(2005) 12 AP CK 0006

Andhra Pradesh High Court

Case No: Second Appeal No. 500 of 1995

Chapala Chinnabbayi and Others		APPELLANT
	Vs	
Naralasetti Anusuyama and Others		RESPONDENT

Date of Decision: Dec. 7, 2005

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 27, Order 41 Rule 28, Order 42 Rule 1, 100, 101

Citation: AIR 2006 AP 142 : (2006) 1 ALD 669 : (2006) 1 ALT 293 : (2006) 1 APLJ 123 : (2006) 2 CivCC 476 : (2006) 3 RCR(Civil) 526

Hon'ble Judges: G. Yethirajulu, J; B. Prakash Rao, J

Bench: Division Bench

Advocate: P.V.R. Sharma, for the Appellant; M.S. Srinivas, for the Respondent

Judgement

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G. Yethirajulu, J.
This is a reference made by a learned single Judge of this Court to answer the following questions by a Division Bench:

(1) Whether additional documents throwing light by way of subsequent events can be brought on record in a Second Appeal, and if so, what is the scope and ambit and the applicability of Order 41 Rule 27 r/w. Section 151 of the CPC in such a case?

(2) Whether the view expressed by the Division Bench of this Court in Anisetti Bhagyavathi Vs. Andaluri Satyanarayana and others, can be extended to cases of bringing subsequent events to the notice of the High Court in Second Appeals?

2. An application covered by C.M.P. No. 24429 of 2002 in S.A. No. 500 of 1995 was filed under Order 41 Rule 27 read with Section 151 of the CPC to receive additional documents which throw light on subsequent events in a second appeal. The learned

single Judge entertained a doubt whether a Judgment of a Division Bench of this Court in R. Ramachandran Ayyar Vs. Ramalingam Chettiar, can be applied to cases of bringing subsequent events to the notice of the Court in a second appeal. Since the learned Judge felt that the matter is of general importance, referred the matter to invite a decision of a Division Bench.

3. In the light of the questions raised by the learned single Judge, we wish to answer the reference by making a survey of the relevant provisions of law and the legal position relating to this issue.

4. Order 41 Rule 27 C.P.C. deals with the production of additional evidence in appellate Court and it reads as follows:

Order 41 Rule 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.

Under this Rule, additional evidence, by way of producing documents or examining witnesses, can be allowed by the appellate Court by recording the reasons for admission, when the trial Court refused to admit the evidence which ought to have been admitted, when the party seeking to produce additional evidence had no knowledge about the existence of such document or evidence despite exercising of due diligence, when 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 general principle of this Rule is that the appellate Court should not travel outside the record of the lower Court and should not take any evidence in appeal. But in the circumstances enumerated above, the appellate Court may receive additional evidence by recording its reasons. The discretion given to the appellate Court to receive additional evidence under Rule 27 has to be exercised judiciously

and the appellate Court shall not exercise its discretion arbitrarily. Additional evidence can be taken only when the conditions and limitations provided in this Rule exist. The appellate Court is not automatically bound under the above Rule to permit additional evidence, therefore, the discretion has to be exercised judiciously and sparingly. Permission to adduce any additional evidence cannot be refused on the ground that the party has not adduced any evidence in the trial Court.

5. The legal position regarding the production of additional evidence in the appellate Court and the appellate Court permitting such additional evidence is very clear and Order 41 Rule 27 C.P.C. did not impose an absolute bar on adducing additional evidence in the appellate Court and it can be received under certain circumstances as mentioned in this Rule.

6. It has to be now examined whether similar discretion vested with the appellate Court can be exercised by High Court in the second appeal filed u/s 100 C.P.C. Section 100 C.P.C. reads as follows:

100. Second Appeal:- (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed exparte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

Under this Section, an appeal shall lie to the High Court against a decree passed by the appellate Court subordinate to the High Court, if the High Court is satisfied that the case involved a substantial question of law.

