

Munivenkatappa Vs. Chikkapapamma

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Court : Karnataka

Decided On : Jun-06-1991

Reported in : ILR1991KAR3014; 1991(4)KarLJ6

Judge : Rama Jois and ;Kedambady Jagannatha Shetty, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100, 101, 103, 107 and 108 - Order 41, Rule 27 - Order 42; Code of Civil Procedure (CPC) (Amendment)Act, 1976

Appeal No. : R.S.A. No. 1271 of 1978

Appellant : Munivenkatappa

Respondent : Chikkapapamma

Advocate for Def. : V. Gopala Gowda, Adv.

Advocate for Pet/Ap. : T.S. Ramachandra, Adv.

Judgement :

Rama Jois, J.

1. In this Second Appeal presented under Section 100 of the Code of Civil Procedure referred to Division Bench under Section 9 of the Karnataka High Court Act, 1961, the following Question of Law arises for consideration:

Whether in a Second Appeal presented before this Court under Section 100 of the C.P.C. this Court has no power to allow a party to produce additional evidence even if the conditions specified in Clause (aa) of Order 41 Rule 27 are satisfied?

2. Brief facts of the case are these: According to the appellant Munivenkatappa, he purchased 2 acres of land in Sy. No. 45/5 of Kooteri village, Kasaba Hobli, Kolar Taluk, by registered Safe Deed dated 18-1-1951 (marked as Ex.D.4 in the suit) and that he purchased another 32 guntas of land in the same Survey number under a registered Sale Deed dated 5-3-1953 (marked as Ex.D.5 in the suit) from one Hanumanthappa, the father of the respondent. O.S. No. 41 of 1974 was filed by respondent Chikkapapamma praying for declaration and possession of the very property purchased by the appellant under the two registered Sale Deeds from Hanumanthappa. The case of the respondent-plaintiff was that on the date on which the appellant purchased the two items of lands from Hanumanthappa, he had no title as he had sold the said items of lands by registered Sale Deed dated 23-7-1947 (marked as Ex.P.1) in favour of one Munibyrappa and the respondent-plaintiff purchased the same from the said Munibyrappa by registered Sale Deed dated 4-10-1947 (Ex.P.2). One of the main issues for consideration before the Court of Munsiff was, as to whether the plea of the respondent that on the date on which the appellant claimed that he had purchased the suit schedule lands under two registered Sale Deeds dated 8-1-1951 (Ex.D.4) and 5-6-1953 (Ex.D.5) from Hanumanthappa, he did not acquire any right or title to the property, for the reason that on the said date Hanumanthappa did not have any title to the property, he having sold the same to Munibyrappa on 23-4-1947 (Ex.P-1) and the same having been purchased by the respondent from him under registered Sale Deed dated 4-12-1947 (Ex.P-2) was correct. The trial Court recorded a finding in favour of the respondent and decreed the suit. Aggrieved by the Judgment and Decree of the Court of Munsiff, the appellant preferred an Appeal before the Principal Civil Judge, Kolar. The Appellate Court affirmed the findings recorded by the Court of the Munsiff and dismissed the Appeal presented by the appellant. Along with this Appeal presented under Section 100 of the C.P.C., the appellant has made an application for receiving certified copies of two registered Sale Deeds dated 11-3-1948 and 8-1-1951, which are reproduced along with the application and the certified copy of the Record of Rights in which there are entries about the aforesaid two Sale

Deeds. The appellant has stated in the application that the respondent after purchasing the suit schedule land under registered Sale Deed dated 4-12-1947 from Munibyrappa had sold the property once again in favour of Munibyrappa on 11-3-1948 and Munibyrappa had in turn sold the property in favour of Hanumanthappa by registered Sale Deed dated 8-1-1951 and it is only thereafter the appellant purchased the land from Hanumanthappa under two registered Sale Deeds dated 8-1-1951 and 5-1-1953. The appellant has stated that the respondent who had executed the Sale Deed in favour of Munibyrappa on 11-3-1948 was not only aware of the same but was also aware of the fact that the said Munibyrappa had in turn sold the property to Hanumanthappa on 8-1-1951 under a registered Sale Deed, whereas the appellant was not at all aware of the same. He has also stated that in the Record of Rights extract produced by the respondent as Exhibit-P22, there was no reference at all to the sale deed dated 11-3-1948 and that in spite of efforts the appellant did not get relevant information. He has further stated that when he again made efforts with the help of an educated friend of his, he came to know that the plaintiff had sold the land by registered Sale Deed dated 11-3-1948 i.e., only after he secured on 13-11-1978 the correct Record of Rights extract and he also came to know from it that by another Sale Deed dated 8-1-1951, his vendor had acquired the title to the suit property, The appellant has therefore prayed for receiving the three documents as additional evidence in exercise of the power under Order 41 Rule 27 of the Code. The appellant states that if the two registered documents are taken as additional evidence in the case, it knocks at the bottom of the case put forward by the respondent in the plaint and it fully establishes the case of the appellant that as on the date on which the appellant purchased the lands, i.e., on 8-1-1951 and 5-6-1953 from Hanumanthappa, the latter had the title to sell those properties and therefore the suit filed by the respondent was liable to be dismissed.

