

(1983) 04 GAU CK 0007

In the Gauhati High Court

Case No : M.A. (F) No. 105 of 1982 with Civil Revision No. 57 of 1983

Md. Saifur Rahman

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 21-04-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 41 Rule 30, Order 41 Rule 31

Citation : AIR 1985 Guw 107

Hon'ble Judges : T.C. Das, J;K.M. Lahiri, J

Bench : Division Bench

Advocate : B.M. Mahanta and G.N. Sahewalla, for the Appellant; D.C. Mahanta, Government Advocate Addl. Standing Counsel, Central Government, for the Respondent

Final Decision : Allowed

Judgement

This Judgment has been overruled by : Jaipur Development Authority Vs. Smt. Kailashwati Devi, AIR 1997 SC 3243 : (1997) 2 CTC 544 : (1997) 7 JT 643 : (1997) 117 PLR 880 : (1997) 5 SCALE 658 : (1997) 7 SCC 297 : (1997) 3 SCR 664 Supp : (1997) 2 UJ 604 : (1997) AIRSCW 3301 : (1997) 8 Supreme 255

Lahiri, J.—The appeal and the connected Civil Revision are directed against the judgment and order dt. 6-9-82 passed by the Assistant District Judge No. 1, Nowgong, Assam in Title Appeal No. 19 of 1978. By the impugned order the learned Judge- (1) permitted the appellants-defendants to produce "additional evidence"; (2) remanded the suit to the Court of the first instance for recording the evidence with a direction to dispose of the suit on the basis of the additional evidence, and (3) set aside the judgment and decree obtained by the plaintiff. In short, the learned judge allowed the defendants to produce additional evidence purporting to act under Order 41, Rule 27(aa) of the Civil P. C, "the Code" for short. However, instead of recording the additional evidence himself learned Judge directed the Court of the first instance to take such evidence, and did not

act under Order 41, Rule 28 of "the Code, without assigning any reason whatsoever. Learned Judge has set aside the hard earned judgment and decree obtained by the plaintiff and remained the suit purporting to act under Order 41 Rule 23A of "the Code."

2. It is said that in determining Nation's rank in political civilisation no other test is more decisive than the degree in which justice as defined by law is actually realised in its judicial administration. A trusted and vigilant judiciary can inject inspiration and vibrate vitality in our socio-economic life. It is the pressing need for the Judicial Officer to enthuse confidence in the legal institutions and in their functioning. To a common man shaken, repressed & rocked by various turmoils the only saviour appears to him "an impartial judiciary". As a member of the judiciary must be a trusted person, he must be impartial and independent. Indians clinch implicit faith in an impartial and independent judiciary. A member of the judiciary must always remind himself that he can only serve and this privilege has been given to him when others have it not. Judicial duties must be performed only as worship, without fear or favour, ill-will or affection. Justice should not only be done but must be shown to have been done.

3. Foreigners illegally staying in India should be deported lock, stock and barrel. There can be no second opinion. However, no Indian should be thrown out of India. It is easy to give a dog bad name and hang him. When the question of determination of citizenship comes up before the Court, it should well remember the far-reaching consequences of such a decision. A wrong decision can land an Indian in deep sea. Similarly, a wrong decision makes a foreigner a citizen. Both are fraught with danger. So nothing should be done in a hot haste. Before setting aside a lawfully obtained decree and remanding a suit for "fresh trial" it is pertinent and essential for a responsible judge to consider whether it is avoidable. Undoubtedly learned Judge has disposed of the appeal and earned the credit of disposal of a title appeal. But should a judge overlook the plight of a poor peasant who fought litigation and obtained the decree after about three years? There is no presumption that a member of a particular religion or group is a foreigner.

4. The plaintiff filed the suit for declaration that "he is an Indian citizen" and for a permanent injunction restraining the defendants, the Union of India, the State of Assam and the Supdt. of Police Nowgong restraining them from deporting him from India and obtained the reliefs. He filed the suit on 27-2-76 and obtained the decree on 31-7-78. Before instituting the suit he had served notices u/s 80 of "the Code" on the Union of India and the State of Assam which were duly received by the defendants. The plaintiff instituted the suit and reiterated his assertions made in the notices. The plaintiff claims that he was born and brought up at Kapilipar village under Lanka P. S. District-Nowgong, Assam, and "he is an Indian citizen by birth". He described his name and his father's name in the notices as well as in his plaint. He described himself as son of Chanu Mea and claimed that the officer of the State Government had wanted to deport him to