7. In Ratanlal Bansilal and others Vs. Kishorilal Goenka and others, , the Full Bench of the High Court of Calcutta, after referring to the Law Commission''s 54th Report and several leading decisions on the point, observed (majority view):

By importing the expression substantial question of law, the Commission can be said only to have sought to eliminate frivolous, flimsy and fragile second appeal and exhorted the High Courts to be on the strictest vigil against entry to appeals on inconsequential but ingenious grounds. It does not by its own avowal, preclude admission of appeal in cases where there has been judicial misconduct in the assessment or admission of evidence. This predicates that facts found upon such misconduct of the proceedings and misapplication of the procedure with regard to evidence will necessarily be a question of law touching the legality of inference on proved facts.... If the law is settled but is not applied to a set of facts despite the finding warranting its application, it is not perceivable how the legislature could conceive of barring the High Court from setting right the erroneous application. Where the finding of fact is on no evidence it is then to be either on assumptions, or on surmises, and conjectures. How such a situation shall be allowed to go unremedied where it leads to the denial of justice? This will bring the judicial system to discredit before the people.

8. In Ishwar Dass Jain (Dead) Thr. Lrs. Vs. Sohan Lal (Dead) By Lrs., , the Supreme Court indicated the situations under which findings of fact may raise substantial question of law enabling the High Court to interfere with the decree passed by the Courts below.

9. In the following judgments, the Supreme Court held that gross miscarriage of justice is also a substantial question of law:-

Surya Nath Singh v. Khedu Singh 1994 Supp. (3) SCC 561, Mohd. Yunus v. Gurubux Singh 1995 Supp. (1) SCC 418, Rohini Prasad and Others Vs. Kasturchand and Another, , Variety Emporium Vs. V.R.M. Mohd. Ibrahim Naina, , Vithaldas v. Ramchandra 1995 Supp. (3) SCC 374.

10. The Court may treat rejection of evidence on flimsy grounds Ishwar Dass Jain (Dead) Thr. Lrs. Vs. Sohan Lal (Dead) By Lrs., , perverse findings R. Ramachandran Ayyar Vs. Ramalingam Chettiar, , misconstruction of evidence or documents Sundra Naicka Vadiyar (dead) by LRs. and another Vs. Ramaswami Ayyar (dead) by his LRs., , as a substantial question of law and give a finding on such questions.

11. Section 103 C.P.C. deals with the power of the High Court to determine the issue of fact and it reads as follows:

103. Power of High Court to determine issues of fact:- In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,-

(a) which has not been determined by the lower appellate Court or both by the Court of first instance and the lower appellate Court, or

(b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred to in Section 100.

12. Whenever the High Court exercises its power u/s 103 C.P.C. in a second appeal, it shall be subject to the fulfilment of the following conditions:

(i) Determination of an issue must be necessary for the disposal of the appeal;

(ii) The evidence on record must be sufficient to decide such issue; and

(iii) (a) such issue should not have been determined either by the trial Court, or by the appellate Court or by both; or

(b) such issue should have been wrongly determined either by the trial Court, or by the appellate Court, or by both by reason of a decision on substantial question of law.

The provisions of Section 103 C.P.C. can be invoked by the High Court if a specific issue is raised, that there is evidence on record sufficient to determine the issue and in spite of evidence on record and necessity to decide the issue, either there is default on the part of the Courts below or any of them in deciding it, or the Courts below or any of them wrongly determines it. In such cases, the High Court is entitled to exercise its powers under this section to go into the question and decide the same on the basis of evidence on record.

13. In Anisetti Bhagyavathi''s case (1 supra), a Division Bench of this Court had an occasion to deal with Sections 100, 103, Order 41 Rule 27 and Order 42 Rule 1 C.P.C. and held as follows:

The High Court while hearing second appeal cannot go into the question of fact, the application for admitting additional evidence in a review petition in second appeal, whether such evidence was within the knowledge of the party seeking production of the same, or could not have been produced with due diligence at the time the decree was passed in second appeal cannot be entertained.

14. The Division Bench answered a similar reference whether additional evidence can be permitted in second appeal by applying Order 41 Rule 27 C.P.C. The Division Bench considered two sets of views on this issue. One view is that additional evidence can be permitted even in second appeal as Order 41 Rule 27 C.P.C. is equally applicable in regard to second appeal, which was expressed by the Madras High Court and Andhra High Court in Gaddam Paramasivudu v. Mulakala Subbanna AIR 1919 Madras 17 (D.B.) and Venku Reddy v. Pichi Reddy AIR 1956 Andhra 250, which is to the following effect:

There is nothing either in Section 103 or in Order 41 Rule 27 C.P.C. which excludes the applicability of the latter provision to Second Appeals. The terms of Rule 27 are general in application and in an appropriate case it is open to the High Court in Second Appeal to admit additional evidence.