3. The application for receiving additional evidence has been vehemently opposed by Sri Gopala Gowda, the learned Counsel for the respondent. He submitted that in view of Section 100 read with Section 103 of the Code, this Court had no jurisdiction to go into the correctness of a finding of fact and in view of these two provisions, the provisions contained in Order 41 Rule 27 of the Code and Order 42 of the Code, which makes the provisions contained in Order 41 applicable to

second appeals only 'as far as may be', would be of no assistance to the appellant, for, that provision has to be read with Sections 100 and 103 of the Code and if so read there was no power vested in the Court hearing a Second Appeal to admit any additional evidence.

4. Regarding the merits of the case, the learned Counsel submitted that the two documents which the appellant wants this Court to receive as additional evidence, were not genuine documents and in fact the father of the respondent had died as early as in the year 1949 and therefore there was no question of the property being sold to Hanumanthappa in the year 1951 or the said Hanumanthappa selling the said property to the appellant on 8-1-1951 and 5-6-1953 respectively.

5. In support of the contention that no additional evidence can be received in a Second Appeal, the learned Counsel relies on the Judgment of a learned Judge of this Court in the case of BALWANT YADNESHWAR v. SRINIVAS APPAJI KULKARNI, 1959 Mys. L.J. 581, in which the learned Judge after referring to various Decisions cited at the Bar, held that no additional evidence could be received in a Second Appeal. The relevant portion of the Judgment reads:-

'If we look to the scheme of the Civil Procedure Code, we find that Part VII which relates to appeals is sub-divided into five divisions viz.,

1. appeals from original decrees (Sections 96 to 99);
2. appeals from appellate decrees (Sections 100 to 103);
3. appeals from orders (Sections 104 to 106);
4. general provisions relating to appeals (Sections 107 & 108);
5. appeals to the Supreme Court (Sections 109 to 112).

It will be found that the scope of the provisions relating to second appeals is very narrow. Whereas Section 96 provides that an appeal shall lie from every decree, except one passed by consent of parties, Section 100 lays down that a second appeal shall lie only on one of the three grounds, viz.,

- a. When the decision is contrary to law or to some usage having the force of law;
- b. When it has failed to determine some material issues of law or usage having the force of law; and
- c. When there is a substantial error or defect in procedure which may have produced some error or defect in the decision of the case upon the merits.

Section 101 lays down emphatically that no second appeal shall lie except on the said grounds. From these provisions, it is clear that no second appeal can lie on a question of fact. In other words, the High Court, in second appeal, is bound to accept the finding of the first Appellate Court as final and it cannot enter into questions of fact. An exception to this Rule is provided by Section 103. It provides that the High Court in second appeal may determine any issue of fact where it is necessary for the disposal of the appeal under two circumstances viz.,

1. Where such an issue has not been determined by the lower Appellate Court; or
2. Where it has been wrongly determined by that Court by reason of any illegality, omission or error or defect such as is referred to in Section 100(1).

Except under such circumstances, it is not open for the High Court in second appeal to enter into questions of fact.

Examining further the scheme of the Civil Procedure Code, we find that Order XLI, relates to appeals from original decrees and Order XLII to appeals from appellate decrees. The latter order consists of only one Rule which lays down that 'the Rules of Order XLI shall apply so far as may be to appeals from appellate decrees.' It is obvious that the use of the clause 'so far as may be' in the above Rule indicates that, although generally the provisions of Order XLI are applicable to second appeals, some of them cannot be applied. If all the Rules are applicable, the above qualifying clause would not have been introduced.' xxx xxx xxx 'On a careful consideration of the foregoing, I reach the conclusion that the provisions of Rule 27 of Order XLI C.P.C. are not applicable to second appeals and no document can be allowed to be produced in second appeal.'

This Decision does support the, contention of the respondent. He also relies upon the Judgment of the Rajasthan High Court in the case of CHATAR LAL v. RAMDASS, . He next relied on the Decision of the Supreme Court in AFSAR SHAIKH v. SOLEMAN BIBI, : [1976]2SCR327 . The relevant portion of the Judgment reads:-

'18. Be that as it may, the High Court was not competent, in second appeal, to reverse the finding of fact recorded, after the remand, by the first appellate Court, to the effect, that Afsar was not in a position to dominate the will of the plaintiff, and he did not exercise any undue, influence on the plaintiff to obtain the Hiba-bil-Ewaz, which was voluntarily executed by the plaintiff after understanding its contents and effect. The scope of the powers of the High Court to interfere in second appeal with Judgments and decrees of Courts below is indicated in Sections 100, 101 and 103 of the Code of Civil Procedure. Broadly, the effect of Sections 100 and 101, read together, is that a second appeal is competent only on the ground of an error in law or procedure, and not merely on the ground of an error on a question of fact. The High Court has no jurisdiction to entertain a second appeal on the 'ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be' (Mst. Durga Choudhrani v. Jawahar Singh), (1890) 17 Ind App 122 (PC). Section 103 enables the High Court in second appeal, where the evidence on the record is sufficient to determine an issue of fact necessary for the disposal of the appeal only -

(a) if the lower appellate Court has not determined that issue of fact, or

(b) if it has determined that issue wrongly by reason of any illegality, omission, error or defect such as is referred to in Sub-section (1) of Section 100.'

