
(1952) 08 CAL CK 0033

In the Calcutta High Court

Case No : Appeal from Appellate Order. No. 133 of 1951

Sahib Jada Kairaja Syed Kazim Ali Mirza

APPELLANT

Vs

Debendra Narayan Sinha Rao

RESPONDENT

Date of Decision : 14-08-1952

Acts Referred:

Bengal Wakf Act, 1934 — Section 70, 70(1)

Citation : (1953) 2 ILR (Cal) 395

Hon'ble Judges : Renupada Mukherjee, J

Bench : Single Bench

Advocate : Durgesh Prasad Das and Manik Chandra Mitra, for the Appellant; Panchanan Pal and Murari Mohan Mitra, for the Respondent

Final Decision : Allowed

Judgement

Renttpada Mukherjee, J.—This appeal arises out of an order of remand passed by Sri C.C. Chakravarty, Additional Subordinate Judge, Murshidabad, in connection with an appeal preferred from the judgment and decree of munsif, Lalbagh, passed in Title Suit No. 191 of 1949.

2. The facts which are material for the purpose of the present appeal lie within a very narrow compass. The suit in question was instituted in the munsif's court at Lalbagh by the Appellant in this appeal for a declaration that a certain award made by a Debt Conciliation Special Officer was illegal, ultra vires and without jurisdiction. A prayer was also made in this suit for issuing an injunction upon the principal Defendants restraining them from obtaining possession of the suit properties on the basis of the said award. The suit was contested in the court of the munsif by the principal Defendants on various grounds. Their contentions were negatived and the suit was decreed.

3. In the appeal, which was preferred against the judgment and decree of the munsif, the learned subordinate judge made an order that the suit should be heard again by the munsif, after issuing a notice on the wakf commissioner u/s

70 of the" Bengal Wakf Act (Ben. XIII of 1934). In view of this order, the judgment and decree of the trial court were set aside by the subordinate judge. Against this order of remand, the Plaintiff of the trial court has come up in appeal.

4. The following two points arise for decision in this appeal:

(1) Is the appeal liable to be dismissed for non-filing of the certified copy of the decree of the lower appellate court within the period prescribed for filing of the appeal ?

(2) Is the order of remand passed by the lower appellate court sustainable 1

5. As regards the first point, it would appear on an examination of the record of the High Court that the appeal against the order of remand of the subordinate judge was presented on August 23, 1951. The judgment of the lower appellate court was passed on June 16, 1951, and the decree was signed on June 23, 1951. The memorandum of appeal was presented in the High Court within the period prescribed for filing of the appeal, but as the certified copy of the decree of the lower appellate court did not accompany the memorandum of appeal, that memorandum was defective in a material particular. A certified copy of the decree of the lower appellate court was filed in the High Court on February 29, 1952. If, therefore, the delay in the filing of this certified copy be not condoned, then it must be held that the memorandum of appeal filed in this Court should be rejected as the petition of appeal was defective in a material particular.

6. On behalf of the Appellant, it was contended that while presenting the memorandum of appeal in this Court, the Appellant in this Court was informed that no decree had been drawn up in the lower appellate court, and, therefore, no certified copy of the decree was filed with the memorandum of appeal. A certificate to the above effect was given in the memorandum of appeal by the learned advocate for the Appellant who filed it. The question which requires determination is whether this omission to file a certified copy of the decree of the lower appellate court was due to a bona fide mistake on the part of the Appellant which may be condoned by the Court.

7. It appears that except for the non-filing of the certified copy of the decree of the lower appellate court, the memorandum of appeal is in order in all other respects. In my judgment, there was no ground on the part of the Appellant for not filing the above document intentionally. On an examination of the certified copy of the decree of the lower appellate court, it appears to me that the decree in the present case was of an extremely formal nature, being practically a replica of the ordering portion of the judgment. That being the case, the Appellant might well have been under the impression that no decree was drawn up in the lower appellate court. There was no reason whatsoever on the part of the Appellant for not filing the certified copy of the decree of the lower appellate court deliberately in this Court. The mistake was purely a bona fide mistake, caused no doubt by some wrong information supplied to the Appellant. That being the case, there is sufficient ground for condonation of the delay in filing a certified copy of the

decree of the lower appellate court in this Court. I, therefore, allow the application filed by the Appellant on March 28, 1952, and condone the delay, and hold that the appeal should not be dismissed because the document in question was filed after the period prescribed for filing of the appeal.

