

PETITIONER:
THE OFFICIAL LIQUIDATOR

Vs.

RESPONDENT:
RAGHAVA DESIKACHAR & ORS.

DATE OF JUDGMENT 23/08/1974

BENCH:
REDDY, P. JAGANMOHAN
BENCH:
REDDY, P. JAGANMOHAN
BEG, M. HAMEEDULLAH
ALAGIRISWAMI, A.

CITATION:
1974 AIR 2069 1975 SCR (1) 890
CITATOR INFO :
RF 1991 SC1654 (43)

ACT:
Code of Civil Procedure--0.41, r. 27--Scope of.

HEADNOTE:

Respondent No. 5, who was the Managing Director of a limited company, resigned his post and in his capacity as a shareholder filed an application in the District Court for compulsory winding up of the company, which was ordered. The Official Liquidator made an application before the District Judge that as the four Directors, respondent 1 to 4, had illegally, withheld or retained certain amounts, they became liable to refund them. Contesting this application respondents 1 to 4 requested that they might be allowed to cross examine respondent no. 5, which application was rejected. On appeal the High Court set aside the order of the District Judge and remanded the case to the City Civil Court, Bombay to record additional evidence under Order 41 Rule 27, Code of Civil Procedure.

On appeal it was contended in this Court that the High Court was wrong in directing additional evidence to be allowed under this Order.

Dismissing the appeal,

HELD : The High Court rightly ordered that additional evidence be recorded in this case. There was no justification whatsoever for the District Court to reject the evidence which the respondent had intended to lead or to disallow the production of documents. [895 H; 896 A]

Under O. 41 r. 27 it is only where the Court had improperly refused to admit evidence or where the appellate court required additional evidence to be recorded in order to enable it to pronounce judgment that it could make such an order. Under cl. (b) of this rule the Court may require additional evidence either to enable it to pronounce judgment or when it may require additional evidence to be recorded for any other substantial cause, [894 A-B]

Arjan Singh v. Kaetar Singh and others [1951] SCR 258, state of U.P. V. Manbodhan Lal Srivastava, [1958] SCR 533, Municipal Corporation for Greater Bombay v. Lala Pancham of Bombay, [1965] SCR 542 at 548 referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1283 of 1967.

Appeal from the Judgment & Decree dated the 22nd March/26th April/26th June, 1963 of the Bombay High Court in Appeal No. 38 of 1959.

V. S. Desai and S. K. Gambhir for the appellant.

S. T. Desai, Ramesh D. Divan and R. P. Kapur, for the Respondent Nos. 1-4.

R. M. Mehta, S. K. Dholakia and R. C. Bhatia, for the Respondent No. 5.

The Judgment of the Court was delivered by

JAGANMOHAN REDDY, -J-This appeal is by certificate against the judgment of the High Court of Bombay varying the judgment and decree passed against respondents 1 to 4 by the District Judge of Jagpur on an application under s. 235 of the Indian Companies Act 7 of 1913-hereinafter called the Act'.

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It appears that in or about April 1949 the Industrial & Agricultural Engineering Company (C.P.) Ltd.-hereinafter referred to as the Company' was formed under the Act with its registered office situated at Nagpur. From the date of the Company's incorporation till August 27, 1952 one Shantilal Nemchand Shah respondent 5 was the Managing Director, while respondents 1 to 4 were the Directors of the Company. On August 27, 1952, respondent 5 resigned as Managing Director and in his place two Directors C.V. Krisbnamurthi respondent 2 and M. Ganpatram respondent 3 were appointed Directors. These two new Directors were the employees and Directors of a concern known as Industrial & Agricultural Engineering Company (Bombay) Ltd.-hereinafter called the Bombay Company'. Respondent 4 T. K. Shamu is the cousin of respondent 1 Raghawa Desikachar. There was also a partnership firm consisting of respondent 1 and some others. The office of this partnership was located in the office of the Bombay Company. After August 27, 1952, respondent 5 having resigned the office of Managing Director was only a shareholder and it transpired that as the Company was not making profits, the Directors called a meeting of the shareholders of the Company on July 29, 1954, in order to obtain a Special Resolution for voluntary liquidation of the Company. Even before this meeting took place, respondent 5 as share-holder of the Company filed an application on July 26, 1954 in the District Court at Nagpur against the Company, respondents 1 to 4 and other parties praying for an order for compulsory winding up of the Company. The District Judge passed an order on July 13, 1955 directing compulsory winding up of the Company and appointed one K. S. Misra as the Official Liquidator of the said Company. The Official Liquidator Misra made a report to the District Court on April' 28, 1956 asking the Court to pass an order for the public examination of respondents 1 to 4-the Directors of the Company. The District Judge passed the order prayed for under s. 196 of the Act on July 7, 1956. Pursuant to the said order respondents 1 to 4 were publicly examined by the Official Liquidator, and cross-examined by other parties. The Official Liquidator also asked for the examination of respondent 5 who however was directed by the District Judge to be present in the Court. But since the District Judge was not in a position to know why and for what purpose respondent 5 was to be examined he directed the official Liquidator or Mr. Mani to make an application for