The learned Counsel also relied on the Judgment of the Supreme Court in STATE OF GUJARAT v. VORA SALEBHAI GULAMALI AIR 1987 SC 1815, the relevant portion of which reads:-

'We think that the learned single Judge of the High Court was not right in allowing the question which is not a pure question of law to be raised at that stage.'

In the above three Decisions, the question which was considered and answered was about the scope of Sections 100 and 103 and the precise question which arises for consideration in this case did not arise for consideration. In the Judgment of the Rajasthan High Court the only question which arose was whether on a finding recorded by a First Appellate Court after an order of remand made in a Second Appeal, the High Court has the jurisdiction to interfere with the finding of fact on the ground that there was only a finding of fact of the First Appellate Court on the issue and there was no finding of the trial Court. The Rajasthan High Court on consideration of all the relevant provisions and in particular Sections 100 and 103 of the Code held that notwithstanding the fact that the finding recorded by the First Appellate Court was on a question of fact pursuant to an order of remand made by the High Court, the fact remains that it is a finding of the First Appellate Court and therefore in an appeal presented under Section 100 of the Code the High Court could not interfere with the said finding of fact.

6. The learned Counsel for the respondent, however, relied on the Decision of the Gujarat High Court in the case of CHUDASMA JASUBHA MANUBHA v. CHUDASMA RAISING BAPUBHA, : AIR1976 Guj140 . Relevant portion of the Judgment reads:-

'On the question whether additional evidence can be taken or not in a Second Appeal there are two schools of thought. In P.V. Subba Raja v. S.S. Narayana Raja, : AIR1954 Mad1074 Mr. Justice Krishnaswami Nayudu after having reviewed a number of decisions has held that the circumstances under which a second appellate Court may determine an issue of fact are limited to the conditions arising under Section 103 which makes the position clear that so far as evidence is concerned, on which an issue of fact may be determined, the evidence on record must be sufficient to enable the High Court to decide the question of fact. According to him it necessarily implies that it is ordinarily not competent to the High Court in a second appeal to consider any other evidence excepting the evidence on record, Therefore, the second appellate Court cannot admit evidence and give its own decision on a question of fact. The provisions of Section 103 are sufficiently clear to exclude the operation of Order 41, Rule 27 and their applicability to appeals filed under Order 42, Civil Procedure Code. Every

provision in Order 41 does not automatically apply to a proceeding in second appeal by virtue of Order 42, Rule 1 but only such provisions as may reasonably be applied having in view the provisions of Sections 100 and 103 and the limited scope of the jurisdiction of the second appellate Court in matters affecting questions of fact. According to him, therefore, the proper view to be taken is that it is not competent to admit additional evidence in a second appeal. The second school of thought is represented by the decision of Andhra Pradesh High Court in Venku Reddi v. Pichi Reddi, AIR 1956 Andhra 250, Mr. Justice Chandra Reddy has taken the view therein that there is nothing either in Section 103 or in Order 41, Rule 27, Civil Procedure Code, 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 a second appeal to admit additional evidence.'

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'The first proposition is that the considerations which prevail in regard to the reception of additional evidence in a First Appeal are different from those which prevail in regard to its reception in a second appeal. In a second appeal, the Court is required to examine whether the impugned decree is in conformity with law. The findings of fact recorded by the lower Appellate Court are final and binding on the Court. The second proposition which emerges from the aforesaid decision is that additional evidence subsequently discovered by a party cannot be admitted in a Second Appeal. That is the view which this Court has taken in three decisions to which I have referred. That is the view which was taken by the High Court of Bombay in Ramachandra Pandurang Sathe v. Krishnaji Vithal Joshi, (1904) ILR 28 Bom. 4 (supra). In light of this settled view of the question it is clear that the additional evidence which Mr. Chhatrapati seeks to produce in this second appeal cannot be taken, The expression 'substantial cause' under Order 41 Rule 27 does not in my opinion mean that a further opportunity should be given to the plaintiffs to fill in the lacuna caused by their indifference and negligence. The first contention which Mr. Chhatrapati has raised is, therefore, without any substance and is rejected.'

In this Judgment of the Gujarat High Court, the precise question did arise for consideration and it was held no additional evidence could be received in a Second Appeal.

