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K.R. MOHAN REDDY

v.

M/S NET WORK INC. REP. TR. M.D.

SEPTEMBER 26, 2007

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[S.B. SINHA AND H.S. BEDI, JJ.]

*Code of Civil Procedure, 1908:*

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*Or. 41, rr. 27(1)(aa) and (b)—Application for adducing additional evidence at appellate stage—No notice issued to opposite party—Application taken up by High Court at the time of hearing of the appeal—High Court holding that the “application should be allowed, the same being a requirement of court and/or was otherwise for substantial cause”—HELD: High Court failed to apply provisions of*

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*Or. 41, r.27 in its correct perspective—It proceeded on the basis as if clause (b) of r.27(1) was applicable—Condition precedent for application of clause (aa) of sub-rule (1) of r.27 is different from that of clause (b)—Judgment of High Court set aside—Application would*

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*be disposed of in accordance with law after parties exchange affidavits as directed in the judgment.*

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**The respondent firm filed a suit against the appellant for recovery of certain amount. The case of the plaintiff-respondent was that the parties entered into a partnership. The said partnership was reconstituted, and thereupon the defendant appellant handed over certain works to the respondent firm for execution. Though the appellant had retired as a partner from the said firm, he requested the respondent firm to continue the work allotted in his name. The work was executed by the respondent firm and the appellant issued**

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**a cheque in favour of the respondent firm, but the same was dishonoured. The plea of the defendant-appellant was that he had already retired from the firm; all the accounts between the parties had been comprehensively settled and the cheque was obtained by fraud and forgery. The trial court without framing a specific issue**

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whether the cheque was an outcome of fraud and forgery, dismissed the suit. In the appeal the plaintiff-respondent firm filed an application under Order 41 Rule 27 for adducing additional evidence. The appellate court issued no notice to the said application which came to be considered along with the hearing of the appeal itself. The appellate court, ultimately held by the impugned judgment that the application for adducing additional evidence filed by the plaintiff should be allowed, the same being a requirement of the Court and/or was otherwise for substantial cause. A B

In the instant appeal filed by the defendant it was contended that the application of the plaintiff-respondent was based on clause (aa) of Rule 27(1) of Order 41 and the High Court committed an error in relying upon clause (b) of Rule 27(1); and that the High Court, prior to passing of the order, did not give any opportunity to the appellant to file an objection with regard to maintainability of the said application. C D

Disposing of the appeal, the Court

**HELD:** 1. The High Court failed to apply the provisions of Order 41 Rule 27 CPC in its correct perspective. It proceeded on the basis as if clause (b) of Sub-rule (1) of Rule 27 of Order 41 of CPC was applicable. Power of the appellate court to pass any order thereunder is limited. It is now a trite law that the condition precedent for application of clause (aa) of Sub-rule (1) of Rule 27 of Order 41 is different from that of clause (b). In the event the former is to be applied, it would be for the applicant to show that the ingredients or conditions precedent mentioned therein are satisfied. On the other hand, if clause (b) to Sub-rule (1) of Rule 27 of Order 41 CPC is to be taken recourse to, the appellate Court was bound to consider the entire evidences on record and come to an independent finding for arriving at a just decision that adduction of additional evidence as has been prayed by the appellant was necessary. The fact that the High Court failed to do so, amounts to misdirection in law. E F G

[Paras 15, 17, 18 and 19] [877-E, H, F; 878-A-D]

*State of Gujarat v. Mhendrakumar Parshottambhai Desai (dead)* H

A *by LR.s.* [2006] 9 SCC 772, relied on.

B 1.2. An appellate court should not pass an order so as to patch up the weakness of the evidence of the unsuccessful party before the trial court, but it will be different if the Court itself requires the evidence to do justice between the parties. The ability to pronounce judgment is to be understood as the ability to pronounce judgment satisfactorily to the mind of the Court. But mere difficulty is not sufficient to issue such direction. While saying so, however, it is not meant that the Court at an appropriate stage would be precluded from considering the applicability of clause (b).

C [Para 21] [878-H; 879-A-B]

D 1.3. The impugned judgment cannot be sustained. It is set aside accordingly. The respondent may file additional affidavit in support of its application under Order 41 Rule 27 CPC, and thereafter, the appellant may file his response both to the original application as also the additional affidavit, if any. [Para 22] [879-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4588 of 2007.