The other view is that additional evidence in second appeal to ascertain question of fact cannot be admitted, which was expressed by a single Judge of Madras High

Court in P.V. Subba Raja Vs. S.S. Narayana Raja and Others, . The decision in Venku Reddy''s case AIR 1956 Andhra 250 is a judgment delivered by a learned single Judge of Andhra High Court.

15. In M. Subbarayudu and Others Vs. The State, a Full Bench of Andhra High Court held that Andhra High Court and the Madras High Court prior to 5-7-1957 (sic. 1954) are Courts of coordinate jurisdiction and even if the two Courts are not deemed to be Courts of co-ordinate jurisdiction, Andhra High Court shall follow the Madras decision on the principle of ''stare decisis'' in the manner that the Madras High Court follows the own decisions and subject to the same limitations. The judgment in P.V. Subba Raja Vs. S.S. Narayana Raja and Others, was delivered on 31-3-1954 and thus prior to 5-7-1954. The decision in Venku reddy''s case AIR 1956 Andhra 250 is in conflict with the judgment in Subba Raja''s case AIR 1954 Madras 1074. While in the latter a Full Bench of the Madras High Court in Bollapragada Gam Narayana Raw v. Rama Lakshmamma ILR 31 Madras 415 (F.B.), referred a Division Bench Judgment in Barukutti v. Mamad and Ors. ILR 18 Madras 480 (D.B.) with approval, while in the former i.e., in Venku Reddy''s case AIR 1956 Andhra 250 a Division Bench judgment of Madras High Court in Gaddam Parama Sivudu''s case (12 supra) was followed. In case of conflict of Bench decisions, single Judge should refer the case to a Bench of two Judges who may refer it to a Full Bench.

16. Since there was conflict of decisions as to whether evidence can be admitted at the stage of second appeal, a learned single Judge referred the matter to the Division Bench and the Division Bench answered the question framed by the learned Single Judge. The Division Bench referred to the scheme of the CPC with regard the production of evidence in the suit/appeal and after referring certain decisions held that additional evidence cannot be permitted to be adduced in second appeal in view of Order 41 Rule 27 C.P.C.

17. In regard to appeals against the appellate decrees, commonly known as ''second appeals'', the provisions of Sections 100 - 103 and Order 42 Rule 1 C.P.C. apply. Section 100 C.P.C. provides second appeal to the High Court from every decree passed in appeal by any Court subordinate to it only if the High Court is satisfied that the case involves a substantial question of law.

Order 42 C.P.C. reads as follows:-

Order 42 prescribes the procedure for hearing of the second appeal which says that the Rules of Order 41 shall apply, so far as may be, to appeals from appellate decrees.

18. In Gaddam Parama Sivudu''s case (12 supra), a Division Bench of the Madras High Court held that no general rule could be laid down with regard to admission of additional evidence in second appeal and that each case has to be dealt with reference to its own merits and the existence of sufficient cause referred to in Order 41 Rule 27 C.P.C. On the facts of that case the Bench held that there could be no

objection to receive the judgment of the High Court which was not in existence at the time of passing of decree and which required no further evidence to explain it and which could not be produced earlier because it was not in existence either on the ground of principle or convenience.

19. In Vaithinatha v. Kuppa AIR 191 Madras 1166 (F.B.), (Full Bench of the Madras High Court), the question whether additional evidence can be admitted in second appeal did not arise for consideration of the learned Judges in the said Judgment.

20. In Subba Raja''s case (14 supra), a learned Single Judge of the Madras High Court held that having regard to the provisions of Section 103 C.P.C., the second appellate Court could not admit evidence and give its decisions on a question of fact and that the provisions of Section 103 were sufficiently clear to exclude the operation of Order 41 Rule 27 C.P.C. The judgment in Subba Raja''s case (14 supra) was dissented by a learned single Judge of the Andhra High Court in Venku Reddi''s case (13 supra). In that case, the learned Judge took the view that there is nothing either in Section 103 or in Order 41 Rule 27 C.P.C. which excludes the applicability of the latter provision to the second appeals and that the terms of Rule 27 C.P.C. are general in application and in an appropriate case it would be open to the High Court in the second appeal to admit additional evidence. The learned single Judge of the Madras High Court in Subba Raja''s case (14 supra) did not notice the judgment of the Division Bench of the Madras High Court in Gaddam Paramasivudu''s case (12 supra) and the principle broadly stated by him was opposed to the said judgment.

