IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.35 of 2022

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1. Mossamat Chintamani Devi W/o Late Ram Najar Tiwari resident of Village Nagpura, P.S. Simri, District- Buxar
2. Mithilesh Tiwari Son of Late Ram Najar Tiwari resident of Village Nagpura, P.S. Simri, District- Buxar
3. Abhishek Tiwari Son of Late Ram Najar Tiwari resident of Village Nagpura, P.S. Simri, District- Buxar
4. Nitu Mishra Daughter of Late Ram Najar Tiwari resident of Village Nagpura, P.S. Simri, District- Buxar
5. Parashuram Tiwari Son of Late Brahmdat Tiwari resident of Village Nagpura, P.S. Simri, District- Buxar
6. Mossamat Girija Tiwari @ Girija Devi W/o Late Shankar Dayal Tiwari resident of Village Nagpura, P.S. Simri, District- Buxar
7. Jai Prakash Tiwari Son of Late Shankar Dayal Tiwari resident of Village Nagpura, P.S. Simri, District- Buxar
8. Basukinath Tiwari Son of Late Shankar Dayal Tiwari resident of Village Nagpura, P.S. Simri, District- Buxar
9. Mossamat Shanti Devi W/o Late Ramadhar Tiwari resident of Village Nagpura, P.S. Simri, District- Buxar
10. Shashikant Tiwari Son of Late Ramadhar Tiwari resident of Village Nagpura, P.S. Simri, District- Buxar
11. Rajanikant Tiwari Son of Late Ramadhar Tiwari resident of Village Nagpura, P.S. Simri, District- Buxar
12. Shailendra Kumar Tiwari @ Sailendra Tiwari Son of Late Ramadhar Tiwari resident of Village Nagpura, P.S. Simri, District- Buxar
13. Satya Nana Tiwari Son of Late Ramadhar Tiwari resident of Village Nagpura, P.S. Simri, District- Buxar

... ... Petitioners

Versus

1. Lalan Chaubey S/o Late Bihari Choubey resident of Village Nagpura, P.S. Simri, District- Buxar
2. Sita Devi W/o Lallan Choubey resident of Village Nagpura, P.S. Simri, District- Buxar

... ... Respondents

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Appearance :
For the Petitioner/s : Mr. J. S. Arora, Sr. Advocate
Mr. Manoj Kumar, Advocate
For the Respondent/s : Mr. Ashok Kumar Pathak, Advocate

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CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT
Date : 25-07-2024

The present petition has been filed under Article 227

of the Constitution of India by the petitioners for setting aside the order dated 26.11.2021 passed in Title Appeal No.73 of 2019 by the learned Additional District Judge-VII, Buxar whereby and whereunder the application under Order 41 Rule 27 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') filed by the petitioners has been rejected.

02. Briefly stated the facts of the case are that the petitioners were plaintiffs in the trial court and have filed Title Suit No. 12 of 2009 and after its dismissal, petitioners became appellant in Title Appeal No. 73 of 2019 in which the impugned order has been passed. It transpires that one Bhagwati Chaubey sold a piece of land, having an area of 68.5 decimal with respect to old *Khata* No. 95 of *Plot* No. 654 and area 6.5 decimal of old *Plot* No. 951 through a registered deed of sale on 18.06.1986 in favour of the petitioners/their ancestors for consideration amount of Rs. 20,000/-. Prior to purchase of the said land, the petitioners/their ancestors had purchased 1.5 *Bigha* land of *Khata* No. 94, *Plot* No. 1334 through a registered sale deed dated 31.05.1977 from Bhagwati Chaubey. After purchase of the aforesaid properties, the name of the ancestors of the petitioners were duly mutated and the purchasers started making payment of rent to the State of Bihar which issued receipts in lieu thereof.

