APPELLATE CIVIL.

Before Fletcher and Richardson JJ.

GARDEN REACH SPINNING AND MANUFACTURING CO.

1914

July 27.

v.

SECRETARY OF STATE FOR INDIA.*

Appeal—Additional Evidence—Civil Procedure Code (Act V of 1908) O. XLI, r. 27; O. XLVII, r 1—Jurisdiction of Appellate Court to admit additional evidence—Application to admit additional evidence before the hearing of the appeal, if it can be entertained.

Where in an appeal an application was made before the hearing of the appeal for the admission of additional evidence :

Held, that such an application was not warranted by the terms of O. XLI, r. 27, and the Appellate Court had no jurisdiction to entertain it.

O. XLI, r. 27, does not authorise an Appellate Court to admit fresh evidence, documentary or oral, and whether or not it was in existence at the time of the judgment of the lower Court or at the time the appeal was preferred, unless the Appellate Court after examining the evidence on the record comes to the conclusion that it requires the additional evidence in order to enable it to pronounce judgment, namely, that there is a defect on the evidence on the record.

An application to admit fresh evidence discovered out of Court by the parties comes under O. XLVII, r. 1. and not under O. XLI, r. 27.

Kessowji Issur v. *Great Indian Peninsula Railway Co.* (1) referred to.

APPLICATION by the Garden Reach Spinning and Manufacturing Co., the appellants.

The appellants were the proprietors of a cotton mill situated at Garden Reach and of about 26½ bighas of land on a part of which the cotton mill

*Application in Appeal from Original Decree No. 400 of 1911, against the decree of A. Goodeve, Land Acquisition Judge, 24-Parganas, dated June 2, 1911

(1) (1907) I. L. R. 31 Bom. 381 ; L. R. 34 I. A. 115.

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stood. Adjoining the appellants' property on the west was a piece of land the property of the British India Steam Navigation Company, Limited, which was used by that Company as a coal depôt and was known as "Bracebridge Hall." The area of the Bracebridge Hall property was about 114 bighas, and consisted of two plots containing respectively about 26½ bighas and 87¼ bighas. The smaller plot and the appellants' property were practically identical in area and similar in situation, as both were bounded on the south by the Garden Reach Road and on the north by the river Hughli. Both properties were included in a scheme for the acquisition of 5,500 bighas of land at Garden Reach by the Commissioners for the Port of Calcutta. A declaration for the acquisition of this land under the Land Acquisition Act was published in the *Calcutta Gazette* on the 30th May 1906 ; but it was not until the 8th March 1909 that notices under the Land Acquisition Act were served upon the appellants, and the British India Steam Navigation Company to submit their claims for compensation. The appellants and the British India Steam Navigation Company submitted their respective claims to the Land Acquisition Collector ; the claim of the appellants amounted to Rs. 14,66,907, and that of the British India Steam Navigation Company to Rs. 1,22,40,786.

On the 7th February 1910, the Collector published his awards in respect of the two claims. To the appellants the Collector awarded Rs. 2,38,625 for their land alone, which he valued at Rs. 450 per cottah ; and the total amount awarded to the appellants was Rs. 6,18,848-8-9. To the British India Steam Navigation Company the Collector awarded in respect of the smaller plot, comprising about 26½ bighas, which was contiguous to the appellants' property, Rs. 2,39,531-14, which he also asssessed at Rs. 450 per cottah, and

Rs. 4,18,730 for the larger plot, which the Collector valued at Rs. 240 per cottah. The total amount awarded to the British India Steam Navigation Company was Rs. 14,48,628-14-3.

Both the appellants and the British India Steam Navigation Company filed petitions under s. 18 of the Land Acquisition Act praying that the respective awards should be referred to the Court for determination. The case of the appellants was first taken up by the Land Acquisition Judge who, on the 23rd June 1911, decreed an additional sum of Rs. 46,258 for structures only, but otherwise maintained the Collector's award and upheld the valuation of Rs. 450 per cottah. The appellants appealed.

The case of the British India Steam Navigation was to have been heard by the Land Acquisition Judge on the 13th December 1911, but negotiations which had been pending between that Company and the Port Commissioners culminated in a settlement of that case with the result that a decree by consent was granted on the 30th April 1912 by the Land Acquisition Judge in favour of the British India Steam Navigation Company for Rs. 28,00,000.

