Harbilas Ochchelal and others Vs Kokabai and others

Court: Madhya Pradesh High Court (Gwalior Bench)

Date of Decision: Sept. 2, 1980

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 41 Rule 27(1)

Citation: (1982) JLJ 67

Hon'ble Judges: R.C. Shrivastava, J

Bench: Single Bench

Advocate: M.L. Gupta, for the Appellant; K.S. Shrivastava, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

R.C. Shrivastava, J.
This petition is for revision of an order dated 27-4-1978 passed by the First Additional District Judge, Bhind, in Civil

Appeal No. 44/A of 1977, preferred against decree dated 9-4-1976 passed by Civil Judge, Class II, Gohad in Civil Suit No. 8/A of 1972.

2. The facts are as follows: Durjan and Ocche were real brothers. Durjan died on 16-11-1971 leaving a widow Kokabai (respondent No. 1) and

a daughter Javitribai (respondent No. 2). Ocche was the recorded Bhumiswami of certain fields situated at village Nonera and was in cultivating

possession thereof. In the month of January 1972, the respondent 1 and 2 instituted the above-mentioned Civil Suit No. 8/A of 1972, against

Ocche for the joint possession to the extent of half share in those fields. The plaint-allegations were that before coming into force of the M. B.

Zamindari Abolition Act (Act 13 of 1951), the Zamindari of the village was the joint property of the two brothers Durjan and Ocche and those

fields were their Khudkasth. On coming into force of the said Act they became Pakka tenants and on coming into force of the M. P. Land

Revenue Code, 1959 (Act 20 of 1959) Bhumiswarai of those fields but, after the death of Durjan, Ochhe denied the title of the respondents 1 and

2 and ousted them from possession of the fields. The defendant Ochhe denied the allegations and the claim. According to him he and Durjan did

not constitute a joint Hindu family and the field in question were Khudkasth of him alone. Durjan had no interest in those fields. On coming into

force of the M. B. Zamindari Abolition Act (Act 13 of 1951) he alone became Pakka tenant thereof and on coming into force of the M. P. Land

Revenue Code, 1959 (Act 20 of 1959) he alone acquired Bhumiswami rights therein. It was also contended that the suit was barred by time. The

trial Court upheld the defendant''s contentions and dismissed the suit. The respondents 1 and 2, i.e. the plaintiffs preferred Civil Appeal No. 44/A

of 1977 against that decree. The appeal was presented on 5-5-1976, i.e. before coming into force of the CPC (Amendment) Act, 1976 (Act 104

of 1976). Ochhe died during pendency of the appeal and the present petitioners and the respondents 3 and 4 were brought on record as his legal

representatives.

3. During pendency of the appeal the appellant plaintiffs (present respondents 1 and 2), on 17-12-1977 filed an application for amendment of the

plaint. Thereby they wanted to plead that the fields in question were Khudkasht of the joint family Zamindari of Durjan and Ochhe and both of

them were jointly cultivating the same as partners each of them having half share. On 7-4-1978, another application was filed by them for

admission of some documents in evidence. After hearing arguments on 18-4-1978 and 19-4-1978, the appellate Court by order dated 27-4-1978

without discussing merits of the case allowed the amendment-application subject to payment of cost Rs. 50 and the other application subject to

payment of cost Rs. 10. That order dated 27-4-1978 is the subject-matter of this revision.

4. According to the learned counsel for the petitioners, the application could not be disposed of without considering the merits of the case. He has

placed reliance on this Court''s decision in Khemchand Mulchand v. Government of Madhya Pradesh and others 1972 MPLJ 524. In that case

also during pendency of first appeal before an Additional District Judge, an application for amendment of pleading and an application for

permission to tender a document in evidence were filed. Both the applications were allowed by the Additional District Judge on payment of costs

to the opposite party without hearing the appeal on merits. That order of the Additional District Judge was challenged before this Court in revision.

