Sarjubai Madangopal Bhangadia Vs Pukhraj Motilal Kochar

Court: Bombay High Court (Nagpur Bench)

Date of Decision: April 26, 1965

Citation: (1965) 67 BOMLR 926

Hon'ble Judges: Wagle, J; Patel, J

Bench: Division Bench

Judgement

Patel, J.
[His Lordship after stating the facts and dealing with points not material to this report, proceeded.] Mr. Padhye then contended

that in any event the plaintiff is entitled to a decree as the heir of Madangopal as she has now obtained the necessary succession certificate. In this

connection, it must be noted that in the trial Court the plaintiff had not produced succession certificate, nor had she made any application

whatsoever for the same. It seems that during the pendency of the suit on February 22, 1955, the learned Judge had drawn the attention of the

plaintiff"s advocate to the fact that as regards her alternative claim she would have to produce a succession certificate. As at the date of the

judgment she had not obtained succession certificate, he dismissed her suit without considering the alternative claim.

2. It is argued by Mr. Deo, that it is not within the power of the appellate Court to reverse the decree of the trial Court on the ground that she has

now obtained a succession certificate. Mr. Deo relies on Fateh Chand v. Muhammad Bakhsh ILR (1894) All. 259. and Mt. Habib Fatma Vs. Mt.

Arjumand Khatun, where it is held that if the plaintiff failed to produce succession certificate in the trial Court, the appellate Court could not reverse

the decree even if a succession certificate were produced before the appellate Court.

3. We fail to see why on first principles the appellate Court is not entitled to make a decree in favour of the plaintiff if she is otherwise entitled to

have it and when she has produced the succession certificate. In England, an appeal is always regarded as rehearing of the Suit and the appellate

Court moulds its decree according to the circumstances. See: Quitter v. Mapleson (1882) 9 Q.B.D. 672 This was accepted in Attorney-General

Birmingham, Tame and Bea District Drainage Board [1912] A.C. 788 where it was said (p. 788):

An appeal to the Court of Appeal is by way of rehearing, and the Court may make such order as the judge of first instance could have made if the

case had been heard by him at the date on which the appeal was heard.

4. As early as 1902 Bhaahyam Ayangar J. in Kristnama Chariar v. Mangammal I.L.R (1902) Mad. 91 under the older procedural Code held that

hearing of the appeal was in. the nature of rehearing of suit and this was reaffirmed under the present Code in Kanakayya v. Janardhana Padhi

I.L.R (1910) Mad. 439 after full discussion. Order XLI, Rule 33, of the present Code is similar to Order LVIII, Rule 5, of the Rules of the

Supreme Court. The reasoning, therefore, in Quilter v. Mapleson and Attorney-General v. Birmingham, Tame and Rea, District Drainage Board

for holding that appeal is in the nature of a rehearing of the suit applies.

5. In AIR 1941 5 (Federal Court) a question arose as to whether the Bihar Money Lenders Act which was enacted after the decision of the High

Court but during the pendency of appeal in the Federal Court could be applied. Varadachariar J. (with whom Gwyer C.J. agreed) considered the

question and affirmed the principles laid down in the Madras cases referred to above observing that (p. 18) :

...There is no reason to suppose that the powers of this Court when acting as a Court of appeal are less extensive than those of the High Courts

when hearing an appeal.

In Rustomji v. Sheth Purshottam Das I.L.R.(1901) 25 Bom. 606, s.c. 3 Bom. L.R. 227 and Sakharam Mahadev Dange v. Hari Krishna Dange

I.L.R.(1881) Bom. 113 the Court took notice of subsequent events and moulded the decree necessitated by the change of circumstances.

6. The decision in Fateh Chand v. Muhammad Bakhsh was rendered under the old Code and there is no discussion about the powers of the

Appellate Court under the procedural Code. It is said ""no subsequent production of the certificate could show that the decree of the Subordinate

Judge was contrary to law"". The later case follows the earlier and the Madras decisions are not even noticed. We cannot, therefore, with respect,

agree with the ratio of the decisions in those two cases. The production of the certificate therefore is a circumstance which must now be taken into

account. The obstruction in her way now disappears and she be entitled to the decree if she succeeds on merits.

7. [The rest of the judgment is not material to this report.]