In connection with their appeal from the judgment of the Land Acquisition Judge, the appellants submitted two petitions dated respectively 16th July 1912 and 1st May 1914, in which they applied to submit as additional evidence at the hearing of their appeal certain documents relating to the negotiations and the decree that had been passed in the case of the British India Steam Navigation Co. The application was opposed by the respondent. It was heard on the 21st and 22nd July 1914.

Mr. L. P. E. Pugh (with him *Mr. W. M. Cubitt*, *Babu Surendra Nath Roy*, *Babu Satyendra Nath*

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Roy and *Babu Narendra Nath Sett*), for the applicants. The evidence that we wish to put in are documents relating to the negotiations which led up to the settlement of the case between the Port Commissioners and the British India Steam Navigation Company. This evidence is material to our case, since it clearly supports our contention that the valuation allowed by the Collector and the Land Acquisition Judge for our land was greatly under-estimated. The compromise shows that for practically an identical piece of land to ours the Port Commissioners agreed to pay Rs. 1,350 a cottah. Some part of the evidence was not in existence when this appeal was filed. It is submitted that unless evidence is given of the price paid for the plot of land adjoining our property, there is a lacuna in the evidence on the record, and the Court cannot pronounce judgment.

Mr. S. P. Sinha (with him *Mr. A. Casperz*, *Babu Ram Charan Mitra* and *Babu Ambica Pada Chaudhri*), for the Secretary of State. This application should be rejected, because (*a*) it is premature, (*b*) the evidence is inadmissible, and (*c*) even were the evidence admitted, it does not support the contention that the Port Commissioners paid for similar land three times as much as has been allowed for the land of the appellants. The Court must be satisfied that additional evidence is required to enable it to pronounce judgment and that a lacuna or defect in the evidence on the record is apparent: see *Kessowji Issur* v. *The Great Indian Peninsula Railway Company* (1) and *Jagarnath Pershad* v. *Hanuman Pershad* (2).

[FLETCHER J. The distinction is that the evidence in this case did not come into existence until after the appeal had been filed.]

(1) (1907) I. L. R. 31 Bom. 381; (2) (1909) I. L. R. 36 Calc. 833. L. R. 34 I. A. 115.

The application should have been made under Order XLVII, rule 1. The appellants should have withdrawn their appeal and asked for a review of judgment. They cannot use the procedure which applies to applications for a review to help them to get in further evidence under an appeal. The Court must first deal with the appeal on its merits, and only allow further evidence if for substantial reasons it is required by the Court: see *Sreeman Chander Dey* v. *Gopaul Chander Chuckerbutty* (1) and *Ganga Govind Mandal* v. *The Collector of the Twenty-four Pargunnahs* (2).

[*Mr. Sinha* then proceeded to contend that the evidence which the appellants wished to put in, even if admitted, did not support the case put forward by the appellants.]

Mr. Pugh, in reply. The evidence which we seek to have admitted is evidence of a transaction which shows the price paid for land adjoining ours, and should be considered with other evidence. Such evidence can be admitted under O. XLI, r. 27 "for substantial reason": see *Morgan* v. *Morgan* (3). He also referred to *In re Wiltshire Iron Company* (4).

[FLETCHER J. In England you cannot ask for a review of judgment; you ask for appeal on the ground of new evidence. Here the document was not in existence.]

In the cases of *Ram Ratan Sahu* v. *Mohant Sahu* (5), *Hazari Mall* v. *Janaki Prasad* (6), *Ramyad Sahu* v. *Bindeswari Kumar Upadhay* (7) and *Udit Chobey* v. *Rashika Prasad Upadhya* (8), in which O. XLVII, r. 1, had been discussed and it was held that it was

(1) (1866) 11 Moo. I. A. 28, 48.
(2) (1866) 11 Moo. I. A. 345, 368.
(3) (1882) I. L. R. 4 All. 306.
(4) (1868) 3 Ch. App. 443, 449.
(5) (1907) 6 C. L. J. 74.
(6) (1907) 6 C. L. J. 92.
(7) (1907) 6 C. L. J. 102.
(8) (1907) 6 C. L. J. 662.

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not only competent to a Court of Appeal, but it may be its duty, under certain circumstances, to take notice of events which have happened since the order challenged in appeal was made. He also referred to the case of *Kotaghiri Venkata Subbamma Rao* v. *Vellanki Venkatarama Rao* (1), and *Kessowji Issur* v. *The Great Indian Peninsula Railway Company* (2), to show that O. XLVII, r. 1 does not authorize the review of a decree, which was right when made, on the ground of the happening of some subsequent event. The only question is whether the fresh evidence is material and necessary to enable the Court to pronounce judgment.