It further transpires that during revisional survey operation, the name of Shiv Dahin Chaubey was entered with regard to Schedule-II land of the petitioners although right of ownership and possession of the petitioners continued on the said land. The petitioners were unaware about the erroneous entry but they came to know about the same when the defendants tried to wrongfully interfere in peaceful possession of the petitioners. Thereafter the petitioners filed Title Suit No. 12 of 2009 before the court of learned Sub-Judge-III, Buxar against the descendants of said Shiv Dahin Chaubey for declaration of the title of the said land. During pendency of the title appeal, the petitioners came to know in January, 2019 about execution of power of attorney dated 30.01.1950 by Bhagwati Chaubey in favour of Shiv Dahin Chaubey with regard to properties of Plot Nos. 651 and 654 which are in dispute in Title Suit No. 12 of 2009. The said Shiv Dahin Chaubey, on the basis of this power of attorney, used to do work in the interest of his Principal. However, Bhagwati Chaubey sold the land claiming the land to be his own ancestral property whereas the descendants of Shiv Dahin Chaubey claimed purchase of the land by Shiv Dahin Chaubey in his personal capacity in Execution Case No. 811 of 1954 on 15.06.1955. Petitioners' further case is that the power

of attorney dated 30.01.1950 came to the knowledge and possession of the petitioners for the first time in January, 2020 and the petitioners felt that it could be a very useful document for deciding and appreciating the evidence as to whether the land in suit belong to Bhagwati Chaubey or Shiv Dahin Chaubey. In these circumstances, the petitioners filed the petition dated 14.02.2020 under Order XLI Rule 27 of the Code for bringing the said document on record by marking it exhibit as an additional evidence. A rejoinder was filed by the respondent and the learned first appellate court rejected the petition filed by the petitioners vide order dated 20.11.2021 at the pre-hearing stage of the appeal. This order has been challenged in the present petition.

03. Learned senior counsel, Mr. J. S. Arora, appearing on behalf of the petitioners submitted that the order of the learned first appellate court suffers from jurisdictional error in disposing of the application at the pre-hearing stage as a petition filed for additional evidence could be considered only while hearing the appeal and not separately and, that too, by entering into appreciation of facts. Mr. Arora further submitted that the vendor of petitioners, Bhagwati Chaubey, used to stay in Assam and for taking care of his property and for sale-purchase

of the properties, he executed a power of attorney dated 30.01.1950 in favour of ancestor of respondents, Shiv Dahin Chaubey. The suit property was auctioned by Dumraon Raj in Case No. 555 of 1954 in Execution Case No. 811 of 1954 and Shiv Dahin Chaubey purchased the said property as a power of attorney holder of Bhagwati Chaubey. However, *khatiyan* entry was wrongly prepared in the name Shiv Dahin Chaubey whereas it should have been in the name of Bhagwati Chaubey. As there was no power of attorney before the learned trial court, the learned trial court passed the orders against the petitioners. Mr. Arora further submitted that after much effort the nephew of Bhagwati Chaubey gave the document to the petitioner which is essential for complete justice in the dispute of the parties. If the document, i.e., the power of attorney is taken as an additional evidence, in that case, the sale-deeds executed in favour of the petitioners would become a relevant and pertinent document.

04. On the point of dealing with an application under Order 41 Rules 27 of the Code, learned senior counsel referred to the decision of Hon'ble Supreme Court in the case of ***G. Shashikala Vs. G. Kalawati Bai*****,** reported in ***(2019) 15 SCC 201*** wherein the Hon'ble Supreme Court has held that the question as to how application under Order 41 Rule 27 in appeal

should be decided by appellate court remains no more *res integra* and stands decided by three decision of Hon'ble Supreme Court in the cases of ***North Eastern Railway Administration Vs. Bhagwan Das,*** reported in (***2008) 8 SCC 511*** [Paras 13-17], ***Shalimar Chemical Works Ltd. Vs. Surendra Oil & Dal Mills,*** reported in ***(2010) 8 SCC 423*** [para-16] and ***Corporation of Madras & Anr. vs. M. Parthasarathy & Ors,*** reported in ***(2018) 9 SCC 445*** [Paras 11-15]. Learned counsel further submitted that the learned first appellate court passed the impugned order in a most mechanical way and against the principles for consideration of additional evidence. The learned first appellate court went on to assess the genuineness and evidentiary value of the document when it was not required to comment on the genuineness and evidentiary value of the document sought to be brought on record. The learned first appellate court did not test the said petition on the touchstone of the principles laid down by various decisions of the Hon'ble Supreme Court. Mr. Arora also referred to the decision of Hon'ble Supreme Court in the case of ***Wadi Vs. Amilal and Ors.,*** reported in ***(2015) 1 SCC 677*** wherein it has been observed that the general principle incorporated in Sub-rule (1) is that the parties to an appeal are not entitled to produce

