
(1947) 08 CAL CK 0005

In the Calcutta High Court

Case No : Appeal from Appellate Order No. 1(sic)0 of 1946

Raj Narayan Kundu and others

APPELLANT

Vs

Shrikh Murad Ali and others

RESPONDENT

Date of Decision : 29-08-1947

Acts Referred:

Citation : (1947) 08 CAL CK 0005

Final Decision : Allowed

Judgement

Harries, C.J.—This is an appeal by the Defendants from an order of remand made by a lower Appellate Court. The Plaintiffs claimed that they were mutwallis of a certain mosque and they brought a suit for a declaration that the lands described in the schedule of the plaint were wakf properties of the mosque. They claimed a declaration of title and confirmation of possession, or in the alternative recovery of possession. The learned Munsif dismissed the Plaintiffs' claim holding that they had failed to establish that these lands belonged to the mosque and that the Plaintiffs as mutwallis could obtain any relief. The Plaintiffs appealed to the lower Appellate Court and the learned Subordinate judge of that Court discussed the evidence at great length. He then arrived at the following conclusion.

Even after considering the evidence adduced by the parties there remains in my mind a kind of uncertainty with regard to the actual position of the rights of the parties with respect to the lands in suit. On the side of the Plaintiffs we find the record-of-rights and other evidence; whereas the Defendant No. 1 has produced a large number of documents to prove that the lands in suit used to be held by the tenants in their personal capacity and not as mutwallis of the mosque. The uncertainty is further increased when it is considered that the Defendant No. 1 could not explain how Ahmedi Dewan acquired interest in the lands. It is a fact that once it is established that a certain property is a wakf property mismanagement by mutwallis will not, in any way, affect the wakf character of the property. Considering all this I am of opinion that the suit should not be finally decided on the evidence as it is on record. It should be remanded so that

the Plaintiffs" kobala Ext. 1 may be relayed and by relaying it may be established whether or not the suit lands are covered by this kobala Ext. 1. As the suit is being remanded, I think the Defendant No. 1 should be given a further opportunity to prove, if he can, how Ahmedi Dewan acquired interest in the suit lands and under what circumstances he was recognised as tenant by landlord.

2. In other words, the learned Subordinate judge found himself in some doubt, upon the evidence. That being so he thought it his duty to give the parties another chance of proving their case. I know of no provision of law that allows a Judge to follow that course. The parties had adduced all their evidence and it was for the learned Subordinate Judge to decide the matter as best he could. The record-of-rights was in favour of the Plaintiffs and if the presumption of accuracy was not rebutted then the Plaintiffs must succeed. On the other hand, if the evidence did rebut that presumption then the Defendants might well succeed. The learned Subordinate Judge thought that the kobala, Ext. 1 should be relayed, but no party had thought it necessary and the Court must decide the case upon the evidence produced. No Court is entitled to order a remand for re-hearing of a case merely because it finds itself in some difficulty in making up its mind. It must always be remembered that it is for the Plaintiff to establish his case and if he does not, the suit fails. Of course, in this case the Plaintiffs have the record-of-rights in their favour and upon the materials before the Court, the Court must decide the case. It appears to me that the order of the learned Subordinate Judge cannot be justified.

3. It was suggested that no second appeal would lie in this case. But it appears to me that if that was so, then this is a case in which I should be bound to interfere in my revisional powers. However, there is authority that in a case such as this a second appeal will be entertained.

4. In the result, therefore, I would allow this appeal, set aside this order of remand and send the case back to the lower Appellate Court for that Court to decide the case upon the materials before it. The costs of proceedings in this Court will abide the event in the lower Appellate Court. As I have allowed the appeal no order need be passed on the alternative application. All I need say is that if I had not interfered in appeal, I should have made the same order under sec. 115 of the Code of Civil Procedure.