Cur. adv. vult.

FLETCHER J. This is an application by the appellants for the admission of certain additional evidence in an appeal we are about to hear.

The appeal itself is with reference to the amount to be paid by the Government as compensation for the property of the appellants which has been compulsorily acquired under the provisions of the Land Acquisition Act. The fresh evidence that the appellants wish to adduce consists of certain documents leading up to and resulting in a compromise of another case with reference to the acquisition of the premises of the British India Steam Navigation Company which adjoin the premises of the appellants.

The compromise with the British India Steam Navigation Company had not been arrived at when the lower Court gave judgment, nor when the appeal was filed in this Court. The present application is opposed by the Secretary of State for India in Council, the respondent to the present appeal.

(1) (1900) I. L. R. 24 Mad. 1. (2) (1907) I. L. R 31 Bom. 381.

Now the powers of an Appellate Court in India to admit further evidence are governed by the provisions of O. XLI, r. 27, which, so far as material, is in the following terms:—

"(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

"(*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."

The wording of the rule shows clearly that the power of an Appellate Court to admit further evidence is a very restricted one.

In the first place, the rule prohibits the parties to the appeal from producing further evidence.

Next, the power of the Court to admit further evidence is only in case the Appellate Court "requires" the additional evidence "to enable it to pronounce judgment or for any other substantial cause."

As has been pointed out, the word "requires" plainly means "needs or finds needful." When therefore can the Appellate Court "require the additional evidence to enable it to pronounce judgment or for any other substantial cause"? Manifestly not until the Appellate Court has examined the evidence on the record and comes to the conclusion that the evidence as it stands is inherently defective. Until the Court has therefore examined the record, it is not in a position to say, whether the evidence is inherently defective and that it will require the further evidence to enable it to pronounce judgment or for any other substantial cause. A preliminary application such as the present is not warranted by the terms of O. XLI, r. 27.

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An application to admit fresh evidence discovered out of Court by the parties comes under O. XLVII, r. 1, not under O. XLI, r. 27.

It is said that the evidence was not in existence at the date of the trial and the case of *Kotaghiri* v. *Vellamki* (1) was cited to show that such evidence is not admissible by way of review. The point does not arise in the present case and it is not necessary for us to decide whether such view is correct or not.

O. XLI, r. 27, does not, I think, authorise an Appellate Court to admit fresh evidence, documentary or oral, and whether or not it was in existence at the time of the judgment of the lower court or at the time the appeal was preferred unless the Appellate Court after examining the evidence on the record comes to the conclusion that it requires the additional evidence in order to enable it to pronounce judgment, namely, that there is a lacuna or defect on the evidence on the record.

This appears to me to be the effect of the decision of the Privy Council in the case of *Kessowji Issur* v. *Great Indian Peninsula Railway Co.* (2). I can find nothing in the judgment of their Lordships to suggest that new evidence discovered out of Court by the parties but which only came into existence after the filing of the appeal can be admitted on a preliminary application by the parties to the Appellate Court. Such a suggestion is negatived by the express words in O. XLI, r. 27, that "the parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary in the Appellate Court."

I think, therefore, that we have no jurisdiction to assent to the present application. But even if we had such jurisdiction, I should, on the materials before us,

(1) (1900) I. L. R. 24 Mad. 1, 10. (2) (1907) I. L. R. 31 Bom. 381.

refuse this application. The evidence the appellant company wish to put forward is to the following effect:—

The British India Steam Navigation Co. were the owners of the premises adjoining those of the appellant company. Both the British India Co. and appellant company are represented in Calcutta by Messrs. Mackinnon, Mackenzie & Co., as also in London, although apparently the two companies have different Boards of Directors in London,

On the premises adjoining those of the appellant company, the British India Co. had a considerable coal business chiefly for the purpose of coaling their extensive fleet. This property of the British India Co. is known as "Bracebridge Hall."

The same declaration under the provisions of the Land Acquisition Act was made in respect of the property of the appellant company, Bracebridge Hall and various other properties.

The British India Co. after the declaration preferred a claim for a very large sum amounting in the first instance to over one crore and 22 lakhs of rupees.

