plaintiff to defendants 6 and 7. As regards defendants 1 to 3, who also appeared in this Court, I would make no order of costs.

VARMA, J.—I agree.

J. K.

Appeal dismissed.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and James, J.

DURGA TEWARY

v.

RAMRATI KUER.*

1937.

February, 26.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XLI, rule 27—additional evidence, appellate court's power to receive—discretion—additional evidence taken, whether can be left out of account in deciding the case on the merits—principles governing reception of additional evidence.*

Held, that paragraph (*b*) of rule 27 of Order XLI of the Code of Civil Procedure does not lay down that additional evidence should not be received by the appellate court, except on the definite requirement of the court itself and that if the new and additional evidence is produced by one of the parties it should be ignored. There is nothing in the said paragraph which suggests that unless the appellate court finds some good reason for filling up some lacuna in the evidence, the parties have no right to produce such further evidence.

The word "requires" means that it is necessary.

A party is entitled to adduce additional evidence at the appellate stage if the evidence proposed to be offered was not available to him at the trial and has since become available to him.

*Appeal from Appellate Decree no. 79 of 1933, from a decision of Babu Ananta Nath Banerji, Subordinate Judge of Saran, dated the 28th September, 1932, reversing a decision of Maulavi Nasim-ud-din Ahmad, Munsif of Chapra, dated the 18th May, 1931.

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If additional evidence has been admitted and is admissible as relevant the additional evidence must be considered upon its merits even if the discretion to admit it may have been exercised upon erroneous grounds.

Parsotim v. *Lal Mohar*(1), explained.

Per James, J.—The grounds which would justify the original court, if no appeal has been preferred, to review its judgment should always be regarded as substantial cause justifying the admission of additional evidence by the appellate court.

Appeal by the defendant.

The facts of the case material to this report will appear from the judgment of Courtney Terrell, C.J.

The case was first heard by Wort, J. who referred it to a Division Bench. It was then heard by Terrell, C.J. and James, J. who referred it to a Special Bench. As the points of law involved in the appeal were not pressed at the hearing, the case was referred back to the Division Bench.

Harnarayan Prasad, for the appellant.

Janak Kishore, for the respondent.

COURTNEY TERRELL, C.J.—This second appeal is by defendant no. 1 against a decree of the Subordinate Judge of Saran reversing a decision of the Munsif of Chapra. The plaintiff claimed as the sister of a lady named Kalika who had died, and one of the important issues in the case was as to when Kalika in fact died. The matter was heard by the trial court, and it was held that the lady died as alleged by the defendant in the year 1928. The matter went on appeal to the lower appellate court, and the lower appellate court had brought to its notice a certain document purporting to be an admission by the defendant of the date when the lady died and

(1) (1931) I. L. R. 10 Pat. 654; L. R. 58 Ind. App. 254.

putting that date not at the date alleged by the defendant but at a subsequent date, the 8th of May, 1929. The learned Judge decided to admit this document into evidence and having considered it together with the rest of the evidence allowed the appeal, deciding that the lady in fact died on the 8th of May, 1929. The matter was taken on second appeal to a learned Judge of this Court sitting singly, and the appellant took the ground that the lower appellate court should not have admitted this additional evidence. There was another point in dispute which was a matter of law only. The learned Judge heard the second appeal and decided to refer the matter of the legal point to a larger Bench. It was accordingly heard by a Full Bench and the matter of its disposal is of no great interest, the order being in so far as it affects this case that the case was sent back to a Division Bench and now comes before us.

The main point which has been taken before us is that of the admission of the evidence by the lower appellate court. On behalf of the appellant and in assistance of his argument there has been produced before us an expression of opinion by the learned Judge, who first heard the case in second appeal, to the effect that the additional evidence should not have been received by the lower appellate court and that the case should have been indeed decided ignoring the additional evidence which was in fact admitted and taken into consideration. The argument of the learned Advocate and the opinion of the learned Judge of this Court are based upon the wording of Order XLI, rule 27, of the Code of Civil Procedure. It is suggested that the meaning of paragraph (*b*) of that rule is that the evidence should not be admitted except on the definite requirement of the Court itself and that if the new and additional evidence is produced by one of the parties it should be ignored. It is sought to base this argument upon certain passages in a judgment of their Lordships of the Privy Council

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COURTNEY TERRELL, C. J.

