APPELLATE CIVIL.

Before Henderson and Biswas JJ.

NARENDRA NARAYAN ROOJ

v.

JNANADA DASEE.*

1937

May 7, 10.

Evidence—Additional evidence, when can be taken in the appellate Court —Remand, when should be ordered—Code of Civil Procedure (Act V of 1908), O. XIII, r. 2; O. XLI, r. 27.

The scope and requirement of O. XLI, r. 27 (*1*), cl. (*b*) of the Code of Civil Procedure, which permits additional evidence, oral as well as documentary, to be let in at the appellate stage, are different from those of O. XIII, r. 2, which refers to the production of documents only at the trial. The question under O. XIII, r. 2, is only one of condoning delay in the production of documents, which may be allowed to be introduced, if the Court is satisfied that there was sufficient ground for their non-production at the initial stage. The appellate Court cannot let in additional evidence merely on such ground.

In order to let in additional evidence under O. XLI, r. 27 (*1*), cl. (*b*), the Court, on examining the evidence as it stands, must feel the requirement of the production of such additional evidence, either because it is necessary to enable it to pronounce judgment or for any other substantial cause.

Kessowji Issur v. *Great Indian Peninsula Railway Company* (1) and *Parsotim Thakur* v. *Lal Mohar Thakur* (2) referred to.

Under O. XLI, r. 27 (*2*), the Court is to record its reason. The mere fact that the Court observes that consideration of justice demands that additional evidence should be allowed to be taken is not sufficient. If it does not appear that the Court came to that conclusion upon an appreciation of the evidence on record, or that it felt it necessary to call for such additional evidence, but the object in making the order was merely to enable a party to bring in further evidence which the party thought was necessary to completely establish its case, the Court ought not to allow additional evidence at the appellate stage.

The fact that a document, for example, a record-of-rights, is of unimpeachable authenticity, is no doubt very material in considering whether the Court should or should not exercise its discretion in favour of a party under O. XIII, r. 2, but considerations of a different character arise under O. XLI, r. 27 (*1*), cl. (*b*).

*Appeal from Appellate Decree, No. 1048 of 1935, against the decree of B. K. Guha, District Judge of Birbhum, dated Mar. 6, 1935, reversing the decree of Durga Prasanna Pal, Subordinate Judge of Birbhum, dated Dec. 22, 1932.

(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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Gopika Raman Ray v. *Atal Singh* (1) distinguished.

The High Court has, generally speaking, on Second Appeal no right to look at the evidence to decide whether the remaining evidence in a case other than that which has been improperly admitted, is sufficient to warrant the findings of the Court below. The only cases which can be properly disposed of without remand are those where the lower Court has apparently arrived at its conclusion upon other grounds independently of such evidence.

Womes Chunder Chatterjee v. *Chundee Churn Roy Chowdhry* (2) and *Kanta Mohan Mallik* v. *Makhan Santra* (3) referred to.

APPEAL FROM APPELLATE DECREE preferred by the plaintiff.

The material facts of the case and arguments in the appeal appear sufficiently from the judgment.

Atul Chandra Gupta and *Mukti Pada Chatterji* for the appellant.

Surajit Chandra Lahiri and *Kamalakhya Basu* for the respondent.

Cur. adv. vult.

BISWAS J. The plaintiff is the appellant in this case. The suit was for declaration of title and recovery of possession. In support of his title, plaintiff relied on a mortgage, a *kabâlâ* and a *kabuliyat*. His case was that the property in suit, being a house in the town of Suri, belonged to one Keerti Bas Haldar, and that Keerti Bas first mortgaged, and then sold it, to the plaintiff, and that, thereafter, plaintiff let it to Keerti Bas's mother, Nani Bala, for six months. Keerti Bas afterwards died, and his mother not having given up the house on the expiry of her lease, plaintiff brought this suit. He made both Nani Bala and Keerti Bas's widow, Jnanada Dasee, defendants, as both were in possession. The mother died pending the suit, and the suit was contested by the widow (defendant No. 2) alone.

The defence was that the mortgage, the *kabâlâ* and the *kabuliyat* were all *benâmi* transactions, and that these had been put through by Keerti Bas to defraud some creditors in Calcutta.

(1) (1929) I. L. R. 56 Cal. 1003; L. R. 56 I. A. 119.
(2) (1881) I. L. R. 7 Cal. 293.
(3) (1934) 39 C. W. N. 277.

The trial Court overruled the defendant's contention and held that the plea of *benâmi* had not been made out. The plaintiff's title was declared, but the prayer for *khâs* possession was refused, as the learned Subordinate Judge held that notice was necessary, and such notice had not been given.

The defendant appealed, and on appeal the learned District Judge reversed the decision of the trial Court. He held that the transactions relied on by the plaintiff were all *benâmi*, and in that view dismissed the suit.