that purpose. On June 29, 1957 the Official Liquidator stated that he did not want to examine respondent 5. Again on July 10, 1957 the Official Liquidator requested the Court to examine respondent 5 and the learned Judge passed an order on the same day directing examination of respondent 5 at 3 P.M. on that day-

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On July 11, 1957, the Official Liquidator made an application that as the four Directors respondents 1 to 4 had illegally withheld or retained certain amounts specified therein they became liable to refund or repay the amounts with costs and with such interest as the Court deems fit. The items which were said to- be withheld were as follows

Commission in respect of sales of General Motors pumping sets worth about Rs. 5 lakhs at 4 per cent. to Bombay

Rs. 20,000-0-0

(2) Three percent commission on General Motors supplied, transaction worth Rs. 12 lakhs. Rs. 36,000-0-0

(3) Commission due on other articles supplied to Model Mills and Power House etc. Rs. 30,000-0-0

(4) For stock, furniture, motor car etc. purchased by the Bombay Company at a very low price. The amount mentioned being the difference between the real price and the purchase price Rs. 30,000-0-0

(5) Improperly remitted to a sister concern I. A. R. C. (Hyderabad) Ltd.' Rs. 2,686-3-0

(6) Commission on the sale of a boiler manufactured by Stein-Muller to M. P. Electricity Board for Itarsi Power House through the instrumentality of the Nagpur Company. Rs. 1,30,000-0-0

TOTAL Rs. 2,48,686-3-0

Thereafter the Official Liquidator applied for certain amendments to the application and for impleading respondents 1 to 4-Directors of the Company in liquidation. The District Judge by his order dated December 7, 1967 allowed the application and accordingly the application dated July 11, 1956 was amended. Respondents 1 to 4 by their reply dated December 27, 1957, showed cause against the said application of the Official Liquidator and requested that they may be allowed to lead evidence in connection with the charges mentioned in the application of the Official Liquidator. They also requested that they be allowed to cross-examine respondent 5 Managing Director of the said Company. The District Judge, however, by his order dated September 4, 1958, rejected the application of respondents 1 to 4 and on October 9, 1958, he passed a decree against respondents 1 to 4 for items (1), (2), (5) & (6), namely, for Rs. 20,000/-; Rs. 36,000/-; Rs. 2,686/3/- and Rs. 1,30,000/- with interest at 4 percent. p. a. The District Judge further directed the Official Liquidator to furnish a statement in respect of the amounts due on certain charges which was accordingly furnished by him on October 23, 1958. On October 25, 1958, the District Judge ordered respondents 1 to 4 to pay further amounts of Rs. 36,649-32 p.

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and Rs. 21,700-75p as per the report of the Official Liquidator. This order formed part of the decree dated October 9, 1958.

Respondents 1 to 4 preferred an appeal to the High Court of

Bombay which by an interlocutory judgment dated January 25, 1963 set aside the order made by the District Judge refusing respondents 1 to 4 permission to lead evidence and permission to cross-examine respondent 5. Accordingly the Bench ordered the case to be remanded to the City Civil Court at Bombay to record additional evidence in the said matter under O. 41 r. 27 Code of Civil Procedure and remit to it that evidence.

On an application dated February 11, 1963, the Bench of the High Court by its order dated February 12, 1963, refused to allow respondents 1 to 4 to produce certain documents which were not produced by them at an earlier stage. Pursuant to the aforesaid orders dated January 25, 1963 and February 12, 1963 respondents 1 to 4 led the evidence of 11 witnesses including themselves and cross-examined respondent 5. They also filed certain documents. No evidence was led by the Official Liquidator or respondent 5. After the record of the evidence was transmitted to the High Court the Bench by its judgment dated March 22, 1963 passed a decree against respondents 1, 2 and 3 to pay to the Official Liquidator of the Company a sum of Rs 11,973/12/- in respect of certain stock-in-trade, furniture, motorcycle and motor car sold by the said Company and a further sum of Rs. 2,686/8/3 being part of the debt remitted by the said Company with interest on the aforesaid amounts at 6 per cent from July 25, 1954 until payment. The remaining claim of the Official Liquidator was set aside and the decree of the District Court was reversed to that extent..

