(2006) 12 KAR CK 0061

Karnataka High Court

Case No: M.S.A. No. 205 of 2006

Gabriel Bhaskarappa Kuri, Immanuel Philmon Hittalmani and Shantavir		APPELLANT
	Vs	
Hullyal Vs The United Basel Mission Church in India Trust Association (Bombay-Karnataka)		RESPONDENT

Date of Decision: Dec. 13, 2006

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 13 Rule 1, Order 41 Rule 27

Citation: (2007) 3 KarLJ 205 : (2007) 1 KCCR 758

Hon'ble Judges: N. Kumar, J

Bench: Single Bench

Advocate: V.P. Kulkarni, for the Appellant; M.C. Pyati and T.Y. Katwa Advs. for R1 and R2, for the Respondent

Final Decision: Allowed

Judgement

N. Kumar, J.

This is a defendants'' Miscellaneous Second Appeal challenging the order of the lower Appellate Court which has set aside the judgment and decree of the trial Court only on the ground that as it has allowed the applications filed by the parties for production of additional evidence and consequently remanding the case to the trial Court to decide the case afresh in the light of the said additional evidence.

2. The plaintiff-The United Basel Mission Church filed a suit for permanent injunction on 12.10.1990 on the ground that the defendants are interfering in the administration and management of the Church and Community Hall situated in

Gadag-Betageri and for costs. Defendants contested the matter. The trial Court framed as many as 7 issues. Both the parties adduced documentary and oral evidence. On consideration of the aforesaid material on record, the trial Court decreed the suit, of the plaintiff and restrained the defendants, their men, servants from obstructing or interfering in the administration and management of the suit properties of the Church. Aggrieved by the said judgment and decree, defendants numbering about 10 preferred Regular Appeal No. 58/1994. In the said appeal both the appellants and respondents filed several applications for production of additional evidence. Thereafter, the first Appellate Court took up the appeal for hearing. Instead of hearing the appeal on merits and then considering these applications for production of additional evidence, the said applications were taken up for consideration first and all the applications were allowed. Thereafter it held those documents ought to have been considered by the trial Court and the issues involved in the suit ought to have been decided. Further it held that, the said documents are relevant and they would help the Court in deciding the matter effectively and finally. Therefore, it set aside the judgment and decree of the trial Court, remanded the matter back to the trial Court for fresh consideration in accordance with law, with a direction to give opportunity to both the parties to adduce evidence on additional documents which are produced by them. The Court Receiver was directed to deposit the keys before the CMO of the Court and CMO in turn was directed to return the said keys from whom he had received as per the records. Receiver was directed to return movables which were received under inventory from whom he had received. Aggrieved by this judgment and decree, the defendants are in second appeal.

3. I have heard the learned Counsel for the parties.

4. Order 41 Rule 27 CPC deals with production of additional evidence, whereas Rules 28 and 29 deals with mode of taking additional evidence in the Appellate Court, reads as under:

27. Production of additional evidence in Appellate Court.- (1) 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

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, 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.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

Underlining by me

28. Mode of taking additional evidence-Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

29. Points to be defined and recorded.- Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

5. A perusal of the provisions shows the Code specifically provides for production of additional evidence in Appellate Court. However, the opening words of the provision are couched with negative words. It declares that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate Court. This legislative intent has to be kept in mind. It is in the nature of a command, coughed in a negative form, declaring that the parties have no right to produce additional evidence in the appellate Court. That is the rule. However, as an exception, the provision sets out under what circumstances additional evidence could be produced in the appellate Court. Therefore, the production of additional evidence in appellate Court has to be strictly construed. This power so conferred upon the Court by the Code ought to be very sparingly exercised. While exercising such power it is necessary for the Appellate Courts to keep in mind the amendment to the CPC brought about in the year 2002. Now, even in the trial Court the parties have to produce the documents on which they rely on, for their claim or the defence along with the pleadings. Thereafter documents shall not, without the leave of the Court be received in evidence at the hearing of the suit. Further, the Court mandates under Order 13 Rule 1 that all the documents shall be produced on or before the settlement of issues. If anything remains to be produced, they have to be produced along with the affidavit which is by way of examination in chief. Therefore, the concept of showing a good cause for not producing the documents earlier has been given a complete go by. Unless the document is relevant to the matter in issue, without the leave of the Court, the same cannot be produced, once the opportunity to produce the same is not availed of by the parties. In that context when production of documents at a later stage in the suit itself is very much restricted, in appeal it cannot be allowed as a matter of course even though these provisions are not amended by the said Amendment Act. Unless the party makes out a case as contemplated under Order 41 Rule 27 CPC the Court cannot admit documents. While exercising such power, the Court shall comply with the requirement of law as

contained in Sub-rule (2) of Rule 27 and Rule 29.

