# Mahavir Singh & Ors vs Naresh Chandra & Anr on 8 November, 2000

## Equivalent citations: AIR 2001 SUPREME COURT 134, 2000 AIR SCW 4000, 2000 (8) SUPREME 13, (2001) 1 PUN LR 496, (2001) REVDEC 67, 2001 UJ(SC) 1 236, (2001) 1 ALLMR 782 (SC), (2001) 1 ALL RENTCAS 154, (2000) 4 CURCC 234, (2001) 1 PAT LJR 221, (2001) 2 MAHLR 128, (2000) 41 ALL LR 765, (2001) 1 ANDH LT 60, (2001) 1 ALL WC 170, (2001) 1 CURLJ(CCR) 39, (2001) 1 ORISSA LR 689, 2001 (1) SCC 309, (2001) 1 ICC 33, (2000) 7 SCALE 356, 2001 ALL CJ 1 699, (2001) 1 BLJ 331, (2000) 93 ECR 586, (2001) 2 CIVILCOURTC 708, (2001) 2 LANDLR 506, (2001) 2 MAD LW 92, 2001 SCFBRC 35, (2000) 8 SUPREME 13(2), (2001) WLC(SC)CVL 68, (2001) 1 UC 117, (2001) 1 RECCIVR 454

## Bench: S. Rajendra Babu, D.P. Mohapatra

PETITIONER:
MAHAVIR SINGH & ORS.

Vs.

RESPONDENT:
NARESH CHANDRA & ANR.

DATE OF JUDGMENT: 08/11/2000

BENCH:
S. Rajendra Babu, & D.P. Mohapatra.

JUDGMENT:

RAJENDRA BABU, J. :

Leave granted.

L...I...T.....T.....T.....T.....T.....T.....T..J This appeal arises out of an order made by the High Court in a revision petition filed under Section 115 of the Code of Civil Procedure, 1908 by which it allowed an application filed by the respondents-plaintiffs under Order XLI, Rule 27 read with Section 151 CPC by setting aside the order dated 24.12.1999 passed by the learned District Judge, Gurgaon, refusing to permit the respondents-plaintiffs to adduce additional evidence by the said

application. The respondent-plaintiffs filed a suit for (i) specific performance of the agreement to sell dated 30.1.1995, (ii) delivery of vacant possession and (iii) a declaration that the defendant No.1 was an absolute owner of the land measuring 102 kanals and 14 marlas as described in the plaint. In pursuance of the said agreement, it is alleged that the defendants submitted on 7.2.1995 an application to the Income Tax Department for obtaining clearance for sale of the said land which was signed by the plaintiff No.1 and defendant No.1 along with certain other documents attached thereto. After trial, the trial court dismissed the suit against which a regular appeal was filed. In the course of the trial the original agreement of sale produced before the court was sent for scientific examination. PW-8, Ashok Kashyap, who is stated to be Hand-Writing and Finger Prints Expert, deposed that he had examined the original agreement to sell dated 30.1.1995 and found evidence of interpolation at pages 2 and 3. In the appeal filed before the learned District Judge, an application under Order XLI, Rule 27 CPC read with Section 151 CPC is filed by the respondents to adduce additional evidence. The contention put forth in the appellate court is that the original agreement for sale and the copy of agreement produced before Income Tax Department should be examined by Forensic Science Laboratory, Government of N.C.T., Delhi or by any other Government Forensic Science Laboratory having sufficient instruments or apparatus for detection of erasyers thereby asking the Court to make detailed inquiry as to whether the said facilities are available in any laboratory and then to send the documents to such laboratory. The appellate court dismissed the said application by the order made on 24.12.1999. Being aggrieved by that order, a revision petition was preferred before the High Court, as stated earlier.

It is unfortunate that the appellant made a representation to the Chief Justice of the High Court to list the case before another Judge in the circumstances set forth in the representation and a copy of which was also sent to the learned Judge. However, it appears that this aspect does not seem to have been pursued with and the same learned Judge before whom the matter was listed heard the matter and decided the same. These allegations have been reiterated in the course of the special leave petition. Preliminary objection is raised by the respondents to the effect that the case came up for hearing in the High Court on 28.3.2000 and 25.4.2000, while the representation had been made on 23.3.2000 but not brought to the notice of the learned Judge nor any objection to this effect during the course of the hearing of the matter by the learned Judge was raised before him before the arguments were concluded and, therefore, reiteration of those apprehensions in the course of the special leave petition will tantamount to making allegations against the learned Judge of the High Court which are uncalled for and this Court should not entertain the special leave petition at all in view of the conduct of the appellant. We have given our anxious consideration to this aspect of the matter. Though certain apprehensions have been expressed by the appellant as to the appropriateness of the hearing of the matter by the learned Judge whose order is under appeal before us, the same has not been pursued with either before the same learned Judge or before the learned Chief Justice of the High Court. A mere reiteration of the circumstances set forth in the

said representation will not disentitle the appellant to file this special leave petition. In that view of the matter, we overrule the preliminary objection raised by the learned counsel for the respondents.