21. In Gaddam Paramasivudu''s case (12 supra), the Division Bench of the Madras High Court declined to lay down a general principle on the question of admissibility of additional evidence in second appeal. However, on the facts of that case admitted the additional evidence in the second appeal. The learned Judges did not consider the scope of the power of the High Court under Sections 100 and 103 C.P.C. as they stood then. The Division Bench by keeping in view the amended provisions of Sections 100 and 103 C.P.C. expressed the view that the High Court in hearing the second appeal cannot re-appraise the evidence and determine the questions of fact.

22. The Division Bench of this Court also referred to a judgment of the Supreme Court in Balai Chandra Hazra Vs. Shewdhari Jadav, , wherein the Supreme Court observed that the Court hearing the second appeal after granting amendment could not take over the function of the trial Court or the first appellate Court and undertake appreciation of evidence and record findings of facts and that that was not the function envisaged by the Code of the Court hearing second appeal u/s 100 C. P.C. and that was crystal clear from the provision contained in Section 103 C.P.C. and held that in view of the judgment of the Supreme Court in Balai Chandra''s case (19 supra), the view taken by a learned single Judge (Chandra Reddy, J.) in Venku Reddi''s case (13 supra) is no longer good law and ultimately held that the High Court while hearing the second appeal cannot go into the questions of fact, therefore, additional evidence cannot be permitted to be adduced in the second

appeal.

23. In Balai Chandra Hazra Vs. Shewdhari Jadav, , the Supreme Court observed that the power of the High Court u/s 103 C.P.C. is limited to evidence on record which is sufficient to determine an issue necessary for the disposal of the appeal and which has not been determined or has been wrongly determined by the lower appellate Court or by the trial Court or both.

24. In Shri Bhagwan Sharma Vs. Smt. Bani Ghosh, , the Supreme Court held that the High Court was right in reversing the decree passed by the appellate Court and in observing that the appellate Court had overlooked certain vital facts which have their bearing on the legal effect of the findings of fact, and hence the judgment was vitiated.

The Supreme Court further held as follows:

The High Court was certainly entitled to go into the question as to whether the findings of fact recorded by the first appellate Court which was the final Court of fact were vitiated in the eye of law on account of non-consideration of admissible evidence of vital nature. But, after setting aside the findings of fact on that ground the Court had either to remand the matter to the first appellate Court for a re-hearing of the first appeal and decision in accordance with law after taking into consideration the entire relevant evidence on the records, or in the alternative to decide the case finally in accordance with the provisions of Section 103(b) of the Code of Civil Procedure.

25. In Karnataka Board of Wakf Vs. Anjuman-E-Ismail Madris-Un-Niswan, the Supreme Court held that the High Court should not interfere in pure findings of fact reached by the Courts below without coming to the conclusion that the findings of fact are either perverse or are not based on material on record.

26. The above judgments indicate that the High Court may interfere with the findings of fact also if it finds that those findings are perverse or that they were made on imaginary basis without any material on record.

27. In Navaneethammal Vs. Arjuna Chetty, , the Supreme Court held as follows:

Interference with the concurrent findings of the Courts below by the High Court u/s 100 CPC must be avoided unless warranted by compelling reasons. In any case, the High Court is not expected to reappreciate the evidence just to replace the findings of the lower Courts. Even assuming that another view is possible on a reappreciation of the same evidence, that should not have been done by the High Court as it cannot be said that the view taken by the first appellate Court was based on no material.

28. In Ishwar Dass Jain''s case (3 supra), the Supreme Court, while considering the scope of Section 100 C.P.C., observed as follows:-

Under Section 100 C.P.C. after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate Court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate Court by placing reliance on inadmissible evidence which if omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise.

29. In Radha Kishan Sao Vs. Gopal Modi and Others, , a suit was instituted by the plaintiff praying for eviction of the defendant on the ground of non-payment of rent of two shops of the respondent landlord and furniture for three months. The District Munsiff, Ranchi, dismissed the suit holding that failure to remit the rent for furniture along with rent for the two shops did not amount to default u/s 11(1)(d) of Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (for short ''the Act''). On appeal, the II Additional Subordinate Judge, Ranchi, reversed the Judgment of the trial Court and decreed the suit for eviction upholding the ground of default. The Subordinate Judge held that the plaintiff was entitled to realize the rent at the rate of Rs. 78/- per month which included the rent for furniture and hence remittance by the defendant of Rs. 50/- per month was not a valid discharge of his rental liability and he was a defaulter within the meaning of Section 11(1)(d) of the Act. The Subordinate Judge who was also the final Court of facts held that the subsequent supply of furniture was an independent contract unconnected with the original tenancy. In second appeal, the High Court agreed with Subordinate Judge that a rent of Rs. 78/- was payable and there had been a default. On an appeal preferred by the tenant, the Supreme Court observed as follows:-

