are hereby allowed and on the basis of the evidences discussed above, I come to the conclusion that the appellants have been able to prove that there had already been partition as claimed by the defendants-appellants. There is no unity of title and possession between the parties. It appears that the court below has not properly appreciated the evidences as discussed above and moreover, the documentary evidences produced by the appellants by way of additional evidences were not available during trial. Thus, the finding of the learned trial court is hereby reversed.

31. In the result, this First Appeal is allowed. The impugned judgment and decree are set aside. The plaintiffs-respondent's suit for partition is hereby dismissed.”

9. It is also relevant to note that the High Court in its judgment in Para 11 has stated that applications were directed to be heard at the time of hearing and although the I.A.s had been filed long ago nor any counter-affidavit or any reply has been filed and nobody appeared to controvert the case of the appellant.

10. As noticed above, the High Court while allowing the I.A.s and accepting the additional evidence on record proceeded to pronounce the judgment simultaneously. The question to be answered in this appeal is as to whether the High Court ought to have granted an opportunity to the defendant-appellant, who was respondent in the First Appeal to lead evidence in rebuttal or to give an opportunity to explain the alleged admissions, which were relied by the defendant-appellant before the High Court.

A 11. Order LXI Rule 27 of the CPC, which deals with the provision
of additional evidence in Appellate Court provides for the grounds and
circumstances on which the Appellate Court may allow such evidence
or documents or witnesses to be examined. Order LXI Rule 27 sub-
rule(2) further provides that wherever additional evidence is allowed to
B be produced by an Appellate Court, the court shall record a reason for
its admission. Order LXI Rule 27 is silent as to the procedure to be
adopted by the High court after admission of additional evidence.
Whether after admission of additional evidence, it is necessary for the
Appellate Court to grant opportunity to the other party to lead evidence
in rebuttal or to give any opportunity is not expressly provided in Order
C LXI Rule 27.

12. One provision, which is part of Order LXI, which also needs
to be noted is Order LXI Rule 2, which is as follows:-

2. Grounds which may be taken in appeal.- The appellant
shall not, except by leave of the court, urge or be heard in support of any
D ground of objection not set forth in the memorandum of appeal; but the
appellate court, in deciding the appeal, shall not be confined to the grounds
of objections set forth in the memorandum of appeal or taken by leave
of the court under this rule:Provided that the Court shall not rest its
decision on any other ground unless the party who may be affected
E thereby has had a sufficient opportunity of contesting the case on that
ground.

13. Order LXI Rule 2 provides that the appellant shall not, except
by leave of the court, be allowed to urge any ground in the appeal, which
is not set forth in the memorandum of appeal. The proviso to Order LXI
F Rule 2 engrafts a rule, which obliged the Court to grant a sufficient
opportunity to the contesting party, if any new ground is allowed to be
urged by another party, which may affect the contesting party. The
provision engrafts rule of natural justice and fair play that contesting
party should be given opportunity to meet any new ground sought to be
urged. When Appellate Court admits the additional evidence under Order
G LXI Rule 27, we fail to see any reason for not following the same course
of granting an opportunity to the contesting party, which may be affected
by acceptance of additional evidence. In the present case, additional
evidence, which were brought on the record were registered sale deeds,
which were executed by present appellant and his other co-sharers and

H

what was relied before the High Court was that the appellant admitted in the sale deeds that the partition has been taken place in the family. The main issue in the First Appeal before the High Court was as to whether the finding of the trial court that no partition by metes and bounds taken place in the family is correct or not. The additional evidence which was admitted has been relied by the High Court while allowing the appeal. It was in the interest of justice that High Court ought to have allowed opportunity to the plaintiffs, who were respondents to the First Appeal to either lead an evidence in rebuttal or to explain the alleged admissions as relied by the defendants. The mere fact that no counter affidavit was filed to the I.A.s was not decisive. Since I.A.s having not been admitted, occasion for counter affidavit did not arise at any earlier point of time. The High Court on the same day, i.e. 08.03.2017 has allowed the I.A.s as well as the First Appeal. The fact that contesting respondents to the First Appeal, who are appellant before us were not represented at the time of hearing of the First Appeal, was not a reason for not giving opportunity to them to lead evidence in rebuttal.

