ARK. STATE HIGHWAY COMMN. *v.* CLARENCE BROWN ET UX

5-4038 410 S. W. 2d 737

Opinion delivered January 30, 1967

1. COURTS—STATEMENT OF EVIDENCE OR PROCEEDINGS—JURISDICTION & PROCEDURE.—Where a statement of the evidence and proceedings to be used when a reporter's transcript is not available does not accurately reflect the evidence which was received, the matter is for the attention, correction and disposition of the trial court.

2. COURTS—STATEMENT OF EVIDENCE OR PROCEEDINGS—JURISDICTION & PROCEDURE.—In view of the statute, trial court had jurisdiction as well as responsibility, to settle record on appeal where, because of breakdown in court reporter's machine, appellant was unable to file a complete transcript of testimony and proceedings, and filed a statement of evidence from best available means.

3. APPEAL & ERROR—STATEMENT OF EVIDENCE OR PROCEEDINGS—DISCRETION OF TRIAL COURT, ABUSE OF.—Appellant's assertion that the tardy filing of appellees' objections and proposed amendments to a statement of evidence and proceedings filed by appellant required that appellant's motion to strike be granted and its version of the record accepted held without merit in absence of abuse of trial court's discretion to permit the filing of pleadings out of time as the circumstances of the case and justice require.

4. NEW TRIAL—UNAVOIDABLE CASUALTY AS GROUNDS FOR—WEIGHT & SUFFICIENCY OF EVIDENCE.—Trial court did not err in refusing to grant appellant's motion for new trial on ground of unavoidable casualty where trial judge followed appropriate procedure in settling the record and no prejudicial error resulted.

5. TRIAL—INSTRUCTIONS TO JURY—ISSUES, PROOF & VARIANCE.—Appellant's assertion of error because of trial court's refusal to give its instruction No. 7 held without merit where the portion of the record transcribed by court reporter showed the instruction was given, and trial court had accepted appellant's version of the record for that portion not transcribed only as to testimony of appellant's witnesses.

6. EMINENT DOMAIN—COMPENSATION—EVIDENCE OF LOSS OF ACCESS, ADMISSIBILITY OF.—Trial court did not err in refusing to grant condemnor's motion to strike testimony showing that the means of access to and from a portion of landowner's farm left on one side of a controlled access highway right-of-way condemned from and to that portion remaining on the other side was not the kind of access that would prevent a decrease in value of the former portion.

Appeal from Crawford Circuit Court, *Carl Creekmore*, Judge; affirmed.

George O. Green and *Don Langston*, for appellant.

Ralph W. Robinson and *Floyd G. Rogers*, for appellee.

JOHN A. FOGLEMAN, Justice. Appellant filed its complaint and declaration of taking condemning 24.83 acres belonging to appellees, Clarence and Lorena Brown, in the Circuit Court of Crawford County on May 25, 1965. These lands, except for oil and gas interests that would not interfere with the surface use for highway purposes, were taken outright, along with temporary construction easements over 8.2 acres for construction of a controlled access; Interstate Highway No. 40. Trial to a jury resulted in an award of $40,000.00 to the landowners, from which this appeal is taken.

Appellant finds itself in the unfortunate predicament of being unable to file a complete court reporter's transcript of the testimony and proceedings in the case because of a breakdown in the reporter's recording machine. This was discovered after the verdict and judgment and the giving of notice of appeal. Appellant then availed itself of the remedy this court has held to be applicable in these circumstances—the filing of a statement of the evidence or proceedings from the best available means, which in this case was the recollections of counsel for appellant, aided by notes taken by him during the trial. See Ark. Stat. Ann. § 27-2127.11 (Repl. 1962); *Tomlin* v. *Reynolds Mining Corp.*, 231 Ark. 393, 329 S. W. 2d 552; *Mowrey* v. *Coleman*, 224 Ark. 979, 277 S. W. 2d 481. While this statute requires that appellee, in such cases, serve objections or propose amendments within ten days, appellees did not file their response until twenty days had elapsed.

Thereafter, the court heard the parties, caused witnesses who testified on behalf of appellees to be brought

in, sworn and examined as to the testimony and ordered that the portion of the record offered by appellant showing the testimony of appellant's witnesses and the statements of appellees' witnesses be approved and incorporated into the record. Prior to the making of this order, appellant moved to strike the objections and proposed amendments filed by appellees, contending that by failure to respond within the period set out by statute, appellees had waived their right to object and that the appellant's statement as to the testimony became the record thereof, insofar as this appeal is concerned. When this motion was denied and the court's order settling the record made, appellant moved for a new trial on the premise that the inability of appellant to have a complete stenographic report of the evidence and proceeding constituted accident or surprise which ordinary prudence could not have guarded against, a statutory ground for new trial. This motion was also denied and appeal was also taken from the order overruling that motion. Appellant now contends that the trial court committed error in denying its motions.