An award of 14 lakhs odd of rupees was made by the Land Acquisition Collector. The British India Company then required the matter to be taken before the Special Land Acquisition Judge. Negotiations were then opened between Sir Frederick Dumayne on behalf of the Calcutta Port Commissioners on the one hand, and in the first instance with Mr. Alexander McLaurin Monteath and subsequently Lord Inchcape on behalf of the British India Co. on the other hand. After long and protracted negotiations the case of the British India Co. was subsequently settled by a cash payment of 28 lakhs of rupees to the British India Co.; and the grant of certain facilities

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by the Port Commissioners with reference to the coaling of the fleet of the British India Co. It is now alleged that the facilities granted to the British India Co. are more valuable than those enjoyed by them at Bracebridge Hall, and therefore the whole of the 28 lakhs was awarded in respect of the other items of their claim. On this footing, it is said that the Port Commissioners have paid the British India Co. in respect of the site of the Bracebridge Hall an amount three or four times larger than the amount paid to the appellant company, when in fact the land of the appellant company and Bracebridge Hall must be of substantially the same value. The appellant company, therefore, desire to give in evidence certain documents relating to the compromise of the claim of the British India Co. Two affidavits have been filed on the present application, one by Mr. Alexander McLaurin Monteath in support of the application and the other by Sir Frederick Dumayne in opposition thereto. Sir Frederick Dumayne is the Vice-Chairman and Chief Executive Officer of the Port Commissioners. There is a conflict between the statements contained in the affidavit of Mr. Monteath and those in the affidavit of Sir Frederick Dumayne. Now, it appears from the evidence that the negotiations, which led to the settlement with the British India Co., were opened early in January 1911. The negotiations no doubt were stated by Sir Frederick Dumayne to be "without prejudice to either side" and "confidential." Mr. Sinha, on behalf of the Government, has argued that this would render all correspondence which passed between the parties thereto incapable in any event of being used in evidence even when a settlement was arrived at. I think Mr. Sinha placed his case too high. The affidavits do establish, however, that in addition to the

correspondence interviews took place in the first instance between Monteath and Sir Frederick Dumayne with a view to a settlement of the case of the British India Co.

The negotiations in India closed in May 1911.

In June 1911, Sir Frederick Dumayne proceeded to England. It appears from his affidavit that the Port Commissioners had directed him to see Lord Inchcape with reference to compromising the British India Company's case. He was also authorised to go as far as to make an offer of 25 lakhs of rupees for that purpose. Lord Inchcape and Sir Frederick Dumayne arrived finally at a settlement, viz., that the Port Commissioners should pay to the British India Co. 28 lakhs of rupees and give to the British India Company certain facilities. Sir Frederick Dumayne has sworn in his affidavit that in the settlement he never contemplated paying 28 lakhs of rupees for the land, structures and machinery of the British India Co., but that he agreed to this sum as a settlement of the whole case.

Lord Inchcape has not made an affidavit as to what took place between himself and Sir Frederick Dumayne. The Port Commissioners sanctioned with reluctance the settlement arrived at between Lord Inchcape and Sir Frederick Dumayne and recommended it to the Government for sanction and approval. The settlement was subsequently approved of by the Government. This, however, was after the present case had been decided by the Special Judge and the present appeal filed.

Much stress had been laid by the appellants on the proceedings of the Special Land Acquisition Committee of the Port Commissioners of the 20th October 1911. No doubt the record of the proceedings is not very happily worded, but I cannot imagine that a public

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body like the Port Commissioners intended to pay the British India Co. for their land a sum so vastly in excess of what they were paying to other parties and which would in the end result in their having to pay excessive sums for other lands acquired by them. For if this 28 lakhs was in fact paid only for the land, structures and machinery, this fact would be used in subsequent cases against the Port Commissioners as to the value of the lands acquired by them.

Sir Frederick Dumayne has sworn that he was fully cognisant of the prices paid by the Port Commissioners on other acquisitions and that what he wanted to settle was the whole case against the Commissioners.

The total claim preferred by the British India Co. amounted to Rs. 1,22,40,786-11-10. A large number of the items in the claim would appear to be altogether untenable. One of the items in the claim was a sum of Rs. 37,01,940 "for loss of time." This item was claimed for the difference between the time it would take to bring the vessels of the British India Co. alongside at Bracebridge Hall and that required to take them into the docks of the Commissioners.

