(1869) 02 CAL CK 0003

Calcutta High Court

Case No: None

Kachekalyana Rungappa Kalakka Tola Udiar — APPELLANT

Vs

Kachivigajaya Rungappa Kalakka Tola Udiar — RESPONDENT

Date of Decision: Feb. 24, 1869

Judgement

1. Their Lordships have considered this case, and they must, in the first place, express their great regret that the record contains no statement of the grounds of the decision of the High Court, which is now under appeal. The Charter of the High Court of Judicature expressly requires that the reasons of its decisions should be recorded by the Judges, and transmitted for the information of this Court; and it is the subject of great regret, especially in a case which comes before their Lordships ex parte, that the grounds of the judgment appealed from should be wanting on the record. But in the absence of any such information, their Lordships must deal with the case as it appears on the record in this present suit. The first objection which is taken is, that, in this case, no issues were directed in the manner which has been prescribed by the practice of the Courts in India. But the order of the 19th of December 1862, which directs that the matter shall be referred to ascertain the amount of maintenance which may appear to be justly and properly payable with reference to the means of the defendant and the other facts of the case, and to proceed to decision in the manner indicated in section 351* of the Code of Civil Procedure, invalidates any such objection, because, that is in substance an order for enquiry, and an order for enquiry raising the very points upon which the appellant has relied in the argument before this Court, for it is a direction to ascertain the amount of maintenance which may appear to be justly and properly payable, with reference to the very point which it was urged ought to have been taken into consideration, viz., the means of the defendant, in connection with the other facts of the case. It appears to their Lordships to be impossible to object to such an enquiry as that, upon the ground of its not

being sufficient. It is, therefore, equivalent to issues, and rendered any further issues entirely unnecessary. The first ground of objection, therefore, fails.

2. We proceed, then, to the second ground, viz., that there was in this case an improper rejection of evidence. Now it appears to their Lordships, that, under an enquiry, such as that to which I have alluded, it was obviously competent to either party to produce evidence in support of his case during the conduct of that enquiry; and if evidence had been properly tendered on the part of the appellant, and had been improperly rejected by the Judge, such improper rejection of evidence would have constituted a valid ground for appeal. But we find that, in fact, there was an appeal from the decision of the Judge,--a decision arrived at in the prosecution of that enquiry, and eleven grounds for the appeal from that judgment are stated. In considering these eleven grounds, we find, in the first place, that the appellant raised the case that the plaintiff"s case was barred by the Statute of limitation; and, secondly, the plaintiff not having produced, nor given notice to the defendant to produce the istemrari sunnud of the zemindar, no judgment could be passed as to the nature of the property. Now that appears to be again raising the same question which had been decided before, viz., as to whether this property was acquired property, or whether it had been inherited? It appears to have been originally acquired by one zemindar, but it had descended to the then zemindar, and, therefore, it could not then be properly considered as acquired property. That had been already decided, and that point, once before decided, seems to be intended to be raised again by the second ground of appeal. The third ground proceeds to raise the objection as to the plaintiff"s mother being entitled to maintenance, and then the fourth is "the Civil Judge"s estimate of the income of the "zamindari is erroneous, and even opposed to the plaintiff"s own allegation." The fifth is, "the Civil Court has not correctly estimated the wants of the plaintiff." We need not go at length into the other grounds; but it is to be observed that these grounds proceed mainly upon an insufficiency of the evidence produced by the plaintiff, and that they do not in the least degree point to any evidence having been tendered by the appellant, or having been improperly rejected by the Judge; and under these circumstances, even if the appellant had any such ground of appeal, if he did not think fit to produce it before the Court, where such an appeal might regularly have been prosecuted, and where such a ground would have afforded a sufficient ground for such an appeal, in the opinion of their Lordships it is not competent for him to maintain it now; and it appears to have been raised for the first time in the petition of the 6th of August 1864, No. 16, page 11, where it is said: "Because your petitioner was not permitted to prove what the net income of the zamindari was." Their Lordships, therefore, are of opinion that the second ground of complaint also fails.

3. Then it is said that the decision is erroneous, inasmuch as it is based upon an assumption that the income of the zamindari was Rs. 50,000, which is more than has been alleged in the original plaint, which only claimed maintenance as against an income of Rs. 40,000. But, in the opinion of their Lordships this is a misconception of the terms of the judgment. The judgment appears to have proceeded upon this. The claimant alleges

that the income of the zamindari is Rs. 40,000, but the Judge finds, that, upon a former occasion, many years ago, it is true the appellant had admitted the income to be Rs. 50,000, and that on a former occasion, also many years ago, in the year 1831, a sum of Rs. 250 per mensem, or Rs. 3,000 a year, had been awarded to another brother of the zemindar for maintenance. The Judge, proceeding upon that, says:--"I find an allegation of Rs. 40,000 on the one side, an admission of Rs. 50,000 on the other, and a former order allotting for maintenance Rs. 3,000; and, in the absence of any evidence to the contrary, the fair inference to be drawn from these documents is that Rs. 2,000 is a reasonable sum for maintenance, with the addition of a house." Under the circumstances, their Lordships are of opinion that it cannot with justice be said that the Judge has proceeded upon the foundation of the income being Rs. 50,000, and therefore in excess of the allegation made by the claimant. It remains only to notice the other point with respect to the residence. It may, we think, be fairly assumed that this question was taken into consideration by the Judge in fixing the amount of the maintenance. It was a matter for the discretion of the Judge, and a matter with which this Board would be very reluctant to interfere, unless it could be shown that that Judge had miscarried in some very gross and striking manner. Now, in the opinion of their Lordships, there is no such miscarriage in this judgment, having regard to the documents which were proved, and to the absence of any other evidence. It appears to their Lordships not to be unreasonable to award the sum which has been awarded by the Judge, with the addition of the residence, and therefore their Lordships will feel it their duty humbly to advise Her Majesty that this decree should be affirmed, and the appeal dismissed.

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When a case may be remanded by Appellate Court.	Sec. 351:--If the Lower Court shall have disposed of the case upon any preliminary point so as to exclude any evidence of fact which shall appear to the Appellate Court essential to the rights of the parties, and the decree of the Lower Court upon such preliminary point shall be reversed by the decree in appeal, the Appellate Court may, if it think right, remand the case, together with a copy of the decree in appeal to the Lower Court, with directions to restore the suit to its original number in the Register and proceed to investigate the merits of the case, and pass a decree therein.