The first question that has been urged before us is whether the High Court of Bombay was right in directing additional evidence to be led by respondents 1 to 4 under O. 41 r. 27 Code of Civil Procedure. This Court has, in several decisions, laid down the circumstances in which an Appellate Court will be justified in directing additional evidence to be recorded for the disposal of the appeal. Order 41 r. 27 Code of Civil Procedure under which additional evidence could be called for states thus :

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

(b) 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.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

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It is apparent that by the terms of the above rule, it is only where the Court has improperly refused to admit evidence or where the Appellate Court requires additional evidence to be recorded in order to enable it to pronounce judgment that it can make such an order. Under O. 41 r. 27(1) (b) the Court may require additional evidence either to enable it to pronounce judgment or it may require additional evidence to be recorded for any other substantial cause, in *Arjan Singh V. Kartar Singh and others*(1) it was held that the legitimate occasion for admitting additional

evidence in appeal is when on examining the evidence as it stands some inherent lacuna or defeat becomes apparent, not where a discovery is made outside the Court, of fresh evidence, and an application is made to import it. The true test is whether the appellate court is able to pronounce judgment on the materials before it, without taking into consideration the additional evidence sought to be adduced. See also *State of U. P. v. Manbodhan Lal Srivastava*(2) and *Municipal Corporation for Greater Bombay v. Lala Pancham of Bombay and others*(3). The learned Advocate for the appellant, while admitting that the Appellate Court has power to record additional evidence submits that the High Court did not go through the evidence, nor did it apply its mind as to whether the case was such that it could not pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. This argument, however, ignores the provisions of O. 41 r. 27(1)(a) under which an Appellate Court can direct additional evidence to be recorded if the Trial Court had refused to allow or declined to record evidence which the party against whom the decree had been passed was prepared to produce before it. What we must, therefore, see is whether the District Judge had improperly rejected the request to record the evidence of the respondents and consequently whether the High Court was justified in directing additional evidence to be recorded. On a perusal of the record we have no doubt that the District Judge had improperly rejected the prayer of the respondents that they should be allowed to lead evidence in connection with the charges mentioned in the application filed by the Official Liquidator and that they should be allowed to cross-examine respondent 5.

The Roznama dated September 4, 1958 shows that on that day the four respondents, namely respondents 1 to 4 represented by Mr. Amin, and the Official Liquidator in person, appeared before the District Judge. The order made in those proceedings is as follows:

"Mr. Amin for the respondents wanted that the petitioner should be put into the witness box so as to enable him to cross-examine the petitioner on the point of alleged misfeasance. From the record it appears that the petitioner was under cross-examination for a great length of time and it is on the material elicited in his evidence, as also on the record otherwise available here, that the charge of misfeasance is made. Mr. Amin's contention

(1) [1951] S.C.R. 258. (2) [1958] S.C.R. 533.

(3) [1965] 1 S.C.R. 542 at 548.

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is that when the petitioner was cross-examined by Mr. Mani, Mr. Mani represented the four different companies and not these respondents. This may be so, but I do not think now I should allow another cross-examination of the petitioner when from the record it appears that a detailed and searching cross-examination was made of the petitioner. Besides, there was no question of leading any evidence, since the case was fixed for argument from 21-1-58. The only part which the parties had to play was to point out the documents on which each relied for proving or disproving the alleged misfeasance.

I do not think it is possible for me to put the hands of the clock behind by reverting to the stage of leading evidence, when this matter has been fixed for argument since 21-1-1958. Hence the request is rejected."