In a matter where the first appellate Court came to a positive finding in favour of the defendant with regard to the non-compliance with its order u/s 11-A, we do not consider that the High Court was right in adopting the course it did in a rather unsatisfactory manner to reach a contrary conclusion, for the first time, on a vital and clinching fact about handing over the amount of rent to the Nazir in absence of the latter''s oral testimony. There is no denial even in the written information furnished by the Nazir that the rent was handed over to him on March 14, 1974. The matter would have been different if the High Court, in the interest of justice, had called for additional evidence under Order 41, Rule 28, Civil Procedure Code, so that the parties would have proper and adequate opportunity to establish their respective versions including the procedure of the particular Court regarding acceptance of deposit in a given situation. It is true that the High Court itself permit documentary evidence to be produced before it under Order 41, Rule 27, but, as we have seen, this course has resulted in great prejudice to the defendant. Even the counsel were unable to inform us about the procedure of depositing the money in

compliance with the order u/s 11-A in the Court of the Subordinate Judge even after entertaining of additional evidence before the High Court.

The observations of the Supreme Court would indicate that permitting one of the parties to adduce additional evidence in the second appeal by invoking Order 41 Rule 27 C.P.C. is permissible so long as it does not cause prejudice to the opposite party. The above judgment of the Supreme Court further indicates that such prejudice to the opposite party can be avoided by invoking the procedure for taking additional evidence under Order 41 Rule 28 C.P.C.

30. Order 41 Rule 28 C.P.C. reads as follows:-

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.

31. In Abdul Ghani Memorial Trust and Ors. v. Bihar State Sunni Wakf Board and Ors. 1987 (Supp.) SCC 577, the Supreme Court, while dealing with Section 100 C.P.C., held as follows:

The High Court in exercise of power u/s 100 C.P.C. can either set aside the findings of the lower appellate Court or call for a finding of trial Court while retaining the appeal with itself if it considers necessary to adduce further evidence, or receive additional evidence itself and proceed to determine the matter in accordance with law. But the High Court cannot set aside the judgment of the lower appellate Court and remand the matter virtually for writing a fresh judgment causing prejudice to the party in whose favour the findings were recorded.

The Supreme Court further held as follows:

If, on the other hand, the additional evidence which the High Court considers it appropriate to receive even at the stage of a second appeal in accordance with law is in the form of a document and does not require any formal proof, the High Court can receive additional evidence itself and proceed to determine the matter in accordance with law. It is open to the High Court to adopt any of these courses if considered necessary.

32. After making a combined reading of Sections 100, 103, Order 41 Rule 27, 28 and Order 42 C.P.C. and in view of the latest legal position, we are coming to a different conclusion from the conclusion in Anisetti Bhagyavathi''s case (1 supra).

33. The High Court may interfere with the findings of fact when material or relevant evidence is not considered by the Courts below which, if considered, would have led to an opposite conclusion and when a finding has been arrived at by the appellate Court by placing reliance on inadmissible evidence which, if omitted, an opposite conclusion was possible. Though the High Court should not interfere in pure

findings of fact reached by the Courts below, without coming to the conclusion that the findings of fact are either perverse or are not based on material on record, it may interfere with the findings of fact also if it finds that those findings are perverse or that they were made on imaginary basis without any material available on record. If the High Court considers necessary and appropriate to receive further evidence at the stage of second appeal and in the interest of justice and both parties, it may permit the additional evidence to be adduced by invoking Order 42 C.P.C. and by taking the aid of Order 41 Rule 27 C.P.C. Though the parties to the proceedings in a second appeal are not entitled as a matter of right to adduce additional evidence, in exceptional and compelling circumstances, the High Court may take the aid of Order 42 C.P.C. and permit adducing of additional evidence in the second appeal in the interest of justice.

34. In the light of the above discussion, we hold that the High Court may permit a party to adduce additional evidence in Second Appeal under the following circumstances:-

(1) Adducing additional evidence is in the interest of justice;

(2) Evidence relating to the subsequent happenings or events, which are relevant for disposal of the Second Appeal.

33. The reference is accordingly answered.