7. As against the submission made by the learned Counsel for the appellant, Mr. T.S. Ramachandra, the learned Counsel for the appellant, relied on the Judgment of the Bombay High Court in LAXMINARAYAN v. BHIKU UNJAJI, 1976 BLR 82.

The learned Counsel pointed out that in the said case the question as to whether additional evidence could be received under Order 41 Rule 27 of the Code in a second appeal has been considered by the Division Bench of the Bombay High Court and the Division Bench on consideration of the Judgment of this Court in Balwant Yadneshwar, had expressed disagreement giving reasons. The learned Counsel also submitted that the Division Bench of the Bombay High Court pointed out that a few Decisions on which reliance was placed by the learned Judge of this Court to come to the conclusion that no additional evidence could be received in a second appeal, had not actually laid down any such proposition.

8. In order to appreciate the contention, it is necessary to set out in the first instance the relevant provisions of the Code. They are:-

'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 ex parte.

(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.'

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'103. POWER OF HIGH COURT TO DETERMINE ISSUE 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.'

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'107. POWERS OF APPELLATE COURT:- (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power -

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.'

'108. PROCEDURE IN APPEALS FROM APPELLATE DECREES AND ORDERS:- The provisions of this Part relating to appeals from original decrees shall, so far as may be, apply to appeals -

(a) from appellate decrees, and

(b) from orders made under this Code or under any special or local law in which a different procedure is not provided.'

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'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 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.'

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'Order 42. APPEALS FROM APPELLATE DECREES

1. PROCEDURE:- The Rules of Order XLI shall apply, so far as may be to appeals from appellate decrees.'

9. Section 100 of the Code provides that the High Court has jurisdiction to interfere with the Judgment of the first Appellate Court only on a substantial question of law. The Section, after the 1976 amendment even requires the High Court to formulate the substantial question of law required to be considered in a second appeal even at the stage of admitting the appeal. Section 103 of the Code empowers the High

Court to determine any issue which had not been determined by the trial Court or the Appellate Court, if only the evidence on record is sufficient. Section 107 of the Code specifies the powers of the First Appellate Court which includes the power to take or receive additional evidence: Section 108 makes the provision of Section 107 applicable to appeals against appellate decrees, 'so far as may be'. As far as Order 41, Rule 27 is concerned, it applies to first appeals. This provision like Section 107 expressly provides that the first Appellate Court has got the power to receive additional evidence:

(i) if the first Appellate Court had refused to admit evidence which ought to have been admitted [vide Clause (a)].

(ii) that if the party seeking to produce evidence establishes that notwithstanding the exercise of due diligence, the evidence had not come to his knowledge and therefore could not produce it in the Court below [vide Clause (aa)]; and

(iii) the Appellate Court requires any evidence to be adduced in order to enable it to pronounce Judgment or for any other substantial cause (vide Clause (c)).

Order 42 of the Code expressly provides that the provisions contained in Order 41 includes Order 41, Rule 27, shall apply to Second Appeal 'so far as may be'. Great stress was laid by the learned Counsel for the respondent on the words 'so far as may be' used in Section 108 as also in Order 42. The learned Counsel submitted that as the jurisdiction of the High Court in a Second Appeal is limited to only substantial questions of law in view of the clear language of Section 100 read with Section 103 of the Code, the provisions of Order 41, Rule 27 cannot be invoked at all. As against this, Sri T.S. Ramachandra, the learned Counsel for the appellant contended that the very fact that Order 42 provides that the provisions contained in the previous Chapter also applies to second appeals would show that the provisions of Order 41 Rule 27 also applies. He submitted that if the intention of the Legislature was that the provisions of Order 41 Rule 27 cannot be invoked in an appeal presented under Section 100 of the Code, the Legislature would have expressly stated so.

10. As seen earlier, there has been divergence of opinion on the question of admissibility of additional evidence in a Second Appeal. The question has been considered by the Division Bench of the Bombay High Court in the case of Laxminarayan. In the said case, reliance was placed on the Decision of the learned Judge of this Court in the case of Balwant Yadneswar in support of the proposition that no additional evidence can be received in a Second Appeal. The Division Bench of the Bombay High Court disagreed with the said view and gave reasons in support of disagreement. Relevant portion of the Judgment reads:-

