North Eastern Railway Administration, ... vs Bhagwan Das (D) By Lrs on 11 April, 2008

Equivalent citations: (2008) 3 ICC 612, AIR 2008 SUPREME COURT 2139, 2008 (8) SCC 511, 2008 AIR SCW 3159, 2008 (4) ALL LJ 228, 2008 (3) AIR JHAR R 192, (2008) 6 ALLMR 43 (SC), (2008) 2 CLR 44 (SC), 2008 (6) SRJ 185, 2008 (6) SCALE 254, 2008 (2) CLR 44, 2008 (6) ALL MR 43 NOC, (2008) 2 GUJ LH 441, (2008) 4 MAD LW 80, (2008) 3 ALL RENTCAS 911, (2008) 3 CIVILCOURTC 226, (2008) 8 MAD LJ 789, (2009) 106 REVDEC 398, (2008) 3 RECCIVR 165, (2008) 6 SCALE 254, (2008) 2 WLC(SC)CVL 186, (2009) 74 ALL LR 370, (2008) 3 ALL WC 2898, (2008) 3 CAL HN 125, (2009) 3 CIVILCOURTC 787

Author: D.K. Jain

Bench: S. B. Sinha, D.K. Jain

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           CASE NO.:
Appeal (civil)  2785 of 2008

PETITIONER:
NORTH EASTERN RAILWAY ADMINISTRATION, GORAKHPUR

RESPONDENT:
BHAGWAN DAS (D) BY LRS

DATE OF JUDGMENT: 11/04/2008

BENCH:
S. B. SINHA & D.K. JAIN

JUDGMENT:
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J U D G M E N T REPORTABLE CIVIL APPEAL NO. 2785 OF 2008 [Arising out of S.L.P. (C) No. 17725 of 2006) D.K. JAIN, J.:

Leave granted.

2. This appeal by North Eastern Railway Administration arises out of orders dated 17th July, 2002 and 14th June, 2005 passed by the High Court of Uttaranchal. By the first impugned order, the second appeal, preferred by the appellant, was dismissed on the ground that no substantial question of law arose for consideration of the Court. By the same order, the High Court has dismissed one of the applications' filed by the appellant under Order 6 Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), seeking leave to amend the written statement, on the ground that such an application cannot be entertained in the second appeal. An application preferred by the appellant

for review of order dated 17th July, 2002 has been dismissed vide latter order dated 14th June, 2005.

3. In order to appreciate the issue, requiring determination, a few material facts may be stated:

> The respondent herein instituted a suit for perpetual prohibitory injunction against the appellant herein, restraining them from interfering in his possession and cultivation of crop on plot bearing Nos.129 and 131 situated in village Bhajanpura, Tehsil and District Champawat. The suit was contested by the appellant on the ground that after acquisition, the suit land had been transferred to them by the Government.

4. Vide order dated 13th March, 2001, the Trial Court decreed the suit, inter alia, holding that the respondent is a Bhumidar and in possession of the suit land and the transfer of possession by the U.P. Government to the appellant was not proved. Against the said decree, the appellant filed appeal before the District Judge, which was dismissed vide order dated 13th November, 2001.

5. Being aggrieved, the appellant preferred second appeal before the High Court. Alleging that the respondent had obtained the decree by concealing material facts, it was averred that, as per the official records, the name of Kanhai, grandfather of the respondent, was entered as Maurnsin Khasikar in Varg-2 at Zaman 8 in the revenue record, which showed that he was simply a Pattedar, while the State of U.P. was its owner. It was pleaded that vide government order dated 16th June, 1969 the suit land (3.615 acres) was ordered to be transferred to the appellant on deposit of Rs.4855.60p. In pursuance of the said order, the appellant deposited the money and took possession of the land in question from Kanhai, who had not only received Rs.201.56p as compensation from the government, he had delivered the possession of the land to the appellant and had also moved an application to Tehsildar Khatima for deleting his name from the revenue records. He also gave a statement to the effect that he was not in possession of the land and, therefore, since October, 1971 the appellant had become the owner in possession of the land. It was also stated that since the State of U.P. was the owner of the land, there was no question of acquiring it by issuing notifications under Sections 4 and 6 of the Land Acquisition Act, 1894. It was also alleged that Kanhai had fraudulently, without getting any notice issued either to the State of U.P. or to the appellant, obtained the Bhumidhari Sanad in the month of December, 1971, although prior to that period he had already surrendered possession of the land and was not in possession thereof. It was, thus, pleaded that Sanad having been obtained by playing fraud, it was null and void and could not create any right or title in favour of Kanhai. Subsequently, in support of the said pleas and contentions, in order to bring on record the copies of the official records, the appellant moved an application under Order 41 Rule 27 C.P.C., before the High Court on 3rd April, 2002.

