

(1869) 07 CAL CK 0002
In the Calcutta High Court
Case No : Special Appeal No. 27 of 1869

Srimati Trailakhomayi Barmani

APPELLANT

Vs

Bihari Lal Nandi and Another

RESPONDENT

Date of Decision : 26-07-1869

Acts Referred:

Citation : (1869) 07 CAL CK 0002

Judgement

Markby, J.—In this case the plaintiff sued to establish her right as a co-sharer in certain property. She obtained a decree in the first Court, but this decree was set aside on appeal. The plaintiff then applied for a review, on the ground that a material issue in the case had not been decided; that through inadvertence a certain document had not been brought to the notice of the Court on the argument on the appeal; and that she was now ready to produce additional evidence in support of the same issue. Notice was given to the defendant, and after hearing the parties, the Judge made the following order:

This day the petition for review came to be argued before me. It appears from the original judgment, that the Court did not express any opinion on the point as to whether the sale impugned was held in a private manner as alleged by the plaintiff, or not. This, no doubt, is a defect which ought to be rectified by review. Again, a certain challan, which was in the record, has not at all been noticed in the judgment. The pleader for the plaintiff says, that it altogether escaped him to bring it to the notice of the Court. The plaintiff has also filed copies of certain other petitions with the present petition, to show that the defendant, talookdar, was perfectly aware that she was an 8 anna co-sharer of the tenure. I think it right to ascertain the point of fraud or no fraud with reference to the said documents. The review is accordingly admitted to try the said two points.

When the case was heard in review, the Judge reversed his former decision, and affirmed the original decree.

2. From this decree the defendant has now appealed, and the first substantial objection which he has made is that the Judge was wrong in admitting the review

without assigning any reason why the additional evidence was not produced at the trial.

3. It appears to me, however, on reading the above order, that the object; of the review was to take into consideration a material issue which the Court had omitted to consider. Why the Court had omitted to consider it, is not very clear; but I am not prepared to say that this was not a legal ground for reviewing a judgment.

4. It is still, however, argued that the appellate Court had no power to admit the fresh evidence. That clearly was so u/s 376, because it is admitted that no reason was assigned before the Judge on the application for review why the evidence was not produced at the trial. But there being sufficient grounds for admitting the review independently of the fresh evidence, I think the question as to the admissibility of that evidence turns on section 355. I do not think the Judge admitted the review in order to admit the fresh evidence, but having admitted the review thought it proper that the fresh evidence should be received. Section 355 provides, that the appellate Court may admit fresh evidence, if the evidence is required to enable it to pronounce a satisfactory judgment, or for any other substantial cause. The latter part of the section says, "provided that whenever additional evidence is admitted by an appellate Court, the reasons for the admission shall be recorded in the proceedings of such Court."

5. The Privy Council have held, as it seems to me they must hold, that this section does not make the act of the Judge recording the reasons for receiving the evidence "a condition precedent to the reception of the evidence"--Gunga Gobind Mundul v. The Collector of the 24-Pergunnas 11 M.I.A. 345--but this Court has nevertheless held in Jugabandho Deb v. Golak Chandra Halder 10 W.R. 228 and Joog Maya Debia v. Ram Chunder Chatterjee 10 W.R. 378, that the evidence has been improperly received, and has, on that account, set aside the decision. I imagine that these cases rest upon the ground that it was considered that in them the Judges below had never considered the matter at all with reference to the provisions of section 355, and have never decided upon that section that the evidence ought to have been received. One of them is so explained by Mr. Justice Hobhouse in Radha Nath Dhubi v. Ramgobind Pal 3 B.L.R. A.C. 218. I do not at all question the authority of these decisions, but I am not prepared to go to the length of saying that in this case the Judge has not considered the matter in accordance with the law. He says, he considers that it is proper to ascertain the point of fraud or no fraud with reference to the documents then produced for the first time. If it were necessary to record the reason for the reception of the new evidence, in order to render the new evidence legally admissible, the Judge has not done so. But as it is conclusively settled that this is not necessary, then I think we have nothing before us which will justify us in saying that the Judge has acted erroneously. This seems to me to be in accordance with the view taken by Bayley and Hobhouse, JJ., in Radha Nath Dhubi v. Ramgobind Pal 3 B.L.R. A.C. 218, in which decision I concur.

6. I fully accede to the necessity of a very careful exercise of the power to receive fresh evidence given by section 355, and I think it quite likely that the exercise of that power frequently leads to great injustice, as it manifestly must, unless much care be taken.

Jackson, J.

7. I think this case is not free from difficulty, but on the whole I concur in the judgment proposed.

8. It is not so clear to me that the Subordinate Judge meant by the first part of his order to admit the review, and having done that, then by the subsequent words to make an order u/s 355 to permit fresh evidence to be given. My first impression (and one which I have not quite got rid of) was that both the curious inadvertence admitted by the Subordinate Judge, and the necessity of letting in the fresh evidence, had worked upon his mind as reasons for granting the review; but either construction is possible, and, that being so, I think we ought to adopt that one which at once favors a full inquiry, and enables us to support the decision of the Court below. I therefore concur in dismissing the appeal, but I think this is not a case in which the appellant ought to be ordered to pay costs in this Court.