VENKATA-NARAYANA PILLAI v. SUBBAMMAL.

LORD DUNEDIN, LORD SHAW, SIR GEORGE FARWELL, SIR JOHN EDGE AND MR. AMEER ALI.

persons brought separate suits, any common question of law or fact would arise."

It seems to their Lordships that under this rule the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's suit. The right to relief on the part of the reversioners exists severally in order of succession, and arises out of one and the same transaction impugned as invalid and not binding against them as a body; and the dispute involves a common question of law, viz., the validity or invalidity of the act challenged as incompetently done. If the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's action, it follows that on his death the "next presumable reversioner" is entitled to continue the suit begun by him. Their Lordships are of opinion that in this case the right to sue survives, and that the petitioner is clearly entitled to the order asked for. The costs of this application will be costs in the appeal.

Application granted.

Solicitor for the petitioner—*John Josselyn.*

Solicitor for the respondent—*Douglas Grant.*

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

1912. September 11.

AMBUJA AMMAL (PLAINTIFF), APPELLANT,

v.

APPADURAI MUDALI AND FOUR OTHERS (DEFENDANTS NOS. 2, 4, 3, 1 AND 5), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XLI, r. 27, cl. (b)—Additional evidence on appeal—Powers of the Appellate Court—Test to be applied for admitting—State of mind of the Judge, after hearing the appeal—No external standard—'Any other substantial cause,' meaning of.

Where a Subordinate Judge first heard an appeal and then passed an order for the admission of some additional documents in evidence on the ground that "it was necessary to have the documents before the Court to enable it satisfactorily to pronounce its judgment,"

* Second Appeal No. 819 of 1911.

Held, that the admission of the documents as additional evidence was permissible under Order XLI, rule 27 of the Code of Civil Procedure, Act V of 1908.

The test laid down under clause (*b*) of Order XLI, rule 27, is not whether any tribunal would be unable to pronounce any judgment without production of the additional evidence in question but whether the mind of the Appellate Judge is in such a condition on the evidence on record that he requires any documents to be examined to enable him to pronounce judgment.

The expression 'any other substantial cause' added in Order XLI, rule 27, confers a wide discretion on the Appellate Court to admit additional evidence when the ends of justice require it to be done.

Kessowji Issur v. *G.I.P. Railway Company* (1907) I.L.R., 31 Bom., 381 (P.C.), explained and distinguished.

Krishnama Chariar v. *Narasimha Chariar* (1908) I.L.R., 31 Mad., 114, referred to.

Andiappa Pillai v. *Muthukumara Thevan* (1913) I.L.R., 36 Mad., 477; s.c. (1912) M.W.N., 450, followed.

Subba Naidu v. *Ethirajammal* (1912) 22 M.L.J., 14, dissented from.

SECOND APPEAL against the decree of K. KRISHNAMACHARIYAR, Temporary Subordinate Judge of North Arcot, in Appeal No. 120 of 1910, preferred against the decree of K. S. LAKSHMINARASA AYYAR, District Munsif of Ranipet, in Original Suit No. 909 of 1907.

The facts appear from the judgment of SUNDARA AYYAR, J.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the appellant.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the respondents.

SUNDARA AYYAR, J.—In this case, there is no ground for interference in Second Appeal unless we are prepared to adopt the appellants' contention that the Subordinate Judge acted illegally in admitting certain additional documents in evidence in appeal. The appeal was first heard on the 14th September 1910. The Subordinate Judge then observed "I think it is necessary to have the documents described as 1 and 2 in the list attached to the petition, and also the will of the original mortgagee before the Court to enable it satisfactorily to pronounce its judgment." On that ground, he allowed the additional evidence to be received. It is contended that in doing so he acted in excess of his powers. The appellate Court's right to receive additional evidence in appeal is restricted by Order XLI, rule 27 of the Code of Civil Procedure, 1908. The rule is in substantially the same terms as section 568 of the

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repealed Civil Procedure Code. It runs as follows:—"The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary in the appellate Court. But if [clause (*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 to be produced or document to be received or witness to be examined." Considering the clause apart from the decided cases, it appears to me that the test laid down in clause (*b*) "if the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment," is one relating to the state of mind of the appellate Court and not an external standard. In other words, the test is not, whether any tribunal would be unable to pronounce any judgment without the production of the additional evidence in question, but, whether the mind of the appellate Judge is in such a condition on the evidence on record that he requires any document to be produced or any witness to be examined to enable him to pronounce judgment. The object appears to me to be to enable the appellate Judge to satisfy his own mind, when he entertains a doubt; the test proposed is therefore not an external one, viz., whether some other mind or an average mind would require additional evidence to be produced in order to pronounce some judgment or other.