additional evidence in the appellate court to cure a lacuna or fill up a gap in a case. The exceptions are in Clauses (a), (aa) and (b). The Supreme Court has further held that Clause 1(b) says that if the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, it may allow such document to be produced or witness to be examined. The requirement or need is that of the appellate court bearing in mind that the interest of justice is paramount. Mr. Arora further referred to the decision in the case of ***J. Balaji Singh Vs. Diwakar Cole & Ors.,*** reported in ***(2017) 14 SCC 207,*** wherein the Hon'ble Supreme Court has upheld the correctness of order of first appellate court remanding the matter to the learned trial court when it found the additional evidence to be material and necessary for proper adjudication of the suit and also the reason why it could not be filed during the trial. Mr. Arora further relied on the decision of Hon'ble Supreme Court in the case of ***State of Rajasthan Vs. T. N. Sahani & Ors.,*** reported in ***(2001) 10 SCC 619*** wherein it has been held that the application under Order 41 Rule 27 should have been decided along with the appeal. Had the Court found the documents necessary to pronounce the judgment in the appeal in a more satisfactory manner it would have allowed

the same; if not, the same would have been dismissed at that stage. The Hon'ble Supreme Court further held that taking a view on the application before hearing of the appeal would be inappropriate.

05. Mr. Arora further referred to the decision of Hon'ble Supreme Court in the case of ***Jagdish Prasad Patel & Anr. Vs. Shivnath and Ors.,*** reported in ***(2019) 6 SCC 82*** wherein in paragraph-29, the Hon'ble Supreme Court summarize the law as follows:-

> *"**29.** Under Order 41 Rule 27 CPC, production of additional evidence, whether oral or documentary, is permitted only under three circumstances which are:*
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> *(I) Where the trial Court had refused to admit the evidence though it ought to have been admitted;*
>
> *(II) the evidence was not available to the party despite exercise of due diligence; and*
>
> *(III) the appellate Court required the additional evidence so as to enable it to pronounce judgment or for any other substantial cause of like nature.*
>
> *An application for production of additional evidence cannot be allowed if the appellant was not diligent in producing the relevant documents in the lower court.*

However, in the interest of justice and when satisfactory reasons are given, court can receive additional documents."

In the aforesaid decision in the case of ***Jagdish Prasad Patel*** (supra), the Hon'ble Supreme Court has also held that even the documents were not produced before the trial court nor were there reference to those documents in the pleadings, if the said document has a direct bearing on the main issue in the suit, the same has to be received as additional evidence.

06. Mr. Arora further submitted that in the case ***Sanjay Kumar Singh Vs. State of Jharkhand***, reported in ***(2022) 7 SCC 247,*** the Hon'ble Supreme Court has held that as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence if the conditions laid down in this Rule are found to exist and the parties are not entitled, as of right, to the admission of such evidence. The Supreme Court further held that, however, 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. The Supreme Court further reiterated that the admissibility of

additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. It is further observed that the true test, therefore is, whether the appellate court is able to pronounce judgment on the material before it without taking into consideration the additional evidence sought to be adduced.

07. Mr. Arora further submitted that the learned first appellate court completely overlooked the principles as laid down by the various decisions of the Hon'ble Supreme Court. Mr. Arora further submitted that though the petitioner explained the circumstances under which the fact regarding execution of the power of attorney came to their notice in January, 2020, there was no occasion for the petitioners to plead the said fact in the plaint in the year 2009. Moreover, the evidences are not required to be pleaded and in the pleadings one has to place only the facts of substance. Mr. Arora further submitted that the learned first appellate court has committed further error of jurisdiction by not appreciating the fact that the additional

evidence sought to be brought on record might be a relevant piece of evidence which could help in adjudication process for deciding the dispute between the parties and for this reason absence of evidence in pleading is not a ground to reject the prayer for bringing the additional evidence on record. The learned first appellate court in most casual manner held that the additional evidence sought to be brought on record is forged and fabricated document and petitioners want to usurp the judgment in their favour. Learned first appellate court further failed to appreciate that the document was a piece of evidence for deciding the issues between the parties and the said document should be on record. Mr. Arora further submitted that the learned first appellate court failed to appreciate that the document in question is not only a registered document but also more than 30 years old and hence no formal proof to prove the same was necessary. There has been no challenge to genuineness of the document from any of the quarter. Mr. Arora further submitted that the power of attorney is an important and crucial document and must be allowed to be brought on record to enable the court come to a just finding. Furthermore, no formal proof would be required as it is a 30 years old document. Thus, learned senior counsel submitted that the impugned order

is not sustainable and the same be set aside allowing the petition of the petitioners for bringing on record the additional evidence.

