

(1916) 06 CAL CK 0044
In the Calcutta High Court

Gajadhar Prosad	Vs	APPELLANT
Musammat Lohia alias Lobhia and Another		RESPONDENT

Date of Decision : 01-06-1916

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27

Citation : 35 Ind. Cas. 698

Hon'ble Judges : Lancelot Sanderson, C.J.; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

Lancelot Sanderson, C.J.—In this case the suit was brought by the plaintiff, alleging that by custom the plaintiff was entitled to half the fruits of a certain tree which was upon his estate, but within the homestead of the defendant who was a tenant of the plaintiff. The custom was alleged to exist with regard to this tree, inasmuch as it was upon land in respect of which the tenant paid no money-rent but had to give half its fruits, and it was alleged that the landlord was entitled to receive half the fruits of this particular tree.

2. We are told that this is a test case which may govern other cases than the one now in question.

3. The Munsif who tried the case in the first Court decided in favour of the plaintiff, and held, as I read his judgment, that there was the custom.

4. Then the appeal went to the learned Subordinate Judge in the first Appellate Court, and it seems that on the 21st of August the appeal was heard and arguments addressed to the learned Judge; and after that he reserved judgment. Then having reserved judgment, as I understand, at a subsequent stage, in the absence of the plaintiff, although the plaintiff's Pleader was there, the learned Judge allowed the defendant's Pleader to put in certain documents, in spite of the protest of the plaintiff's Pleader. Those documents are described by the learned Judge as certain papers along with lists," and it appears from a subsequent note that those papers included a "certified copy of survey village notes," which was

marked Exhibit B under the direction of the learned Judge; but the learned Judge has not recorded any reason for admitting that evidence. On the other hand, the plaintiff has alleged that if the evidence was to be admitted at all, he ought to have been given an opportunity of rebutting that evidence; and the importance of that argument is made clear by the judgment of the learned Judge himself, because in giving his judgment, after referring to the village note which was put in on behalf of the defendant, he goes on to say, when dealing with the plaintiff's evidence: The plaintiff has, in my opinion, failed to prove that the defendant ever divided the fruits with the plaintiff or his predecessor-in-title. It is admitted by the plaintiff's witness that the previous owner made over to him the village papers. These would have been the best "evidence to show the division of the fruits but they have been withheld." It is stated in the plaintiff's affidavit that if the plaintiff had been given an opportunity of rebutting the evidence contained in the notes which were put in on behalf of the defendant, he would have been able to put in those papers. Whether they would assist his case or not, I cannot tell. Personally I think, quite apart from the rules of the Code to which I intend to make reference directly, that is not the way in which an appeal ought to be heard. I do not think it was fair to the plaintiff that these notes should have been admitted by the learned Judge after the arguments were finished, when apparently the plaintiff's Pleader had no opportunity of arguing the effect of them; certainly, the plaintiff had no opportunity of rebutting the evidence contained in those papers.

5. But the case may be looked at from a different point of view. That is the point of view under the rules of the Civil Procedure Code, the material one being Order XLI, Rule 27, which runs as follows:--"The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if...the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined. Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission." In this case the learned Judge has not recorded any reason for the admission of the evidence and I think myself that that alone would be sufficient for us to allow this appeal. I do not wish to rest my judgment upon that alone, because I think the merits of the case are in favour of the plaintiff. The learned Judge of the High Court, Mr. Justice Walmsley, in giving his judgment seems to have been satisfied that the learned Subordinate Judge was not influenced by the evidence contained in the papers which were put in on behalf of the defendant after the case had been argued and judgment was reserved. With greatest respect to him, I think, that is not a legitimate conclusion to arrive at, because, if we look at Exhibit B, there is a material statement in it--a statement which has been marked with red pencil--and we cannot help noting that that must have been marked by him because it was in his opinion a material piece of evidence in the case. How much it may have

affected his mind, we are unable to say; but in my opinion, it is impossible for us to say that it did not affect his mind at all. Therefore, on the ground, first of all, that the learned Judge has not recorded his reason for admitting the evidence; and, secondly, on the ground that the evidence ought not to have been admitted in the circumstances after the case was argued, and thirdly, on the ground that we cannot say that the evidence did not affect his mind, I think this appeal ought to be allowed.

6. Then the question arises what course ought to be adopted. In my judgment, the case should go back to the first Appellate Court for the purpose of being re-heard, and we give direction that if the learned Judge who hears the case thinks it right to hear further evidence under the circumstances of this case, then, of course, it will be in his discretion to allow it; but if he does allow it, he must give an opportunity to both parties to produce such evidence as they think fit. Further, I think that we ought to say that this case ought not to be tried by the same Subordinate Judge who has already heard it. I do not wish to make any reflection on the Subordinate Judge, in any shape or form; but I think it may be difficult for him, when he hears the case on the second occasion, to have an impartial mind free from his former impression. Therefore, I think the case should go back to the District Judge, so that if he does not hear it himself, he will direct it to be tried by another Subordinate Judge competent to try it.

7. The plaintiff will have the costs of this appeal, the appeal before Mr. Justice Walmsley and in the first Appellate Court.

Asutosh Mookerjee, J.

8. I agree.