E From the Judgment and final Order dated 20.09.2006 of the High Court of Judicature, Andhra Pradesh at Hyderabad in C.C.A. M.P. No. 239 of 2006 & C.C.A. No. 253 of 2004.

Rakesh Dewedi, Annam D.N.Rao and Rita Gupta for the Appellant.

F Udai U. Lalit, P.S. Narsimha, Somiran Sharma, L. Rashmani Mandakini and Aribam Guneshwar Sharma for the Respondent.

The Judgment of the Court was delivered by

**S.B. SINHA, J.** Leave granted.

G (1) This appeal is directed against the judgment and order dated 20/9/2006 passed by a Division Bench of the Andhra Pradesh High Court in C.C.C.A.No.253/2004 and the application for adduction of additional evidence marked as City Civil Court Appeal Misc. Petition No. 239 of 2006, whereby and whereunder the application filed by the respondent

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herein, purported to be under Order 41 Rule 27 of the Code of Civil Procedure was allowed. A

(2) The parties entered into a partnership. The said partnership was reconstituted on 1.7.1994. Plaintiff -respondent contended that pursuant to the reconstituted partnership deed, the appellant had handed over certain works to the respondent-firm for its execution. It is also not in dispute that the appellant herein retired as a partner from the said Firm. However, it has been contended that despite his retirement, the appellant had requested the respondent to continue the work allotted in his name so as to protect his turnover and continuation of his registration as a special class contractor. Further, the case of the respondent was that the appellant was to hand over the payment which he is supposed to receive in lieu of the Khammam Project. According to it upon settlement of accounts of Khammam Project, an amount of Rs. 34,82,000/- was found due and payable by the appellant to the respondent Firm. B C

(3) The contention of the respondent, on the other hand, is that in respect of construction of Minister's quarter at Hyderabad, the appellant had paid. Rs. 8,00,000/- and Rs. 5,25,316/-. It claimed that a sum of Rs. 8,03,350/- was owing to it by the appellant in respect of the Vijayawada work. D

(4) According to the respondent, the appellant issued a cheque of Rs. 34,82,000/- in favour of the Firm in respect of Khammam Project along with a covering letter wherein the appellant assured the respondent that he would settle the accounts pertaining to the other two projects after finalizing the accounts with the department. The said cheque was dishonoured. E F

(5) On the aforementioned premise, on or about 21.1.2002 a suit for recovery of Rs. 50,74,109/- along with the interest @ 24% per annum was filed by the respondent herein. G

(6) Appellant in his written statement, while denying and disputing the aforementioned contentions of the plaintiff-respondent, inter-alia, asserted that the cheque had been obtained by it by fraud, forgery and with the connivance of one Shri K. Ramesh Reddy and Mr. Y.S.Subramaniam, Managing Partner of the Respondent. It was also H

A asserted by the appellant that he had retired from the partnership on 12.1.2000 and all the accounts between the parties were comprehensively settled which was also recorded in the deed of retirement.

B (7) The trial Court framed a general issue as to whether the plaintiffs are entitled to any relief and did not frame a specific issue with regard to the case of the appellant herein that the said cheque was an outcome of fraud and forgery. The learned trial Judge, however, dismissed the suit holding as under:

C “(i) Defendant admits assignment of Khammam & Vijayawada Projects to the petitioner.

(ii) Clause 8 of the retirement deed does not mention about pending work with the respondent and future dues payable.

D (iii) Plaintiff did not file its accounts to prove that the plaintiff has executed the entire work at Khammam Hospital.

E (iv) Pending disposal of the suit filed by the defendant against the plaintiff for recovery of the amounts paid to the plaintiff after retirement (7.6.2000 & 13.7.2000) on the ground that the same was by way of loan, it is difficult to take a view that the defendant has paid any money after his retirement towards the dues payable under the aforesaid transaction.

(v) There is a possibility that the cheque was dishonestly obtained.”

F (8) Respondent preferred an appeal thereagainst. Indisputably, an application under Order XLI Rule 27 of Code of Civil Procedure was filed on 22.3.2006.

G (9) It, however, appears that no notice was issued in relation thereto. The said application purported to have come up for consideration along with the hearing of the appeal.

(10) With the consent of the parties, the main appeal itself was to be heard.