The above proceedings clearly show that no opportunity was given to respondents 1 to 4 because proceedings of January 12, 1958 show that as soon as written statement was filed on December 30, 1957 the District Judge fixed the case for argument. The proceedings of July 7, 1958 further show that Mr. Amin had brought to the notice of the Official Liquidator that he should be supplied with materials on which the Official Liquidator would rely for the alleged malfeasance on the part of his clients, but no materials were furnished by the Official Liquidator. Accordingly on the second hearing after the aforesaid application, a petition for submitting fresh evidence and for cross-examining respondent 5 was made but it was rejected. The show cause notice was given by the Official Liquidator on the basis of the public examination of respondents 1 to 4. It is only in answer to the show cause notice that respondents 1 to 4 could lead evidence and cross-examine respondent 5. It may be mentioned that misfeasance action against the Directors is a serious charge. It is a charge of misconduct or misappropriation or breach of trust. For this reason the application should contain a detailed narration of the specific acts of commission and omission on the part of each Director quantifying the loss to the Company arising out of such acts or omissions. The burden of proving misfeasance or nonfeasance rests on the Official Liquidator. The Official Liquidator it may be mentioned, merely relied upon the evidence recorded in public examination of the Directors and on a few documents tendered in evidence. At the stage of public examination there was no charge of misfeasance against the Directors and they were not in a position to know what would be the grounds that would be alleged against them for recovering any amounts, for the loss said to have been caused to the Company by reason of such misfeasance. The application made by the Official Liquidator did not give sufficient particulars which, in our view, it should have. Once a show cause notice was given to respondents 1 to 4 the Official Liquidator did not lead any evidence nor rely upon any other documents, nor did respondent 5 who was instrumental in initiating the misfeasance case against respondents 1 to 4 lead any evidence. In our view, there was no justification whatsoever for the District Court to reject the evidence which

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the respondents had intended to lead or to disallow the production of documents other than those already produced, and for that reason the High Court rightly ordered that additional evidence be recorded in this case.

Now coming to the merits of the appeal. The first challenge is to the disallowance of Rs. 1,30,000/-. This amount represented the commission on the sale to M. P. Electricity Board of a Stein-Muller Boiler for Itarsi Power House through the instrumentality of the Nagpur Company. The reason why the High Court disallowed this amount is because the Official Liquidator failed to establish that there was any connection with the Nagpur Company and the sale of this Boiler to the Itarsi Power House of the M. P. Electricity Board. On the admitted facts of the case itself this conclusion is amply justified. It appears that there was a partnership firm known as Industrial and Agricultural

Engineering Company hereinafter called the I.D.D. This partnership firm was the sole selling agent for Stein-Muller machinery and products. On October 31, 1953, the M.P. Electricity Board agreed to purchase from the partnership a Stein Muller Boiler for a sum of about pound, 86,000 in respect of which there was an agreement between the I. D. D. and the Electricity Board. The Electricity Board agreed to pay a sum of Rs. 1,50,000 to the I. D. D. for certain services. Out of this sum the Official Liquidator claimed Rs. 1,30,000/- on the ground that it amounted to 10 percent of the commission which was due to the Nagpur Company from the I.D.D. and which was wrongly withheld by the latter Company, with the acquiescence of respondent I who was one of the partners of the I. D. D. The case of the Official Liquidator was that Shantilal Shah then Managing Director of the Company had contacted the officers of the M. P. Electricity Board and it was through his efforts that the ultimate contract was entered upon. Accordingly a part of the commission which the I. D. D. was claiming on behalf of the Nagpur Company may be allowed to the Company. The defence of respondents 1 to 4 is that the Nagpur Company had nothing to do with the I. D. D. and that the order was obtained by the I. D. D. partnership itself. In our view, it is not the case of the Official Liquidator that there was an agreement under which a part of the commission was payable by the I. D. D. to the Nagpur Company and much less is there any justification for our holding that respondents 1 to 4, even if there was any agreement, which on the evidence we say there was not, had intended to withhold the amount. The High Court has gone into the evidence very carefully and we do not see any reason for disagreeing with its conclusion.

With respect to item (1), namely, commission in respect of sales of General Motors pumping sets worth about Rs. 5 lakhs at 4 per cent viz. Rs. 20,000/-, the foundation of the claim is the payment made by one Premnath Transport Company at Delhi to the Bombay Company as infringement commission, because they had sold certain machinery of the General Motors Ltd. in Bhopal area, the agency of which was held by the Company, and consequently the Company agreed to give an infringement commission of 4 per cent to the Bombay Company. 897

This amount of Rs. 20,000/- is claimed out of that amount. It is contended that Bhopal was within the area allotted to the Nagpur Company and, therefore, it was entitled to the commission. This was denied by Directors. The Official Liquidator failed to establish that the Nagpur Company was entitled to the whole or part of the infringement commission by reason of the fact that it was a sole selling agent of the General Motors parts in that particular area or it had an exclusive sub-agency from the Bombay Company. The High Court considered that the evidence in the case was not sufficient to establish either of these claims. We have not been persuaded to hold otherwise.