It was held that the Additional District Judge followed an altogether erroneous course in considering the application without first hearing the appeal

on merits. Referring to both the clause of Order 41 Rule 27 (1) of the CPC as it stood before coming into force of the CPC (Amendment Act of

1976) this Court observed as follows:

These conditions must be satisfied before additional evidence can be allowed to be tendered at the appellate stage. The rule is not intended to

allow a litigant who has been unsuccessful in the lower Court to patch up the weak part of his case and to file up an omission in appeal. Now the

question whether the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted or the

question whether the appellate Court required additional evidence to enable it to pronounce judgment or whether there is any other substantial

cause for permitting additional evidence cannot in its very nature be decided unless and until the appeal is first heard on merits. As pointed out by

the Privy Council in Parsotim v. Lal Mohar AIR 1951 PC 143 and by the Supreme Court in Arjan Singh v. Kartarsingh and others AIR 1931 SC

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defect calling for the exercise of the discretion under Order 41 rule 27(1) becomes apparent. A party may during the pendency of an appeal move

the Court for being allowed to produce additional evidence but the appellate Court is clearly not in a position to decide whether additional

evidence should or should not be allowed to be produced unless and until the appeal is first heard on merits. This seems to be plain enough and

does not require elaboration. Even though the position that an appellate Court is not in a position to decide whether additional evidence should be

allowed in the appeal unless it is first heard on merits is clear enough on the wording of Order 41 rule 27(1) itself, the practice has grown up in the

lower appellate Court of deciding an application under Order 41 rule 27 (1) immediately after it is moved and even before hearing the appeal on

merits. It is beyond comprehension how the appellate Courts are able to decide such application when they have no idea whatsoever of the merits

of the appeal. This practice must stop forthwith and no lower appellate Court should yield to the request of any party to consider its application

under Order 41, rule 27(1) before the hearing of the appeal itself. The appeal must first be heard on the merits and then the lower appellate Court

should decide whether the application for production of additional evidence should or should not be allowed. If the application is allowed, then, no

doubt, the appeal has to be heard again on merits after the reception of additional evidence for final disposal.

Order 41, rule 27 reads as follows:

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.

Clause (aa) has no relevancy in the present case as it was inserted by the Amendment Act of 1976 during pendency of the appeal. Clause (a) is

also not attracted because the documents sought to be filed in appeal were not produced in the trial Court and that being so, that Court had no

occasion to refuse to admit them in evidence. According to the learned counsel for the respondents 1 and 2 i. e. the plaintiffs it was under clause

(b) that the documents were sought to be filed under clause (b) in order to dispose of an application for permission to produce additional evidence

whether oral or documents the appellate Court has to take a decision on the point as to whether the additional evidence is required by it in order to

enable it to pronounce judgment or for any other substantial cause. It is easy to see that such a requirement of the appellate Court is not likely to

arise ordinarily unless some inherent lacuna or defect becomes apparent on examination of the evidence. The legitimate occasion for the exercise of

this discretion is not whenever before the appeal is heard a party applies to adduce additional evidence but when on examining the evidence as it

stands some inherent lacuna or defect becomes apparent calling for the exercise of the discretion. This is clear from decisions in Parsotim Thakur v.

Lal Mohar Thakur, K. Venkataramiah Vs. A. Seetharama Reddy and Others, and Khemchand Mulchand v. Government of Madhya Pradesh and

others (Supra). For the purpose of disposing of an application filed under Order 41, rule 27 the appeal cannot be said to have been heard on

merits unless the appellate Court examines the evidence on record and, after examination thereof reaches the legitimate occasion for deciding the

application one way or the other.

