

(1978) 09 GAU CK 0005
In the Gauhati High Court

Kali Charan Raj Bongshi

APPELLANT

Vs

Roheswaripriya Raj Bongshi

RESPONDENT

Date of Decision : 19-09-1978

Acts Referred:

Citation : AIR 1978 Guw 7

Hon'ble Judges : B.N. Sharma, J;B.N. Sarma, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.N. Sarma, J.—This is an appeal by the plaintiff, whose suit was partially decreed by the trial court but dismissed in entirety by the appellate court in the First Appeal.

The plaintiff's case was that he purchased 2 kathas 10 lechas of land comprised in dag No. 828 of K.P. Patta No. 54 of village Bhathuakhana, Mauza Tihu from defendant Roheswaripriya, who is his aunt, under a registered sale deed dated 20-11-1967. As the defendant caused obstruction in his possession after the sale, the plaintiff filed the suit for declaration of his title to the land and for recovery of khas possession.

2. The defendant filed a written statement and contested the suit alleging, inter alia, that she did not sell any land to the plaintiff under dag No. 828. She, however, admitted that on 20-11-1967 she sold 1 katha 10 lechas of land to the plaintiff under registered sale deed tn dag No. 813. The fact that she caused obstruction in the possession of the plaintiff over the suit land was also denied. The suit was also resisted on same other technical grounds with which we are not concerned in this Second Appeal.

3. Upon the pleadings as many as 5 issues were framed including one as to whether the plaintiff acquired good title over the suit land by right of purchase dated 20-11-1967, which was issue No. 3.

4. On a consideration of the evidence adduced by the parties, the learned Munsiff held that the defendant had actually sold 1 katha 10 lechas of land in dag No. 813 and not 2 kathas 10 lechas of land in dag No. 828, as alleged by the plaintiff. He further found that the plaintiff in collusion with a peon of the Sub-Registrar's Office tampered with the sale deed as well as with the Register in the office of Sub-Registrar, altering dag No. "813" into dag No, 828" and the area "1 katha 10 lechas" Into "2 kathas 10 lechas". However, in view of the admission made by the defendant that she had sold 1 katha 10 lechas of land to the plaintiff in dag No. 813 under a registered sale deed on the same date, the Munsiff decreed the suit for this land, although the plaintiff did not seek any relief in his plaint for any land in that dag.

5. Being aggrieved by the decree of the trial court, for not decreeing the suit in terms of the plaint, the plaintiff took an appeal before the Assistant District Judge. No appeal or cross objection was filed by the defendant against the decree passed by the trial court in respect of dag No. 813. In deciding the appeal the learned Assistant District Judge agreed with the finding of the trial court that the plaintiff committed forgery in respect of the sale deed and that he was not entitled to get any decree in respect of 2 kathas 10 lechas of land comprised in dag No. 828. He further held that when the plaintiff did not seek any relief in his plaint in respect of dag No. 813, the Munsiff was not justified in decreeing the plaintiff's suit for 1 katha 10 lechas comprised in that dag. In this view of the case, the learned Assistant District Judge dismissed the appeal and also set aside the decree passed by the trial court. Being aggrieved by this decree of the First Appellate Court, the plaintiff has come up with the present Second Appeal,

6. Mr. J.N. Sarma, the learned Counsel for the appellant submits before me that when the defendant did not take any appeal, against the decree passed by the trial court in respect of 1 katha 10 lechas of land comprised in dag No. 813 and that decree became final for that reason, the learned lower appellate court committed an error in law by setting aside that decree in the appeal filed by the plaintiff-appellant,

7. Mr. K. Sarma, the learned Counsel appearing on behalf of the Respondent, on the other hand, submits that in view of the provisions of Rule 33 of Order 41 of the Civil P.C. which give wide power to the Court, the learned Assistant District Judge was competent to pass the decree which has been appealed against, for ends of justice.

8. Rule 33 of Order 41 of the Civil P.C. reads as follows:

The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection:

Provided that the Appellate Court shall not make any order u/s 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

There is an illustration under this rule as below:

A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The appellate Court decides in favour of X. It has power to pass a decree against Y.