6. A careful reading of the provision shows that additional evidence could be produced under five circumstances. They are:

(1) When the trial Court refused to admit evidence, which ought to have been admitted.

(2) Notwithstanding the exercise of due diligence, such evidence was not within his knowledge.

(3) Even after the exercise of due diligence, such evidence could not be produced.

(4) Appellate Court requires any evidence to enable it to pronounce judgment.

(5) Any other substantial cause.

7. If any one of those conditions are satisfied or exists, the appellate Court has the power to allow a document to be produced and a witness to be examined. But, before the appellate Court decides to admit additional evidence, the examination of evidence on record has to take place. On examination of such evidence on record, the appellate Court comes to the conclusion that there is some inherent lacuna or defect, then it may admit additional evidence. Until this is done, the appellate Court has no power to admit additional evidence, not even if the evidence offered be the evidence of new matter discovered after the Court of first instance had pronounced its judgment. 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. But, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. This rule is not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak points in his case and fill up the omissions in appeal, thus remove the lacunae and fill in gaps in evidence. Therefore, it follows the application for additional evidence cannot be considered as an interlocutory application in a pending appeal. The said application has to be necessarily considered along with the appeal, while hearing the appeal on merits.

8. In a case falling under Clause (b) of Sub-rule (1) of Rule 27, the requirement of the appellate court must be limited to those cases where it found it necessary to obtain such evidence for enabling to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage, where even without such evidence it. can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. The true test, therefore is, whether the appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Ultimately, it is established by authority that it is the

requirement of the Court and not the requirement of the litigant in considering whether or not additional evidence will be allowed to be produced. 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.

9. Once the Court decides to admit additional evidence, then the Court shall record the reasons for its admission. Thereafter it shall specify the points to which the evidence is to be confined and record on its proceedings the points so specified as required under Rule 29. The appellate Court should remember, merely because it decides to admit additional evidence under this Rule, it should not set aside the judgment and decree of the trial Court and remand the case to the lower Court, unless it falls within Rule 23, Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it to the Appellate Court. This is the requirement of law as contained in Rule 28. On receipt of such material, after hearing the parties, the appellate Court shall pronounce the judgment on merits. The scheme of these provisions do not provide for setting aside a well considered judgment and decree of the trial Court solely on the ground that the application filed for additional evidence is allowed.

10. In the instant case a reading of the judgment shows the appeal is not heard on merits. Though the judgment of the Appellate Court runs to 50 pages, a perusal of the same shows in paras 1 to 3 the plaint is reproduced. From paras 4 to 7 the written statement is reproduced verbatim. In para 8 the number of witnesses examined and the number of documents marked are referred to Paragraph 9 contains the issues which are framed by the trial Court. In paragraph 10 the result of the suit is mentioned. In paragraphs 11 and 12 the grounds of appeal are verbatim produced. In paragraph 13 the applications filed by the appellant for production of additional evidence which are more than one are set out. In paragraph 14 the applications filed by the second respondent for production of additional evidence which are also more than one are set out. Paragraph 15 shows that the learned Judge heard the arguments. It is not clear whether the arguments were heard on I.As or on merits or both. Then the lower Appellate Court has formulated the points for consideration. Point Nos. 1 to 3 is whether the applications filed by the parties is to be allowed or not, and point No. 4 is whether the appellant proves that the judgment and decree passed by the trial Court is perverse and arbitrary and the Court''s interference is necessary. Point No. 5 is what order or relief. Then in paragraphs 18 to 24 the applications filed by the appellants and the objections to the same filed by the respondents were considered and all those applications are allowed. In paragraphs 25 to 31 the applications filed by the respondents and the objections filed by the appellants were considered and all those applications were allowed. Then the lower Appellate Court has considered the other applications filed and for the reasons set out therein it has disallowed those applications. In point No.

4 in paragraph 39 the lower Appellate Court records that, it has perused the pleadings of the parties, evidence of the parties, judgment and decree passed by the trial Court, memorandum of appeal, written arguments submitted by both sides along with decisions referred in the written arguments and also at the time of oral arguments. Then it concludes as under:

The said documents are produced on both the sides filing application and requested to receive the said documents as additional evidence. This Court also considered the said applications and permit them to produce the documents and received the documents as additional documents. Said documents also will help to decide the possession and management of the suit properties of the parties. Admittedly said documents are not produced before the trial Court. Said document is to be received in evidence to mark the documents. To receive the said documents evidence is required on both the sides on additional documents which are produced by the parties as additional evidence said documents, will decide the every root of the case and clinching the issues. In my opinion said documents also will help to decide the subject matter in dispute in between the parties fully and effectively and finally. Without admitting such a document judgment would be defective and not effective. Admittedly additional evidence is produced before this Court and the said additional evidence was not produced before the trial court. Trial Court also did not give any findings on the subsequent documents, which are produced before this Court. If this Court give findings on facts by considering the additional evidence produced by the parties, the parties lose the right of appeal on facts.
In view of production of number of documents produced by both the sides before this Court, said documents are also very relevant to the facts of the case, by considering the said facts, findings given by the trial court cannot be accepted and said findings given by the trial court is to be set aside. For receiving the said documents evidence is required. Additional material placed before this Court will have to be appreciated with the other material already on record. Hence, the matter is to be remanded back to the trial court. Written arguments and decisions referred by both the sides also cannot be considered in view of the above circumstances.

11. This is not the approach which is expected of a first Appellate Court, As is clear from the aforesaid legal position, the Appellate Court should have heard the appeal on merits. Then it should have come to the conclusion whether the evidence as it stands, some inherent lacuna or defect becomes apparent. Only if it found that it is unable to pronounce judgment on the basis of the evidence on record it should look into the additional evidence. Then it should have looked into the documents which are sought to be produced as additional evidence and then decide whether those additional evidence was necessary for the purpose of doing complete justice between the parties to enable it to pronounce the judgment. The observation that the additional evidence sought to be produced before the Court were not produced before the trial Court and, therefore, the trial Court has not given any findings on

the. subsequent documents and, hence, the matter is to be remanded back to the trial Court is a perverse finding. In each and every case of allowing the additional evidence before the first Appellate Court, it is obvious the same was not produced or permitted to be produced before the trial Court and the trial Court had no opportunity to have its say in the matter. When the statute expressly provides that, it is open to the first Appellate Court to look into that additional evidence, record oral evidence if necessary and decide the case on merits, it cannot be said that the parties have lost the right of appeal. The very provisions which provide for a light of appeal and procedure of preferring the appeal provides this procedure to be followed by the Appellate Court. On the ground that the parties would lose the right of appeal, the judgment and decree of the trial Court cannot be set aside and the matter should not be remanded back to the trial Court only to give opportunities to the parties to prefer an appeal.

12. The suit is of the year 1990. It was filed on 12.10.1990. The judgment and decree in the trial Court was passed on 28.9.1994. The appeal is numbered as R.A. No. 58/1994 and the same was disposed of on 20.9.2006, 12 years after the institution of the appeal. In other words after 16 years of the institution of the suit the parties are back to square one. It is because of these solitary cases the entire judicial system is ridiculed. The lower Appellate Court if only had looked into these provisions and was conscious of the criticisms levelled against the judiciary, it would not have remanded the matter to the trial Court as it has done. Even if those documents are relevant, as the documents sought to be produced are judgments and decrees passed by various Courts, they could have been marked by consent and they could have been looked into and a judgment could have been passed on merits. Even if parties wanted opportunity to lead oral evidence, the first Appellate Court had jurisdiction to record oral evidence by itself and decide the appeal on merits with that additional evidence on record. Instead of resorting to these settled legal procedures as contemplated under Order 41 Rules 27, 28 and 29, the learned Judge has short circuited the whole process, which the lower Appellate Courts should avoid. In that view of the matter, the impugned judgment and decree of the first Appellate Court cannot be sustained. It is an appropriate case to direct the first Appellate Court itself to record the evidence if necessary and decide the appeal on merits.

13. Hence, I pass the following order:

(i) Appeal is allowed.

(ii) The judgment and decree of the first Appellate Court passed in R.A. No. 58/1994 is hereby set aside.

(iii) The Appellate Court is directed to hear the appeal on merits first and. then take up the applications filed for production of additional evidence for consideration. If it is of the view that it is unable to pronounce the judgment on merits and cannot do complete justice between the parties, without these documents being taken on

record, it has the discretion to allow the said applications. However, after allowing such applications, if the parties request that they may be permitted to adduce oral evidence, then the first Appellate Court itself shall record the oral evidence and in the light of such oral evidence and the oral evidence already on record and documentary evidence, dispose of the appeal on merits in accordance with law without resorting to any remand.

(iv) As the suit is of the year 1990 and for 12 long years the matter is pending, this case is to be taken out of turn and it should be disposed of within three months from the date of appearance of the parties before the Court possibly without seeking any extension of time.

(v) The parties are directed to be present before the first Appellate Court on 8.1.2007.

(vi) Both the parties shall cooperate with the Court in disposing of the appeal within the period stipulated.

High Court registry is directed to send a copy of this judgment to all the Appellate Courts, in Karnataka, for guidance.