
(1977) 11 MP CK 0015
In the Madhya Pradesh High Court
Case No : C. Revision No. 975 of 1973

Rama Rao and others

APPELLANT

Vs

Shantibai and others

RESPONDENT

Date of Decision : 24-11-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (1979) JLJ 385

Hon'ble Judges : Shiv Dayal Shrivastava, C.J

Bench : Single Bench

Advocate : P.R. Padhye, for the Appellant; N.S. Kale, for the Respondent

Final Decision : Allowed

Judgement

Shiv Dayal, C.J.—In the suit instituted by the revision-petitioners, April 2, 1968, was fixed for evidence of both the parties. On that date, the defendants' counsel applied for adjournment on the ground that Shantibai and Ganpatrao were not able to attend the Court because of illness. Seven witnesses for the plaintiffs were present. The trial Court rejected the application for adjournment and at that state counsel for the defendants reported no instructions and retired. The trial Court forthwith recorded evidence of the plaintiffs' witnesses including the plaintiff himself and closed the case. On April 6, 1968, the trial Court delivered its judgment and passed a decree in favour of the plaintiffs against the defendants.

2. The defendants made an application under Order 9, rule 13, CPC for setting aside the exparte decree. That was resisted by the plaintiffs. The trial Court rejected it by its order dated March 3, 1969.

3. The defendants' appealed. The learned Additional District Judge Raipur, allowed the appeal and set aside the decree.

4. When this revision was initially laid before me for hearing of parties a preliminary question was raised by the learned counsel for the petitioners that

the application under Order 9, rule 13, C.P.C., was not competent in as much as the defendants' counsel appeared on April 2, 1968, when the case was called on for hearing. The *ex parte* decree was, therefore, not under Order 17, rule 2, C.P.C. but it was under Order 17, rule 3 of the Code. Since the question was of everyday occurrence, I formulated certain questions for decision by a larger Bench. That reference was answered by a Bench of five Judges. See *Rama Rao and Others Vs. Shantibai and Others*,

5. Thus, in view of the opinion of the Full Bench, the preliminary question raised by Shri Padhya must be decided against the petitioners.

6. Shri Padhye now urges that the order passed by the appellate Court is not in accordance with law. The learned Additional District Judge exercised his jurisdiction illegally, i.e. in contravention of the law. It is urged that the trial Court, after marshalling the evidence of both the parties, gave its reasons why it did not believe Shantibai (A.W. 1), Ganpatrao (A.W. 2) and Ramkrishna Khandelwal Dentist. The trial Judge also discussed the evidence of Ramrao (N.A.W. 1) and Suraj Bali (N.A.W. 2).

7. On a perusal of the order passed by the trial Court, I find that it gave its reasons elaborately why it did not believe the defendant applicant's evidence. But what the learned Additional District Judge did was just to indicate briefly the points deposed to by Shantibai, Dr. Ramkrishna Khandelwal and Ganpatrao and also by Ramrao. However, it does not at all appear from its order that it considered the reasons given by the trial Court for disbelieving the applicants' evidence. It does not appear from the appellate order whether the learned Additional District Judge even perused the order of the trial Court at all or not.

8. The question that arises is whether the appellate Court, can in the matter of appreciating oral evidence, completely shut its eyes as to what the trial Court said, and arrive at a contrary finding.

9. It is a proposition well settled that the appellate Court is bound to consider the reasons on which the trial Court arrived at findings of fact. And. in case, after appreciating the oral evidence produced by the parties, the appellate Court came to a different conclusion, though bearing in mind that it has not enjoyed the opportunity of seeing and hearing the witnesses, it can certainly record its own findings holding that those reached by the trial Court were erroneous. In such a case, three things must appear from the judgment of the appellate Court : (1) That it applied its mind to the reasons given by the trial Court : (2) that it was present to its mind that the trial Court had the advantage of seeing and hearing the witnesses, which the appellate Court itself did not have; and (3) that the appellate Court must give cogent reasons for disagreeing with the trial Court. If this is not done, it must be said that the order of the appellate Court is contrary to law. The appellate Court has the undoubted jurisdiction to re-appreciate the oral evidence and reach a finding contrary to that arrived at by the trial Court, but this it can do only if its order satisfies the above three conditions. This law is

to be found in the Supreme Court decisions in Sarju Pershad Vs. Raja Jwaleshwari Pratap Narain Singh and Others, and Radha Prasad Singh Vs. Gajadhar Singh and Others, .

10. In Sarju Pershad v. Jwaleswari (Supra), it was observed;-

The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the appellate Court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in Court. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is and it is nothing more than a rule of practice that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact.