In this case the Subordinate Judge states explicitly that he wished to have the additional evidence in order to be able to pronounce his opinion on the merits of the contest between the parties. But it is argued for the appellant that there are authorities which we cannot disregard, which compel us to hold that the power to admit additional evidence does not exist in such a case. The most important decision is that delivered by the Judicial Committee of the Privy Council in *Kessowji Issur* v. *G.I.P. Railway Company*(1). In that case the application for the admission of additional evidence was made prior to the hearing of the appeal and, so far as the report shows, the appeal had not been heard before permission was given for the admission. The appellate tribunal, therefore, did not feel it to be necessary to have additional evidence in order

(1) (1907) I.L.R., 31 Bom., 381 (P.C.).

to enable it to pronounce judgment. Their Lordships of the Privy Council held that the additional evidence should not have been admitted. So far the case presents absolutely no analogy to the present one. It is the duty of the appellate Court, according to the section, to give its reasons for admitting further evidence. No reasons had been stated in the judgment of the Bombay High Court, nor does it appear that any difficulty was felt by the appellate Court in coming to a proper conclusion on the case without the help of the additional evidence admitted. Their Lordships lay stress on the fact that no reason was given for allowing further evidence to be adduced. They then go on to say that the appellate Court was merely 'reviewing and reversing TYABJI, J's. refusal of a review and they point out that further evidence was ordered not after the appeal had been heard on the merits and the evidence as it stood had been examined, but on special and preliminary application. They then make the observation on which stress is laid. "The legitimate occasion for section 568 is when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent, not where a discovery is made out-side the Court, of fresh evidence and the application is made to import it." I do not understand the expression 'defect' as meaning a defect which makes it impossible to come to any conclusion at all; but a defect which makes it difficult for the appellate Judge to come to a conclusion satisfactory to his own mind. Nor do I think the expression '*lacuna*' carries the case any further. The general principle applicable to a Court of Appeal having plenary jurisdiction over a cause is that it has got all the powers of the Court of first instance. See section 107 of the Code of Civil Procedure, 1908. Rule 27 of Order XLI is a restriction placed on the powers of the Court of first instance itself in admitting evidence at a late stage of the case. It appears to me that a wide discretion is given to the trying Judge, when he feels a difficulty himself or when he considers it proper in the interests of justice, to admit evidence which as a matter of discipline between party and party might be rejected. I think that rule 27 of Order XLI embodies no more than the same principle. I may observe, further, that in addition to a case where the appellate Court feels a difficulty in coming to a satisfactory conclusion on the evidence on record, additional evidence may be admitted

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also "for any other substantial cause." In *Subba Naidu* v. *Ethirajammal*(1), ABDUR RAHIM, J. was inclined to hold that that phrase must be interpreted as meaning a cause of a nature similar to the classes of cases referred to in the preceding clause. I find it difficult to understand what a cause of the same kind as is referred to in the preceding clause would be. In my opinion, the object of adding "any other substantial cause" was to give a wide discretion to the appellate Court to admit additional evidence when the ends of justice should require it to be done. In *Krishnama Chariar* v. *Narasimha Chariar*(2), no interpretation was put on "any other substantial cause." On the other hand in *Andiappa Pillai* v. *Muthukumara Thevan*(3), a more liberal interpretation was put on the powers of the appellate Court to admit additional evidence. My learned brother SADASIVA AYYAR, J., referred there to the powers given to the Court of first instance in order to enable the Court to do justice. In my opinion similar powers are vested in the Court of Appeal although a restriction is placed, in the interests both of discipline and of preventing concoction of evidence, on the discretion vested in the appellate Court. I am of opinion that there are no grounds for holding that the additional evidence was wrongly admitted in this case. I dismiss the Second Appeal with costs.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I concur in the judgment of my learned brother.

(1) (1912) 22 M.L.J., 14. (2) (1908) I.L.R., 31 Mad., 114.
(3) (1913) I.L.R., 36 Mad., 477; s.c., (1912) M.W.N., 450.