In so far as item (2) for Rs. 36,000/- is concerned, here again the Nagpur Company was being paid 15 per cent and 20 per cent commission in respect of machinery and spare parts respectively by the Bombay Company which Company was retaining 5 per cent of the commission in respect of the orders placed by the Nagpur Company. According to the Official Liquidator the Bombay Company was only entitled to retain 2 per cent and consequently the Nagpur Company would be entitled to a further 3 per cent which had been wrongly withheld. Here again the High Court considered that there was not sufficient evidence to sustain the claim. Shantilal

Shah who gave evidence did not spell out the actual terms of the agreement between the Nagpur Company and the Bombay Company by reason of which the Bombay Company was entitled to retain only 2 per cent and not 5 percent. It was held, and there is nothing to establish to the contrary. Inasmuch as the evidence of respondents 1 to 4 as Directors of the Company was confirmed by the first minutes, the explanation given by the respondents must be accepted. Reliance was placed on sub-item (2) of Item 2 of the minutes of the Board of Directors of the sister companies at which Shantilal Shah was also present. It was agreed and accepted by all the associates that a commission of 2 per cent on all such imports on the c. i. f. or f. o. b. invoice value, as the case may be, should be paid to the Bombay Office. But in so far as sub-item V of Item III was concerned, it was unanimously agreed that the associated offices should pay a commission of 5 percent on their imports covered by, the licences owned by the Bombay office.

The third item is for Rs. 30,000/- in connection with the supplies to Model Mills and the Power House in Nagpur with the products of the Mysore Electric Company Ltd. There was some suggestion that the Bombay Company should reduce its commission from 5 per cent to 2 per cent but as the High Court pointed out that it had absolutely no connection whatsoever with the inter-Company transaction in respect of goods of which agency was held by the Bombay Company. The evidence of Shantilal Shah in this regard was considered to be highly unsatisfactory. Apart from that Exhibit T-a letter dated February 2, 1950 clearly showed that the arrangement between the Nagpur Company and the Bombay Company was to give commission at a particular rate. The High Court extracted the relevant portion of the letter which merits repetition, It says :

"I am glad to inform you that we have been able to get some additional concession by way of extra discounts from the Mysore
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Lamp Works and as intimated to you personally during your recent visit, we shall give you a portion of this extra commission, thus in all 25 and 2 1/2 per cent, discount on the list price."

It is no one's case that the commission according to this letter was not paid, and as the Nagpur Company has received this commission it cannot claim any additional commission. Insofar as item (4) is concerned, it has reference to four amounts, namely Rs. 7,689/12/- Rs. 2,184/-; Rs. 9,827 and Rs. 2,100/-. Nothing has been shown as to why these claims were not properly allowed. The appellant, however, challenges the item for Rs. 9,827/- as not being the correct amount. In fact the book value is Rs. 39,309/4/9. The High Court took the difference between the book value and the stock purchased by the Bombay Company after August 23, 1952, since the date of resignation of Shantilal Shah. Accordingly it took the opening stock as per the balance sheet dated March, 31, 1953 at Rs. 53,574-4-0, The closing stock as per audit report dated March, 13, 1953, reduced to the extent of 7/9 was Rs. 24,092-0-0 leaving an amount of Rs. 29,482-4-9. This amount was transferred to the Bombay office and the difference between the above amounts amounted to Rs. 9,827 /- . Shantilal Shah was questioned about this but he did not know how it was made up of. No explanation was also given on behalf of the Official Liquidator as to how the item was made up of. For this reason this item was

not allowed. Similarly no exception can be taken to the amount of Rs. 2,100/- which was allowed because within few months of its purchase the scooter was sold to the Delhi Branch for only Rs. 6,001. These two items, namely Rs. 9,827/- and Rs. 2,100/- which are allowable to the Liquidator come to Rs. 11,927 the other two items for Rs. 7,689/12/- and Rs. 2,184/- which relate to the purchases actually made by the Bombay Company in pursuance of their offer and in pursuance of the majority resolution of April 25, 1953 and the difference between the book value and the purchase value of the car by the Bombay Company were also allowed. Apart from this, item (5) for a sum of Rs. 2,686/3/- in connection with the wrongful remission to the Hyderabad Company was also allowed. There seems to be no dispute on this account because the whole of the amount as claimed has been allowed.

In the result we find no reason to interfere with the Judgment of the Bombay High Court under appeal. Accordingly the appeal is dismissed with costs.

P.B.R.

Appeal dismissed.