Bhairab Chandra Dutt and Others Vs Kali Kumar Dutt and Others

Court: Calcutta High Court

Date of Decision: May 26, 1922

Citation: 74 Ind. Cas. 1038

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

Bench: Division Bench

Judgement

1. This is an appeal by the defendants in a suit for partition against an order for re-trial of the matters in controversy. The defendants resisted the

claim, of the plaintiffs his the primary Court on the allegation that the land had been previously partitioned by metes and bounds and that they and

their predecessors had been in separate possession for more, than a century. The Subordinate Judge held in favour of the defendants and

dismissed the suit. Upon appeal the plaintiffs asked for permission to adduce in evidence an entry in the Record of Rights which had been finally

published on the 5th August 1919 long after the decree of dismissal had been made by the Trial Court on the 10th August 1918. The District

Judge came to the conclusion that before the matters in difference were finally decided, the entry in the Record of Rights should be taken into

account. In this view, he allowed the appeal, set aside the decree of the Court of first instance and directed a re-trial of the suit with reference to

the entry in the Record of Rights and such other evidence as might be adduced by both the litigants. Against this order for re-trial, the defendants

have preferred this appeal.

2. On behalf of the plaintiffs, a preliminary objection has been taken that the appeal is incompetent because the order was not and could not have

been made under Order XLI, Rule 23, Civil Procedure Code. We are of opinion that there is no force in th;s contention. The order does not

purport to have been made under Order XII, Rule 23. It has been made in the exercise of under power of the Court as explained the Full Bench in

Abdul Karim Abu Ahmed Khan Ghaznavi v. Allahabad, Bank, Ltd. 41 Ind. Cas. 598 : 44 C. 929 : 21 C.W.N. 877 : 26 C.L.J. 49 . The order so

made is a decree which reverses the decree of the Court of first instance and derives the plaintiffs of the valuable; right they had acquired

thereunder. The appeal is, consequently competent, not as an appeal framed under Order XLIII, Rule 1, Sub-rule (u) but an appeal from a decree

u/s of the Code, read with Section 100. I deed, the appellants have described appeal not as an appeal from an order but as an appeal from a

decree. The prilimnary objection cannot sustain and must be overruled.

3. The appellants have assailed the order of the District Judge on the ground the additional evidence should not have bee allowed to be adduced in

contravention of the principle recognised in Order XL Rule 27 of the Code, as explained in Kessowji Issur v. Great Indian Peninsular Railway Co.

34 I.A. 115 : 31 B. 381 : 9 Bom. L.R. 671 : 11 C.W.N. 721 : 6 C.L.J. 5 : 4 A.L.J. 461 : 17 M.L.J. 347 : 2 M.L.T. 435 (P.C.). We are of

opinion, that the District Judge has not disregarded the principal enunciated in Order XLI, Rule 27. That rule authorises the Court to afford

opportunity to a party litigant to adduce addition evidence if the Appellate Court require a document to be produced or a witness to be examined

to enable it to judgment or for any other substantial cause. In the case before us, there is suet a substantial cause. The Record of Rights

proceedings were in progress during the pendency of the trial in the Court of first instance, but the order for final publication had not then been

made. It was consequently, impossible for the plaintiffs to produce the decision of the Revenue Authorities. The order for final publication was

made during the pendency of the appeal in the Court of the District Judge. At this stage alone, it became possible for the plaintiffs to bring before

the Court the decisions of the Revenue Authorities. The appellants have, however, contended that view of the decisions of this Court in Kumar

Sarat Kumar Roy v. Sripati Chatterjee 50 Ind. Cas. 119 : 23 C.W.N. 242 and Baid Nath Sahay v. Nanku Mahton 29 Ind. Cas. 219 the decision

of the Revenue Authorities should not be used in evidence. These decisions are cleanly distinguishable as the subsequent judgment which the Court

was called upon to receive in evidence was not a judgment inter partes. In the case before us, the order of the Settlement Authorities been

pronounced in proceedings which are inter partes. It is no doubt , not conclusive: but a presumption attaches to the order finaily published under

the Bengal Tenancy Act. Consequently, the decision in Young v. Kershaw (1899) 81 L.T. 531 : 16 T.L.R. 52 and Nundo Lal Mullick v.

Panchanon Mukherjee 42 Ind. Cas. 484 : 45 C. 60 : 21 C.W.N. 1076 : 26 C.L.J. 187 which disapprove of the reception of additional evidence

in proceedings in review, cannot be applied to the circumstances of this case. The course adopted by the District Judge is, in our opinion, eminently

reasonable and is well calculated to avoid that ultimate conflict between the decision of the Civil Court and the decision of the Revenue Authorties

which would inevitably arise if this suit were decided without reference to their proceedings.

4. The result is, that the decree of the District Judge is affirmed and this appeal dismissed with costs.