Bangladesh alleging that he was a Bangladeshi, which created a cloud caused imminent danger and apprehension in his mind that he might be deported from India, so he instituted the suit. The defendants received the notices u/s 80 of "the Code" and also received the copies of the plaint, filed a joint written statement but the Defendants never averred in their pleadings that the plaintiff had mis-described or suppressed his father's name. However, the defendants claimed that the plaintiff was born and brought up at village Dekapara in Bangladesh and illegally infiltrated in India, stealthily moved in villages near Lanka, he was never a voter nor did his name appear in the voters list. The plaintiff examined five witnesses in support of his case and proved some documents including the certified copy of voter's lists of 1966 and 1970 and further proved the Jamabandi of his village where name of Chanu Mea or Sanu Mea appeared as the owner of lands in Kapilipar village. It may be stated that the name "Chanu" is pronounced and written in Assamese as Sanu. There is no contest at the bar that the word Chanu is pronounced in Assamese as Sanu and often written as such. It will thus be seen that the defendants got full information about the name of the plaintiff and his father's name in the notices u/s 80 of "the Code" and also in the plaint. But, the defendants never contested that the plaintiff had misdescribed his father's name or suppressed the same, in their pleadings. Further, the defendants did not adduce any evidence oral or documentary in the Court of the first instance. In fact there was no contest by the defendants that plaintiff had suppressed or mis-described his father's name.

5. After the plaintiff had obtained the decree the defendants filed an appeal and took up an absolutely "new plea" for the first time in the Memo of Appeal. The relevant portion thereof is extracted :

"2). For that subsequently it has been gathered that the plaintiff's father is not Chanu Mia but his real father is Noor Mia and mother one Aftahun Nessa. And in the lower Court the plaintiff filed some documents belonging to Chani Mia and on the basis of those documents the learned lower Court hold the plaintiff as citizen of India,

3). For that the plaintiffs real father Md. Noor Mia and his mother Aftafun Nessa are living in Bangladesh."

The said statements averred in the Memo of Appeal were not verified by any one nor did the defendants file any affidavit supporting the averments. Thereafter, the appellants filed an application on 22-7-82 to the appellate Court but without any verification or without any supporting affidavit alleging that the plaintiff had obtained the decree by suppressing his father's name and additional evidence was necessary at the appellate stage. It was purported to be under Order 41, Rule 27(a) of "the Code". Neither in the Memo of appeal nor in the application for adducing additional evidence the defendants made any averment that notwithstanding the exercise of due diligence "the additional evidence was not within the knowledge" of the defendants. Nor did they state that the Additional evidence could not be produced by them at the time when the decree appealed

against was passed in spite of the exercise of the due diligence by them. The defendants nowhere asserted that there was in existence some documentary or oral evidence to show that Chanu Mea was not the father of the plaintiff.

6. Whether the defendants-appellants were entitled to adduce additional evidence in the appellate Court? Had the learned Judge jurisdiction to permit the defendant-appellants to adduce additional evidence? These are the precise questions to be answered. Let us extract Order 41, Rule 27(1)(a) and Sub-rule (2) :--

"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). . .

(aa). 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, or

(b). . .

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."

We are not concerned with the provisions contained in Order 27 Rule 1(a)(b) as the appellate Court did not exercise power under the said provisions. It may be seen on a bare perusal of the rule that the general rule is that the appellant is not entitled to produce any additional evidence, either oral or documentary, however, in exceptional cases and under exceptional circumstances the appellate Court may allow a party to produce additional evidence. To bring a case within the purview of Order 41 Rule 27(I)(aa) the party seeking to produce additional evidence must establish the following circumstances :

(1) that notwithstanding the exercise of due diligence the additional evidence was not within his knowledge; (2) that he could not, even after the exercise of due diligence, produce additional evidence in the Court of the first instance; (3) that the party had contested the point at issue and produced some evidence in the trial Court and (4) that in fact some evidence is in existence. Before a party is allowed to produce additional evidence in the appellate Court, the Court must be very slow, circumspect and cautious in allowing the indulgence. In our opinion, in the instant case, where the defendants did not at all contest the issue in question during the course of trial and did not take any plea, the question of allowing the party to produce additional evidence at the appellate stage, on the uncontested issue must be considered as allowing a party to take up "a new

plea" for the first time and adduce fresh evidence on the issue. In allowing the defendants to open up a new case and then to adduce evidence on a new point is not within the purview of Order 41 Rule 27(aa) of "the Code". Without amendment of the pleadings of the defendants the learned judge could not allow a party to take up a new case and to adduce fresh evidence in support of a new plea. It is impermissible. The provision of the Section 107 of the Code as elucidated by Order 41 Rule 27 are clearly not intended to permit a litigant, who has been unsuccessful in the lower Court to experiment with a new plea for the first time without amending the pleadings of the party. The provisions are not intended to allow a litigant to patch up the weak parts of his case and fill up omissions for the first time in the Court of appeal. Therefore, when the defendants did not contest the fact introduced for the first time at the appellate stage, the learned judge should not have allowed the defendants to adduce evidence without asking the party to amend his pleadings. As such, the learned judge acted illegally and without jurisdiction in allowing the appellants to adduce the so-called additional evidence and thereby permitting the defendants to open up a new case at the appellate stage without any amendment of the pleadings.

