

Bench:

Mr. Justice Bhishmadev Chakraborty

Civil Revision No. 1455 of 2008

Md. Sabaj Miah and anotherpetitioners

-Versus-

Jhunu Miah and othersopposite parties

Mr. Chanchal Kumar Biswas, Advocate

..... for the petitioners

Mr. Tabarak Hossain, Advocate

..... for opposite party 1

Judgment on 04.03.2024

This Rule, at the instance of the pre-emptor-respondent, was issued calling upon the pre-emptee-appellant to show cause as to why the judgment and order dated 03.03.2008 passed by the Joint District Judge, Court No.2, Moulvibazar in Miscellaneous Appeal No.01 of 2004 allowing the application under Order 41 Rule 27 of the Code of Civil Procedure (the Code) for accepting additional evidence should not set aside.

The material facts for disposal of the Rule, in brief, are that the pre-emptor, petitioner herein, filed Pre-emption Miscellaneous Case No.19 of 2001 in the Court of Assistant Judge, Rajnagar, Moulvibazar for pre-empting the deed described in the schedule to the case for pre-emption. In the case, the pre-emptor claimed that he was the contiguous land owner to the suit land and the vendors sold out the land to the pre-emptee by a registered *kabala* dated 25.06.2001 without serving any notice upon him. After obtaining certified copy of the deed he instituted the miscellaneous case

under section 96 of the State Acquisition and Tenancy Act (SAT Act, 1950) within the period of limitation. The pre-emptee contested the case by filing written objection. He contended that the deed in dispute is not a deed of sale but it is a *nadabi patra*. The recorded owner transferred the suit land to the pre-emptee's predecessor in interest without any instrument of transfer and as such the case would be rejected.

In the trial, the pre-emptor examined 5 witnesses while the pre-emptee examined 2. However, the learned Assistant Judge considering the evidence and other materials on record allowed the case for pre-emption deciding all the issues in pre-emptor's favour.

Being aggrieved by the pre-emptee as appellant preferred appeal before the District Judge, Moulvibazar. The appeal was transferred to the Court of Joint District Judge, Court No.2, Moulvibazar for hearing. In the appellate Court, the pre-emptee filed an application under Order 41 Rule 27 of the Code for examining 5 witnesses as cited in the said application to prove their case of *nadabi patra*. The Joint District Judge by its order dated 03.03.2008 allowed the said application which prompted the petitioner to approach this Court and this Rule was issued with an *interim* order of stay of the proceeding of the miscellaneous appeal.

Mr. Chanchal Kumar Biswas, learned Advocate for the petitioners taking me through the impugned order and other

materials on record submits that the pre-emptee filed the application in the appellate Court under Order 41 Rule 27 of the Code for examining the witnesses cited therein. But in the application he did not assign any reason why taking of additional evidence is required or what prevented him from examining those witnesses in the trial of miscellaneous case. He refers to the provisions of Order 41 Rule 27 of the Code and submits that although the aforesaid provision empowers the appellate Court to take additional evidence but it can be allowed only where the Court finds it require for any one of the two causes specified in the Rule. In the absence of any such cause as envisage in Order 41 Rule 27(1), the appellate Court cannot allow the appellant to adduce additional evidence. If such prayer is allowed, it would only amount to giving the appellant an opportunity to fish out a new evidence for improving his case by filling up the lacuna therein. He then submits that there in nothing in the application that the trial Court refused to examine them as witnesses and, therefore, the application for taking additional evidence of those persons is not maintainable. The appellate Court below committed error of law resulting in an error in such order occasioning failure of justice in allowing the application. He further submits that the aforesaid rule and order of the Code does not provide to allow a litigant who has been unsuccessful in the lower Court. To patch up the weak part of the case and to fill up the gaps, the appellate Court below cannot

allow the application for additional evidence. Therefore, the Joint District Judge committed error of law which has resulted in an error in such order occasioning failure of justice. He refers to the case of Mohammad Ali Akhand Vs. Bahatan Nessa Bewa and others, 18 BLD 50 and relied on the principle laid therein.

Mr. Tabarak Hossain, learned advocate for opposite party 1 opposes the Rule and submits that power of the appellate Court under Order 41 Rule 27 of the Code is discretionary. The Court can consider such an application if it is found that the evidence is required for effective disposal of the appeal. Here the lower appellate Court found that taking of evidence of the listed persons is required to secure the ends of justice. The lower appellate Court correctly allowed the application because without taking evidence of those persons the pre-emptee's case of *nadabi patra* could not be established. If the application for additional evidence is allowed and the witnesses are called for examination, the present petitioner will not be prejudiced in any way. Mr. Hossain refers to the cases of Gopesh Chandra Dey being dead his heirs: Ahadini Dey and others Vs. Provashini Dey and others, 1 MLR (AD) 390 and AK Azad and another Vs. Mostafizur Rahman and others, 18 BLC (AD) 78 and relied on the *ratio* laid therein that the appellate Court has the discretion to admit additional evidence on any particular point in order to pronounce judgment or for any substantial cause in the interest of justice. He further relied on the principle that it must

be borne in mind that appeal is the continuation of the suit and the appellate Court has similar power like that of the trial Court and in appropriate cases it can obtain additional evidence to come to a correct decision. Mr. Hossain finally submits that this Rule can be disposed of with a direction to the appellate Court to dispose of the appeal expeditiously keeping the order passed by it as it is.

