

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR.

JUDGMENT

Elkar & Anr. v. State of Rajasthan & Ors.

S. B. CIVIL MISCELLANEOUS APPEAL NO.390/2007
against the order dated 13.10.1996
passed by learned Additional District
Judge, Bhinmal, District Jalore in
Civil Appeal No.3/2003.

Date of Judgment :: 29th February, 2008

PRESIDENT

HON'BLE MR.JUSTICE GOVIND MATHUR

Mr. Sandeep Shah, for the appellants.
Mr. B.L.Tiwari, Deputy Government Advocate.

....

BY THE COURT :

The plaintiffs are appellants against an order of remand. The appeal is directed to challenge the judgment dated 13.10.1996 passed by learned Additional District Judge, Bhinmal, whereby he has set aside the judgment and decree dated 24.9.2003 passed in Original Suit No.25/1999 (Elkar & Anr. v. State of Rajasthan & Ors.) and has remitted back the matter to learned trial court for a fresh judgment in accordance with the observations made therein and in accordance with law.

The suit was instituted for declaration of the title and to restrain the defendants from making any interference with peaceful possession and use of property in question by the plaintiffs. The plaintiffs coming from a traditional nomadic community, averred in the plaint that with an object to settle them at a place the Tehsildar Sanchore about 40 years back allotted residential plot to their father and since then they are residing thereon. The proceedings to remove them from the land in question were initiated by treating them trespassers but in the year 1972 the Tehsildar concerned made a proposal for regularisation of their possession over the land in dispute, accordingly the proceedings aforesaid were withdrawn, however, the defendant No.3, i.e. Station House Officer, Police Station, Sanchore was conspiring to remove them from the possession of the land in question.

In written, the defendants denied allotment of land and also possession thereon of the plaintiffs. As per the defendants, the land was gochar and the same was set apart by the Government for construction of the office of the Deputy Superintendent of Police and for construction of the residential accommodation for police officials. The land was accordingly allotted to police department.

On basis of the pleadings the trial court settled eight issues. After completion of plaintiffs' evidence several opportunities were given to the defendants to adduce evidence but of no consequence hence, by order dated 4.2.2003 the trial court closed the defendants' evidence and after hearing the parties, decreed the suit as per the judgment dated 24.9.2003.

The defendants in appeal before learned Additional District Judge preferred an application under Order XLI Rule 27 Code of Civil Procedure for production of additional evidence. The documents sought to be produced in evidence are :-

- (1) the order No.F.12(3)(35)Raj./91-99 passed by the Collector, Jalore setting apart the land for construction of a police station building;
- (2) the order passed by the Collector, Jalore making allotment of land to the Department of Police and the Department of Revenue;
- (3) copy of the jamabandi showing the land as gair mumkin gochar;
- (4) the land entered in the name of the Department of Police and the Department of Revenue;

(5) the order dated 10.12.1972, allotting plot No.15 to father of the plaintiffs;

(6) report dated 26.9.1991 handing over possession of the land to the police department;

(7) order dated 1.8.1991 keeping the land reserved for police department;

(8) inspection report submitted by Patwari, Sanchore dated 3.7.1989 showing encroachment of plaintiffs over the land;

(9) copy of the order dated 21.3.1991 passed by Revenue Appellant negativating right of the plaintiffs for regularisation of the land said to be in their possession; and

(10) copy of jamabandi for the year 2062-2065 to prove the construction made by the police department over the land.

The appellate authority accepted the application and so also decided the appeal vide the order impugned. To challenge the same, the submissions of counsel for the appellants are:-

(1) while allowing the defendants to produce additional evidence, no reason as required as per the

provisions of sub-rule(2) of Rule 27 Order XLI Code of Civil Procedure is given by the appellate court;

(2) despite knowledge and possession of the documents the defendants did not choose to produce those and as such no permission to produce the same could have now been granted by the appellate court while exercising powers under Order XLI Rule 27 Code of Civil Procedure;

(3) the trial court by its order dated 4.2.2003 closed the defendants' evidence, and the same has acquired finality as no challenge to the order aforesaid was given. The appellate court, as a matter of fact, by accepting the application under Order XLI Rule 27 Code of Civil Procedure has set aside the order dated 4.2.2003 without any challenge to that; and

(4) the appellate court erred while setting aside the judgment and decree passed by the trial court and remanding the matter for fresh adjudication.

I have heard counsel for the parties and given thoughtful consideration to the matter.