9. There is no difficulty in respect of the powers of the Court in regard to cause which are covered by the illustration. But with regard to the powers of the Court under this rule, where the case does not fall within the ambit of the Illustration, there was at one time divergence of opinion amongst different High Courts. It has been held in some cases that though on its terms, the rule confers a wide power, it should be read along with other statutory provisions such as Rule 22, the Limitation Act and Court-fees Act; that where the dispute concerns only the appellant and the respondent, no relief should be granted to the latter under this rule in the absence of cross-objections by him; and that the legitimate occasion for interference as indicated by the illustration is when the Court decides in favour of the appellant and consequential thereon and with a view to avoid inconsistent decrees in the same suit, decides to grant appropriate reliefs in favour of non-appealing respondents. On the other hand it has been held that the illustration is not exhaustive, that the Court has power to interfere even when the dispute concerns solely the appellant and respondent and that the Court could interfere even when it dismisses the appeal.

10. This conflict has now been set at rest, in my opinion, by the decision of the Supreme Court in *Nirmala Bala Ghose and Another Vs. Balai Chand Ghose and Others*, In that case while considering the scope and ambit of the provisions of the Rule 33 of Order 41 of the Civil P.C. the Court observed as below:

The rule is undoubtedly expressed in terms which are wide, but it has to be applied with discretion, and to cases where Interference In favour of the appellant necessitates Interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. Where in an appeal the Court reaches a conclusion which Is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by Order 41, Rule 33 may properly be invoked. The rule however does not confer an unrestricted right to re-open decrees which have become final because the appellate Court does not agree with the opinion of the Court appealed from.

11. It is evident from this decision that the Court can interfere with a decree against which no cross-appeal or cross-objection has been taken only if it is necessary for the purpose of giving relief to the appellant and not otherwise. If the appeal is to be dismissed, the Court cannot go to interfere with such decree.

12. Similar view was expressed by the Supreme Court in Rameshwar Prasad and Others Vs. Shyam Beharilal Jagannath and Others, where the Court observed as follows:

Rule 33 really provides as to what the Appellate Court can find the appellant entitled to. It empowers the Appellate Court to pass any decree and make any order which ought to have been passed or made in the proceedings before it and thus could have reference only to the nature of the decree or order in so far as it affects the rights of the appellant.. It further empowers the Appellate Court to pass or make such further or other decree or order as the case may require. The Court is thus gives wide discretion to pass such decrees and orders as the interests of justice demand. Such a power is to be exercised in exceptional cases when its non-exercise will lead to difficulties in the adjustment of rights of the various parties.

13. In a recent decision of the Smt. Dayali Devi Vs. Captain J.M. Mitra and Another, the position was made very clear. In that case regarding the scope and ambit of Rule 33, the Court observed:

Order 41, Rule 33 is an enabling provision. It confers certain powers on the appellate court but does not specify or lay down when and under what circumstances those powers are to be exercised. However wide the powers exercisable under this provision it cannot be said that; even though the appellate court finds that the appeal on its own merits cannot succeed, it would still have power to set aside the decree of the court below. The more reasonable and unanomalous interpretation of the rule will be that the powers given to the court of appeal under the rule can be exercised only if the court finds that the appeal on its merits must succeed. It is only then that an appropriate occasion may arise for the exercise of the extraordinary powers conferred on the appellate court by this rule. The court may then consider and decide having regard to all the material circumstances whether and, if so, in what manner the powers should be exercised for doing complete justice between the parties according to law.

14. This view is in consonance with the view expressed by the Supreme Court in the above mentioned cases and I am in respectful agreement with the same.

15. In the instant case, the plaintiff took the appeal before the Assistant District Judge, being aggrieved by the decree of the trial court for not decreeing the suit in respect of dag No. 828. The defendant who was aggrieved by the decree passed in respect of the land in dag No. 813 did not file any cross-appeal or cross-objection against that decree. The appellate court found that there was no merit in the appeal and accordingly it dismissed the same. It was not necessary to set aside the decree of the trial court for giving relief to the appellant or for adjustment of the rights of various parties, as the court found that there was no substance in the appeal and decided to dismiss the same. In these circumstances, the first appellate court had no jurisdiction to set aside the decree

of the trial Court, in respect of dag No. 813, even if he found that the decree was bad. Rule 33 of Order 41 of the Civil P.C. does not give him such power.

16. In the result the decree appealed against is set aside. The decree of the trial court is restored. The appeal is allowed. In the circumstances of the case, I leave the parties to bear their own costs.