The plaintiff has appealed to this Court, and his main contention is that in coming to his finding the learned District Judge had relied on additional evidence which should not have been admitted.

The question in this appeal, therefore, relates to the admissibility of this additional evidence. It will be seen that the judgment of the trial Court was given on Dec. 12, 1932 and the appeal in the lower appellate Court was filed on Feb. 1, 1933. The appeal was not taken up for hearing until June 1, 1934. On this date, the defendant appellant, Jnanada Dasee, applied for permission to put in a number of documents by way of additional evidence which she maintained would be sufficient to repel the finding of the trial Court. In her petition she stated that the documents should have been filed before, but that being an illiterate woman she could not properly instruct her pleader regarding the existence of these documents in time. Although in her petition the defendant limited her prayer to the admission of these documents only and that for the specific purpose indicated, it appears that at the hearing the prayer was enlarged so as to embrace the taking of further additional evidence "on some other points on the record" as well. The application was opposed by the plaintiff, but the learned District Judge made the order asked for and sent down the case to

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the trial Court for "the recording of such additional evidence as may be adduced by either party". In making this order he appears to have been largely influenced by the consideration that the appellant was a poor woman, and that owing to her poverty and some other reason her case had not been properly conducted in the Court below. He thought that it was "essential in the interest of justice" that the appellant should be given an opportunity to adduce additional evidence. The additional evidence which was let in in consequence of this order was both oral and documentary. The documentary evidence included an extract from the record-of-rights, a number of rent-receipts showing payment of rent for the property in suit by Keerti Bas to the superior landlord, and some landlord's papers.

We have no difficulty in holding that this additional evidence ought to be excluded from the record altogether. The order of the learned District Judge was presumably made under the provisions of O. XLI, r. 27, of the Code of Civil Procedure. But clearly it was against both the letter and the spirit of this rule. The purpose for, and the circumstances in, which additional evidence may be admitted under this rule have been now put beyond all doubt by the pronouncements of the Judicial Committee in more than one case. The ordinary rule is that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate Court. But exceptions have been engrafted on this general rule by O. XLI, r. 27 of the Code. These exceptions are set out in cls. (*a*) and (*b*) of sub-r. (*1*) of this rule. Clause (*a*) has no application to the present case, as there is no question of the trial Court having refused to admit evidence which ought to have been admitted. It is not the defendant's case that the documents had been produced by her in the trial Court, though at a late stage, and that they were not admitted by the trial Court, although there was good cause for their non-production at the first

hearing. In other words, it is not her case that the trial Court had wrongly refused to exercise its discretion under O. XIII, r. 2. Her prayer for the admission of the additional evidence could be, therefore, justified, if at all, only under cl. (*b*) of O. XLI, r. 27(*1*). Clause (*b*), however, permits such additional evidence to be let in "only 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". We need not pause to consider whether the reason put forward by the defendant in her petition comes within the words "any other substantial cause". Whether that be so or not, the first requirement under this clause is that the appellate Court must require the additional evidence to be produced. This requirement, in our opinion, cannot be said to have been satisfied in the present case. There is nothing in the order complained of to indicate that it was the *appellate Court which required* the production of this additional evidence, either because this was necessary to enable it to pronounce judgment, or for any other substantial cause. The learned District Judge was merely helping the defendant to improve her case by calling further evidence. In other words, he allowed the defendant who was unsuccessful in the lower Court to "patch up the weak points in her case and to fill "up omissions in the Court of appeal",—the very thing which the Privy Council has held cannot and ought not to be allowed. As was observed by their Lordships of the Privy Council in *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1) which is the leading case on the subject—

> "The legitimate occasion" (for the application of the present rule) 'is when, *on examining the evidence as it stands*, some inherent *lacuna* or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it."

This was re-affirmed and further explained by the Judicial Committee in the later case of *Parsotim*

(1) (1907) I. L. R. 31 Bom. 381 (390); L. R. 34 I. A. 115 (122).

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Thakur v. *Lal Mohar Thakur* (*1*), where, after quoting the above passage, their Lordships say :—

> If 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 r. 27 (2) to record its reasons for so doing, and under r. 29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified.

So far as the record in the present case discloses, we do not find any of these conditions was complied with. The order was no doubt made on the date the appeal was taken up for hearing, but it does not appear to have been made upon an examination of the evidence as it stood, nor were any specific points indicated to which the additional evidence was to be directed. The mere fact that the learned District Judge observed that considerations of justice demanded that the order should be made does not show that he came to this conclusion upon an appreciation of the evidence on the record, or that *he* felt it necessary to call for the additional evidence. On the other hand, his opinion "that the dispute "between the parties should be finally adjudicated "after all the materials are on the record", followed by the further remark, "I do not think that the re- "spondent will in any way be prejudiced, if the pray- "er of the appellant be granted", clearly shows that his object in making the order was merely to enable the defendant to bring in further evidence which *she* thought was necessary to completely establish her case. This he was not justified in doing.