6. Vide order dated 3rd April, 2002, the High Court directed the Collector, Nainital to produce the notification under which the suit land had been acquired. Pursuant thereto, the Collector filed a detailed report, inter alia, pointing out that since the land belonged to the government, there was no question of issue of any notification under the Land Acquisition Act, 1894 and, therefore, the notification/ declaration under Sections 4 and 6 of the Land Acquisition Act, 1894 could not be

produced. It was also pointed out that a sum of Rs.201.56p had been paid to Kanhai as compensation. However, the High Court without even referring to the report of the Collector, which, in fact, had been submitted pursuant to the direction issued by it, dismissed the second appeal, on the afore-stated ground.

7. Aggrieved, the appellant moved an application seeking review of order dated 17th July, 2002, on the ground that some material facts had escaped the attention of the Court while passing the order dated 17th July, 2002.

8. During the pendency of the review application, two more applications were filed by the appellant on 24th March, 2003 and 28th June, 2004 seeking permission to urge additional grounds in support of the amendment application as well as the review application. As noted above, the review application was also dismissed.

9. Mr. V. Shekhar, learned senior counsel appearing on behalf of the appellant has vehemently contended that apart from the fact that the High Court has failed to even take note of the application filed by the appellant under Order 41 Rule 27 C.P.C., it has committed grave error in rejecting the amendment application on the ground of its maintainability at the stage of the second appeal. The submission is that since the respondent has obtained the decree by concealing material facts, the decree is a nullity and, therefore, non consideration of the additional material placed on record, has resulted in grave miscarriage of justice. It is asserted that had the application been allowed, the additional evidence brought on record by the appellant, which was nothing but a part of the official record, would have exposed the fraud played by the respondent and in any case, would have made material difference in the finding recorded by the lower courts. To buttress the argument, learned counsel has referred us to various documents placed on record by the appellant.

10. Per contra, learned counsel for the respondent while supporting the order passed by the High Court has submitted that the appellant cannot be permitted to fill up the lacuna by adducing additional evidence at this belated stage.

11. We have considered the submissions of the learned counsel in the light of the documents on record. We are constrained to observe that the High Court has altogether failed to consider the application filed by the appellant under Order 41 Rule 27 C.P.C. We also feel that even the application under Order 6 Rule 17 C.P.C. has not been dealt with in its correct perspective and the High Court was in error in rejecting the same on the sole ground that such an application was not maintainable at the stage of second appeal.

12. Though the general rule is that ordinarily the appellate court should not travel outside the record of the lower court and additional evidence, whether oral or documentary is not admitted but Section 107 C.P.C., which carves out an exception to the general rule, enables an appellate court to take additional evidence or to require such evidence to be taken subject to such conditions and limitations as may be prescribed. These conditions are prescribed under Order 41 Rule 27 C.P.C. Nevertheless, the additional evidence can be admitted only when the circumstances as stipulated in the said rule are found to exist. The circumstances under which additional evidence can be adduced

are :

> (i) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, (clause (a) of sub rule (1)) or
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> (ii) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within the knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, (clause aa, inserted by Act 104 of 1976) or
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> (iii) 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. (clause (b) of sub rule (1)).

