Jagi Narayan Pandey and Another Vs Smt. Bach Kaliya

Court: Allahabad High Court

Date of Decision: Jan. 9, 1979

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 41 Rule 27, 115

Citation: AIR 1979 All 246

Hon'ble Judges: P.N. Goel, J

Bench: Single Bench

Advocate: S.D. Pandey, for the Appellant;

Final Decision: Allowed

Judgement

P.N. Goel, J.
Jagi Narayan Pandey and his son Lallan Pandey have preferred this appeal against the judgment and decree dated 7-8-

1968 passed by II Temporary Civil and Sessions Judge, Ballia.

2. The plaintiff-appellants brought the suit for recovery of Rs. 2,000/- on the basis of a Sarkhat dated 26-1-1961 for Rs. 800/- The appellants

alleged that Nand Kishore Misra had taken a loan of Rs. 800/- from them at 5 Anna per cent per month as interest.

3. The suit was decreed by the Munsif, East Ballia. In appeal the Civil and Sessions Judge, hereinafter called the Civil Judge, admitted several

documents filed by the respondents and took oral evidence of one Hari Har Rai, Inspector Post Offices and Kamla Kant produced on behalf of

the respondents. Then on an appraisal of the entire evidence the Civil Judge dismissed the appellants" suit.

4. Sri G. P. Bhargava, learned counsel for the appellants contended: (1) The Civil Judge, as an appellate court, was not competent to have taken

documentary and oral evidence produced by the respondents, and (2) The Civil Judge was not justified in rejecting the evidence of Shahanshah

Husain, Government Finger Print Expert on the ground that the negatives of the photographs had not been produced.

5. The learned counsel for the respondents urged that the second appeal was not maintainable in view of the provisions of Section 102, C. P. C.

This section lays down that no second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of

the subject-matter of the original suit does not exceed two thousand rupees. In this section originally the amount was five hundred rupees. This

amount was substituted by the sum of two thousand rupees by U. P. Act No. XXIV of 1954 with effect from 30-11-1954. Thus on the date of

the filing of this second appeal the amount in Section 102 was two thousand rupees. Therefore, on the very face, this appeal was not entertainable

in this Court. The Office of this Court made no report on this behalf. Therefore, this appeal was registered. Sri G. P. Bhargava, learned counsel for

the appellants urged that as the lower appellate court had not exercised jurisdiction legally in admitting the additional evidence this Court could in its

power of revision interfere, even though the second appeal did not lie, in view of the provisions of Sec, 102. In the case of AIR 1949 239 (Privy

Council) , it was held that if the erroneous decision had resulted in the subordinate Court exercising jurisdiction not vested in it by law, the High

Court could interfere in its revisional power.

6. We have now to determine whether the lower appellate court was wholly unjustified in admitting oral and documentary evidence of the

respondents in appeal.

7. In the year 1968, Order 41, Rule 27 read 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 --

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(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.

8. The record shows that on 4-1-1968, the respondents moved an application for additional evidence. This application was allowed by the Civil

Judge on that very day. The order passed on this application is rather interesting and is reproduced below;

This is an application under Order 41, Rule 27 of the C. P. C. for filing three extracts of Kutumb Register and for summoning some Savings Bank

Account papers from the Village Post Office of Daya Chhapra.

I have heard learned counsel in regard to this application. The three Kutumb Registers had been in existence since 1947 and it is an idle plea of the

appellant that he was not aware of the existence of these papers. Similarly, the prayer about the summoning the postal papers is also greatly

delayed. The application has been rightly opposed on behalf of the respondent.

I admit the papers on payment of Rs. 8/- per paper..... A date for final disposal of the appeal will be fixed later.

9. It will be noticed that the Civil Judge found the objection of the appellants against the application justified. Even then he admitted the papers.

Correctly speaking he should have rejected the application.

10. Thereafter, on 29-5-1968, the respondents moved another application for additional evidence. This application was also allowed on the same

day on payment of Rs. 40/- as costs.

11. Record further shows that Hari Har Rai, Inspector Post Offices, was examined on 31-7-1968. Arguments in the appeal were then heard on 3-

8-1968.

12. It is evident that the respondent did not move any application before the trial court for filing the papers and leading evidence which he wanted

to produce before the first appellate court. Therefore, Clause (a) of Rule 27 did not come into operation. It is also evident that the lower appellate

court had not heard the arguments of the parties prior to the admission of the additional documentary and oral evidence. Therefore, the lower

appellate court could not have judged whether any particular document or evidence was required in the case to enable it to pronounce judgment,

or for any other substantial reason. In this way Clause (b) of Rule 27 also did not come into operation.

