Dwarkaram Vs K.C. Dey and Company

Court: Calcutta High Court

Date of Decision: Jan. 16, 1936

Final Decision: Dismissed

Judgement

Derbyshire, C.J.
This is an appeal from a judgment of Mr. Justice Panckridge delivered on the 4th of January, 1935, in favour of the

Defendants. The Plaintiff is an iron merchant carrying on business at Howrah. The Defendants are foundry-owners carrying on business in Calcutta.

The Plaintiff"s claim is for Rs. 3,739-6-0, being the balance, as he alleges, of the price of 84 tons 15 cwts. 3 qrs. of scrap iron which he says he

delivered to the Defendants under a contract for the sale of the same at the rate of Rs. 50 a ton. It is not necessary to go into details of the

Plaintiff"s contentions and the Defendants" contentions. If the Plaintiff"s contentions are right, there was a contract for the sale of between 80 and

90 tons of cast iron scrap and the Plaintiff delivered the quantity of 84 tons odd under that contract and is entitled to be paid the sum claimed. If

the Defendants" contentions are correct, there has never been a contract such as the Plaintiff alleges, there was a delivery of iron at another rate

but the delivery has been paid for. It is a pure question of fact whether the Plaintiff"s story is to be accepted or the Defendants" story. The

evidence has been gone into very thoroughly by Counsel on each side. We have to say whether the Appellant, the Plaintiff, is entitled to succeed.

Mr. Justice Panckridge in his judgment discussed the evidence of the Plaintiff and his witnesses and the evidence of the Defendant and he said in

the beginning of his judgment:

Although the issue in this case is a very simple one and the amount involved not considerable I have had the very greatest difficulty in arriving at a

conclusion.

2. At the end of his judgment he said,

I have given my reasons for holding that the Plaintiff"s witnesses offer no real corroboration of his evidence. The consequence is that the Court

must be prepared, before it can give him a decree, to act on his evidence alone; I am not prepared to do so. Although it is always unsatisfactory to

dismiss a snit on the ground that the burden of proof has not been discharged and without coming to a definite finding as to the facts in issue, the

circumstances of the present case make this course the only possible one.

3. Mr. Justice Panckridge came to the conclusion that the Plaintiff had not proved his case.

4. We have had read to us the evidence of the witnesses called on each side. We have, however, had not one advantage that the learned Judge

below had. We have not seen the witnesses when they gave evidence and we have not had the advantage of hearing the evidence that they gave

and consequently we are not in a position to appraise the truthfulness and the value of their evidence in the same way as the learned Judge below

was. Under these circumstances an Appellate Court has to be satisfied that the Judge below in the conclusion that he came to, was wrong and

satisfied as laid down by Lord Wright in the case of Powell and Wife, v. Streatham Manor Nursing Home L.R. [1935] A. C. 243 at p. 265,

where it is said:

in an appeal of this character, that is from the decision of a trial Judge based on his opinion of the trustworthiness of witnesses whom he bas seen,

the Court of Appeal must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.

5. Now, I have had considerable doubts as to whether the decision of the learned Judge was right,--those doubts being based on the evidence as

read to us here.....

6. [His Lordship then discussed the evidence and proceeded.]

7. He [the learned Judge] has given his careful attention to the evidence called and in his judgment he has dealt with the evidence of each witness

for the Plaintiff and has dealt with the evidence for the Defendants. He has given his reasons after seeing the witnesses why he does not, as he says,

accept the evidence of the Plaintiff''s witnesses as corroborating the Plaintiff and he also says:

I am convinced that the Plaintiff''s story of the interview with Mr. Dey and Mr. Bhattacharjee shortly after the end of November, 1928, is an

invention.

8. He does not attach very great weight to the Plaintiff''s own evidence and he says in consequence that he is unable to say that the Plaintiff has

proved his case. He also says

Although Mr. Dey and his partners seem to have conducted their business in a very slipshod fashion I cannot find any statement in Mr. Dey''s

evidence which I am prepared to say is untrue.

9. Now after having the evidence read to us here and considering it very carefully. although I certainly had very considerable doubt as to the

matter, yet after considering it very carefully I am not convinced that the learned Judge was wrong. He has seen the witnesses, he has heard them,

he has weighed up the evidence they have given very carefully and has come to his conclusion and, in accordance with the practice of the

Appellate tribunal in a matter of this kind, namely, in an appeal from a Judge sitting below, I cannot see my way to differ from the judgment he has

given.

10. In my opinion this appeal must be dismissed with costs.

Costello, J.

11. It is clear in this case that the matter at issue at the trial in the Court below was solely a question of fact and in such circumstances--as Lord

Sumner said in the case of S. S. Hontestroom v. S. S. Sagaporack L.R. [1927] A. C. 37 at p. 47

not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown

that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so

arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The

course of the trial and the whole substance of the judgment must be looked at and the matter does not depend on the question whether a witness

has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any

substantial part of his reasons for his judgment the trial judge"s conclusions of fact should, as I understand the decisions, be let alone.

12. It seems to me that it is manifest in the present instance that the conclusions of fact which Mr. Justice Panckridge arrived at were based to a

very large degree, if not entirely, upon the estimate which he formed as to the witnesses who were called before him at the trial. This matter, in my

opinion, is one of that class of case which falls within the description given by Lord Macmillan in the speech which he made in the House of Lords

in the case which has already been referred to by my Lord the Chief Justice, Powell and Wife V. Streatham Manor Nursing Home L.R. [1935] A.

C. 243 at p. 256, where the noble and learned Lord said:

Where, however, as in the present instance, the question is one of credibility, where either story told in the witness-box may be true, where the

probabilities and possibilities are evenly balanced and where the personal motives and interests of the parties cannot but affect their testimony, this

House has always been reluctant to differ from the judge who has seen and heard the witnesses, unless it can be clearly shown that he has fallen

into error.

13. Although an appeal of this description is in the nature of a re hearing, the onus is upon the Appellant to satisfy this Court that his appeal should

be allowed and I am definitely of opinion that the Appellant here has not succeeded in clearly showing that the learned Judge at the trial fell into

error. That being so, we ought not to disturb the conclusion at which the learned Judge arrived. I agree, therefore, that this appeal must be

dismissed.