APPELLATE CIVIL.

Before Lort-Williams and M. C. Ghose JJ.

1934

Jan. 17, 22.

SURENDRAKUMAR CHAUDHURI

v.

GANGACHANDRA CHAUDHURI.*

Evidence—Additional evidence—Appellate stage—Code of Civil Procedure (Act V of 1908), O. XLI, rr. 27(2), 29.

Under Order XLI, rule 27, of the Code of Civil Procedure, the legitimate occasion for reception of additional evidence in the appellate stage is when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent and not where a discovery is made outside the court of fresh evidence and the application is made to import it.

Kessowji Issur v. *Great Indian Peninsula Railway Company* (1) followed.

It must be the (appellate) court that requires the additional evidence, when on examining the evidence as it stands on the record some inherent *lacuna* or defect becomes apparent. The defect may be pointed out by a party, or a party may move the court to supply the defect but the requirement must be the requirement of the court upon its appreciation of the evidence as it stands. Wherever the court adopts this procedure, it is bound by rule 27(2) to record its reason for so doing and under rule 29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified.

Parsotim Thakur v. *Lal Mohar Thakur* (2) followed.

SECOND APPEAL by the plaintiffs.

The facts of the case and the arguments advanced at the hearing of the appeal appear fully in the judgment.

Rupendrakumar Mitra and *Bhagirathchandra Das* for the appellants.

Jitendrakumar Sen Gupta for the respondents.

Cur. adv. vult.

*Appeal from Appellate Decree, No. 482 of 1932, against the decree of Raikishore Majumdar, First Additional Subordinate Judge of Noakhali, dated Sept. 19, 1931, affirming the decree of Shaileshchandra Sen Gupta, Third Munsif of Sudharam, dated Aug. 18, 1930.

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

(2) (1931) I. L. R. 10 Pat. 654; L. R. 58 I. A. 254.

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M. C. GHOSE J. This is an appeal by the plaintiffs in a suit for declaration of title to and recovery of possession of a 9-anna share in two *shikmi tâluks* described in the schedule to the plaint.

The plaintiffs' case was that, in 1906, Hridaytârâ, from whom the plaintiffs purchased the property in suit, was a young widow and Gangâsundari was her deceased husband's aunt and had been appointed her guardian by the District Judge under the Guardian and Wards Act; that, in that year, 1906, Gangâsundari purchased the property in suit in her own name but the plaintiffs' case is that the purchase was made in *benâmi* for Hridaytârâ with Haridaytârâ's money; that, further, in 1912, when Gangâsundari was leaving the place and was going away to Benares, she transferred the property to her son-in-law, defendant No. 1; and that, since then, defendant No. 1 really held the property in trust for Hridaytârâ. But, in the year before the suit, which was instituted in 1928, defendant No. 1 denied the title of Hridaytârâ and refused to make over possession, whereupon she transferred the property to the plaintiffs, who instituted the present suit.

There were two main issues in the case :—

(1) Whether Gangâsundari was the *benâmdâr* for Hridaytârâ or was she herself the owner of the property in suit; and

(2) Whether the suit was barred by limitation.

On the first issue, the trial court found that the title deeds of the property came from the custody of the plaintiffs and, on a consideration of the same, as well as other evidence, the court came to the conclusion that Gangâsundari was the *benâmdâr* of Hridaytârâ and had purchased the property on account of Hridaytârâ. On the second issue, the trial court found that the possession of defendant No. 1 was adverse to Hridaytârâ from 1912 and the suit was, therefore, barred by limitation.

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In appeal by the plaintiffs, the learned Subordinate Judge found both the issues against the plaintiffs and dismissed the appeal.

Mr. Rupendrakumar Mitra, for the appellants, urges that the learned Subordinate Judge committed an error in law in using in evidence against the plaintiffs a compromise decree in Suit No. 10 of 1930 and that, in doing so, he violated the provisions of Order XLI, rule 27, of the Code of Civil Procedure. It appears that, some time after the decree of the first court, there was another suit pending in another court between the parties and, in that suit, on a certain date after the decree of the present suit, the parties filed a compromise petition, wherein the present plaintiffs admitted the title of defendant No. 1 in the property in suit. A decree was passed in that suit according to the compromise. This compromise decree was produced by the defendants as a piece of evidence before the appellate court. The plaintiffs objected, on various grounds, to the reception of this evidence. The court postponed the decision of the matter until the judgment. In the judgment, the learned Subordinate Judge came to the conclusion, on the evidence, that it was not established that defendant No. 1 held the property in the *benâmi* or in trust for Hridaytârâ and that his possession was, in fact, adverse to her. After that finding, he proceeded as follows :—

> There has, moreover, been produced at the hearing of the appeal on behalf of the respondent, defendant No. 1, a certified copy of a compromise decree supported by an affidavit to indicate that the plaintiff, appellant No. 1, and the other plaintiff, appellant No. 2's father, Uday noticed above, have lately admitted under that decree the title of the defendant No. 1 in the disputed properties in suit No. 10 of 1930 of a local Munsif's court relating to certain lands of the disputed *shikmis*.

Further down in the judgment, the learned Subordinate Judge proceeds :—

> In view of all the above stubborn facts and other circumstances, it is idle to contend on behalf of the appellants that the respondent, defendant No. 1, had been only a trustee for the plaintiffs' vendor Hridaytârâ and the court is not favourably influenced by the production from their custody of the alleged *benâmi kabâlâ* of 1906 and the sale certificate relating to the disputed properties.

It is urged by Mr. Mitra that the additional evidence influenced the learned Subordinate Judge in deciding both the issues before him. On hearing the learned advocates on both sides and considering the whole matter, we are of opinion that this argument is correct. The additional evidence influenced the Subodinate Judge in coming to his conclusions on both the issues.

