
(1963) 05 GAU CK 0007
In the Gauhati High Court
Case No : Second Appeal No. 29 of 1961

Jani Ram Kalita

APPELLANT

Vs

Bishnu Ram Kalita and Others

RESPONDENT

Date of Decision : 20-05-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 100(1)

Citation : (1963) 05 GAU CK 0007

Hon'ble Judges : G. Mehrotra, C.J

Bench : Single Bench

Advocate : S.K. Ghose, D.N. Medhi, M.N. Deka and J.P. Bhattacharjee, for the Appellant; D.K. Sarma, for the Respondent

Final Decision : Dismissed

Judgement

G. Mehrotra, C.J.—This is Defendant's appeal. Briefly the facts are that one Bogabhot had two wives. From his first wife he had two sons, Sona and Khedalu. His first wife and both the sons from his first wife died during his life-time. Thereafter he married Sarufuli. Sarufuli according to the Plaintiff had a daughter and a son Rupa. Plaintiff is the son of Telo. Rupa had a daughter Bhogriya who is now dead and was married to Defendant No. 2. Defendant No. 1 claims to be the direct descendant of Bogabhot's brother Indur. The admitted fact is that Bogabhot acquired the right of occupancy under pro forma Defendants Nos. 3 to 10 in respect of 21 B, 3 K. 4 lechas of land described in the schedule attached to the plaint.

The case of the Plaintiff is that after the death of Bogabhot the property devolved upon his son Rupa and after the death of Rupa the Plaintiff as the sister's son of Rupa is his heir. The Plaintiff claims to be the preferential heir of Rupa.

2. The defence taken was mainly that Telo-Plaintiff's mother was not the real sister of Rupa. Sarufuli had been married before she was married to Bogabhot and Telo the mother of the Plaintiff was born of her wedlock with her former

husband. The Plaintiff thus is not the sister's son of Rupa and has no preferential claim over that of the Defendant. Only Defendant No. 1 contested the suit.

3. Both the Courts on consideration of the evidence have come to the conclusion that Tele-is the daughter of Sarufuli from Bogabhot and not from her former husband and the Plaintiff is a preferential heir.

4. The only point urged before me is that the judgment of the Court below is no judgment in the eye of law. In substance the argument is that the Court below has affirmed the decree of the trial Court without applying its mind to the evidence and thus there has been no proper disposal of the appeal. The Court below has committed an error of procedure and this Court can u/s 100, CPC interfere with the decision of the lower appellate Court.

There are two alternatives open to this Court " either to send back the case to the Court below for disposal of the appeal or examine evidence for itself and come to its own conclusion on the merits, of the case. The infirmity pointed out in the judgment of the Court below is that the Court below has not independently examined the evidence for itself. It has only affirmed the assessment of the evidence made by the trial Court. In the grounds some part of the evidence of the Plaintiff has been quoted to show that if the Court below had applied its mind to the evidence of the Plaintiff's and Defendant's witnesses independently, it could not have come to the conclusion to which it came.

Reference is made to two cases of this Court in support of the contention that the Court below should not only endorse the view of the trial Court but should also give reference to the evidence and give its own reason for believing or disbelieving the evidence of the parties.

5. The first case referred to is Ambor Ali v. Nichar Ali, AIR 1950 Gau 79. Particular reference is made to the following passage at page 80 of the report:

We wish to point out to the Munsiff, just as we have pointed it out to the Subordinate Judge, that it is not sufficient merely to say that on a careful consideration of the evidence, the Court has come to this or that conclusion. The material evidence on a particular issue for and against the parties to the suit must be set out in the judgment, and reasons stated for its acceptance or rejection.

In another unreported decision of this Court in the case of Budhmal v. Jalannagar South Estates Ltd., Second Appeal No. 122 of 1960 D/- 21-3-1961 (Assam) which is my judgment, this principle was accepted. The Court of appeal in India is a Court of rehearing and it has to examine the evidence independently for itself and not only to see if there is any defect in the judgment of the trial Court. The opinion of the trial Court as regards the appreciation of evidence is no doubt entitled to a great weight as the trial Court had an opportunity to watch the demeanour of the witnesses. But it does not mean that the lower appellate Court in every case must write out an elaborate judgment. So long as it is apparent

from the perusal of the judgment of the trial Court that it has considered the points arising in the case and has examined the evidence and has come to its own independent conclusion on the points at issue after the perusal of the evidence on the record, merely because the judgment of the appellate Court is not elaborate and the judge has not given in detail the summary of the evidence produced by the parties, it cannot be said that the judgment of the appellate Court is no judgment in the eye of law and the Appellate Court has committed an error of procedure.