8. I now come to the merits of the appeal. The award which is sought to be set aside in the trial court, relates to some patni property held at one time by the Defendants-Respondents under the Nawab Bahadur of Murshidabad, who is pro forma Respondent No. 4 in this appeal and who was pro forma Defendant No. 4 in the trial court. A question was mooted in the trial court that the Nawab Bahadur had no personal interest in the property in question, and the touzis under which the patni taluk was held were held by the Nawab Bahadur as mutwalli of the wakf estate of Darab Ali Khan. The case of the Plaintiff-Appellant in this respect was that the touzis belonged to the Nawab Bahadur in his personal right, whereas the case of the Defendants-Respondents was that Nawab Bahadur's interest in the property in question was that of a mutwalli. The trial court upheld the contention of the Plaintiff-Appellant and held that the Nawab Bahadur had personal interest in the property in question. This finding was challenged in appeal by the Defendants. I am constrained to observe that the manner in which this question was disposed of by the lower appellate court was rather perfunctory and haphazard. That court did not upset the finding of the trial court that the Nawab Bahadur held the property in question in personal and secular right."

9. The lower appellate court simply set out some documents in which there is a description of the property in question as wakf property, and from such description that court came to the conclusion that a notice u/s 70 of the Bengal Wakf Act should have been served through court upon the wakf commissioner. In my judgment, it was wrong of the lower appellate court to order a rehearing of the suit without coming to a positive finding that the property in question belonged to Nawab Bahadur in his capacity as a mutwalli.

10. In support of his decision, the learned Subordinate Judge referred to the case of Benoy Kumar Acharjee Chaudhury v. Ahammad Ali (1941) 46 C.W.N. 339. But this case has got no application to the facts of the present case, because in the case relied on by the learned subordinate judge, the Plaintiff contended that the disputed property was wakf property, which contention was challenged by the Defendant in the suit. The court observed that although the claim of the Plaintiff that the disputed property was wakf property was challenged by the Defendant, notice u/s 70 of the Wakf Act was necessary. In the present case, the Plaintiff's allegation is that the property in respect of which the award was passed by the Debt Conciliation Special Officer was personal and secular property of Nawab Bahadur of Murshidabad. Up till the present stage that contention has been accepted by the trial court, and unless that finding is upset in appeal, the subordinate judge would not be justified in setting aside the judgment and decree of the trial court, and ordering retrial of the whole suit after causing

service of notice upon the wakf commissioner u/s 70(1) of the Bengal Wakf Act.

11. Whether a notice under the above section should be served upon the wakf commissioner or not in any particular case would mainly depend upon how the disputed property is described by the Plaintiff. If the Plaintiff describes the disputed property as wakf property, although such description may be challenged by the Defendant, a notice u/s 70 of the Bengal Wakf Act should be served upon the Wakf Commissioner by the court. But where the Plaintiff himself alleges that the disputed property is personal and secular property, and where the Defendants' contention that such property is wakf property is overruled by the trial court, the lower appellate court would not be justified in ordering a retrial of the whole suit without definitely superseding the finding of the trial court that such property is secular property. As in the present case the material finding of the trial court has not been upset by the subordinate judge, he was not right in setting aside the judgment and decree of the trial court and ordering a retrial of the whole suit after service of notice u/s 70 of the Bengal Wakf Act upon the wakf commissioner. In this view of the matter, the order of remand passed by the lower appellate court cannot be sustained.

12. In the result, this appeal is allowed and the order appealed against is set aside and the case is sent back to the lower appellate court. The lower appellate court is directed to rehear the appeal according to law.

13. In view of the special circumstances of this case, I direct that parties will bear their own costs of this appeal.