Their Lordships succinctly reiterated the whole position as laying down the law in Radha Prasad v. Gajadhar Singh (Supra) thus:

The position in law, in our opinion, is that when an appeal lies on facts it is the right and duty of the Appeal Court to consider what its decision on the question of facts should be; but in coming to its own decision it should bear in mind that it is looking at the printed record and has not the opportunity of seeing the witnesses and that it should not lightly reject the trial Judge's conclusion that the evidence of a particular witness should be believed or should not be believed particularly when such conclusion is based on the observation of the demeanour of the witness in Court.

But this does not mean that merely because an appeal Court has not heard or seen the witness it will in no case reverse the findings of a trial Judge even on the question of credibility, if such question depends on a fair consideration of matters on record.

When it appears to the appeal Court that important considerations bearing on the question of credibility have not been taken into account or properly weighed by the trial Judge and such considerations including the question of probability of the story given by the witnesses clearly indicate that the view taken by the trial Judge is wrong the appeal Court should have no hesitation in reversing the findings of the trial Judge on such questions.

Where the question is not of credibility based entirely on the demeanour of witnesses observed in Court but a question of inference of one fact from proved primary facts the Court of appeal is in as good a position as the trial Judge and is

free to reverse the findings if it thinks that the inference made by the trial Judge is not justified.

(Broken into 4 Paragraphs by me).

This was also the law laid down by the Privy Council in a line of decisions. See, for instance. Lord Atkin's observations in AIR 1929 15 (Privy Council) , Viscount Simon's observations in Watt v. Thomas 1947 AC 484 (486) and AIR 1949 32 (Privy Council) Viscount Simon's observations in Watt v. Thomas (supra) may be reproduced here:

But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at, at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration, like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.

See also T.D. Gopalan Vs. The Commissioner of Hindu Religious and Charitable Endowments, Madras, , Tulsiram Vs. Shyamlal Ganpatlal and Another, Ganthakoru Mangamma and Others Vs. Dulla Paidayya and Others, , Keluni Dei Vs. Kanhei Sahu and Others, and Sarjug Rai Vs. Mst. Maheshwari Devi and Another,

11. This is then the law as laid down by the Supreme Court. If the appellate Court does not follow it, it must be said that it has exercised its jurisdiction in contravention of the law. It will then be the duty of this Court to interfere in revision.

12. Shri Kale, learned counsel for the plaintiffs strenuously contended that this Court has no jurisdiction to interfere in revision howsoever erroneous a finding of fact may be and, in the present case. since the appellate Court has reached a finding of fact, even though it be grossly erroneous, this Court cannot interfere. It is one thing to say that this Court cannot re-appreciate the evidence and substitute its finding of fact, while exercising revisional jurisdiction, but it is quite another to say that this Court has no jurisdiction to interfere in revision even when a subordinate Court has acted in contravention of the law. u/s 115 of the Code of Civil Procedure, this Court has jurisdiction to set aside an order of a subordinate Court, if it exercised its jurisdiction illegally or with material irregularity.

These words do not refer to the decision arrived at by the subordinate Court, but

they refer to the manner in which it is reached. This was laid down by the Supreme Court in *D.L.F., Housing and Construction Company (P.) Ltd., New Delhi Vs. Sarup Singh and Others*, where it was observed:-

The words "illegally" and "with material irregularity" as used in this clause do not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may, in our view, relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with.

Thus, this Court cannot interfere in revision merely because this Court would have felt inclined to arrive at a different conclusion, if it had dealt the matter initially. In the present case, I find that the manner in which the learned Additional District Judge reached his conclusion was wholly erroneous inasmuch as he completely ignored the reasoning contained in the order of the trial Court, which it reversed.

13. Shri Kale relied on *Ratilal v. Ranchhodbhai* AIR 1956 SC 439, *Pandurang Dhoni Chougule Vs. Maruti Hari Jadhav*, *Shri M.L. Sethi Vs. Shri R.P. Kapur*, *Bai Hiragauri Vs. Abdul Kadar Mamadji and Another*, *Shaik Jaffar Shaik Mahmood and Others Vs. Mohd. Pasha Hakkani Saheb and Others*, *Manindra Land and Building Corporation Ltd. Vs. Bhutnath Banerjee and Others*, *Abbasbhai v. Gulamnabi* AIR 1954 SC 1341 and *Ramnikal Pitambardas Mehta Vs. Indradaman Amratlal Sheth*, . These cases do not lay down law different from what has been laid down in the cases referred to in the foregoing paragraphs.

14. Shri Kale alternatively tried to persuade me to go into the merits of the case by re-appreciating the evidence myself. In my opinion, the proper course will be to direct the appellate Court to dispose of the appeal expeditiously in the light of this order.

15. This revision is allowed. The order of the appellate Court is set aside, The case shall go back to the appellate Court for deciding the appeal on merits in the light of this order. Since this is an old case, the appellate Court shall fix a date for hearing of the appeal, which would be not later than six weeks from the date it receives the record from this Court. The appellate Court shall intimate the Registry the date of hearing so fixed and shall also intimate subsequently the date on which the appeal is decided. Parties shall bear their own costs.