
(1923) 01 CAL CK 0009
In the Calcutta High Court

Nawab Khajeh Habibullah and Others

APPELLANT

Vs

Gola Asmoter Khatun and Others

RESPONDENT

Date of Decision : 15-01-1923

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : 74 Ind. Cas. 575

Hon'ble Judges : Panton, J;C.C. Ghose, J

Bench : Division Bench

Judgement

1. This appeal has arisen under rather peculiar circumstances. The Stilt out of which this appeal has arisen was brought by the plaintiffs for recovery of possession of two plots of land after establishment of title thereto. In the Court of first instance, the suit was decreed in the following manner. The plaintiff's title was declared to the Rian of plot No. 1 and the entirety of plot No. 2 as against defendants, No. 1. I to, 19 and 23 to 26 after contest and ex parte as; against the remaining defendants. In the Court of Appeal below, the following order "was passed: "The suit be decreed in part; the title of plaintiffs Nos. 2 to 7 be declared to I Rani of plot No. 1 and plot No. 2 of the. plaint; and plaintiffs Nos. 2 to 7 do remain in possession of the same. So far as plaintiff No. 1 is concerned the suit is dismissed with costs. The parties (except plaintiff No. 1) do get costs in the lower Court in proportion to their success. But all this is dependent upon plaintiffs Nos. 2 to 7 paying within one month from today a further Court fee of Rs. 65, Appeal No. 79 is, therefore, dismissed with costs. Appeal No. 34 is partially, allowed with proportionate costs, as against other respondent, plaintiffs Appeal No. 34 is dismissed with costs, on condition that plaintiffs Nos. 2 to 7 do pay within one month from to-day, a further Court fee of Rs. 65, in default of which Appeal No. 34 will be allowed in full, i.e., the original suit will be dismissed with costs in both Courts to defendants." This order was made by Mr. C. Sells, Additional District Judge of Tipper, on the 20th February 1918. On the 26th February, the decree, which was the formal expression of opinion on the part of the Court of Appeal below, was signed by Mr. Sells. This decree is in accordance with the ordering

portion the judgment which has been set out above. The appears that the plaintiffs Nos. 2 to 7 did not carry out the order of the Court "by which they were directed to pay of brother Court fee of Rs. 65 within the time limited by the order and by the decree which was signed on the 26th February 1918. On the 5th July 1920 an application was made on behalf of the plaintiffs Nos. 2 to 7: for permission to deposit in Court a further Court fee of Rs. 65 as mentioned in, the judgment which is delivered on the 20th February "and in the decree which was signed" the 26th February 1918. Mr. Sells had been transferred from Tipper and the matter came on before Mr. Martin, who was acting as an Additional District Judge. The further Court fee was actually deposited in Court by the plaintiffs Nos. 2 to 7 on the 30th July 1920 and thereupon Mr. Martin ordered, that the decree (described as the final decree should now be passed it: this case. In accordance with Mr. Martiti's agree, date the 30th July 1920, a clause was inserted in the original decree which ran as follows: "In accordance with older No. 14 of the order sheet dated the 20th July 1918 Court fee of Rs. 65 having been paid, the decree is made final. The appeal that is being dismissed with costs, is against tie other respondents (sic) and the plaintiffs Nos. 2 to 7 will get Rs. 65 as costs in addition to that already awarded to them." (vide the Judgment dated the 20th February 1918). Defendants Nos. 1 to 26 complain that, inasmuch as the plaintiffs Nos. 2 to 7 did not carry out the order made by Mr. Sells on the 20th February 1918 as regards paying into Court a further Court fee of Rs. 65 which was ordered by him to be paid into Court within one month from the 20th February 1918, the decree by Mr. Sells could not be re-opened again and extension of time granted after the expiration of more than two years from the date of the original order on the plaintiffs Nos. 2 to 7 to pay into Court a further Court fee as referred to above. It is argued on behalf of defendants Nos. 1 to 26 that, notwithstanding the terms of Section 148 of the Code of Civil Procedure, the applications of plaintiffs Nos. 2 to 7 made on the 5th July 1920 was incompetent and that the Court below had no jurisdiction whatsoever to amend in July 1920 the decree by Mr. Sells and to enlarge the time granted by the decree of Mr. Sells to pay into Court the further Court-fee of Rs. 65. In support of this contention our attention has been drawn to a number of cases amount which may be mentioned the cases: Suranjan Singh v. Rambahal Lal 21 Ind. Cas. 585 : 35 A. 582 : 11 A.L.J. 95; Sajjadi Begam v. Dilawat Husain 47 Ind. Cas. 4 : 40 A. 579 : 16 A.L.J. 625; v. Dharmaraja Aiyar Srlnivrsa Mudahar 31 Ind. Cas. 240 : 39 M. 876 : 29 M.L.J. 708 : 18 M.L.T. 486 : 2 L.W. 1074 Mr. Haq on behalf of the respondents has vigorously con tested the appellants right of appeal to this Court and has argued, firstly, that there was no right of appeal from the order of Mr. Martin which was merely an order for amendment of the previous decree. Secondly, that even if the appeal preferred by defendant Nos. 1 to 26 be treated by the Court as a petition by way of revision, u/s 115 of the CPC the appellants cannot get any relief whatsoever for the order complained of, was made by the lower Appellate Court in the exercise of its discretion and it is not usual or this Court to interfere with orders made by the Courts below in the exercise of the ear Incretion. Thirdly, that the decree signed by Mr. Sells on the 26th February