The learned Judge examined the matter as if he was deciding an original proceeding before him without bearing in mind the limited scope of Order XLI, Rule 27 CPC and on a revision petition filed against an order made on the application filed by the respondents the learned Judge proceeded to advert to the nature of the facilities available in the Forensic Science Laboratory, Government of N.C.T., Delhi. The observations made by the learned District Judge on the application filed by respondents were held to be not appropriate by the learned Judge. The view expressed by the learned District Judge was termed as fallacious. The High Court took the view that the latest facility was not available at the time when the parties led the evidence before the trial court and if this facility became available only in the year 1999 and if the plaintiff wants to get the disputed documents examined by such Laboratory, it could not be said that it will not be a sufficient cause to permit the plaintiff to adduce additional evidence during the pendency of the appeal. On that basis the learned Judge proceeded to order that it was not appropriate exercise of the discretion vested in the trial court and would require interference by the High Court in the original jurisdiction.

Before we proceed further we would like to refer to the scope of an application under Order XLI, Rule 27 CPC. Section 107 CPC enables an appellate court to take additional evidence or to require such other evidence to be taken subject to such conditions and limitations as are prescribed under Order XLI, Rule 27 CPC. Principle to be observed ordinarily is that the appellate court should not travel outside the record of the lower court and cannot take evidence on appeal. However, Section 107(d) CPC is an exception to the general rule, and additional evidence can be taken only when the conditions and limitations laid down in the said rule are found to exist. The court is not bound under the circumstances mentioned under the rule to permit additional evidence and the parties are not entitled, as of right, to the admission of such evidence and the matter is entirely in the discretion of the court, which is, of course, to be exercised judiciously and sparingly. The scope of Order XLI, Rule 27 CPC was examined by the Privy Council in Kesowji Issur v. G.I.P.Railway, AIR 1931 PC 143, in which it was laid down clearly that this rule alone can be looked to for taking additional evidence and that the court has no jurisdiction to admit such evidence in cases where this rule does not apply. Order XLI, Rule 27 CPC envisages certain circumstances when additional evidence can be adduced :

(i) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(ii) 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

(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.

In the present case, it is not the case of either party that the first situation is attracted. So far as the second circumstance noticed above is concerned, question of exercise of due diligence would not arise because the concerned scientific laboratory from which examination is sought to be made itself was not in existence at the time of trial and so that clause is also not attracted. In the third circumstance the appellate court may require any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. The expression to enable it to pronounce judgment has been subject of several decisions including Syed Abdul Khader v. Rami Reddy & Ors., AIR 1979 SC 553 wherein it was held that when the appellate court finds itself unable to pronounce judgment owing to a lacuna or defect in the evidence as it stands, it may admit additional evidence. The ability to pronounce a judgment is to be understood as the ability to pronounce a judgment satisfactory to the mind of court delivering it. It is only a lacuna in the evidence that will empower the court to admit additional evidence [ See : The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008]. But a mere difficulty in coming to a decision is not sufficient for admission of evidence under this rule. The words or for any other substantial cause must be read with the word requires, which is set out at the commencement of the provision, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this rule would apply as noticed by the Privy Council in Kesowji Issur v. G.I.P.Railway [supra]. It is under these circumstances such a power could be exercised. Therefore, when the first appellate court did not find the necessity to allow the application, we fail to understand as to how the High Court could, in exercise of its power under Section 115 CPC, could have interfered with such an order, particularly when the whole appeal is not before the court. It is only in the circumstances when the appellate court requires such evidence to pronounce the judgment the necessity to adduce additional evidence would arise and not in any other circumstances. When the first appellate court passed the order on the application filed under Order XLI, Rule 27 CPC, the whole appeal was before it and if the first appellate court is satisfied that additional evidence was not required, we fail to understand as to how the High Court could interfere with such an order under Section 115 CPC. In this regard, we may notice the decision of this Court in Gurdev Singh & Ors. vs. Mehnga Ram & Anr., 1997 (6) SCC 507, in which the scope of exercise of power under Section 115 CPC on an order passed in an application filed under Order XLI, Rule 27 CPC was considered. When this decision was cited before the High Court, the same was brushed aside by stating that the principle stated therein is not applicable to the facts of this case. We do not think so. The High Court ought not to have interfered with such an order.

Shri Gopal Subramanium, learned senior counsel for the respondents, submitted that now that the documents had been sent to the concerned Laboratory and the opinion had been ascertained, the matter can certainly be examined by the court. We cannot agree as this trend, if allowed, would result in that at any stage of the case either in the first appeal or the second appeal, the additional evidence is sought to be adduced on the ground that better scientific evidence can be adduced, the

process would become unending. It is only in the circumstances prescribed under Order XLI, Rule 27 CPC such power can be exercised. He contended that if the order of the High Court could not be sustained on the ground that the entire appeal was not before it, the order of the first appellate court also cannot be sustained because while examining the effect of the evidence in the course of the appeal, the application under Order XLI, Rule 27 CPC could have been dismissed. But the argument ignores the fact that if the first appellate court had deemed it necessary to allow the parties to adduce additional evidence, it ought to have examined the entire evidence and when it was rejecting the application, it felt that the evidence already on record was sufficient one way or the other. In that view of the matter, we do not wish to express any opinion on this matter as it is open to the parties to urge that aspect of the case in the appeal that is pending before the High Court.

We, therefore, allow this appeal, set aside the order made by the High Court and restore that of the first appellate court. However, we are making it clear that its correctness can be challenged by the aggrieved party in the appeal that is pending before the High Court, if permissible under law. The appeal is allowed accordingly. However, in the circumstances of the case, we make no order as to costs.