(1922) 08 CAL CK 0042

Calcutta High Court

Case No: None

Gour Krishna Sircar and Another		APPELLANT
	Vs	
Nilmadhab Saha and Others		RESPONDENT

Date of Decision: Aug. 16, 1922

Citation: AIR 1923 Cal 113 : 73 Ind. Cas. 34

Hon'ble Judges: Rankin, J; Asutosh Mookerjee, J

Bench: Division Bench

Judgement

1. This is an appeal by the tenants-defendants in a proceeding instituted by the landlords-respondents u/s 105 of the Bengal Tenancy Act for the settlement of fair and equitable rent in respect of the lands in their possession.

2. An objection has been taken by the respondents on the ground that the appeal has become infructuous, as the decree which is assailed has been vacated by the lower Appellate Court as the result of an application for review of judgment presented by the tenants. It appeals that the judgment of the lower Appellate Court was pronounced on the 6th May 1918. On the 18th July 1918 the tenants made an application for review of judgment. The Court thereupon directed notice to be served on the landlords as required by Order XLVI, Rule (2)(a), Civil Procedure Code. On the 14th November 1918, during the pendency of the application for review of judgment, the tenants lodged in this Court the appeal now before us, which is directed against the decree of the lower Appellate Court made in pursuance of the judgment of the 6th May 1918. The application for review was heard by the lower Appellate Court, in the presence of the tenants and landlords, on the 2nd April 1919, and judgment was reserved. On the 5th April 1919, the review was granted in part and the decree originally made was modified. A new decree was then drawn up and was signed by the Judge on the 29th April 1919. The appeal lodged in this Court, which had been adjourned from time to time, was thereafter heard under Order

XLVII, Rule 11 of the CPC on the 8th May 1919 and notices were directed to issue on the landlords-respondents. The appeal has now been placed before us for final disposal. The respondents urged that, in these circumstances, the decree made by the lower Appellate Court on the basis of the judgment of the 6th May 1918 must be deemed to have been vacated when the application for review was granted on the 5th April 1919 and that the appeal has consequently become abortive. In support of this position reliance lias been placed upon the decisions in Kanhaiya Lal v. Baldeo Prasad 28 A. 240 : (1905) A.W.N. 265 and Birjbasi Lai v. Salig Ram 14 Ind. Cas. 472 : 34 A. 282 : 9 A.L.J. 183.

3. The procedure adopted in the lower Appellate Court seems to indicate that the various stages through which an application for review may pass was, perhaps, not - clearly appreciated. The matter commences, ordinarily, as is clear from Order XTVH of the Civil Procedure Code, with an ex park, application. The Court then may either reject the application at once or may grant a Rule calling on the other, side-to show cause why the review should not be granted. In the second stage, the Rule may either be admitted or rejected, and it is obvious that the hearing of this Rule may involve to some extent an investigation into the merits. If the Rule is discharged, then the case ends. If, on the other hand, the Rule is made absolute, then the third stage is reached; the case is re-heard on the merits and may result in a repetition of the former decree or in some variation of it. Though, in one aspect, the result is the same, whether: the Rule be discharged or on the re-hearing the original decree be repeated, in law there is a material difference, for, in the latter case, the whole matter having been re-opened, there is a fresh decree; in the former case, the parties are relegated to and still rest on the old decree. Consequently, the order appropriate to a discharge of the Rule is the rejection of the application; an order so made terminates the second stage of the proceedings, and there is no third stage for the re-hearing of the case. This analysis of the successive stages of a proceeding for review of judgment, which, was given by Sir Lawrence Jenkins, C.J. in Vadilal v. Fulchand 30 B. 56 : 7 Bom. L.R. 664 and war; adopted by Sir Henry Richards, C.J., in Nanhe v. Mangat Rai 20 Ind. Cas. 647 is of fundamental importance. The failure to recognise the distinction between the second and third stages has, as appears from the cases in the books, led to the embarrasment of litigants in many instances. This has happened specially in the class of eases contemplated in Order XLVII, Rule 5, where an application for review is presented in respect of a decree made by two Judges; if one of them is absent from the Court, the remaining Judge may deal with the matter in the first two stages but not in the third. An illustration is afforded by the case of Hari Char an Saha v. Baran Khan 2 Ind. Cas. 647. There an appeal from appellate decree was heard in the first instance by Mitra and Carnduff, J.J. After the retirement of Mitra, J., the respondent who had been unsuccessful, applied for review of judgment. This application was heard by Carnduff, J., alone, who directed a Rule to issue. The Rule was heard and made absolute, and the review was admitted. Carnduff, J., then proceeded to re-hear the appeal and repeated the decision he had

