Dhant Ram Mahtha Vs Murli Lal Mahtha and Others

Court: Calcutta High Court

Date of Decision: March 3, 1909

Judgement

1. The plaintiff appellant commenced the action, out of which the present appeal arises, for declaration of his title to Immovable property and to

restrain the defendant from enforcing a mortgage which they claimed to hold thereupon. The suit was instituted so far back as the 18th May 1903

and up to the present time it has not been heard on the merits. The plaintiff had at one stage of the suit obtained an order for the examination of a

witness upon commission. That witness was duly examined and the commissioner made his return. When the case came on for trial before the

Subordinate Judge, the evidence taken on commission was on the record but as the witnesses who were to be examined in Court were not in

attendance, an application was made on behalf of the plaintiff for adjournment. The Subordinate Judge made the grant of the application

conditional upon the immediate payment of the costs of the defendant. The plaintiff was unable to carry out the order of the Court and the suit was

dismissed. An appeal was then preferred to the District Judge, but it was dismissed by him u/s 551, C.P.C. The plaintiff has now appealed to this

Court and on his behalf the decision of the Court below has been challenged on two grounds, namely, first, that as the evidence taken on

commission was on the record, the suit ought not to have been dismissed without an adjudication on the merits, and, secondly, that the Court of

first instance ought to have allowed him an opportunity to produce his other evidence. In answer to the first contention, it has been argued by the

learned Vakil for the respondent that as the plaintiff did not tender the deposition in evidence, the Subordinate Judge was not bound to consider it,

and in answer to the second contention it has been suggested that the plaintiff was guilty of laches and was not entitled to any consideration from

the Court.

2. In support of the first contention, reliance has been placed on behalf of the appellant upon the decisions of this Court in Dwarka Nath Butt v.

Ganga Dayi 8 B.L.R. App. 102, Struthers v. Wheeler 6 C.L.R.109 and Nistarini Dassee v. Nundo Lall Bose 26 C. 591, which show that in order

to make a deposition taken on commission available for purposes of the trial, it is not necessary formally to tender it in evidence. On the other

hand, in support of the contention of the respondents, reliance has been placed upon the cases of Kusum Kumari Roy v. Satya Ranjan Das 30 C.

999, at p. 1003 and Hemanta Kumari v. Banku Behary Sikdar 9 C.W.N. 794, in which it was ruled that the deposition of a witness examined on

commission does not become evidence in the suit until the same has been tendered and read as evidence by the party on whose behalf it has been

taken. We observe that in the cases upon which reliance is placed on behalf of the respondents, the view of the Court is based upon the practice

which has prevailed for many years past on the Original Side of this Court. On the other hand, as was pointed out by this Court in the case of Man

Gobinda Chowduri v. Shashindra Chandra Chowdhuri 35 C. 28, the practice in the Mofussil Courts has been precisely in the opposite direction.

There can be no doubt that in the Mofussil Courts the deposition of a witness examined on commission is treated as evidence in the case even

though it has not been formally tendered. In our opinion, this practice is not only perfectly consistent, but also in strict accordance with the

provisions of the Code on the subject. Section 389 of the Code of 1882 provides that after the commission has been duly executed, it shall be

returned together with the evidence taken under it to the Court from which it issued and the commission, the return thereto and the evidence taken

under it form, subject to the provisions of Section 390, part of the record of the suit. Section 390, to which reference is made, then, provides that

evidence taken on commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered unless the

person who gave the evidence is beyond the jurisdiction of the Court or dead or unable from sickness or infirmity to attend to be personally

examined or exempted from personal appearance in Court, or the Court in its discretion dispenses with the proof of any of the circumstances just

mentioned and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such

evidence by commission has ceased at the time of reading the same. Where, therefore, as in the case before us, the circumstances mentioned in