7. The provisions of the Order 41 Rule 27(aa) are applicable when a party contests a point, makes some averments and adduce some evidence at the trial stage. Then and then alone the Court can exercise jurisdiction under Order 41 Rule 27(aa) of "the Code". It is a case of allowing a party to take an "additional plea" for the first time at the appellate stage and to lead "fresh evidence" and surely not a case of adducing "additional evidence". This is impermissible. The term "additional evidence" means extra or added evidence. The word "Additional" embraces the idea of joining or uniting one thing to another, so as thereby to form one aggregate. When no evidence was adduced by the defendants on the point, the question of permitting them to adduce extra or additional evidence did not arise at all. As such, learned Judge acted illegally and without jurisdiction in permitting the defendants to adduce new evidence for the first time under the cover of the plea that it was introduction of additional evidence.

8. Are the provisions of Order 41 Rule 27(aa) meant for fishing evidence by an unsuccessful litigant? In our opinion a party should not be permitted to fish evidence. If he desires to adduce additional evidence he must show the existence of some relevant evidence and these are required to be adduced. There is no indication in the Memo of appeal or in the application for adducing additional evidence about the existence of any oral or documentary evidence which required to be produced in the appellate Court. Neither the so-called documents were referred nor did the defendants state the name of any person who was likely to prove the averments made by the defendants. No list of witnesses or documents was filed. We fail to see how and why the learned Judge was satisfied as to the existence of such evidence. No Court should permit a party to adduce additional evidence without ascertaining as to the existence of the said evidence. It is a case of permitting the defendants to produce the "so called additional

evidence", without ascertaining about the existence of such evidence. On this ground as well the impugned order permitting the defendants to adduce additional evidence must be set aside.

9. Be that as it may, in the instant case we do not find any material to show that the defendants could establish that the so-called evidence was not within their knowledge, "notwithstanding the exercise of due diligence". There is no material that the defendants could not produce the evidence in the Court of the first instance even after the exercise of due diligence. The Court cannot exercise its power until one of those elements is satisfactorily established. The suit was instituted in 1976, notices had been issued prior to the institution of the suit, the defendants are governments and an officer of high echelon. There could be no reason for allowing them indulgence to adduce additional evidence in absence of strong material to show that they were diligent and attentive. If additional evidence is allowed to be adduced in the manner there will no end to litigation and the appellate Court would be plagued with such prayers. The defendants had many instruments and instrumentalities to get her evidence but the defendants did not state that they had exercised due diligence but failed to obtain the "so-called additional evidence". The discretion of the appellate Court to admit additional evidence is not arbitrary but is judicial one circumscribed by the limitations prescribed in Order 41 Rule 27(aa). If additional evidence is allowed to be adduced contrary to the rules governing the reception of such evidence it should be a case of improper exercise of discretion. The opening words of order Order 41 Rule 27(1) constrain a party to produce additional evidence in the appellate Court. However, only an establishment of the requisite essential elements prescribed in Clause (aa) a party can ask for the indulgence to adduce additional evidence. In the instant case the essential elements which are conditions precedents are conspicuously absent. In the result we hold that the impugned order permitting the defendants to adduce additional evidence in the appellate Court is illegal, void and without jurisdiction.

10. The scope of the appellate Court to permit a party to adduce additional evidence has been considered by different Courts the world over. However, the provisions of the law may not be the same but the basic principles appear to be similar. While dealing with the scope of power of the appellate Court to permit a party to adduce additional evidence a threadbare discussion was made by Lord Cohen in *Leeder v. Ellis* (1952) 2 All ER 814. Their Lordships quoted with approval the rule laid down by Sir George Jessol, M. R. in *Sanders v. Sinders* (1881) 45 LT 637 : 51 U Ch 276 which we extract hereinbelow : --

"The appellant has applied for leave to adduce fresh evidence, but I am of opinion that it ought not to be granted. The application is for an indulgence. He might have adduced the evidence in the Court below. That he might have shaped his case better in the Court below is no ground for leave to adduce fresh evidence, before the Court of appeal. As it has often been said, nothing is more dangerous than to allow fresh oral evidence to be introduced after a case has

been discussed in Court.