5. On the authority of decision of the Supreme Court in the case of K. Venkataramiah (Supra) the learned counsel for the respondents 1 and 2, i.

e. the plaintiffs has urged that omission to record reasons for allowing additional evidence does not vitiate the admission. In that case while dealing

with the provision contained in Order 41, rule 27 (2) their Lordships held that recording of reasons under rule 27 (2) was merely directory and not

imperative that the word "Shall" used in that Rule did not make it mandatory and that omission to record reasons for allowing additional evidence

did not vitiate the admission. But the same then at the beginning of paragraph No. 13 of the judgment their Lordships observed as follows:

It is very much to be desired that the Courts of appeal should not overlook the provisions of Clause (2) of the Rule and should record their reasons

for admitting additional evidence..... Clearly the object of the provision is to keep a clear record of what weighed with the appellate

Court in allowing the additional evidence to be produced-- whether this was done on the ground (i) that the Court appealed from had refused to

admit evidence which ought to have been admitted or (ii) it allowed it because it required it to enable it to pronounce judgment in the appeal or (iii)

it allowed this for any other substantial cause. Where a further appeal lies from the decision of the appellate Court such recording of the reasons is

necessary and useful also to the Court of further appeal for deciding whether the discretion under the rule has been judicially exercised by the

Court below. The omission to record the reason must therefore be treated as a serious defect.

In the same paragraph their Lordships further observed as follows:

It does not seem reasonable to think that the Legislature intended that even though in the circumstances of a particular case it could be definitely

ascertained from the record why the appellate Court allowed additional evidence and it is clear that the power was properly exercised within the

limitation imposed by the first clause of the Rule all that should be set at nought merely because the provision in the second clause was not

complied with.

In paragraph No. 17 their Lordships observed:

It is easy to see that such requirement of the Court to enable it to pronounce judgment or for any other substantial cause is not likely to arise

ordinarily unless some inherent lacuna or defect becomes apparent on an examination of the evidence.

Then, in the same paragraph their Lordships quoted with approval the following passage from Privy Council decision in the case of Parsottm

Thakur (Supra):

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. This is the plain grammatical reading of sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the

appeal is heard a party applies to adduce fresh evidence but when on examining the evidence as it stands, some inherent lacuna or defect becomes

apparent.

In the next paragraph the following passage from the same Privy Council decision was also quoted with approval.

It 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.

In the case before their Lordships the facts and circumstances were quite different from those obtaining in the present case before me. In that case

the reasons for admitting the document in appeal were obviously there in the record itself whereas that is not so in the present case. Not only that

the reasons were given by the appellate Court in its judgment. On careful consideration of their Lordships decision in that case it appears to be

clear that their Lordships proposed to lay down that although recording of reasons under Rule 27 (2) is not mandatory yet it is necessary and the

appellate Court is not absolved of its duty to record reasons unless the reasons are apparent from the record itself and further that the legitimate

occasion for exercise of discretion under rule 27 (i) comes only when on examining the evidence as it stands some lacuna or defect calling for

exercise of the discretion becomes apparent. Thus said Supreme Court decision does not render any assistance to the respondents 1 and 2, i.e. the

plaintiffs.

6. In the present case the Additional District Judge did not at all examine the evidence on record and did not decide as to whether any inherent

lacuna or defect calling for exercise of discretion under Order 41, Rule 27(1) was apparent. Reasons are also not apparent from the record. Thus

there was error of jurisdiction on his part in the matter of disposal of the application for permission to file documents, i.e., for permission to adduce

additional documentary evidence.

7. As regards the application for amendment the following observation made by this Court in the case of Khemchand Mulchand (supra) may be

quoted.

What has been said in relation to an application under Order 41, rule 27 (i) applied equally to the disposal of pleadings made at the appellate

stage. The question whether a party should or should not be allowed to amend its pleadings at the appellate stage cannot in its very nature be

decided unless the appeal is first heard on merits.

Thus the amendment-application could also not be disposed of without examining the appeal on merits. That was not done by the Additional

District Judge. Thus he committed error of jurisdiction in the matter of disposal of the amendment-application also.

8. In the case the Khemchand Mulchand (supra) the Additional District Judge"s order allowing the application was set aside and he was directed

to dispose them of afresh according to law in the light of the order passed in that revision.

9. In the result therefore, the impugned order dated 27-4-1978 is set aside and the lower Court is directed to dispose of both the applications

afresh according to law in light of observations made in this order. In the circumstances the parties are left to bear their own costs incurred in this

revision. Counsel"s fee shall be up to Rs. 25 only if pre-certified.