The additional evidence could only have been admitted under Order XLI, rule 27, which provides that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. But if..... 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 section further provides that wherever additional evidence is allowed to be produced by an appellate court, the court shall record the reason for its admission. In this case, the learned Subordinate Judge has not recorded any reason for admitting this piece of additional evidence.

The question of reception of additional evidence by the appellate court came up for discussion before their Lordships of the Privy Council in three cases, which have been cited before us.

In the case of *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1), their Lordships considered the previous section, which is in the same words as Order XLI, rule 27, of the Code. Their Lordships state that the legitimate occasion for reception of additional evidence in the appellate stage is when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent and not where a discovery is made outside the court of fresh evidence and the application is made to import it. In this case, a passenger sued the railway company for

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

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damages for injuries sustained by him when alighting from a carriage, which overshot the platform of a station at night. The High Court on the Original Side decreed the plaintiffs' suit. In appeal, the railway company applied for an inspection by the appellate Judges of the railway station at about the same time of the day to see for themselves whether the light, either natural or artificial, was sufficient to prevent a normal person from meeting with an accident. The appellate Judges held the inspection and incorporated their notes of the same in their judgment. It was held by the Judicial Committee that such reception of additional evidence was not warranted by the law.

The next case is that of *Indrajit Pratap Sahi* v. *Amar Singh* (1). In this case the plaintiffs claimed a declaration of their title to two *mouzâs*. The defendant pleaded that these two *mouzâs* were included under the designation of a certain village, of which he had got *mokarrari* settlement from the plaintiffs' predecessors. The question for decision was whether the plaintiffs' predecessors, from whom the defendant obtained the *mokarrari* title, had granted him the lease of the one village named or of all the three villages under that one name. The suit was decided in favour of the plaintiffs in both courts in India. In the appellate stage, the defendant pleaded for reception of certain evidence, which he had obtained after the decision of the first court to show that, at about the time, when the lease was granted to him many years ago, the lessor in certain solemn documents admitted that he had granted the lease of all the three villages to the defendant. This evidence, if admitted, would decide the matter entirely in favour of the defendant. Their Lordships of the Judicial Committee held that they had unrestricted power to admit documents, where sufficient ground is shown for their not having been produced at the initial stage of the litigation and in the circumstances of that case,

(1) (1923) I. L. R. 2 Pat. 676(684); L. R. 50 I. A. 183 (190).

they admitted the additional evidence and allowed the defendants' appeal. In the judgment, it is stated as follows :—

Under Order XLVII, rule 1, which reproduces section 623 of the Civil Procedure Code, 1882, a party has a right to apply for a review of judgment to the court that has decided the case before an appeal has been preferred. The grounds, on which such an application may be made, are specifically set forth in rule 1. In the present case, an appeal had been preferred and a review, therefore, was out of the question ; and the defendants took the only and proper course, *viz.*, to apply to the High Court, which was in possession of the case, to admit the additional evidence either under the general principles of law or under the specific provisions of rule 27 which lays down that the appellate court may, for any other substantial cause, allow such evidence or documents to be produced or witnesses to be examined. Rules of procedure are not made for the purpose of hindering justice. As the application is now for the admission of the documents to which reference has already been made, we observe that there is no restriction on the powers of the Board to admit such evidence for the non-production of which at the initial stage sufficient ground has been made out.

Mr. Jitendrakumar Sen Gupta, the learned advocate for the respondents, has urged that, having regard to the observations made in the above case, we should hold that the reception of the additional evidence by the learned Subordinate Judge was not illegal.

The last case quoted before us is the case of *Parsotim Thakur* v. *Lal Mohar Thakur* (1), where the matter has been fully discussed. Their Lordships observe as follows :—

Turning to the provisions of rule 27, sub-clause (*1*)(*a*) has no application in the present case. Under rule 27(*1*)(*b*), it is only where the appellate court "requires" it that additional evidence can be admitted. It may be required to enable the court to pronounce judgment, or for any other substantial cause, but in either case it must be the court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but "when on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent" ..... It may well be that the defect may be pointed out by a party, or that a party may move the court to supply the defect, but the requirement must be the requirement of the court upon its appreciation of the evidence as it stands. Wherever the court adopts this procedure, it is bound by rule 27(*2*) to record its reasons for so doing, and under rule 29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified..... .....Reference has been made in this connection to certain observations contained in the judgment delivered by Ameer Ali J.

(1) (1931) I. L. R. 10 Pat. 654 (668-9) ; L. R. 58 I. A. 254 (257-8).

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in *Indrajit Pratap Sahi* v. *Amar Singh* (1).....
If any incidental remarks appearing in that judgment have occasioned any doubt as to the meaning of the rules above referred to, or the conditions under which the discretion of the appellate court is to be exercised, their Lordships desire to emphasise their view that the correct practice in the matter is as they have now defined it in accordance with the plain words of the Code.

In view of the clear explanation of rule 27, as given by their Lordships of the Privy Council, we are of opinion that, on the facts of this case, the learned Subordinate Judge committed an error in law in admitting, as he did, the compromise decree as additional evidence in the appellate stage. This admission coloured the whole of his judgment.

The judgment and decree of the lower appellate court are, accordingly, set aside and the case is remitted to that court to deal with the appeal in accordance with law. The appellants are entitled to the costs of this Court. Future costs will abide the result.

LORT-WILLIAMS J. I agree.

Appeal allowed: Case remanded.

G. S.

(1) (1923) I. L. R. 2 Pat. 676; L. R. 50 I. A. 183.