H (11) By reason of the impugned judgment, although, the High Court noticed the findings of the learned trial Judge and various decisions

operating in the field, *inter alia*, held that the application for adduction of additional evidence filed by the respondent herein should be allowed, the same being a requirement of Court and/or was otherwise for substantial cause. A

(12) Mr. Rakesh Dwivedi, learned senior counsel appearing on behalf of the appellant, *inter alia*, would submit that the High Court prior to passing of the said order did not give an opportunity to the appellant to file an objection in regard to the maintainability of the said application. B

(13) In any event, the learned counsel would contend that the respondent's application being based on clause (aa) of Sub-rule (1) of Rule 27 of order XLI of C.P.C., the High Court committed a serious error in relying upon Clause (b) thereof. C

(14) Mr. Uday Umesh Lalit, learned senior counsel appearing on behalf of the respondent, on the other hand, would submit that if the case of the respondent as set out in his plaint vis-a-vis the findings of learned trial Judge are to be considered in their entirety, the High Court was correct in its view. D

(15) The High Court, in our opinion, failed to apply the provisions of Order 41 Rule 27 of CPC in its correct perspective. Clauses (a), (aa) and (b) of Sub-rule (1) of Rule 27 of Order XLI refer to three different situations. Power of the appellate court to pass any order thereunder is limited. For exercising its jurisdiction thereunder, the appellate Court must arrive at a finding that one or the other conditions enumerated thereunder is satisfied. A good reason must also be shown as to why the evidence was not produced in the trial Court. E F

(16) Respondent in its application categorically stated that the books of accounts had been misplaced and the same were discovered a few days prior to the filing of the said application while the office was being shifted. G

(17) The High Court, unfortunately did not enter into the said questions at all. As indicated hereinbefore, the High Court proceeded on the basis as if clause (b) of Sub-rule (1) of Rule 27 of Order XLI H

A of CPC was applicable.

B (18) It is now a trite law that the conditions precedent for application of clause (aa) of Sub-rule (1) of Rule 27 of Order XLI is different from that of clause (b). In the event the former is to be applied, it would be for the applicant to show that the ingredients or conditions precedent mentioned therein are satisfied. On the other hand clause(b) to Sub-rule (1) of Rule 27 of Order XLI of CPC is to be taken recourse to, the appellate Court was bound to consider the entire evidences on record and come to an independent finding for arriving at a just decision; adduction of additional evidence as has been prayed by the appellant was necessary.

D (19) The fact that the High Court failed to do so, in our opinion, amounts to misdirection in law. Furthermore, if the High Court is correct in its view that the plaintiff-respondent had proceeded on the basis that the suit in its entirety based on a cheque, wherefor, it was not necessary for it to file the books of accounts before the trial Court, finding contrary thereto could not have been arrived at that the same was in fact required to be proved so as to enable the appellate Court to arrive at a just conclusion.

E (20) The Supreme Court in *State of Gujarat v. Mhendrakumar Parshottambhai Desai(dead) by L.Rs.* [2006] 9 SCC 772 relying upon *Municipal Corporation of Greater Bombay v. Lal Pancham and Ors.*, held as under:

F “Though the appellate Court has the power to allow a document to be produced and a witness to be examined under Order XLI Rule 27 CPC, the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision did not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in the case. It does not entitle the appellate court to let in fresh evidence only for purposes of pronouncement of judgment in a particular way.”

H (21) Appellate Court should not pass an order so as to patch up

the weakness of the evidence of the unsuccessful party before the trial Court, but it will be different if the Court itself require the evidence to do justice between the parties. The ability to pronounce judgment is to be understood as the ability to pronounce judgment satisfactorily to the mind of the Court. But mere difficulty is not sufficient to issue such direction. While saying so, however, we do not mean that the Court at an appropriate stage would be precluded from considering the applicability of clause (b).

(22) We are, therefore, of the opinion that the impugned judgment cannot be sustained. It is set aside accordingly. The respondent may file additional affidavit in support of its application under Order XLI Rule 27 CPC within two weeks from the date of receipt of copy of this order. The appellant may file his response both to the Original Application as also the additional affidavit, if any, within four weeks thereafter.

(23) We would request the High Court to consider the entire matter in accordance with law afresh on merits.

(24) The appeal is disposed of with the aforementioned observations.

R.P.

Appeal disposed of.