

**(1922) 05 CAL CK 0002**

**Calcutta High Court**

**Case No:** None

Hriday Krishna Pal and  
Others

APPELLANT

Vs

Rajani Kanta Pal and  
Others

RESPONDENT

---

**Date of Decision:** May 3, 1922

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 27

**Citation:** AIR 1923 Cal 300 : 68 Ind. Cas. 293

**Hon'ble Judges:** Ghose, J

**Bench:** Single Bench

---

### **Judgement**

1. This appeal is preferred by the plaintiffs and it arises out of a suit for ejection. The only objection taken to the judgment of the lower Appellate Court which reverses the judgment of the Trial Court is that the learned Subordinate Judge admitted evidence on behalf of the defendants after the arguments in the appeal had been heard and judgment reserved and based his decision upon that evidence. The objection taken is that the lower Appellate Court had no jurisdiction to admit the evidence complained of under Order XLI, Rule 27, Code of Civil Procedure, as it did not do so either under clause (a) or Clause (b) of sub Rule (1) of Rule 27, and that the learned Judge did not record any reason for admitting it as provided by Sub-rule (2) of that rule. The order of the learned Judge, dated the 2nd of April 1920, runs thus: "Arguments heard and judgment reserved. Let the document filed by the appellants be kept with the record". On the 26th of April the learned Judge delivered judgment decreeing the appeal preferred to him. It may be observed that there is actually no order, as I gather, by which the lower Appellate Court admitted their document in evidence. While, however, pronouncing judgment, the learned Judge relied upon the document, which, he says in his judgment, is marked Exhibit B. The power of the Court to admit evidence in appeal is restricted, and can be exercised only under the provisions of Rule 27 of Order XLI, Code of Civil Procedure, as has been observed by

their Lordships of the Privy Council in the case of *Kessowji I(sic)ssur v. G. I. P. Ry Co.* 31 B 881 PC : 390 Bom. L. R671 : 11 C. W. N. 721 : 6 C. L. J. 5 : 4 A. L. J. 347 : 2 M. L. T. 435 : 34 I. A. 105 (P.C.). Their Lordships observed referring to Section 563 of the CPC of 1882. "The legitimate occasion for Section 568 is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. That is the subject of the separate enactment in Section 623." The appellants also rely upon the case of *Gajadhar Prosad v. Lohia* 35 Ind. Cas. 698 : 24 C. L. J. 457. the facts of which are almost the same as in the present case with regard to this question. It does not appear in this case, because nothing has been stated by the learned Subordinate Judge, as to why this evidence was taken in.

2. It is urged by the learned Vakil for the respondents that this document which purports to be a judgment of the Revenue Court was produced for the purpose of showing that the plaintiffs' evidence with regard to possession was untrue and that, it being a judgment, the plaintiffs could not possibly adduce any evidence in rebuttal of it and, therefore, the fact that this document was admitted and relied on by the Court of Appeal below could not have prejudiced the plaintiffs in any way and that the objection is untenable. It seems to me that where evidence has been admitted in contravention of the provisions of Order XLI, Rule 27, Code of Civil Procedure, it is not for the Court of Appeal to see whether the evidence is incontrovertible or beyond doubt but it should only be seen whether it ought to have been taken at that stage or not. Reliance has also been placed on behalf of the respondents on the case of *Hafiz Abdul Rurim v. Sri Kishen Rai* 11 C. 139 PC : 5 Ind. Dec. (N. S.) 851. and on the case of *Gopal Singh v. Jhakri Rai* 12 C. 37 PC: 6 Ind. Dec. (N. S.) 25. in support of the proposition that the irregularities complained of on the part of the lower Appellate Court ought not to be considered sufficient for setting aside the judgment. I think, however, having regard to the rule and the procedure followed by the learned Subordinate Judge, that this appeal should be allowed and the case should go back to the lower Appellate Court for a rehearing of the appeal. If the Court thinks at the rehearing that there is sufficient ground for taking additional evidence it will do so having regard to the provisions of Order XL, Rule 27, Civil Procedure Code, as explained in the cases already referred to. If the lower Appellate Court allows fresh evidence to be taken on behalf of the defendant, it must also allow the plaintiffs an opportunity to produce such evidence as they think fit to rebut the additional evidence adduced by the defendants. It is desirable, in the circumstances of the present case, that the appeal should be re-heard by some other Subordinate Judge than the Judge who heard it previously. Costs will abide the result.