A review of our statutes and the decisions construing the Federal Rules of Civil Procedure, from which our statutes on the subject were adopted, along with the decisions above cited, clearly shows that the trial court has jurisdiction, as well as the responsibility, to settle the record on appeal. Ark. Stat. Ann. § 27-2127.11 requires that any such statement filed by appellant, with objections or proposed amendments, be submitted to the trial court for settlement and approval, and that the *same as settled and approved by the trial judge* be included in the record on appeal.

While Ark. Stat. Ann. § 27-2129.1 (Repl. 1962) provides that it is not necessary for the record on appeal to be approved by the trial court, it requires that any difference that arises as to whether the record discloses what occurred in the trial court be submitted to and settled by the trial court which is authorized to direct that any omission or misstatement be corrected. The

cited sections were adopted from former Rule 75 (h) and (n) of the Federal Rules of Civil Procedure [now 75 (e) and (d)]. Under these rules, it has been held that such a statement not accurately reflecting the truth and not submitted to the trial judge is for the attention, correction and disposition of the trial court. *Miller* v. *Miller*, 114 F. 2d 596 (D. C. Cir. 1940).

If the judge cannot remember the evidence, he may call witnesses who gave or heard the testimony. *Citizens National Trust and Savings Bank* v. *Welch*, 119 F. 2d 717 (9th Cir. 1941). There is no error in the trial judge denying a motion to amend the record where he has no recollection of the matter sought to be inserted. *Cox* v. *United States*, 284 F. 2d 704 (8th Cir. 1960), *cert. denied*, 365 U. S. 863, 5 L. Ed. 2d 825; *Cox* v. *General Elec. Co.*, 302 F. 2d 389 (6th Cir. 1962). The finding of the trial judge is conclusive unless clearly unreasonable, in the absence of any charge of deliberate and intentional falsification of the record. *Gunther* v. *E. I. Du Pont de Nemours & Co.*, 255 F. 2d 710 (4th Cir. 1958); *Belt* v. *Holton*, 197 F. 2d 579 (D. C. Cir. 1952). It is only where the adverse party files no objections, or where no specific fault is pointed out by the trial judge that appellant's statement of evidence is accepted by the appellate court. See *Laughlin* v. *Berens*, 118 F. 2d 193. (D. C. Cir. 1940); *Citizens National Trust & Savings Bank* v. *Welch*, 119 F. 2d 717 (9th Cir. 1941).

But the appellant says that the tardy filing of appellees' objections and proposed amendments requires that its motion to strike be granted and that its version of the record be accepted. Except as limited by statutes relating to the granting of default judgment when the first pleading of a defendant is not timely filed, a trial court has the discretion to permit a litigant to file pleas or other motions out of time as the circumstances of the case and justice may require and this discretion may not be controlled by this court unless it has been exercised to the palpable prejudice and injustice of the adverse party. *Southern Improvement Co.* v. *Elliott*, 160

Ark. 633, 255 S. W. 299; *Norris* v. *Kellogg & Company*, 7 Ark. 112; *Crow* v. *State*, 23 Ark. 684; *Bookout* v. *Hanshaw*, 235 Ark. 924, 363 S. W. 2d 125. It has been held that striking a cross complaint filed two months after the filing of the suit was erroneous where the filing occasioned no delay. *Huffman* v. *City of Hot Springs*, 237 Ark. 756, 375 S. W. 2d 795.

The trial judge seems to have followed the appropriate procedure in settling the record, and we find no prejudicial error. Appellant's contention as to the refusal of its motion for new trial for unavoidable casualty has been answered adversely to appellant in *Ark. State Highway Commn.* v. *Clay*, 241 Ark. 501, 408 S. W. 2d 600.

Error in refusal to give appellant's requested instruction No. 7 is also asserted. That portion of the record transcribed and certified by the court reporter shows that this instruction was given. This statement will have to be accepted by this court, particularly in view of the fact that the trial court accepted appellant's version of the record only as to the testimony of witnesses called by appellant.

Appellant also contends that the trial court erred in overruling its motion to strike the testimony of certain witnesses concerning damages for loss of access to 57 acres of appellees' farm. This is based on appellant's assertion that this tract will be accessible to the remainder of appellees' tract by reason of the fact that access will not be controlled under a bridge over the relief along the eastern boundary of the property and along the northern right-of-way line of the highway, which will traverse the Brown farm from northeast to southwest. The answer to this contention lies in the fact that there was testimony that water stands ten months of the year on this area; that heavy farm implements and trucks required for use on the tract or in harvesting and transporting crops could not be moved in and out by this means; that the area would wash out and be rough; and that this amounted to no access, or was not the

kind of access that prevented a great decrease in the land value due to severance. This presented a factual question for determination by the jury and the motion to strike was properly denied.

Appellant asserts that there is no substantial evidence to support the jury verdict, but with becoming candor, appellant's counsel admits that there is no merit in this point unless the case should be reversed for one of the other errors asserted. It is sufficient to say that after a careful examination of the record, we agree with this admission.

The judgment is affirmed.