13. It is plain that under clause (b) of sub rule (1) of Rule 27 Order 41 C.P.C., with which we are concerned in the instant case, evidence may be admitted by an appellate authority if it 'requires' to enable it to pronounce judgment 'or for any other substantial cause'. The scope of the rule, in particular of clause (b) was examined way back in 1931 by the Privy Council in Parsotim Thakur & Ors. Vs. Lal Mohar Thakur & Ors. . While observing that the provisions of Section 107 as elucidated by Order 41 Rule 27 are clearly not intended to allow litigant, who has been unsuccessful in the lower court, to patch up the weak parts of his case and fill up omissions in the court of appeal, it was observed as follows:

> "Under Cl. (1) (b) it is only where the appellate Court 'requires' it, (i.e., finds it needful) that additional evidence can be admitted. 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 the 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."

14. Again in K. Venkataramiah Vs. A. Seetharama Reddy & Ors. a Constitution Bench of this Court while reiterating the afore-noted observations in Parsotim's case (supra), pointed out that the appellate court has the power to allow additional evidence not only if it requires such evidence 'to enable it to pronounce judgment' but also for 'any other substantial cause'. There may well be cases where even though the court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence 'to enable it to pronounce judgment', it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Thus, the question whether looking into the documents, sought to be filed as additional evidence, would be necessary to pronounce judgment in a more satisfactory manner, has to be considered by the Court at the time of hearing of the appeal on merits.

15. Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 C.P.C. (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 C.P.C. postulates amendment of pleadings at any stage of the proceedings. In Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil & Ors. which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and

(b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. (Also see: Gajanan Jaikishan Joshi Vs. Prabhakar Mohanlal Kalwar)

16. These are the broad principles to be kept in view while dealing with applications under Order 41 Rule 27 and Order 6 Rule 17 C.P.C.

17. It is manifest that in the present case, the High Court did not examine the record of the case with the thoroughness which was expected at the time of disposal of the pending applications. On a perusal of the impugned decisions, it is clear that the High Court was not even aware of the pendency of the application under Order 41 Rule 27 C.P.C. seeking leave to adduce additional evidence. A perusal of the documents, which came to light pursuant to the directions given by the High Court on 3rd April, 2002, prima facie, goes to show that these are likely to widely affect the decision of the Court in one way or the other. If the stand of the appellant, which, according to them, is borne out from the documents now on record, is found to be correct, then obviously these will have material bearing on the core issue, namely, whether the decree dated 13th March, 2001 is a nullity, having been allegedly obtained by concealing material facts and playing fraud on the Court. It is trite that a judgment or decree by the first court or by the highest court obtained by playing fraud on the Court is a nullity and non est in the eyes of law. (See S.P. Chengalvaraya Naidu Vs. Jagannath and India Household and Healthcare Ltd. Vs. LG Household & Healthcare Ltd.) . In any event, had the Court found the additional documents, sought to be admitted, necessary to pronounce the judgment in the appeal, in a more satisfactory manner, it would have allowed the application and, if not, the application would have been dismissed. Nonetheless, it was bound to consider the application before taking up the appeal. We say no more at this stage, as the aforementioned applications are yet to be considered by the High Court on merits in the light of the legal position, briefly set out hereinabove. In view of the afore-noted factual scenario, we are of the opinion that the impugned judgment and the orders are erroneous and cannot be sustained.

18. In the result, the appeal is allowed and the judgment and orders dated 17th July, 2002 and 14th June, 2005 are set aside. The matter is remitted back to the High Court, which shall, after hearing the parties, take a fresh decision on the applications preferred by the appellant under Order 41 Rule 27 and Order 6 Rule 17 C.P.C. and thereafter form its opinion afresh on the merits of the second appeal. We may clarify that we have not expressed any final opinion on the merits of the second appeal as well as the applications, which shall be considered and disposed of by the High Court on their own merit in accordance with law.

19. The appeal stands disposed of accordingly leaving the parties to bear their own costs.