14. A three-Judge Bench of this Court in *Land Acquisition Officer, City Improvement Trust Board Vs. H. Narayanaiah & Ors., (1976) 4 SCC 9* had occasion to consider Order LXI Rule 27 in context of admission of additional evidence by Appellate Court. This Court had observed that in event the High Court admits an additional evidence, an opportunity should have been given to the other party to rebut any inference arising from its existence by leading evidence. In Para 28 of the judgment, following has been laid down:-

“28. The Karnataka High Court had, however, not complied with provisions of Order 41 Rule 27 of the CPC which require that an appellate court should be satisfied that the additional evidence is required to enable it either to pronounce judgment or for any other substantial cause. It had recorded no reasons to show that it had considered the requirements of Rule 27 Order 41 of the CPC We are of 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 existence by leading other evidence.”

(emphasis supplied by us)

A 15. To the same effect is another judgment of this Court in the
case of *Shalimar Chemical Works Limited Vs. Surendra Oil and*
Dal Mills (Refineries) & Ors., (2010) 8 SCC 423. In this case also,
the Court had occasion to consider Order LXI Rule 27, this Court has
again laid down that when documents are taken in additional evidence,
B an opportunity ought to have been given to other party to lead evidence
in rebuttal. In the above case also, the High Court simultaneously
proceeded to decide the appeal alongwith admitting additional evidence
on record. In Paragraphs 16 to 18 following has been laid down:-

C “16. The learned Single Judge rightly allowed the appellant’s plea
for production of the original certificates of registration of trade
mark as additional evidence because that was simply in the interest
of justice and there was sufficient statutory basis for that under
clause (b) of Order 41 Rule 27. But then the Single Judge seriously
erred in proceeding simultaneously to allow the appeal and not
D giving the respondent-defendants an opportunity to lead evidence
in rebuttal of the documents taken in as additional evidence.

E 17. The Division Bench was again wrong in taking the view that
in the facts of the case, the production of additional evidence was
not permissible under Order 41 Rule 27. As shown above, the
additional documents produced by the appellant were liable to be
taken on record as provided under Order 41 Rule 27(b) in the
interest of justice. But it was certainly right in holding that the
way the learned Single Judge disposed of the appeal caused serious
prejudice to the respondent-defendants. In the facts and
circumstances of the case, therefore, the proper course for the
Division Bench was to set aside the order of the learned Single
F Judge without disturbing it insofar as it took the originals of the
certificates of registration produced by the appellant on record
and to remand the matter to give opportunity to the respondent-
defendants to produce evidence in rebuttal if they so desired. We,
accordingly, proceed to do so.

G 18. The judgment and order dated 25-4-2003 passed by the Division
Bench is set aside and the matter is remitted to the learned Single
Judge to proceed in the appeal from the stage the originals of the
registration certificates were taken on record as additional
evidence. The learned Single Judge may allow the respondent-
defendants to lead any rebuttal evidence or make a limited remand
H as provided under Order 41 Rule 28.”

16. The submission of the learned counsel for the respondents that execution of sale deeds was never denied by the present appellant before the High Court, hence no error has been committed by the High Court in relying on the contents in the sale deed cannot be accepted. Even if, execution of sale deeds was not denied, the Appellate Court before which any statement in sale deeds is relied ought to have given an opportunity to lead evidence in rebuttal or to explain the admission. Opportunity to explain the admission contained in the sale deeds was necessary to be given to the contesting party in the facts of the present case. We thus are of the opinion that the High Court erred in simultaneously proceeding with the hearing of the appeal after admitting additional evidence on record. The High Court ought to have given opportunity to contesting respondents in the First Appeal to lead evidence in rebuttal or to explain the alleged admission as contained in the sale deed, which having not been done, the order and judgment of the High Court deserves to be set aside. The High Court may now proceed to decide the appeal afresh after giving an opportunity to the present appellant to lead evidence in rebuttal. The appeal before the High Court being pending since 1976, we expect that the High Court should conclude the entire process expeditiously preferably within a period of six months from the date of production of this judgment before the High Court. We make it clear that we have not expressed any opinion on merits of the case and it is for the High Court to consider the First Appeal on merits afresh and take a decision in accordance with law. In result, this appeal is allowed, judgment and decree of the High Court is set aside. The First Appeal be decided by the High Court afresh as observed above. Parties shall bear their own costs.