6. As pointed out by their lordships of the Supreme Court in the case of R. Ramachandran Ayyar Vs. Ramalingam Chettiar,

In hearing a second appeal, if the High Court is satisfied that the decision is contrary to law or some usage having the force of law, or that the decision has failed to determine some material issue of law or usage having the force of law, or if there is a substantial error or defect in the procedure provided by the Code, or by any other law for the time being in force which may error or defect in the decision of the case upon the merits, it can interfere with the conclusions of the lower Appellate Court.

The error or defect in the procedure to which Clause (c) of Section 100(1) refers is, as the clause clearly, and unambiguously indicates, an error or defect connected with, or relating to the procedure; it is not an error or defect in the appreciation of evidence adduced by the parties on the merits. That is why, even if the appreciation of evidence made by the lower appellate Court is patently erroneous and the finding of fact recorded in consequence is grossly erroneous, that cannot be said to introduce a substantial error or defect in the procedure. On the other hand, if in dealing with a question of fact, the lower appellate Court has placed the onus on a wrong party and its finding of fact is the result, substantially, of this wrong approach, that may be regarded as a defect in procedure; if in dealing with questions of fact, the lower appellate Court discards evidence on the ground that it is inadmissible and the High Court is satisfied that the evidence was admissible, that may introduce an error or defect in procedure. If the lower Appellate Court fails to consider an issue which had been tried and found upon by the trial Court and proceeds to reverse the trial court's decision without the consideration of such an issue, that may be regarded as an error or defect in procedure; if the lower appellate Court allows a new point of fact to be raised for the first time before it, or permits a party to adopt a new plea of fact, or makes out a new case for a party, that may, in some cases, be said to amount to a defect or error in procedure. But the High Court cannot interfere with the conclusions of fact recorded by the lower appellate Court however erroneous the said conclusions may appear to be to the High Court." "The Supreme Court has further pointed out that if the finding has been recorded without any evidence or

that the finding is such that no reasonable person can come to that conclusion, it will be an error of law. But the High Court is not justified in interfering with the finding of fact recorded by the lower appellate Court merely because the judgment of the lower appellate Court was not as elaborate as that of the trial Judge, or because some of the reasons given by the trial judge had not been expressly reversed by the lower appellate Court.

7. The test, therefore, is whether from the perusal of the judgment it can be said that the trial Court has not considered the evidence at all. The lower appellate Court has held that the witnesses for the Plaintiff appeared to be more reliable and their evidence appeared to be consistent with the facts and circumstances of the case. The Court below has referred to the evidence of the Plaintiff and has not merely affirmed the estimate of evidence made by the trial Court. The lower appellate Court has considered the defence evidence and has compared the reliability of the witnesses produced by the Plaintiff and the Defendant. He has remarked that the evidence of the prosecution witnesses appears to be more reliable, as observed above. He has also referred to other circumstances which go to show that the Defendant's case cannot be believed. It is not even a case of reversal where one could have legitimately expected that the lower appellate Court would deal with some of the reasons of the trial Court. It is a case of affirmation of the judgment. The trial Court has considered the evidence and I do not think that the judgment of the lower appellate Court can be regarded as no judgment in the eye of law. The question which came up for consideration has been clearly set out in the judgment of the Court below. It cannot, therefore, be said that the Court below has not applied its mind to the points which arose in the case. The question for decision is a pure question of fact. The Court below has not accepted the evidence of the Defendant and has believed the evidence of the Plaintiff.

That being so, howsoever erroneous the assessment of the evidence by the lower appellate Court may be, this Court will not interfere with the decision u/s 100, Code of Civil Procedure.

In this view of the matter it is not necessary for me to go into the evidence and deal with the criticism made of the evidence of the Plaintiff by the counsel for the Appellant, nor to examine the reasons given by the counsel for the Appellant in support of his contention that the evidence of the Defendant should be preferred to that of the Plaintiff. The appeal is accordingly dismissed with cost.