'Order XLII of the Code of Civil Procedure, which deals with appeals from appellate decrees, has only one Rule and that Rule provides that the Rules of XLII shall apply, as far as may be, to appeals from appellate decrees. Now, Rule 1 of Order XLII, thus makes applicable such provisions of Order XLI as are possible to be applied in the case of appeals from the appellate decrees. The view which seems to have been taken by the Mysore High Court appears to be that the applicability of the provisions of Order XLI, Rule 27, of the Code of Civil Procedure in a second appeal is ruled out because of the fact that the power of the High Court to decide a question of fact is circumscribed by Section 103. It has, therefore, to be found out whether on a proper construction of provisions of Section 103 of the Code of Civil Procedure it can be said that that provision in any way disables the High Court to decide a question of fact in a second appeal. Section 103 has to be read with Section 100 of the Code of Civil Procedure. Section 100 provides that a second appeal shall lie to the High Court on any of the grounds specified in Clauses (a) to (c) of that section. It is well established that a finding of fact given by the first appellate Court will, in a case where any of the Clause (a), (b) and (c) is attracted, be vitiated and is liable to be set aside. It is not the law that under no circumstances the High Court sitting in second appeal can interfere with a finding of fact, if the finding of fact is vitiated by an error of law, then that finding will not be binding in second appeal. The grounds on which a finding of fact may be vitiated are limited, no doubt, by the provisions of Section 100 of the Code of Civil Procedure. Now, if a finding of fact is vitiated on a ground which is covered by Section 100 of the Code, the question is what further course the High Court is to follow in a second appeal. Does it have jurisdiction to give a fresh finding in place of a finding which has been vitiated or has it the only

alternative to remand the appeal back to the first Appellate Court, or in a given case, to the trial Court to give a finding of fact afresh because the finding of fact given by the lower Appellate Court or given by the trial Court and confirmed by the lower Appellate Court has been set aside. Now, the provision analogous to Section 103 was not to be found in the Code of Civil Procedure, 1882.'

The Division Bench considered the various Decisions in which divergence of opinions were expressed on the point and concluded thus:-

'The sufficiency of evidence contemplated by Section 103 of the Code is sufficiency for the purpose of passing or pronouncing a proper Judgment. If in a given case the High Court comes to the conclusion that a finding of fact is vitiated and that for the purpose of pronouncing a proper Judgment the evidence on record is not sufficient and the evidence sought to be made available by a party under Order XLI, Rule 27, of the Code of Civil Procedure fills up that lacuna so that if that is taken into consideration a proper Judgment can be pronounced, we fail to see anything in the provisions of Section 103 which would restrict the powers of the High Court to admit such additional evidence.

The construction which is placed on Section 103 by the Mysore High Court is sound, in certain circumstances, to result in manifest injustice and prolonging of litigation. Under Clause (a) of Rule 27(1) of Order XLI an Appellate Court has jurisdiction to allow evidence which a Court from whose decree the appeal is preferred has refused to admit it though the evidence ought to have been admitted. To take an illustration, supposing certain documents which are under law admissible as evidence have been rejected both by the trial Court and the first Appellate Court and the High Court is satisfied that the evidence has been wrongly rejected, is the High Court left only with the option of sending the matter back for the limited purpose of admitting those documents and to deny itself the jurisdiction to give a fresh finding after consideration of such evidence which ought to have been rightly admitted? To hold so would obviously be unjust. If the documents were entitled to be admitted there is clear jurisdiction in the High Court under Rule 28 of XLI to take such evidence itself and there is nothing in Section 103 of the Code of Civil Procedure which can be read as depriving the High Court of its

jurisdiction to give a finding of fact after considering such evidence which was wrongly left out of consideration.'

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'The view which we have taken that it is open to the High Court in second appeal to admit additional evidence under Order XLI, Rule 27, Code of Civil Procedure, if the conditions laid down in that Rule are satisfied is supported by the decisions of the High Courts of Andhra Pradesh, Assam, Gujarat and the Madras decision to which we have already made a reference. In Venku Reddi v. Pichi Reddi [(1956) AIR Andhra 250] the Andhra Pradesh High Court has held that there is nothing either in Section 103 or in Order XLI, Rule 27, Civil Procedure Code, which excludes the applicability of the latter provision to second appeals and that 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 learned Judge, who decided that case, dissented from the decision in Subba Raja v. Narayana Raja. In Braja Behari v. Chitta Ranjan [(1958) AIR A & N 19] a Division Bench of that Court, after referring to the Decision of the Supreme Court in K. Venkataramaiah v. Seetharama Reddy, held that the High Court would be justified in allowing additional evidence to be adduced in second appeal before it and accordingly accepted certain documents filed before it as additional evidence. In S.B. Kapadia v. V.B. Kapadia : AIR1967 Guj87 , it was held that while it was true that the High Court was not expected to go into pure questions of fact, unless they fall under Section 100 of the Code of Civil Procedure, additional evidence can be admitted either for enabling the Court to pronounce Judgment or for any other substantial cause, under Order XLI, Rule 27 of the Code of Civil Procedure, and by reason of Order XLII of the Code of Civil Procedure, the provisions contained in Order XLI are made applicable, so far as may be, to appeals from appellate decrees. With reference to facts of that case the Gujarat High Court observed that while it is open to the Court to allow additional evidence under Order XLI, Rule 27(1)(b) in the circumstances set out in that case there hardly appeared any justification for that Court to allow any such additional evidence at such a late stage and that too for the purpose of filling in, as it were, the lacuna by the production of such evidence in support of the plaintiff's claim about his ownership

of the wall in question.

