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**(1986) 03 RAJ CK 0003**

**In the Rajasthan High Court**

**Case No : Civil Miscellaneous Appeal No. 3 of 1974**

Umed Singh and Others

APPELLANT

Vs

Chiranji Lal and Another

RESPONDENT

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**Date of Decision : 20-03-1986**

**Acts Referred:**

Limitation Act, 1963 — Section 5

**Citation : (1986) 1 WLN 673**

**Hon'ble Judges : I.S. Israni, J**

**Bench : Single Bench**

**Final Decision : Dismissed**

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## **Judgement**

Indersen Israni, J.—This is a Civil Misc. Appeal under Order 43, Rule 1, CPC read with Order 41, Rule 27, CPC against the judgement and decree dated 26-5-1973 passed by the learned Civil Judge, Jhunjhunu, camp : Sikar in Civil Appeal No. 19/73 remanding the case and reversing the decree passed by the learned Munsif, Sikar, dated 31-5-1969 in Civil suit No. 23/66 for mandatory and perpetual injunction.

2. The plaintiff-appellants filed a suit against the defendants-respondents for mandatory injunction for demolition of alleged encroachment made by the defendants-respondents on public street and for grant of permanent injunction. It was alleged that defendant No. 2 Nagar Parishad, Fatehpur Sekhawati unauthorisedly and illegally leased a particular piece of land for 99 years, in the year 1969 for consideration of Rs. 33l.35p. to defendant No. 1. It is further alleged that the plaintiffs appellants have been using the land in front of their house for last more than 100 years as path way and also as a place of sitting on the occasions of marriage, death and feasts. It is said that the land has become narrow because of the structures put by the defendants-respondents. It was, therefore, prayed that the structures on the disputed land be removed and the defendants-respondents be restrained by perpetual injunction from encroaching upon the suit land. The learned trial court after framing the issues and recording

evidence of both the parties, decreed the suit of the plaintiffs-appellants on 31-5-1969. An appeal was filed against it by the defendant No. 1 before the learned Additional District Judge, Sikar, which was transferred, heard and decided by the learned Civil Judge, Jhunjhunu.

3. During the pendency of the appeal the defendant-respondent moved an application on 14-11-1970 before the learned Civil Judge for producing certain documents on the ground that as the defendant generally resided at Calcutta in connection with his business, so he could not know about these documents and he came to know about them only in July, 1970. The documents produced by the defendant-respondent are as under:

(a) Certified copy of the site plan produced by one Dal Chand s/o Shri Pannalal, before Tehsildar Fatehpur for grant of Patta of some land. In this site plan it is said its boundaries showed the disputed land as Bara of defendant.

(b) Certified copies of site plan and Khasra of City Survey of Fatehpur of the year 1944 in which the disputed land has been shown as Bara, and not as public street;

(c) Certified copy of the application of Mohanlal alleged to be elder brother of Bhanwar Lal plaintiff and Umed Singh s/o Bhanwarlal dated 5-6-1965 filed before the Municipal Board, Fatehpur in which the disputed land has been mentioned as Bara.

4. Learned Counsel for the appellants contested this application, but the same was allowed and the decree of the lower court was set-aside and the matter was remanded back to the trial court for recording fresh evidence in the light of the documents produced by the defendant.

5. Learned Counsel for the appellant Mr. J.S. Rastogi contends that the documents in question were irrelevant and not material for the decision of the case and that the defendant had knowledge of the documents since long and that the record of city survey has no evidentiary value as the same was not maintained under any provisions of law and was not admissible in evidence. It has further been contended that the plaintiffs-appellants were not party to the site plan (Ex. A5) therefore, the same is not admissible in evidence and in any case no adverse presumption can be drawn on account of the same against the appellants. Learned Counsel has placed reliance on Lalit Kishore v. Laxmi Narain 1968 RLW 308, in which it has been held that the city survey record of Jaipur of S.Y. 2025 was not reliable. It has been further contended that u/O 41 Rule 27 CPC the learned first appellate court could have, at the most, remanded the case for recording the evidence on the documents without setting aside the decree and thereafter decided the appeal on merits. Therefore, it is contended that the learned first appellate court has erred in setting-aside the decree and remanding the case to the trial court.

6. Learned Counsel for the respondents Shri C.L. Simal on the other hand has

stressed that the order of the learned first appellate court is perfectly legal and valid. More so, in view of the amended provisions of Order 41, Rule 27(aa) CPC, which fully apply with the matter. It is contended that the learned first appellate court has exercised the discretion in the interest of justice and the order suffers from no legal infirmity and does not require to be interfered and that all the documents are the certified copies and are very relevant for the proper decision of the case. It was also stated by the learned Counsel that in the trial court, the documents have been admitted and the evidence has been led by both the parties. Final arguments were also heard by the learned trial court, but since the file was called by this Court, therefore, order could not be passed.

7. I have heard the rival contentions of the parties and have gone through the documents on record. The documents are the certified copies and, therefore, no doubt can be raised regarding their being genuine. The application filed by the defendant respondent under Order 41, Rule 27 was supported by an affidavit of the defendant Chiranji Lal, in which the reasons for non-production of the documents at the earliest stage, have been mentioned. Their reply filed on behalf of the appellants to this application is not supported by any affidavit, so there is no reason to disbelieve the affidavit filed by the defendant, in which the circumstances under which the documents were filed late, have been stated. Under the provisions of Order 41, Rule 27(aa) CPC as amended, the court has discretion to allow production of additional evidence, if it is established that not with standing the exercise of due diligence, such evidence was not within the knowledge of the parties or could not after exercise of due diligence produce the same at the time when the decree appealed against was passed. This makes the position of law all the more liberal regarding giving permission for, production of additional evidence, if the circumstances" so require in the interest of justice. In the case of K. Venktaramaina v. A. Seetha Rama Reddy and Ors. AIR 1963 SC 1525, their Lord-ships of the Supreme Court while considering the provisions of Order 41, Rule 27 have held as under;

Under Rule 27(4), the appellate court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce the judgment", but also for "any other substantial case". There may still be case where even brought the court finds that it is able to pronounce judgment on the state of 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. Such a cause will be one for allowing additional evidence for any other substantial cause under Rule 271 (1)(b) of the Code.

Therefore, I feel there is no reason to interfere with the order of learned first appellate court, more so, when the documents have already been admitted in evidence and the case is now ripe for hearing of final arguments. It is for the learned trial court to see how far the documents are relevant and what is their

evidentiary value in the dispute under suit. Since the matter is quite old, I direct that the file of the trial court will be sent along with the copy of this judgment forthwith.

8. Learned Counsel for the respondents has raised a preliminary objection regarding limitation of the appeal filed in the court, which is time barred by one day. The application u/s 5 of the Limitation Act was filed on 26th November, 1973, supported by an affidavit of one Ram Avtar, registered Clerk of Shri Paras Ram, Advocate, Sikar, in which it has been stated that no date was fixed by the Copying Department for obtaining copy of the judgment applied for. No reply to this application has been filed.

9. I find no reason to disbelieve the affidavit filed by the Clerk of an Advocate, who was expected to visit the Copying Department time and again for obtaining the certified copies. In view of the affidavit filed in support of the application, I feel there is no force in the objection raised by learned Counsel for the respondent and the delay of one day is condoned.

10. In the result, I find no force in this appeal, which is hereby dismissed. The record and a copy this judgment be sent to the trial court forthwith. The learned trial court shall hear the arguments and dispose of the suit within 2 months of the receipt of the record and judgment from this Court.

11. In the facts and circumstances of the case, the parties are left to bear their own costs.