No doubt that sub-rule(2) of Rule 27 of Order XLI Code of Civil Procedure provides that whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission, however, omission of the appellate

court to record reasons for allowing the additional evidence does not vitiate such admission in view of the law laid down by Hon'ble Supreme Court in the case of K.Venkataramiah v. A.Seetharama Reddy and others, reported in AIR 1963 SC 1526, thus, the first argument advanced by learned counsel for the appellants is having no merit.

The next submission, that despite knowledge and possession of the documents the defendants did not choose to produce those and as such the appellate court erred while allowing the defendants to produce additional evidence while exercising powers under Order XLI Rule 21 Code of Civil Procedure, is also not having any merit.

In Shantilal v. Mahendra Kumar & Ors. [RLW 2002(2) Raj. 1318], it was held that the parties seeking to produce additional evidence is required to establish 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. In the cases of Vishnu Iron (M/s.) & Steel Industries v. Govind Ram [RLW 2003(4) Raj. 2323] and Madan Lal vs. Mala Ram [RLW 1992(2) 389], this Court held that the plaintiff cannot be allowed to produce the documents to fill up the gaps and lacuna left out by him during trial and also that the

parties to an appeal are not entitled to adduce additional evidence in appellate court until shown that the court below refused to admit the evidence which ought to have been admitted or notwithstanding due diligence, it was not within his knowledge or could not produce at the time of passing decree appealed against. Learned counsel is seeking support of the judgments referred above.

Section 107 Code of Civil Procedure provides that, subject to such conditions and limitations, as may be prescribed, an appellate Court shall have power to take additional evidence or to require such evidence to be taken. As per Order XLI Rule 27 Code of Civil Procedure the parties to an appeal are not entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, but if, the court from which the appeal is preferred, has refused to admit evidence which ought to have been admitted, or 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 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. In the instant matter the appellate court permitted the appellants to produce documents as per clause (b) or Order XLI Rule 27(1) Code of Civil Procedure. The judgment cited by counsel for the appellants pertains either to clause (a) or (aa) of sub-rule(1) of Rule 27 Order XLI Code of Civil Procedure, hence those are not having application in present controversy. In the case in hand, the documents allowed to be produced are having material bearing with the issues involved in the controversy and, therefore, the appellate court rightly exercised its powers under Order XLI Rule 27 (1)(b) Code of Civil Procedure. The documents sought to be produced are having direct bearing relating to the land in question and, therefore, a substantial cause was certainly available to get those documents produced in evidence.

It is strangely urged by counsel for the appellants that by order dated 4.2.2003 learned trial court closed the defendants' evidence and no challenge to the said order was ever given, thus, the appellants should have been estopped to produce the evidence by getting an application accepted as per the provisions of Order XLI Rule 27 Code of Civil Procedure. The argument advanced is substantiated by counsel for the appellants by placing reliance upon a single Bench Judgment of this Court in the case of Madan Singh v. State of Raj. & Ors. [2007(3)RLW 2685], holding

therein that once the trial court has closed the defence and no challenge to that order was given during trial, it shall be unjustified to permit the defendant to submit its written statement subsequently by the appellate court.

while extending all respect to the law laid down in the case aforesaid, I would like to state that in the instant matter the question is relating to permission granted by the appellate court to produce additional evidence and for that the appellate court is having adequate powers as per Order XLI Rule 27 Code of Civil Procedure. It is further relevant to note that Section 105 Civil Procedure Code specifically provides that where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. The defendants, therefore, were right to set forth a ground of objection in the memorandum of appeal relating to closure of evidence. The appellate court may well within its jurisdiction examine such objection.

Finally, it is urged by counsel for the appellants that the trial court erred while remanding the matter for fresh adjudication on acceptance of application under Order XLI Rule 27 Code of Civil Procedure.

It is true that as per Order XLI Rule 28 Code of Civil Procedure the appellate court, after allowing to produce additional evidence, itself could have recorded evidence and also could have directed the court, from whose decree the appeal is preferred or any other subordinate court to take such evidence. The appellate court in such case should have also specified the points to which evidence is to be confined. In the present matter the appellate court remanded the matter to the trial court without framing any point relating to which evidence is sought to be recorded. What it appears from reading of the order is that the appellate court was of the view that on production and admission of the documents a complete adjudication of the evidence shall be necessary and, therefore, while exercising powers under Section 107 Code of Civil Procedure the court remanded the matter. Looking to peculiar facts of the case, I do not find any error in that.

As such, this appeal is having no merit and, therefore, the same is dismissed.

(GOVIND MATHUR),J.

Kkm/ps.