On a review of these authorities and on a construction of provisions of Section 103 and Orders XLI and XLII of the Code of Civil Procedure we must come to the conclusion that there is no absolute bar to receiving additional evidence by the High Court in second appeal.'

The learned Counsel for the respondent, however, pointed out that a learned Judge of the Gujarat High Court had dissented from the view taken by the Division Bench of the Bombay High Court in Laxminarayan's case. Relevant portion of the Judgment of the Gujarat High Court is extracted earlier.

11. After giving careful consideration to the view expressed by the learned Judge of this Court in the case of Balwant and the view expressed by the Division Bench of the Bombay High Court, in which the view taken by this Court was dissented from, and the view expressed by the learned Judge of the Gujarat High Court in which the view expressed by the Division Bench of the Bombay High Court was dissented from, we are persuaded to agree with the interpretation of the relevant provision, as given by the Division Bench of the Bombay High Court. We receive support for this view from the Judgment of the Supreme Court in BALAICHANDRA v. SHEWDHARI JADAV, : [1978]3SCR147 . The question for consideration by the Supreme Court in the said case was, as to the scope of Clause 15 of Letters Patent of the Calcutta High Court, under which an appeal lay to a Division Bench of the same High Court, from a Decision rendered by a learned Judge in a Second Appeal under Section 100 of the Code of Civil Procedure in the context of a new or fresh disputed question of fact required to be resolved in view of allowing the amendment of pleadings. The Supreme Court held that in such a case, in view of Sections 100 and 103 of the C.P.C. the High Court could not record a finding of fact on such new disputed question of fact, but the only course open was to remit the case to the Court below. Relevant portion of the Judgment reads:-

'9. There is a near consensus amongst the various High Courts that ordinarily an appellant is not entitled in an appeal under Clause 15 to be heard on points which have not been raised before the Judge from whose Judgment the appeal is preferred. Now, if in second appeal the findings of fact recorded by the first

appellate Court are taken as binding unless fresh additional evidence is permitted to be led when again appreciation of evidence to record a finding of fact would become necessary, that position is not altered even if amendment of pleadings is granted which puts into controversy some new facts alleged in amended pleadings and therefore 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 evidence and record findings of facts. That is not the function envisaged by the Code of the Court hearing second appeal under Section 100. This become crystal clear from the provision contained in Section 103 which defines the power of the High Court to determine a question of fact while hearing second appeal. But this power of the Court is limited to evidence on record which again is sufficient to determine an issue of fact necessary for disposal of the appeal and which has not been determined by the lower Appellate Court or which has been wrongly determined by such Court. When pleadings are amended at the stage of the appeal under Clause 15 of the Letters Patent and fresh allegations of facts are thus introduced in the controversy which necessitate additional evidence being permitted it would not be open to the Court to proceed to record evidence and to appreciate the evidence and record findings of fact, a function which even ordinarily is not undertaken by the High Court hearing the second appeal, much less can it be done while hearing an appeal under Clause 15 of the Letters Patent. When on account of a subsequent change in law, amendment of the pleadings is granted which raises disputed questions of fact, the situation would not be one governed by Order 41 Rule 27. At that stage it could not be said that the appellate Court is permitting production of additional evidence, oral or documentary on the ground that the Court from whose decree the appeal is preferred has refused to adduce evidence which ought to have been admitted or the appellate Court requires any documents to be produced or any witness to be examined to enable it to pronounce Judgment. Nor would the situation be one which could be covered under the expression 'other substantial cause'. Once pleadings are permitted to be amended which bring into focus altogether new or fresh disputed questions of fact which have to be resolved on additional evidence that would be necessary to be led, the function is one of appreciation of evidence more appropriately to be undertaken by

the trial Court or at the most the first Appellate Court but not the High Court hearing the second appeal or an appeal under Clause 15 of the Letters Patent. It is not for a moment suggested that at the stage at which leave to amend pleadings has been granted the High Court was not competent to grant it. In fact, in an identical situation in B. Banerjee's case : [1975]2SCR774 (supra) this Court had in terms indicated that to avoid hardship to the plaintiff landlord the appropriate thing would be to grant leave to amend the pleading and give an equal opportunity to the defendant to controvert if he so chooses what the plaintiff contends by amended pleading. But once that is done immediately the question of jurisdiction of the Court hearing the appeal under Clause 15 of the Letters Patent would arise and if the appeal was entertained against the Judgment rendered by the High Court in second appeal the limitations on the power of the High Court hearing the second appeal will ipso facto limit and circumscribe the jurisdiction of the appellate Bench. If the High Court while hearing second appeal, conceding that it would have allowed amendment of pleading, where the amended pleadings substantially raise disputed questions of fact which need resolution afresh after additional evidence, could not undertake the exercise of recording evidence and appreciating it and recording findings of fact, but could appropriately remand the case to the trial Court, the Bench hearing the appeal against the Judgment in second appeal could not enlarge its jurisdiction by undertaking that forbidden exercise. It would, therefore, appear that when a Bench of a High Court is hearing an appeal preferred upon a certificate granted under Clause 15 of the Letters Patent by a single Judge of the High Court who by his Judgment has disposed of the second appeal, the appellate Bench would be subject to the limitation on its power and jurisdiction to appreciate or reappraise evidence and to record findings of fact which were never raised before the trial Court or the first appellate Court, as the pleadings were permitted to be amended by it and the question was raised for the first time before it, to the same extent as the High Court hearing second appeal with constraints of Sections 100 and 103 of the Code. It must be distinctly understood that admitting evidence is entirely different from appreciating it and acting upon it. The Judicial Committee of the Privy Council in *Indrajit Pratap Bahadur Sahai v. Amar Singh*, 50 Ind App 183: (AIR 1923 PC 128), was concerned with the ambit of jurisdiction of the appellate Court to admit evidence

