(1869) 05 CAL CK 0011

Calcutta High Court

Case No: Special Appeal No. 3000 of 1868

Ramesh Chandra Roy		APPELLANT
	Vs	
Nizamat Ali		RESPONDENT

Date of Decision: May 4, 1869

Judgement

Bayley, J.
This was a suit for a kabuliat at enhanced rate. The defendant pleaded his occupancy as talookdar at a fixed rate of rent. The first Court gave the plaintiff a decree for a kabuliat at rupees 2, the amount claimed being rupees 6 per kani. The lower appellate Court upheld the judgment of the first Court. The only point urged in special appeal is, that the plaintiff having failed to prove the specific rate he sued for, viz., rupees 6 per kani, his suit should have been dismissed at once under the Full Bench decision to that effect. This objection was not taken before the lower appellate Court, although the question of rate was clearly before that Court. The pleader for the special appellant however contends, on this point, that it has been laid down in Shama Churn Chuckerbutty v. Bindabun Chunder Roy Case No. 1395 of 1866; January 30th, 1868. (B.L.R. Sup. 982.), that every new exposition of law, as made by the Full Bench, should always be followed by us; and that this being so, the plaintiff having failed to make out the precise rate which he sued for, his suit was liable to dismissal.

2. In the first place the decision of the Full Bench in Shama Churn Chuckerbutty v. Bindabun Chunder Roy Case No. 1395 of 1866; January 30th, 1868. (B.L.R. Sup. 982.) was exclusively confined to the question as to whether an appeal lay to this Court as to the reasonableness or otherwise of the order of the lower Court admitting a review, after the expiry of the prescribed period of 90 days; and in the next place, I am aware of no rule or authority which makes it imperative on the Division Benches to follow every ruling of the Full Bench, when the point subsequently decided by that ruling, was never pleaded in the Court below. If this were so, every case in which a Full Bench decision is passed intermediately between the date of the decision of the lower appellate Court, and that of the hearing of the special appeal, has to result in an entire dismissal of the plaintiff"s suit,

on the authority of the subsequent Full Bench ruling, although the defendant may not have contested the plaintiff''s claim as to that point.

3. I do not think, therefore, that, in a special appeal like this, the objection, now taken before us, ought to be allowed. Besides, the justice of the case does not, it seems to me, require that such an objection should be allowed to be taken at this late stage of the case. The lower Courts have, after a careful investigation, come to a finding as to what was the fair and equitable rate of rent due to the plaintiff, and nothing has been urged as against this finding on evidence.

4. I would dismiss the appeal with costs.

Mitter, J.

5. I concur. The objection now raised by the special appellant was not taken before either of the lower Courts; and I see nothing in the justice of the case to induce me to allow at such a late stage of the proceedings.

6. The Full Bench decision in the kabuliat case, Golam Mahomed v. Asmut Allee Khan Case No. 1175 of 1867; March 19th, 1868. (B.L.R. Sup. 974), does not rule that, in every case for a kabuliat in which the plaintiff has failed to prove the specific rate claimed by him, the Court is bound, as a matter of course, to dismiss the suit at once. All that has been laid down by that decision is, that a suit for a kabuliat being in the nature of a declaratory suit, the Court would be justified in dismissing it, if it finds that a plaintiff has failed to prove his right to obtain a kabuliat upon the precise terms which he sought to impose upon the defendant.

7. As regards the case of Din Dyal Paramanick v. Surendra Nath Roy 3 B.L.R. A.C.J. 78. I wish to observe that the objection was taken as soon as the question of rates was finally determined; and it appeared to us that the justice of the case required that that objection should be allowed. The plaintiff''s suit being in the nature of a suit for declaration of right, it was quite in the discretion of the lower Court to make that declaration, notwithstanding the failure of the plaintiff to make out the specific rate he had sued for. The special appellant did not raise any objection in the lower Courts against the exercise of this discretion, and he is therefore not now in a position to say that those Courts have exercised it in an improper manner. If we were to allow the special appellant to take this objection at such a late stage of the proceedings, the result would be that the special appellant, who has hitherto fought the case upon different grounds, and failed to make out those grounds, would succeed in getting rid of two adverse decisions passed by two competent Courts of Justice, after a careful investigation into the merits of the case, and that upon a ground which was never taken before in either of those Courts. I agree in rejecting this special appeal with costs.