I have considered the submissions of both the sides and gone through the materials on record, the provisions of law as referred to and *ratio* of the cases cited by the parties. It is admitted fact that the present petitioner as pre-emptor filed the case for pre-emption claiming them as contiguous land owner of the property sold. In the case, the pre-emptor claimed that the transfer is through a registered *kabala* and the pre-emptee is a stranger purchaser. The pre-emptee's main contention was that the vendors transferred the suit land to the pre-emptee without any consideration; that the deed in question is not a *kabala* but a *nadabi patra* and as such the case for pre-emption does not lie. The Assistant Judge framed 4 issues to adjudicate the matter in dispute. He considered the oral evidence adduced by the parties and finally allowed the miscellaneous case for pre-emption. Against which the pre-emptee preferred appeal before the District Judge Moulvibazar. The appeal was transferred to the Court of Joint District Judge, Court No.2, Moulvibazar for hearing. The pre-emptee filed an application therein under Order 41 Rule 27 of the Code on 03.03.2008 which reads as follows:

“নিবেদন এই যে,

এ মামলার শুনানীর তারিখ অদ্য বটে। এ মামলা সংক্রান্ত আসলী কবলাটি সাফ কবালা ছিল, তাহা নাদাবী নামা ছিল এবং নালিশা ভূমি নরেশ চন্দ্র দাস হইতে বিনা দলিলে তরপছানীর পূর্ববর্তী পাইয়াছেন এবং তরপছানীর পিতা দীর্ঘ্য দিন যাবৎ ভোগ দখলে থাকেন ও ছিলেন এই মর্মে কোন সাক্ষী আপীলকারী পক্ষ দুর্ভাগ্য বশতঃ নিম্ন আদালতে প্রদান করিতে পারেন নাই। তদহেতু ন্যায় বিচারের স্বার্থে উপরোক্ত বিষয়াদি প্রমাণের স্বার্থে নিম্ন তপশীল বর্ণিত ব্যক্তিগণের মৌখিক সাক্ষী গ্রহণের মর্মে আদেশ হওয়ার আবশ্যিক। নতুবা ক্ষতির স্থল হয়।

অতএব দরখাস্তকারী মূল তরপছানী আপীলকারী বিনীত ভাবে প্রার্থনা করেন যে, মাননীয় আদালত দয়া বিতরণে ন্যায় বিচারের স্বার্থে দেঃ কাঃ বিধির ৪১ নং আদেশের ২৭ নং রুলের বিধানমতে নিম্ন তপশীল বর্ণিত ব্যক্তিগণের মৌখিক সাক্ষ্য গ্রহণের পক্ষে আদেশ দানে মর্জি হয়। ইতি তাং ০৩.০৩.২০০৮ ইং।”

The Joint District Judge heard the said application on that day and allowed it as under:

“Heard the learned Advocates for the parties, perused the petition and the record. On perusal, I find that the petition is filed to give change to the appellant for produce more evidences which they could not do in the trial Court. So, I think and consider it that for the ends of justice they should be given chance to produce more evidence as provided by Order 41 Rule 27. So this petition is allowed. To 10.04.2008 for necessary steps.”

On a plain reading of the aforesaid application for taking additional evidence I find that it do not come within the ambit of Order 41 Rule 27 of the Code. To allow an application filed for additional evidence, the applicant is to satisfy the appellate Court that the trial Court refused to admit evidence which ought to have admitted and the appellate Court requires the documents to be produced or any witnesses to be examined to enable it to pronounce judgment or any other substantial cause. From the impugned order

as well as the application filed by the pre-emptee appellant, I do not find that the applicant's application comes within the purview of Order 27 Rule 1 and 2 of the Code. In allowing an application for additional evidence the Court has to record its reason which is not at all found in the impugned order.

On perusal of the written objection filed in the pre-emption case, I find that the pre-emptee stated there that the deed in dispute is not a deed of *kabala* rather it is a *nadabi patra*. But in the trial he did not take any step to adduce evidence to that effect. In the miscellaneous appeal the pre-emptor appellant cannot be allowed to examine witnesses for ends of justice as has been observed by the appellate Court. The law does not empower the appellate Court to do so. The appellate Court has no authority to pass an order to fill up the lacuna of the pre-emptee, if any. The *ratio* of the cases referred to by the learned Advocate for the opposite party reported in 18 BLC (AD) 78 and 1 MLR (AD) 390 do not match this case. In 18 BLC (AD)'s case opinion of the hand writing expert was taken by the lower appellate Court to assertion of genuineness of a document. In 1 MLR (AD)'s case the leave petition was finally dismissed. In the instant case, the materials before the lower appellate Court were sufficient to pronounce the judgment and as such the *ratio* laid in the aforesaid cases do not apply here.

Therefore, I find no merit in the submission of Mr. Hossain that for any substantial cause and interest of justice an application

for additional evidence may be allowed. An application for taking additional evidence cannot be allowed unless it comes within the ambit of Order 41 Rule 27 of the Code. The Joint District Judge allowed the application for additional evidence beyond the provisions of law and thereby committed error of law which has resulted in an error in such order occasioning failure of justice which is to be interfered with by this Court.

I, therefore, find merit in this Rule and accordingly the Rule is made absolute. However, there will be no order as to costs. The judgment and order passed by the Joint District Judge, Court No.2, Moulvibazar in Miscellaneous Appeal No.01 of 2004 is hereby set aside.

The order of stay stands vacated.

However, the Joint District Judge, Court No.2, Moulvibazar is directed to dispose of the miscellaneous appeal expeditiously preferably within 06(six) months from the date of receipt of this judgment and order.

Communicate this judgment and order to the concerned Court.