under Order 41, Rule 27. It was held that the jurisdiction can be exercised at the instance of a party and the Judicial Committee has unrestricted power to admit documents where sufficient grounds have been shown for their having not been produced at the initiate stage of the litigation. This view was affirmed by this Court in Surinder Kumar v. Gian Chand, : [1958]1SCR548 . But that has no relevance to the situation under discussion here.'

xxx xxx xxx

'18. Accordingly, this appeal is allowed and the decree for eviction made by all the Courts against the appellant is set aside and the suit is remanded to the trial Court to proceed further from the stage after amendments of pleadings were granted by the High Court and the relevant issues were framed pursuant to the amended pleadings. In the circumstances of this case there shall be no order as to costs of appeal in this Court.'

(Underlined by us)

As can be seen from the above paragraphs, the Supreme Court has observed that finding of fact recorded by the First Appellate Court was binding in Second Appeal, unless fresh additional evidence is admitted, which necessitates the recording of a finding of fact based upon such additional evidence. This observation clearly implies that there is jurisdiction under Order 41 Rule 27 read with Order 42 of the Code to admit additional evidence in Second Appeal, if grounds specified in Order 41 Rule 27 are made out in a given case. The Supreme Court has also further pointed out that there is a clear distinction between the restriction on the jurisdiction of the High Courts under Section 100 read with Section 103 of the C.P.C. and admitting of additional evidence in a Second Appeal. The clear purport of the ratio is that if the High Court in exercise of its power under Order 41 Rule 27 decides to admit additional evidence in a Second Appeal, as such admission necessitates the recording of a finding of fact based upon such additional evidence and as it cannot be done in a Second Appeal in view of Section 100 read with Section 103 of the C.P.C., the matter should be remitted to either of the Courts below. Therefore, it is clear if we were to permit the appellant to adduce additional evidence in this Second Appeal under Clause (aa) of Order 41 Rule 27, inserted

into the Code by a Karnataka Amendment, on the ground that he was prevented from adducing the particular evidence inspite of his diligence, and if the same had been secured and was produced, it might have resulted in a decision in his favour, all that we could do is to admit the additional evidence, set aside the Judgment and Decree of the Court below and remit the matter either to the First Appellate Court or the trial Court as considered expedient by us, but we cannot on the basis of additional evidence received in the second appeal, reverse the finding of fact recorded by the First Appellate Court, in view of the limitation placed on the jurisdiction in a Second Appeal under Sections 100 and 103 of the C.P.C. Therefore, we are of the opinion that the construction sought to be placed on the provision of Sections 107 and 108 and Order 42 read with Order 41 Rule 27(aa), read with Sections 100 and 103 of the Code, by the learned Counsel for the respondent, is such, as would defeat the object and purpose of Order 41 Rule 27(aa), which has been incorporated to ensure that justice is not defeated in cases where a party was not aware of evidence in his favour and which inspite of the exercise of diligence he could not secure and adduce it before the trial Court or the First Appellate Court. We fail to see, how a rational distinction can be made in this behalf between a First Appeal and a Second Appeal. If the ground mentioned in Order 41 Rule 27(aa) constitutes a valid ground for admitting additional evidence in a First Appeal, in our opinion, it must be so even in respect of a Second Appeal. Therefore, in our opinion, Sections 100 and 103, Sections 107 and 108, Order 41 Rule 27 and Order 42 should be harmoniously construed so as to advance the remedy and do Justice to a party, who, inspite of exercise of diligence was unaware of an evidence in his favour and prays that the same be received as additional evidence in Second Appeal. So construed, we are of the view that if conditions specified in Order 41 Rule 27(aa) are satisfied, the Court can allow the production of additional evidence in a Second Appeal subject to the condition that reasons should be recorded as required under Order 47 Rule 27(2) and subject to the condition that the interest of the party in whose favour a finding of fact has already been recorded should not be adversely affected, in that the order of remand should ensure that except on the basis of additional evidence the finding of fact recorded earlier on the basis of evidence already on record should not be reversed.