The learned District Judge appears to have dealt with the matter as if it was one under O. XIII, r. 2 of the Code of the Civil Procedure, and the only point for consideration was whether or not there was sufficient ground for non-production of the evidence at the initial stage. The scope and requirement of O. XLI, r. 27 (*1*), cl. (*b*), are, however, different from

(1) (1931) I. L. R. 10 Pat. 654 (669) ; L. R. 58 I. A. 254 (257).

those of O. XIII, r. 2. Order XIII, r. 2 refers to production of documents only, and that in the trial Court, while O. XLI, r. 27 (*1*), cl. (*b*) deals with the taking of additional evidence, oral as well as documentary, in the appellate Court. In the one case, the question is one of condoning delay in the production of documents on which a party relies; in the other, of admitting evidence which the Court requires, either of its own motion or at the instance of a party, for the disposal of the case. It is not to be supposed that an appellate Court should admit additional evidence merely because it is satisfied that there was sufficient ground for its non-production at the initial stage in the trial Court.

The learned advocate for the respondent argued that so far at any rate as one item in the additional evidence, namely, the record-of-rights, was concerned, there could be no objection to its being admitted, seeing that it was an official document and there could be no suspicion about its genuineness or authenticity. In support of this contention he relied on the decision of the Privy Council in *Gopika Raman Ray* v. *Atal Singh* (1). That was, however, a case under O. XIII, r. 2. It was pointed out that the rule of exclusion embodied in this rule comes into operation only when the documents on which a party relies should have been, but were not, produced at the first hearing, and that, therefore, this rule will not apply, where the evidence is that the documents were not in the possession or power of the party at the date of the first hearing. Their Lordships then went on to add:—

> Further, as has been held in India, even where the rules of exclusion apply and the documents cannot be filed without the leave of the Court, that leave should not ordinarily be refused where the documents are offical records of undoubted authenticity which may assist the Court to decide rightly the issues before it.

As already indicated, there was no question in the present case of any of the documents being admitted at a late stage with the leave of the trial Court under

(1) (1929) I. L. R. 56 Cal. 1003 (1011); L. R. 56 I. A. 119 (127).

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O. XIII, r. 2, or of the Court of appeal admitting the documents, because the trial Court had wrongly refused such leave. The fact of a document being of unimpeachable authenticity is, no doubt very material in considering whether the Court should or should not exercise its discretion in favour of a party under O. XIII, r. 2, but in determining whether or not an order should be made under O. XLI, r. 27 (*1*) cl. (*b*), considerations of a materially different character arise. Treating the case even as one under O. XIII, r. 2, it is not shown that the documents which the defendant sought to be admitted in the appellate Court were not in her possession or power at the initial stage.

The learned advocate for the respondent next argued that, although the additional evidence was admitted by the appellate Court, it did not allow itself to be influenced by such evidence in coming to its findings. We do not think this argument is well-founded. The learned advocate relies on this passage in the judgment of the District Judge:—

> I may as well place it on record that I have not been swayed to any material extent by the fresh oral evidence adduced on the side of the widow after the case went back on remand.

It will be seen that the learned Judge here refers only to the oral evidence, and not to the documentary evidence which formed the really important part of the additional evidence. He has indeed freely referred to and relied on the documentary evidence in his judgment. It is impossible for us to say what conclusion he would have come to upon the remaining evidence on the record, if the additional evidence were eliminated.

As was held by this Court in *Womes Chunder Chatterjee* v. *Chundee Churn Roy Chowdhry* (1), the High Court has, generally speaking, on Second Appeal no right to look at the evidence to decide whether the remaining evidence in a case other than

(1) (1881) I. L. R. 7 Cal. 293.

that which has been improperly admitted, is sufficient to warrant the finding of the Court below. The only cases which can with propriety be disposed of under such circumstances without a remand are those where, independently of the evidence improperly admitted, the lower Court has apparently arrived at its conclusions upon other grounds. See also *Kanta Mohan Mallik* v. *Makhan Santra* (*1*). On the principle laid down in these cases, we must accordingly set aside the judgment and decree of the learned District Judge, and remand the case for a re-hearing of the appeal after excluding the additional evidence. As the learned District Judge of Birbhum has already expressed an opinion on the merits of the case, we think the re-hearing should be before another learned Judge. The result is that this appeal is allowed, the judgment and decree of the learned District Judge are set aside, and the case remanded to the Court of the District Judge of Burdwan to be disposed of in accordance with the directions in this judgment. Costs of all the Courts, including the costs of this hearing, will abide the result.

HENDERSON J. I agree.

Appeal allowed. Case remanded.

A.C.R.C.

(1) (1934) 39 C. W. N. 277.