Section 390, which would exclude the deposition from being read as evidence in the suit, do not exist there is no reason why the deposition should

be formally tendered before it can be treated as evidence in the cause. No doubt it may be plausibly suggested, as indeed it has been suggested by

writers, that the mere fact that the deposition forms part of the record does not make it evidence, because everything that is on the record may not

be evidence in the suit till it has been made evidence in the manner contemplated by law. That may be so, but the analogy has no application to the

case before us. Hero the deposition has been taken by a duly authorized commissioner, the parties had the opportunity to appear and examine and

cross-examine the witness as contemplated by law, there is no suggestion that the commission has not been duly executed and, returned; nor is

there any reason for suggestion that circumstances may exist which would exclude the deposition from being used as evidence u/s 390. Under

circumstances like these, it would be, in our opinion, an idle formality not contemplated by the Code to require that the deposition must be formally

tendered in evidence. The practice of the Mofussil Courts, as pointed out in the case of Man Gobinda Chowdhuri v. Shashindra Chandra

Chowdhuri (6), is entirely consistent with the provisions of the Code and there is no reason why we should substitute for it a practice, which has

grown up in the Original Side of this Court. We do not think it can rightly be suggested that there is any thing on principle which makes it obligatory

upon a party to tender a deposition formally at the trial. No doubt, if, as is provided in the English Rules of the Supreme Court 1883, Order 37,

Rule 24, there were any statutory rule that notice of intention to use a deposition of the trial should be given, the practice must be regulated

accordingly. But in the absence of any similar provision in our Code of Procedure, we do not see why we should insist upon this formality. The

deposition forms part of the record and either party may use it. If the opponent of the party who relies on the deposition has any objection to its

admissibility, it is open to him to urge that point. But we do not see that there is upon principle any necessity to tender the deposition in evidence.

That there is no real question of principle involved in the matter, would appear from the circumstance that under other systems of law, the practice

which is followed in our Mofussil Courts has been adopted, for instance, in the American Federal Courts, it is not necessary for a deposition duly

taken on commission to be tendered in evidence, it is treated as already part of the record and may be used at once by either party. Andrews v.

Graves (1870) 1 Dillon 108: 1 F. Cas 894; Park v. Willis (1806) 1 C C.C. 357; 18 Fed. Cases 1108. In our opinion, we ought to adhere to the

practice which prevails in the Mofussil Courts, and, according to that practice, there is no question that the deposition in this case ought to have

been considered by the Subordinate Judge. The first point taken on behalf of the appellant must, consequently, prevail.

3. As regards the second point taken on behalf of the appellant, it is contended that u/s 156 of the Code of 1882, it was not open to the

Subordinate Judge to make the order for adjournment conditional upon the immediate payment of costs. It is suggested that if, in the opinion of the

Subordinate Judge, an adjournment was necessary in the interests of justice, the object of the grant of the adjournment ought not to have been

defeated by the imposition of an order for costs, inability to comply with which would nullify the very object which the Court had in view. In our

opinion, there is no foundation for the broad contention that the Court could not make an appropriate order for costs, the second paragraph of

Section 156 clearly gives the Court ample discretion as to the particular directions to be given in the matter of costs occasioned by the

adjournment. At the same time, we are of opinion that in the circumstances of this case, the Court might have adjourned the case to a subsequent

date and made the hearing on that date conditional upon the payment of costs before that date. Such an order would have enabled the plaintiff or

his legal adviser to comply with the order for costs. We are of opinion, therefore, that sufficient opportunity was not given to the plaintiff to enable

him to carry out the order of the Court and to produce his evidence.

4. The result is that this appeal must be allowed, the decrees made by the Courts below discharged and the case remitted to the Court of first

instance to be tried on the merits. Both parties will be at liberty to adduce evidence in support of their respective claims.

5. As regards the costs of this appeal, they must abide the result, but there will be no order for costs in the lower Appellate Court. The costs in the

Court of first instance up to this stage, as also after the remand, will be in the discretion of that Court.