
(1956) 08 AHC CK 0042
In the Allahabad High Court
Case No : F.A.F.O. No 190 of 1952

Jitan Singh and Others

APPELLANT

Vs

Smt. Rajai and Others

RESPONDENT

Date of Decision : 31-08-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 131, 151

Citation : (1956) 26 AWR 741

Hon'ble Judges : D.N. Roy, J

Bench : Single Bench

Advocate : S.K. Verma, for the Appellant;

Final Decision : Dismissed

Judgement

D.N. Roy, J.—This matter has been brought before the court in the manner of a First Appeal from Order, but it has to be treated as a revision inasmuch as the order in question is not subject to appeal but is open to revision. The facts are these. The Plaintiff-opposite-party made an application u/s 12 of the Agriculturists' Relief Act for redemption of certain mortgage, alleging that the provisions of the U.P. Agriculturists' Relief Act were available to him. The Defendant-opposite-party asserted that the provisions of that Act were not applicable. The Munsif dismissed the application on the ground that there was no proof that the original mortgagor was an agriculturist on the date of the loan, namely, on 19-7-1884.

2. The Plaintiff preferred an appeal before the lower appellate court. The judgment of the lower appellate court bears out that it was conceded on behalf of the Plaintiff that on the evidence on the record it was not possible for the Plaintiff to contend that it was proved that the original mortgagor was an agriculturist on the date of the mortgage. It was, however, contended before the lower appellate court on behalf of the Plaintiff that indulgence should be given to the Plaintiff to file documentary evidence to prove that fact and twelve copies of village extracts were filed in that court to sustain the contention that the original

mortgagor was an agriculturist on the date of the loan. The Respondents vehemently opposed the prayer of the Plaintiff-Appellant in the lower appellate court and contended that the lacuna in the evidence cannot be made up by fresh opportunity to the Plaintiff to file fresh papers. The lower appellate court considered the question and observed as follows:

The point raised before me was that the Appellant was an old and illiterate parida nashin lady and got the case in the court below conducted by her Pairokar Mewa Singh, her Pattidar and distant relation and that she was never instructed by that Pairokar either as to the necessity for the disputed papers or about their availability. She has filed an affidavit to that effect. The affidavit shows that she never knew that it was necessary to prove that the original mortgagor was an agriculturist on the date of loan or that the only evidence permissible under the law was documentary. She has further sworn that her Pairokar never told her that documentary evidence should be filed. There is no counter-affidavit. I, therefore, take it as true that the lady never knew personally and was never made to understand by her Pairokar that such papers were necessary in order to enable her to obtain the relief claimed. I trust that it is a case in which the lady was one who could not have filed the papers with due diligence inasmuch as she was never made to believe that it was obligatory upon her to file these papers. I would, therefore, allow the papers to be filed, but this must be conditional on payment of costs as the Pairokar was certainly negligent in not informing her about the necessity of filing these papers and she must pay the penalty for the negligence of the Pairokar. I would, therefore, impose a cost of Rs. 75/-.

3. Upon that observation the lower appellate court allowed the appeal, set aside the decree and judgment of the trial court and remanded the case for a fresh trial after the admission of the evidence that the Plaintiff intended to produce.

4. The order of remand is not appealable Under Order 43, Rule 1 of the Code of Civil Procedure. It would be an order open to revision provided that it comes within the four corners of Section 115 of the CPC That section provides that the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears--

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.

5. The limits of the jurisdiction conferred, by Section 115 have been the subject of a number of judicial decisions. As long ago as 1894 the Privy Council in *Rajah Amir Hassen v. Sheo Baksh Singh* 11 Ind App 237 made the following observations:

The question then is, did the Judges of the lower courts in this case, in the

exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the case, and, even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity. In 1917 again in *Balkrishnan Udayar v. Vasudeva Aijaob* L.R. 44 Ind App 261, the Board served:

It will be observed that the section appeals to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusion of law or fact in which the question of jurisdiction is not involved.

6. In 1949 in *Venkatagiri Ayyangar v. Hindu Religious Endorsements Board*, Madras L.R. 76 Ind App 67 the Privy Council again examined the scope of Section 115 and observed that they could see no justification for the view that the section was intended to authorise the High Court to interfere and correct gross and palpable errors of subordinate courts so as to prevent grave injustice in non-appealable cases, and that it would be difficult to formulate any standard by which the degree of error of subordinate courts could be measured. In examining Section 115 of the Code, the Board said that the section empowers the High Court to satisfy itself on three matters,

(a) that the order of the subordinate court is within its jurisdiction;

(b) that the case is one in which the court ought to exercise jurisdiction; and

(c) that in exercising jurisdiction the court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. The Board further observed that if the High Court is satisfied on those three matters, it has no power to interfere because it differs, however profoundly, from the conclusions of the subordinate court on questions of fact or law.

7. Later in the same year, in *Joy Chand Lal v. Kamalaksha Chaudury* L.R. 76 Ind App 131 their Lordships had again adverted to this matter and reiterated what they had said in their earlier decision.