It is difficult to imagine on what principle such a claim could be supported. The Port Commissioners were, however, in this difficulty that the Collector had allowed the sum of Rs. 1,27,140-10-0 in respect of this item and so had admitted the claim in principle. The Court under the provisions of the Land Acquisition Act has no jurisdiction to reduce the amount awarded by the Collector and it may perhaps be doubted whether the Court has jurisdiction to re-allot over the different items of claim the aggregate amount allowed by the Collector. All the probabilities therefore suggest that the story told by Sir Frederick Dumayne in his affidavit that what he settled with Lord Inchcape was the whole case

between the British India Co. and the Port Commissioners and that the sum of 28 lakhs of rupees was not paid to British India Co. in respect of the land, machinery and structures only, is correct. The only person who could have contradicted Sir Frederick Dumayne as to the terms arrived at in London between Lord Inchcape and himself, would be Lord Inchcape. If therefore we were to decide to permit the appellant company to adduce further evidence it would have to be the evidence of Lord Inchcape as to what were the terms of settlement between himself and Sir Frederick Dumayne. In that event, such evidence would have to be tested in the ordinary manner by cross-examination.

The letters that passed between Lord Inchcape and Sir Frederick Dumayne dated the 26th of January and the 13th of February 1912 suggest that Lord Inchcape did not consider that the sum of Rs. 28 lakhs had been paid to the British India Co. in respect of Bracebridge Hall and the structures and machinery thereon.

The statements in Sir Frederick Dumayne's affidavit appear to me to agree with all probabilities of the case and are uncontradicted as to what was intended to be settled between him and Lord Inchcape. Even, therefore, if we have jurisdiction to admit this further evidence on the materials before us I should refuse the appellant company leave to do so.

The present application is therefore dismissed with costs.

RICHARDSON J. I entirely agree with Mr. Justice Fletcher, whose judgment I have had the advantage of reading, that the application before us is not one which we have jurisdiction to entertain under O. XLI, r. 27. And I will only add this that even if we had a power, co-extensive with the power of the Trial Court under

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O. XLVII to admit fresh evidence by way of review, I am not of opinion that the evidence tendered is evidence which ought to be admitted in the exercise of any such power. It is not evidence, the bearing of which on the issue which has to be determined is practically beyond the sphere of controversy or in any sense conclusive. On the contrary it is only necessary to read the affidavit on the one side and the counter affidavit on the other to show that matter is raised of a controversial and argumentative character. The question at issue is the market value of certain land at a certain date. The agreement which it is sought to put in (together with letters and other documents leading up to it) was arrived at in another case between parties one of whom is not a party to the present case and it was arrived at after the trial of the present case was concluded. By itself the agreement is of no use to the appellant company. It only shows that a lump sum was paid to the British India Co. in respect of the compulsory acquisition of their land and that in the same respect certain facilities were also promised to them by the Port Commissioners in connection with their coal tract. The land, it is true, adjoins the land of the appellant company. But the compensation which the British India Co. had claimed from the Collector was arranged under different heads many of which had nothing to do with the value of the land. Two or three items were withdrawn while the case was before the Collector, but the total claim which was subsequently carried before the Special Land Acquisition Judge was still very large. That claim was satisfied by the lump sum and the coaling facilities. Then comes the point how much of the money payment is to be allocated to the land? That depends on the further question what was the value assigned to the facilities? Both these questions

are in serious dispute, each side endeavouring to fasten upon the other its own interpretation of the agreement. As might have been expected, when such questions are debated between practical business-men, there is a good deal to be said—at any rate a good deal was said—on both sides. The difficulty of arriving at a decision as to what was paid for the land is not diminished by the reflection that it was not the actual value of the land and the actual value of the facilities that has to be considered, but what was in the minds of the parties to the agreement. What the appellant company is really trying to do is to fix upon the Port Commissioners an admission as to the value of the land acquired from the British India Co., and I merely add that for that purpose the value which the Port Commissioners attributed to the land (as to which Sir Frederick Dumayne's affidavit is entitled to the greatest weight) is more important than the value which the British India Co. may have attributed to the land. But to my mind the doubts and difficulties which surround the evidence tendered is not only no recommendation, but is a complete bar, to its reception at this stage, even, as I have said, if we had a power to receive fresh evidence such as that conferred on the Trial Court by O. XLVII.

W. M. C. *Application refused.*