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(1) Before Mr. Justice Phear and Mr. Justice Hobhouse.

Dindayal Paramanik (Defendant) v. Surendranath Roy (Plaintiff). *

[25th June, 1868.]

JUDGMENT.

Phear, J.--The plaintiff in this suit seeks to obtain a kabuliat from the defendant, at a certain rate of rent specified. The first Court has found that he is not entitled to obtain a kabuliat at the rent so specified and claimed, but, nevertheless, has decreed that he shall obtain one at the old rates paid by the defendant, which were less than those of the kabuliat in question.

Against this decision, the defendants appealed to the Judge, in whose judgment we find it stated:-- "The next plea is that, as the lower Court found that the plaintiff had not proved his claim to a kabuliat at enhanced rates, no decree for kabuliat, even at the old rates, should have been given." The Judge went on to make some observations with regard to this plea, and eventually overruled it. Finally, he dismissed the appeal, and confirmed the decision of the first Court.

The defendant appeals to this Court specially, and one of the grounds of appeal is that, "when the lower Courts found that the plaintiff could not prove the rent for which he tendered the potta to your petitioners, they should have dismissed the plaintiff"s case, without making any further enquiry." There can be no doubt that this objection is a perfectly good objection to the Judge"s determination of the matter of law, which as we have mentioned, the appellant raised before him; and the only question that has occurred to us, with regard to the defendant"s right to succeed in special appeal on this head is this, namely, whether this defence to the plaintiff"s suit, which the defendant first set up in the appellate Court below, and now relies upon, not having been taken, as in fact it was not taken in the Court of first instance, ought to have been allowed to be taken in the Court of Appeal.

After a little consideration, we are of opinion that an objection of this kind, which is founded upon law only, may be made by a party to the suit in the Court of Appeal, although it has not been made in the Court below. Perhaps, it might be said generally, that points which have not been taken in the Court below, ought not to be taken in a Court of Appeal; and at any rate, whenever so taken, if they are founded in any material degree upon matters of fact, the Court of Appeal would probably do right, as a general rule, to refuse to entertain them, because it can never be known with certainty whether if the point had been taken in the Court of first instance, and the opposite party been allowed to bring forward evidence, which might have seemed to him necessary in consequence, the facts before the Court would not have assumed a different aspect from that which they do exhibit under the existing circumstances of the case. As regards a pure point of law, no doubt, this argument does not apply, but still it is inconvenient, to say the least of it, both to the Court and to the parties that a point of law should be sprung in a Court of Appeal,

which had not been raised and discussed before the Court. It is too, somewhat unfair to the lower Court, that is judgment should be objected to, on the ground of omission to decide a question, to which its attention had not been directed by the parties, or which was not necessarily involved in the substance of the contest between them. And we do not think that an appeal Court would act improperly, if it declined to listen to an objection of this sort so made before it. However, in the present case the Judge has, as we have already mentioned, entertained the objection of the special appellant, and given a judicial decision upon it, and we think that there is certainly nothing necessarily wrong on the part of a Court of Appeal, in entertaining a point of law, for the first time, which had not been raised in the Court below. This being so, we cannot see how we can avoid giving liberty to the special appellant to object in law before us to the decision which the Judge has pronounced.

We have already said that the decision is not a correct one. In a case lately determined by a Full Bench of this Court, it was expressly held that, when a plaintiff claims of the defendant a kabuliat at a specified rent, his suit fails, and ought to be dismissed, if he does not succeed in establishing his right to a kabuliat at that specified tent. Obviously (indeed, it is admitted by the respondent in this case), the plaintiff here, whatever were the merits of the suit, in other respects, did fail to make out to the satisfaction, either of the first Court, or the second Court, that he was entitled to obtain from the defendant a kabuliat at the amount of rant which be claimed. Under the ruling, then, of the High Court to which we have already referred, the Courts below ought, as a matter of law, to have dismissed the plaintiff"s suit on this ground.

The objection of the special appellant, therefore, is made out. We decree the appeal, and dismiss the plaintiff"s suit, but without costs in either of the Courts below; the special appellant to have his costs of this Court only.

* Special Appeal No. 3180 of 1867, from a decree of the Additional Judge of Nuddea, dated the 30th August 1867, affirming a decree of the Deputy Collector of that district, dated the 23rd May 1867.