13. The position that follows is that Order 41, B. 27 did not empower the lower appellate court to admit the documentary or oral evidence

produced by the respondents in the appeal. It would not be incorrect to say that the lower appellate court allowed the applications of the

respondents in a routine manner and without taking into consideration the provision of Rule 27 under which he proceeded to act. It will be noticed

that the Rule 27 is negative in form, It does not entitle a party to produce additional evidence at his own will. The rule clearly shows that a party to

an appeal shall not be entitled to produce evidence. Therefore, it was necessary for the lower appellate court to see if the provisions of Clauses (a)

and (b) of Rule 27 were strictly applicable or not. It has been indicated above that both these clauses were not applicable to the case and as such

the lower appellate court committed a gross legal error in admitting the documentary and oral evidence of the respondents,

14. The effect of illegal admission of evidence in appeal is that the said evidence should be ignored and case decided as if the additional evidence

was non-existent, Such view was expressed in the case of Arjan Singh v. Kartar Singh, (1951) 2 SCR 258 .

15. The learned counsel for the respondents urged that as the appellants* counsel had taken costs awarded by the lower appellate court while

allowing applications for additional evidence the appellants were estopped from raising this point. Reference was made to three cases: Ramendra

Mohan Tagore Vs. Keshab Chandra Chanda and Another, ; District Council, Wardha v. Anna Daulatrao Kunbi, AIR 1941 Nag 273 and

Puvvada Satyanarayanamurthy Vs. Gadepalli Sundara Rao, .

16. In the first two cases amendment application was allowed and the other party had accepted the costs. In the third case an application for

setting aside an ex parte decree was allowed and the other side had accepted costs. It is well known that allowing an amendment or allowing an

application for setting aside an ex parte decree are matters of discretion and appraisal of evidence. These three cases are not applicable to the

instant case where the mistake committed by the lower appellate court is about jurisdiction to accept additional evidence in appeal. The appellate

court does not have an unfettered right to admit additional evidence, The appellate court has to act within the limits of the statute, There can be no

estoppel against the provisions of a statute, In these circumstances, the three cases relied upon by the learned counsel for the respondents are not

at all applicable to the case, Therefore, this contention does not carry force.

17. The learned counsel for the respondents next contended that the lower appellate court formed its opinion on the material which was before the

trial court. No doubt, the lower appellate court has decided the points on the evidence which was before the trial court, but a persual of the

judgment of the lower appellate court shows that it was very much influenced by the additional evidence which was illegally admitted in appeal. In

such a case it is difficult to say that the lower appellate court formed its opinion merely on the material which was before the trial court, Where a

wholly inadmissible evidence is taken into consideration by a court along with the admissible evidence, there is always a risk of doing injustice in

the case and prejudicing the rights of the party. We have carefully seen the judgment of the lower appellate court and we are unable to accept the

contention of the respondents counsel.

18. As soon as the additional evidence taken in appeal is ignored, the position that remains is that on behalf of the appellants, there was sworn

testimony of Jagi Narayan, plaintiff, Nathuni Singh, scribe of the Sarkhat and Shahanshah Hussain, Government Finger Print Expert. On the other

side, there was the bare statement of Nand Kishore Misra, respondent. A look at the statement of Nand Kishore Misra clearly shows that he did

not venture to deny his signature on the Sarkhat. He made a bald statement by saying that he had not written the Sarkhat. The Sarkhat was actually

written out by Nathuni Singh. Government Finger Print Expert compared the thumb impressions on the Sarkhat with the specimen thumb

impressions of Nand Kishore Misra and found that they tallied. Thus there was overwhelming evidence on behalf of the appellants to prove the due

execution of the Sarkhat, The testimony of Jagi Narayan and Nathuni Singh also prove the passing of the entire consideration. Therefore, the trial

court was justified in decreeing the appellants" suit. The lower appellate court was wholly in error in brushing aside the overwhelming evidence of

the appellants in the case. A perusal of the judgment of the lower appellate court shows that this Court has been hypercritical of the evidence of the

plaintiffs" witnesses. As a matter of fact the lower appellate court was impressed by the additional evidence taken by him in appeal and for that

reason he found petty faults in the evidence led by the appellants. Therefore, great injustice has been done to the appellants in this case.

19. With regard to the production of the negatives of the photographs of the finger prints by the Government Finger Print Expert, a look at the

statement of Shahanshah Hussain is sufficient. His statement clearly shows that he had compared the original thumb marks on the Sarkhat with the

specimen thumb marks of the respondent. In view of this statement, there was hardly any need of the negatives to have come to the court. The

photographs are taken with the intention of making enlargements so as to show to the Court the point of similarities and dissimilarities. If the lower

appellate court was keen about the negatives, he could easily summon the same from the Finger Print Expert just as he was inclined to allow the

respondents to lead oral and documentary evidence against the specific provisions of Order 41, Rule 27, C. P. C.

20. Therefore, the lower appellate court was not justified in not accepting the statement of the Finger Print Expert.

21. No other point was urged.

22. The result of the entire discussion of the material on record is that the lower appellate court fell in gross legal error in dismissing the appellants"

suit and in setting aside the decree passed by the trial court. Therefore, this Court would be justified in making interference.

23. The appeal is allowed and the judgment and decree dated 7-8-1968 passed by the Civil and Sessions Judge, Ballia are set aside and the

decree dated 29-8-1966 of Munsif, East Ballia is restored. The appellants shall get costs of this Court as well as of the lower appellate court from

the respondents.