1918 was merely a preliminary decree which had; be made final by a further decree, and; that no such decree having been made by the Courts below for a period of more than two years from the 26th February 1918, at any rate, before the 5th July 1920. It was open to the plaintiffs Nos. 2 to 7 to apply to the Court, to put in a further court fees as mentioned in the original order of the 20th February 1918 to make such application at any time before the final decree was passed. We are of opinion, for the reasons about to be given, that there is no substance; what Yes in any of the contentions urged before us on behalf of the respondents, but that the contentions urged on behalf of defendants Nos. 1 to 26 should prevail. In the first place, it is quite unnecessary for us to go into the question as to whether the appellant shaft a cite of appeal to this Court. Assuming (however, that they had not, the circumstances of this case demand of us that we should treat the appeal preferred by the defendants Nos. 1 to 26 as a petition u/s 115 of the Code of Civil Procedure. The circumstances are so extraordinary that it would amount to a denial of justice if We were hold that our powers are so limited that We cannot give any relief to defendants Nos. 1 to 26 in the circumstances which have happened. It is the second piece, We are of opinion that the decree Which was drawn up shortly after the 20th February 1918, namely, on the 26th February 1918 was in itself a final decree. No doubt, it would have been better if the Court after determining that the extra fee was payable; had ordered the fee to be paid within certain time and had delayed passing the decree until this time limited by the order had expired, But the fact that the decree was drawn before the expiration of one month from the 20th February 1918 did not in any way amount to this that it was to be treated as a preliminary decree and that it was to be followed by a further formal expression of opinion of the Court, namely, by a further final decree. The default provisions mentioned in the judgment itself of the 20th February 1918, are incorporated in the decree which was signed on the 26th February 1918 and it was a self contained decree in every sense of the word and it was, to all intents and purposes, the final formal expression of opinion of the Court. That being so, it now remains for us to consider as to whether the appellants before us have brought their case within the four corners of Section 115. As we have already held, the decree signed on the 26th February 1918 was a final decree. If it was a final decree, then, subject to such rights of amendment, as, for instance, the rectification of a clerical error and so forth, that decree could not be amended by the Court which passed the decree. That being so, there was clearly an exercise of jurisdiction by the Court below which had not been vested in it. In the circumstances, there is, therefore, no other alternative but to set aside the order made by Mr. Martin on the 2nd August 1920 and we accordingly do so.

2. The result, therefore, is that the decree as drawn up and signed by Mr. Sells on the 26th February 1918 must stand and all necessary results must follow there from.

3. The appellants have succeeded and they are, therefore, entitled to their costs. We assess the hearing fee at two gold mohurs.