12. To these reasons, we answer the Question set out first as follows:

'In a Second Appeal presented before this Court under Section 100 of the C.P.C. this Court has the power to allow a party to produce additional evidence if the conditions specified in Clause (aa) of Order 41, Rule 27 are satisfied, but when so received the only course open to this Court is to remit the matter to the Court below with a direction that a finding of fact recorded earlier shall not be reversed except on the basis of the additional evidence.

13. Now the next question for consideration is whether there is any justification to permit the appellant to adduce additional evidence. The documents sought to be produced by the appellant are certified copies of the two documents registered in the office of the Sub-Registrar, Kolar, and the third document sought to be produced is the correct certified copy of the Record of Rights in which there is reference to the two registered documents. Prima facie, we have to proceed on the basis that the two Sale Deeds being documents registered in the office of the Sub-Registrar more than 35 years ago are genuine. The question, however, for consideration is, is it true that the appellant had no knowledge of these documents and inspite of diligence he could not secure these documents and produce them in the Court below? The appellant is an uneducated ignorant villager. He says on oath that he was not aware of the two registered documents. Significantly in the certified copy of Record of Rights produced by the respondent (Ex.P-22) though there ought to have been a reference to the two documents, there was no reference, which indicates some foul-play in issuing the said certified copy and that it was only after making inquiry with the aid of his friends, after the Judgment of the First Appellate Court and he took the correct certified copy of the R of R on 13-11-1978, he came to know about the two registered documents and thereafter he took the certified copies of the same and made an application under Order 41, Rule. 27. The plea of the respondent is that her father died in the year 1949 itself and therefore the two documents were not genuine. The learned Counsel for the appellant, however, pointed out that according to the entries in the Record of Rights (Ext.P-22) produced by respondent herself, there was another Sale Deed executed by one Munibyrappa in favour of Hanumanthappa on 8-1-1951, vide Entry No. 809 and this shows that Hanumanthappa was alive in 1951. In the

circumstances, it appears to us the question as to whether these two documents were those really executed by Hanumanthappa or not cannot be considered by us. The only question we have to consider is whether the three documents should be admitted as additional evidence before this Court in the Second Appeal. On the facts and circumstances, we are satisfied that prima facie the two documents being certified copies of registered documents registered in the office of the Sub-Registrar as on 8-1-1951 and 5-6-1953 should be received as additional evidence, for, we are also satisfied that the appellant, even with the exercise of 'due' diligence could not produce them in the Court below. In this behalf, it is significant to note that in Ex.P-22, the certified copy of the Record of Rights produced by the respondent, entry relating to registration of Sale Deed dated 11-3-1948 is not found, though its Sl. No. was 778, whereas subsequent entries bearing Sl. Nos. 807, 809 and 854 were shown. It is also pertinent to note, if the appellant really had the knowledge of the two documents he would not have failed to produce them, as they were sufficient to have the suit filed by the respondent dismissed. We should, however, make it clear that the respondent has the liberty to contest the genuineness of these documents on whatever ground she considers expedient.

14. The next point for consideration is, what is the type of order that should be passed so that no prejudice should be caused to the respondent in the event of a finding by the Court below that even on the basis of the additional evidence no case is made out for the appellant. For that purpose, we consider it expedient to make it clear that if only on the basis of additional documents received by us a finding were to be recorded by the Court below in favour of the appellant, the Judgment and Decree should go in his favour and if not the finding already recorded on the basis of evidence by the trial Court and the First Appellate Court should remain undisturbed and consequently Judgment should be rendered once again on that basis.

15. In the result, we make the following order:-

(1) The application for receiving additional evidence is allowed and copies of the two registered Sale Deeds dated 11-3-1948 and 8-1-1951 and the certified copy of

the Record of Rights dated 13-11-1978 are received as additional evidence.

(2) The Judgment and Decree of the First Appellate Court are set aside and the matter is remanded to the First Appellate Court to record a finding on the issue as to whether the vendor of the appellant had a valid title in respect of the suit schedule lands when he sold them to the appellant under the two registered Sale Deeds dated 8-1-1951 and 5-6-1953 after giving opportunity to both the parties to adduce evidence regarding the genuineness of the two registered Sale Deeds admitted as additional evidence and in the light of the said additional evidence.

(3) If the Appellate Court comes to the conclusion that the additional documents are genuine and the vendor of the appellant had the title to sell the property to the appellant then the First Appellate Court shall proceed to pass appropriate Judgment and decree.

(4) If, however, the First Appellate Court comes to the conclusion that the additional documents are not genuine for any reason or even on the basis of those documents no finding could be recorded in favour of the appellant, then the First Appellate Court shall proceed to pass final Judgment and decree on the basis of the findings already recorded in the Judgment under appeal.

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