

(1933) 06 CAL CK 0010
In the Calcutta High Court

Chowdhurani

APPELLANT

Vs

Promoda Sundari Rai Chowdhurani and Others

RESPONDENT

Date of Decision : 05-06-1933

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 26 Rule 8, Order 9 Rule 13, 115

Citation : 148 Ind. Cas. 1203

Hon'ble Judges : M.C. Ghose, J

Bench : Single Bench

Judgement

M.C. Ghose, J.—This is an application u/s 115, Civil Procedure Code, by the plaintiff in a title suit. The plaintiff's case is that in June, 1931,

the plaintiff instituted a suit against the defendants for declaration of her title to a plot of land with huts thereon and for recovery of possession of the

same, that defendants Nos. 1 and 2, mother and son, entered appearance, filed their written statement on August 15, 1931, and thereafter the suit

went on for a long time on adjournments till on April 26, 1932, the Court warned the parties to come ready on the next date when the case would

be positively heard and the next date fixed was June 8, 1932; that on June 8, 1932, the plaintiff was ready with her witnesses and defendant No. 2

along with his junior Pleader was present but they did not file any list of witnesses, although some of the defence witnesses themselves filed their

hajiras; the defence prayed for one day's time on the ground that their senior Pleader was engaged at Dacca and would not be able to come till 3

p.M. The learned Munsif-rejected the prayer for a day's adjournment but adjourned the hearing till 2 p.m. There after at 2 p.m. on that day the

case was taken up and one witness for the plaintiff was examined. The

defendants were asked to cross-examine the witness, but the Pleader declined to cross-examine and, filed a petition praying for an adjournment till the following day. The Court refused the prayer for adjournment and examined another witness and decreed the suit ex parte. On the following day a petition was filed on behalf of the defence praying that the order of the previous day might be set aside and the suit restored for fresh hearing.

2. After hearing both the parties, the learned Munsif by his order dated November 30, 1932, set aside the order of June 8 and restored the suit for fresh hearing. The Munsif took his action under Order XLVII, Rule 1, CPC on the ground that the Court had committed an error apparent on the face of the record inasmuch as the Court in passing the judgment did not take into consideration the evidence which had been taken on commission and which was upon the record. The Court considered that the order passed was under Order XVII, Rule 3, Civil Procedure Code.

It is urged by the learned Advocate for the petitioner that the order of the Court was passed not under Order XVII, Rule 3 but under Order XVII, Rule 2 and as such the Court was not justified in reviewing the said order; but the defendants might have filed a case under Order IX, Rule 13 if they had been able to show that they had a sufficient cause for default; and in the second place it is urged that even if it be considered that the case was under Order XVII, Rule 3 the learned Munsif acted illegally in allowing the case to be restored.

3. Upon hearing the learned Advocates on both sides who have placed the entire record before the Court, it appears that in fact the learned Munsif passed an order on June 8, 1932, under Order XVII, Rule 2; but when the review application was filed, he considered, he dealt with the case under Order XVII, Rule 3, and even when he dealt with the matter under Order XVII, Rule 3, it does not appear that the defendants were justified in asking for review. Their action should have been taken under Order IX, Rule 13, see *Krista Kishore Bose Vs. Pancharam Maity*, where Sir George Rankin the learned Chief Justice, has explained the matter very fully. In the next place assuming that the order passed by the Munsif was under Order XVII, Rule 3, it is to be considered whether he was right or committed an error apparent on the face of the record in not accepting the evidence taken on commission. On this point it is urged on the side

of the petitioner, that under the provision of Order XXVI, Rule 8

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

such conditions are fulfilled. It is clear, therefore, that the evidence taken on commission does not ipso facto become an evidence in a case. It has

to be offered by the party who has examined the witness on commission and it, has to be accepted by the Court after hearing the opposite party

and unless it is tendered by the party and accepted by the Court it is not to be considered as evidence in the case: see the case in Kristo Kishore

Base v. Pancharam Maity 111 Ind.Casa. 430 : AIR 1928 Cal. 348 : 47 C.L.J. 467, already referred to and also the:caseof Mahim Chandra Guha

Vs. Naba Chandra Chowdhury and Others, .

4. In this case six persons had been ex-mined on commission on behalf of the defence and those witnesses proved certain documents but those

were not offered in evidence by the defence before the Court. Indeed, as the learned Advocate for the petitioner has stated, the junior Pleader for

the defence pleaded that he was not in a position to conduct the case and the senior Pleader who alone was said to know the facts of the case and

used to look after the case on behalf of his sister, defendant No. 1, and on behalf of her son, defendant No. 2, was absent at Dacca on

professional engagement. There was a local Pleader and defendant No. 2 present in Court. But the pleader when asked to cross-examine the

plaintiff's witness declined to do so. Indeed he professed to be unable to give any assistance to Court and he did nothing except filing two

applications for ad journment and defendant No. 2 stated in the petition that he was not cognizant of many facts and was not conversant in mak ing

tadbirs; that as a matter of fact no one but his maternal uncle Babu Rebati Mohan Ghose, Pleader, Dacca, knew all the facts of the case.

Apparently the defendants took up the position that they could do nothing until Rebati Babu returned from Dacca. In these circumstances they did

nothing to assist the Court, and without the evidence taken on commission being presented to Court ""and consented to by the plaintiff or accepted

by the Court without the consent of the plaintiff, it could not be taken as evidence in the case. In this viewthere was no error apparent on the face

of the record.

5. The learned Advocate for the petitioner has also placed for consideration two unreported cases: In the matter of Mongal Chand Dudhuria, Civil, Revision Case No. 1297 of 1929 and In the matter: of Abdul Khaleque, Civil Revision case No. 1157 of 1932 in both, of which in similar circumstances this Court set aside the restoration of suits. Having regard to the circumstances of the case, I am of opinion that the order of the learned Court below was illegal. It is accordingly set aside and the order of June 8, 1932, is restored. The Rule is made absolute. The petitioner is entitled to her costs, hearing fee being assessed at two gold mohurs.