in the case of *Parsotim* v. *Lal Mohar*(1). In my opinion the judgment referred to lays down no such proposition. It is suggested from the wording of the judgment that unless the appellate court itself finds some good reasons for filling up some lacuna in the evidence the parties have no right to produce such further evidence. The wording of the paragraph (*b*) is quite against such a view and I am perfectly certain that their Lordships of the Privy Council intended to lay down no such principle. The appellate court may require any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause, and, as was pointed out by their Lordships of the Privy Council in the case referred to, the word "requires" means that it is necessary. It may be necessary for the purpose of enabling the court to pronounce judgment, that is to say, the court may find that unless such evidence is produced before it, it has not sufficient material before it to decide the case or there may be some other good and substantial cause and the most common and frequent is that the evidence was not available in the trial court because the party was unaware of it at the time of the trial and it has since been brought to the notice of the party. It must be remembered that a party is entitled to obtain a review of a judgment and one of the grounds upon which it is entitled to obtain a review is that evidence which it could not be expected to have produced at the trial has become available since the trial which is material to the decision of the issue. It would be ridiculous to imagine that the appellate court should first of all ignore the profferred new evidence and then allow the proffered new evidence to be brought before it on an application for review of its own judgment. There is a point further which must be noticed in considering the judgment of the Privy Council: they did not decide that if the court should have exercised its discretion to admit further

(1) (1931) I. L. R. 10 Pat. 654; L. R. 58 Ind. App. 254.

evidence upon grounds which did not appeal to the Privy Council, the Privy Council would have proceeded to refer the matter back to the lower appellate court to be heard with directions that the additional evidence given was to be ignored, nor did they decide the matter themselves ignoring such additional evidence. The principles upon which the court is to exercise its discretion are well known. If that discretion, however, has been exercised and if the additional evidence has been admitted, and is admissible as relevant, the additional evidence must be heard upon its merits even if the discretion to admit it may have been exercised upon erroneous grounds, for an appellate court does not interfere with the discretion of a lower court unless that discretion has been exercised upon fundamentally erroneous principles. The learned Judge of this Court, however, seems to have been led to the impression that the case ought to have been remanded by him to the lower appellate court to be decided on the evidence as it stood before the admission of the additional evidence, and I see no justification for that point of view. In the case before the Privy Council their Lordships as a matter of fact while stating that the additional evidence ought not to have been admitted considered that additional evidence on its merits which governed the decision on the appeal and nothing else.

There is one further small point which is conceded by the learned Advocate on behalf of the respondents. It is pointed out that the suit was to recover a certain mukarrari no. 635 as having belonged to the deceased lady and certain moveable property as having been owned by the deceased lady and that the trial court found as a matter of fact that she did not possess the mukarrari and did not possess any moveable property. This point of fact was not considered at all by the appellate court which reversed the decision of the Munsif on wider grounds, but it is quite clear that the judgment of the Munsif can only stand on the hypothesis of the findings of the Munsif as to these

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two items of property, which findings have not been disturbed by the appellate court. Therefore the decree will stand in favour of the plaintiff subject to the modification that those two items of property will be excluded from the decree.

COURTNEY TERRELL, C. J.

The appeal fails and must be dismissed with costs.

JAMES, J.—I agree entirely. The learned Subordinate Judge admitted this additional evidence on grounds which would have justified the admission of an application for review by the original court if no appeal had been preferred. If such grounds are made out by an appellant in an application under Order XLI, rule 27, they should always be regarded as substantial cause justifying the admission of the additional evidence. It appears to me that Order XLVII, rule 1, cannot be reasonably read as implying anything else; though if there should appear any danger of its being read in any other manner, I consider that this Court with the Rule Committee ought to amend it. It appears to me that it would be absurd to lay down as a general rule, that a respondent is permitted in certain circumstances to adduce additional evidence before the court of appeal, and a person who being a party to the suit is not a party to the appeal is similarly permitted to do so; and to provide that the only person who cannot in these circumstances produce additional evidence before the appellate court is the appellant himself. The whole of rule 1 of Order XLVII proceeds on the assumption that if the person who has discovered new and important matter or evidence which after exercise of due diligence was not within his knowledge at the time of the trial is a person who is in any way concerned in a pending appeal from the decree, he will be permitted to produce that evidence before the appellate court and it will be heard at the time of the appeal.

J. K.

Appeal dismissed.