8. The Supreme Court in *Keshardeo Chamaria v. Radha Kissan Chamaria* 1953 ALJ 101 approved of the view expressed by the Privy Council in the cases cited above in determining a matter in which the facts (sic) these. On the request of the decree-holder, the execution case was adjourned to a certain date. On the adjourned date of hearing the decree-holder again applied for adjournment. The adjournment application was dismissed by the executing court, without informing the decree-holder's counsel that the request for adjournment had been refused. The execution case was also dismissed by the very same order without calling upon the decree-holder's counsel to state (sic) he wanted to be done in the matter in these circumstances. When the decree-holder was apprised of this order, he made an application u/s 151 CPC for restoration of the execution and

for setting aside the order of dismissal. Thereupon, the court restored the execution case u/s 131, CPC on the sole ground that it had committed a mistake in dismissing the execution case at the same time when it dismissed the adjournment application without informing the decree-holder's counsel that the request for adjournment had been refused. An appeal and a revision were preferred in the High Court against that order. The High Court held that no appeal lay. On the revision application the High Court took the view that the Subordinate Judge was in error in restoring the execution case without taking into consideration the point whether the decree-holder's counsel could really take any steps in aid of the execution if he had been apprised of the order of the court dismissing the adjournment application. The High Court allowed the revisional application and remanded the case to the Subordinate Judge for reconsideration and disposal in accordance with the observations made in the order. In appeal before the Supreme Court, the Supreme Court held that the order of the Subordinate Judge was one that he had jurisdiction to make, that in making that order he neither acted in excess of his jurisdiction nor did he assume jurisdiction which he did not possess; and that it could not be said that in the exercise of it he acted with material irregularity or committed any breach of the procedure laid down for reaching the result.

9. In AIR 1943 289 (Nagpur) it was held that negligence on the part of a party or his pleader is no ground for allowing fresh evidence under Order 41, Rule 27 of the Code of Civil Procedure, and that if there is no proper record of the reason for admitting additional evidence, the order passed by the lower appellate court admitting additional evidence at the stage of appeal is not justified and is without jurisdiction and ought to be set aside in revision.

10. The Bombay High Court in Motibhai Jesingbhai Patel Vs. Ranchhodbhai Shambhubhai Patel, observed that where there is a wilful disregard or conscious violation by a Judge of a rule or law or procedure, the case is one of material irregularity and the High Court can interfere in revision.

11. In AIR 1931 143 (Privy Council) the Privy Council observed that Order 41, Rule 27 is not intended to allow a litigant who has been unsuccessful in the lower appellate court to patch up the weak parts of his case and fill up omissions in the court of appeal; and that under Clause (1) of Rule 27 it is only where the appellate court "requires" it that additional evidence can be admitted; and that the legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent and that wherever the court adopts this procedure it is bound by the rule to record its reasons for so doing, and Under Rule 29 must specify the points to which the evidence is to be confined and record in its proceedings the points so specified. The Privy Council further laid down that the power so conferred by the Code ought to be very sparingly exercised.

12. The same view was taken by the Supreme Court in Arjun Singh alias Puran

Vs. Kartar Singh and others, . The Supreme Court held that the discretion given to the appellate court by Rule 27 of Order XLI to receive and admit additional evidence is not an arbitrary one, but is a judicial one circumscribed by the limitations specified in that rule, and if the additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence, it will be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it were non-existent.

13. In *Kalika Pande Vs. Ram Autar Pande and Another*, , a learned Judge of this Court held that where the Plaintiff has placed evidence before the trial court and the trial court has decided the question on the evidence so placed, the appellate court cannot remand the case to allow Plaintiff to produce additional evidence that he desires on the ground that the evidence of the Plaintiff was not sufficient to establish his case. It was further held that it is the duty of the appellate court in such a case to come to its conclusion on the evidence on the record and decide the appeal either for the Appellant or for the Respondent in accordance with its conclusions.

14. In this connection it will be necessary to reproduce the rule as it stands amended by this High Court. It is as follows:

27. (1) the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if--

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) the evidence sought to be adduced by a party to the appeal, which alter exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made, or

(c) 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.

15. The case does not appear to come under any portion of Rule 27. It is not under Clause (a) because the trial court did not refuse to admit evidence. It is not under Clause (b) because there is no suggestion that the evidence was not within the knowledge of the Plaintiff or could not be produced by her at the time of the trial. What she contended was that she was not informed by her Pairokar that such evidence was necessary or could be made available. Ignorance of law or neglect or slackness of a party or his Pairokar cannot form the foundation for admission of fresh evidence Under Order XLI, Rule 27 of the Code; See *Ramehra v. Kalbu Rai* ILR 46 Alld. 264, *Wali Muhammad v. Muhammad Baksh* ILR Lah. 84, *Mallappa Minappa Patil Vs. Venkaji Appaji Patil*, and *Firm Kapurchand Bhagaji v.*

Laxman Trimbak AIR 1952 Nag. 57.

16. The order in question was not under Clause (c) of Rule 27 because it is not a case where the appellate court has "required" the documents to be produced to enable it to pronounce judgment. Obviously therefore the admission of evidence was not within rules and the lower appellate court could not by permitting that evidence to be taken allow the litigant who has been unsuccessful in the trial court to strengthen the weak parts of her case and fill up the omissions. Under the circumstances I am of opinion that this matter has to be treated as a revision and that in view of the fact that the lower appellate court's order was not in accordance with the provisions of Order XLI, Rule 27, and in exercising jurisdiction the lower appellate court acted illegally, that is in breach of the provisions of law, or with material irregularity, that is by committing some error of procedure in the course of the trial which is material in that it affected the ultimate decision, the order in question must be vacated and the order of the trial court dismissing the suit with costs should be restored. The Appellants shall get their costs in this Court and in the lower appellate court from the Respondents.