08. Learned counsel appearing on behalf of the respondents vehemently contended that there is no infirmity in the impugned order and the same needs to be sustained. Learned counsel further submitted that while moving the petition, petitioners have not mentioned the reasons for bringing the document on record so late. Admittedly, there is no pleading with regard to power of attorney. In their pleadings, the petitioners have only mentioned the survey entry in favour of the ancestor of the respondents and they have never mentioned about the auction proceeding. The title suit was filed in the year 2009 and after 11 years, against their pleadings, the petitioners have filed the document with a prayer to take the same as an additional evidence. There is no due diligence and the petitioner have not taken any action against the auction proceeding which were finalized in Case No. 555 of 1954. Power of attorney cannot nullify the facts of auction purchase by Shiv Dahin Chaubey, which is a material fact of paramount the importance. The learned trial court recorded its finding about auction purchase by the donor of the respondents. The learned counsel also countered the argument of the learned senior counsel on the

point that the application for amendment should have been disposed of at the time of hearing of appeal submitting that the petitioner did not make any such prayer before the learned first appellate court. Learned counsel reiterated that there is no merit in the present petition and the same be dismissed.

09. I have given my thoughtful consideration to the rival submissions of the parties in the light of facts and circumstances of the case. The introduction of power of attorney at the appellate stage would always be seen with circumspection. But, if it is a registered document, there is a presumption of genuineness of its execution. However, it is for the court concerned to see that whether the document is required to enable it to pronounce the judgment or for any other substantial cause. Another condition for taking the additional evidence at the appellate stage is that 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. The petitioners claim that only in the year 2020, they came to know about the said document and for this reason, no pleading were incorporated earlier in the plaint. The

argument seems reasonable, if the petitioners were having knowledge of document, there was no reason for not introducing the same by mentioning it in the plaint and producing the document earlier during trial. From perusal of impugned order, I also find that the learned first appellate court has not discussed the relevance of the document and even usefulness in the decision of the appeal. It appears that the learned first appellate court entered into the merits of the document and raised a question over its genuineness on the possibility of fabrication or false document to procure the judgment. Such observation are certainly uncalled for and could not be sustained.

10. The law with regard to production of the additional evidence has been crystallized by various decisions of the Hon'ble Supreme Court and some of the decisions have been quoted by the learned senior counsel for the petitioners. By placing reliance on the decisions of ***Wadi Vs. Amilal and Ors.*** (supra), it is evident that apart from condition of Order 41 Rule 27 (1) (aa) of the Code, Order 41 Rule 27 1(b) provides that the appellate court has to give a finding that whether it requires document for pronouncement of judgment or for any other substantial cause. But, such requirement could be asserted at the final stage of the appeal and not at the time of pre-hearing. In

the case of ***Pirgonda Hongonda Patil vs Kalgonda Shidgonda Patil & Ors,*** reported in ***AIR 1957 SC 363,*** the Hon'ble Supreme Court has held that all amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties.

Furthermore, the Hon'ble Supreme Court in the case of ***Union of India vs. Ibrahim Uddin & Anr***., reported in ***2013 (1) PLJR (SC) 48*** has held that the application for taking additional evidence at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of final hearing of the appeal and the same could not be disposed of prior to the final stage of hearing of the appeal. However, in the present case, the learned first appellate court has disposed of the petition at the very beginning of the appeal.

11. In the light of discussion made here-in-above, the impugned order could not be sustained. Hence, the order dated 26.11.2021 passed in Title Appeal No.73 of 2019 is set aside and the matter is remanded to the learned first appellate court to pass orders afresh on the petition dated 14.02.2020 of the petitioners in the light of decisions of Hon'ble Supreme Court in

the case of ***Union of India vs. Ibrahim Uddin & Anr***. (supra).

12. As a result, the present petition stands allowed.

(Arun Kumar Jha, J)

Ashish/-

AFR/NAFR	AFR
CAV DATE	01.07.2024
Uploading Date	25.07.2024
Transmission Date	NA