In our opinion, the provisions of Order 41 Rule 27(aa) also grant indulgence to a party to introduce additional evidence. In our opinion, allowing a party to adduce additional evidence after a case has been fully discussed and argued in Court is always fraught with danger particularly when additional oral evidence is sought to be introduced after a decision has been reached by the Court. We are also of the opinion that in public interest and in the interest of the administration of justice such indulgence should not be liberally granted to a party to drag on proceedings indefinitely or to allow a party to take "another chance" after the conclusion of the trial in the Court of the first instance. Lord Cohen in *Leeder v. Ellis* (supra) speaking for the Privy Council entirely agreed with the view expressed by Street C.J. of the Supreme Court of New South Wales. We extract the principles of the law laid down by Street C.J. : --

"It is impossible for this Court, within the limits which necessarily control it, to achieve abstract justice in every case. It must work within its prescribed limits, and rules must be observed and complied with in the general interests of justice, and one general interest is that there should be an end to litigation, once, it is instituted, and that parties should not be permitted to protract proceedings indefinitely by taking a chance on the hearing in the lower Court as to whether the evidence is sufficient, and on finding it insufficient should then be able to come to the appellate Court and ask for fresh evidence to be admitted, which was available at the time and in respect of which no difficulty arose in the way of putting that evidence before the Court, and seek to have the matter re-opened on that ground."

Our Supreme Court has similarly interpreted the provisions of Order 41 Rule 27 of the Code. In *State of U.P. Vs. Manbodhan Lal Srivastava*, the Supreme Court has held that additional evidence should not be permitted at the appellate stage to enable a party to remove certain lacuna in presenting his case at the proper stage and fill in gaps. The same view has been expressed by the Supreme Court in *Maganlal Bhikchand Nahar v. Jawarhal Nahar*, C. A. No. 1325 of 1966 : (reported in 1969 UJ (SC) 654). In *Associated Hotels of India Ltd., Delhi Vs. S.B. Sardar Ranjit Singh*, , the Supreme Court has held, when the party had the opportunity of adducing evidence in the Court below and made no attempt to adduce evidence, he cannot be permitted to adduce additional evidence or a new trial. The views that we have taken are just reflections of the principles enunciated by their Lordships.

11. It is strange that the learned Judge instead of recording the so-called additional evidence himself under Order 41 Rule 28 of the Code thought it prudent to direct the Court of the first instance to record the evidence upon setting aside the judgment and decree. Thereby, he prolonged the life of the suit. He could have taken the additional evidence and decided the appeal. It appears to us that he took a wrong decision. However, we have already held that the order permitting the defendant to adduce evidence was illegal and without

jurisdiction and we have set it aside and, therefore, the order directing the trial Court to record the so-called additional evidence stands automatically set aside.

12. What was the reason for setting aside the judgment and decree? We extract the reasons of the learned Judge :

"As the production of additional evidence as prayed for shall have an impact on the decision of the entire suit, I think it to be proper to remand it back to the trial Court to record the additional evidence and record its findings and re-dispose of the same according to law. The appeal is therefore allowed, but without cost. The judgment and decree of the Court below are set aside, and the suit is sent back on remand for re-disposal as indicated above."

Strangely enough the learned judge did not find any fault with the decision rendered by the Court of the first instance. Yet he set aside a valid and existing decree on the assumption that production of so-called additional evidence would have "impact on the decision of the entire suit." How could the learned Judge pre-judge that there would be some evidence and that they would create an impact on the decision? Even the learned Judge was unaware of the nature and quality of the so-called additional evidence. Therefore, his expectations were entirely based on surmises and conjectures and on that basis he allowed the appeal and set aside a valid and live decree of the trial Court, without complying with the essential requirements of Order 41 Rules 30 and 31 of the Code. We have no hesitation in reaching the conclusion that the order of remand, on setting aside the judgment and decree of the trial Court based on the expectancy that some additional evidence would be forthcoming, which might create an impact on the decision of the entire suit, is bad in law. It is violative of the provisions contained in Order 41 Rules 30 and 31 of "the Code". It was a "purported determination" that the order of remand was covered by Order 41 Rule 23-A, and, not a "real determination". Only upon setting aside a decree in due compliance with the provisions of Order 41 Rules 30 and 31, the appellate Court could have remanded the matter. In the result, the order setting aside the decree of the trial Court is also set aside.

13. For the foregoing reasons we hold that the learned judges acted illegally and without jurisdiction in allowing the defendants to adduce the so-called additional evidence and to remand the suit for fresh disposal after recording the so-called additional evidence upon setting aside the judgment and decree of the trial Court. In the result, the appeal and the connected revision are allowed and the order and decree of the Assistant District Judge No. 1, Nowgong dt. 6-9-82 passed in Title Appeal No. 39 of 1978 is set aside. We direct the learned Judge to hear and dispose of the appeal in accordance with the law after serving proper notice to the parties.