previously passed in concurrence with Mitra, J. The respondent preferred an appeal against the decision of Carnduff, J., and urged that he had no jurisdiction to re-hear the appeal, that as soon as the review was admitted, the original decree was in law vacated, and that thereupon the appeal stood revived, to be heard only by the Division Bench authorised to deal with that description of cases by the Chief Justice. This contention was upheld by Jenkins, C.J., and the restored appeal was re-heard by a Special Bench constituted for the purpose. The error thus rectified had its parallel in the cases of Arayalpurath v. Cheekiladen Ahmad 2 Ind. Cas. 204 and Gour Sundar Bhoumik v. Rakhal Raj Bhoumik 34 Ind. Cas. 592 : 27 C.L.J. 326 : 20 C.W.N. 1165, but was avoided in Maksud Mahi v. Secretary of State 9 Ind. Cas. 532. These decisions are authorities for the proposition that, when the application for review is granted, the decree previously made is vacated. We are not now concerned with the question whether when the application for review is granted the decree is vacated in its entirety or only in part. The decisions in Bhubaneshwari Koer v. Ajodhya Singh 11 Ind. Cas. 102 : 15 C.L.J. 339, Sadar-ud-din v. Ekram-ud-din 20 Ind. Cas. 670 : 19 C.L.J. 325 : 18 C.W.N. 22 Janaki Nath v. Prabhasini Dasi 30 Ind. Cas. 898 : 19 C.W.N. 1077 : 22 C.L.J. 99 : 43 C. 178 and Gour Sundar Bhoumik v. Rakhal Raj Bhoumik 34 Ind. Cas. 592 : 27 C.L.J. 326 : 20 C.W.N. 1165 indicate that the Court is competent to determine whether when a review is granted, the case should be re-opened in part or in its entirety, and that the view cannot be supported on principle that whenever an application for review is granted, the entire case must of necessity be re-opened and reconsidered. When, however, on the grant of an application for review, no reservation is made, it may fairly be assumed that the entire case is intended to be reopened.

4. The principle recognised in these cases justifies the view adopted by Sir John Stanley, C.J., in Kanhaiya Lal v. Baldeo Prasad 28 A. 240 : (1905) A.W.N. 265 that when an application for review has been granted, the original decree ceases to exist, with the consequence that an appeal preferred against that decree can no longer be prosecuted. This view is identical with that adopted by Sir John Edge, C.J. In Kuar Sen v. Ganga Ram A.W.N. (1890) 144 and was sub-sequently approved in Birjrbasi Lal v. Salig Ram 14 Ind. Cas. 472 : 34 A. 282 : 9 A.L.J. 183 and Chenna Reddi v. Pedda Obi Reddi 2 Ind. Cas. 802 : 32 M. 416 : 6 M.L.T. 135 : 19 M.L.J. 388. It was pointed out in Pyari Mohan Kundu v. Kalu Khan 41 Ind. Cas. 497 : 44 C. 1011 where reference is made to the decision of the Full Bench in Bhurrut Chunder Mojoomiar v. Ram Gunga Sein B.L.R. Sup. Vol. 362 : 5 W.R. 59 that if a review be applied for in proper time and before an appeal has been preferred, the Judge is not prevented from proceeding upon the application for review by the subsequent presentation of an appeal. That power exists so long as the appeal is not heard, because once the appeal is heard the decree on appeal is the final decree in the case, and the application for review, of judgment of the Court of first instance can no longer be prosecuted. On the other hand, if the application for review is successful and the judgment is vacated the appeal directed against that judgment can no longer proceed. When a final decree is

made after the review has been admitted, that decree is, however, liable to be challenged in accordance with law.

5. What then is the position of the parties tested in the light of these principles? An application for review was presented to the Judge. The application was not summarily rejected, but notice was ordered to issue upon the opposite party. The application was then heard and the re view granted, though no separate order appears to have been recorded at this stage. The Court forthwith proceeded to re-consider the case on the merits and reserved judgment. The judgment subsequently delivered states at the outset that the review had been granted on the ground (1) that in calculating the rent payable by the tenure-holder, no allowance had been made for profits and cost of collection as required by Section 7 of the Bengal Tenancy Act, and (2) that the enhancement, which had worked out to about seven times the original rental was not fair and equitable. The Judge next proceeds to discuss these points which are decided in favour of the tenants. He then deals with the contention that the rent was not enhanceable at all, as by virtue of the presumption embodied in Section 50 of the Bengal Tenancy Act, the tenure must be deemed to have existed from before the time of the permanent Settlement. He overrules this contention and then makes an order for "modification of the decrees as noted above." A decree was in pursuance of this order drawn up in modification of the decree previously made.

6. Three points now require to be emphasized. In the first place, when the Judge decided to grant the application for review, he should have recorded an order to that effect, and a note thereof should have been made in the register under Order XTWTI, Rule 8.; the order should have stated clearly whether the decree was vacated in its entirety or not. In the second place, the decree in the present case must have been set aside in its entirety, though the judgment states that the review was granted on two specified grounds. There were two points in controversy, namely, first, whether the rent of the tenure was enhanceable and secondly, if enhanceable, how should fair and equitable rent be assessed. Though the ground for granting the review as specified in the judgment, relates only to the second of these points, it is clear that the first question also was re-investigated. Such re-consideration would be permissible only if the original decision had been vacated in its entirety. In the third place, the judgment concludes with an order for modification of the decree, and this language is reproduced in the decree subsequently drawn up. But, plainly there was no decree to modify. The origina1 decree had ceased to exist as the result of the decision of the Judge to grant the application for review. The appeal was, in fact, restored and re-opened, and if the Judge arrived at a conclusion different from what he had reached at the original hearing, the decree made was a new decree. Indeed, as pointed out by Sir Lawrence Jenkins, C.J., in Vadilal v. Fulchand 30 B. 56 : 7 Bom. L.R. 664 even if the Judge had adhered to his former opinion, the final decree after review would have been a new decree. We are consequently of opinion that the decree made by the lower Appellate Court on the basis of the judgment dated the

6th May 1918 was vacated when the application for review was granted on the 2nd April 1919, and that the decree prepared on the 29th April 1919 pursuant to the judgment delivered on the 5th April 1919 was a new decree. The appeal now before us has thus become infructuous and must be dismissed with costs on that ground. The hearing fee will be assessed at one gold mohur.