
(1925) 01 CAL CK 0061
In the Calcutta High Court

Umesh Narain Chowdhury and Others	APPELLANT
Vs	
Secretary of State	RESPONDENT

Date of Decision : 21-01-1925

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23

Citation : AIR 1925 Cal 1157 : 87 Ind. Cas. 575

Hon'ble Judges : Mukerji, J;Greaves, J

Bench : Full Bench

Judgement

Mukerji, J.—This appeal arises out of a suit for a declaration of the plaintiffs' title to certain lands and also a declaration that the said lands are not liable to assessment of revenue under the provisions of Act IX of 1847. The suit was decreed by the Court of first instance. On appeal preferred by the defendant the lower appellate Court set aside the decreed passed by the Court of first instance in favour of the plaintiffs and made an order of remand which is questioned before us in the present appeal, which has been preferred by the plaintiffs.

2. A preliminary objection has been taken on behalf of the respondent to the effect that the order in question was not passed by the learned Judge under the provisions of Order 41, Rule 23 and that, therefore, no appeal lies to this Court from that order. As to this preliminary objection it will be observed that the learned Judge does not say anywhere in his judgment under what provisions of law he purported to pass the order and I am not prepared to hold in the absence of anything definitely stated by the learned Judge that the order was not passed under the provisions of Order 41, Rule 23 of the Civil Procedure Code. To hold otherwise would be to curtail the right of appeal which should not be done except upon very clear proof of circumstances justifying such curtailment. Assuming, therefore, that the learned Judge made the order under the provisions of Order 41, Rule 23, although it may not be that the provisions of that rule strictly justify the order in question. I am of opinion, following the decision in the case of Radha Krishna Saha and Others Vs. Kamal Kamini Debya and Others, that) an appeal

lies to this Court from that order. The preliminary objection, therefore, in my opinion, fails.

3. Then as to the appeal itself the learned advocate appearing on behalf of the appellants has urged two points for our consideration. The first is that the order of remand is not one contemplated by law and that the findings of the learned Judge do not disclose any opinion for reversing the decision of the Court of first instance in this matter and that if the learned Judge was of opinion that the proper issue had not been framed or had not been tried he should have made an order under the provisions of Order 41, Rule 25 or if he was of opinion that additional evidence was necessary he should have made an order under the provisions of Order 41, R.27. The second contention put forward on behalf of the appellants is that the learned Judge was wrong in directing certain amendment to be made in respect of one of the issues framed in the suit namely, Issue No. 7.

4. So far as the first contention is concerned, in order to Judge of its worth it is necessary to examine a little closely the judgment of the learned Judge and the findings which were recorded in that judgment. The learned Judge observed in his judgment that upon the evidence in the case, it was not possible to hold that the lands in suit formed part of the plaintiffs permanently settled estate which had been assessed to revenue. He held that it lay upon the plaintiffs to prove that the disputed lands were specifically included in the estate as settled with the plaintiffs' predecessors in 1793 and were assessed to revenue then. He then dealt with Rennell's map which was one of the documents relied upon by the plaintiffs for the purposes of their case. He discussed certain authorities dealing with the question as to the value of Rennell's map as a guide for determining the boundaries of estates and ultimately he observed that the map was of very little evidentiary value as regards the position and boundaries of villages and estates and that it did not show the state of things at the time of the Permanent Settlement. He further observed, that it could not be said that Rennell's map was correctly relied or correctly superimposed on the case map with reference to any fixed point, in both those maps; for there is no fixed point in the case map. Then he re-corded certain findings to the effect that both the parties were in default in the matter of production of evidence which was necessary for the purposes of their respective cases. He was of opinion that the evidence that was on the record was neither complete nor satisfactory; and being of opinion that though the onus was upon the plaintiffs to prove their case, the defendants could as well have filed their papers in order to disprove the plaintiffs' case and he was not inclined to throw out the plaintiffs' case on that ground of their failure to produce evidence and he thought that; there should be a fresh trial of the suit. With regard to the trial of the suit in the Court of first instance he remarked that the learned Sub-Judge who tried the suit did not discuss the facts and law in such a way as might be of any assistance to the appellate Court and that the findings of fact at which the learned Sub-Judge had arrived were arrived at in a cursory way and that the oral and the documentary evidence had neither been fully nor fairly discussed. Being of that opinion he made the order which is now

complained of on behalf of the appellants in this appeal.

5. The question is whether upon circumstances such as these it was open to the lower appellate Court not to make an order strictly in accordance with the provisions of Order 41, Rule 23 or Order 41, Rule 25 or Order 41, Rule 27, but to make an order of remand setting aside the decision of the Court of first-instance and directing a fresh trial to be held. Now it has been held by this Court in the case of *Abdul Karim Abu Ahmad Khan Ghaznavi v. Allahabad Bank, Limited* [1917] 44 Cal. 929 that the powers of the appellate Court as regards remand are not restricted to the case specified in Order 41, Rule 23 but that the Court by reason of its inherent jurisdiction vested in it by Section 151 of the C.P.C. may remand in any case other than the case specified in Order 41, Rule 23, if it be necessary for the ends of justice to do so. The order passed by the learned Sub-Judge in the present case although it may not be justified by the terms of Order 41, Rule 23 may very well be justified as having been passed under the inherent powers vested in a Court by Section 161, C.P.C. I am of opinion, that the order was a just and proper order having regard to the facts and circumstances of this particular case and that it should not be disturbed.

6. With regard to the next contention, namely, as to the order of the Subordinate Judge directing that Issue No. 7 should be amended, the position is this: The plaintiffs' suit as laid in the plaint was to the effect that the lands in question formed part of the plaintiff's permanently settled estate. The defence set out in the written statement was to the effect that the lands were outside the ambit of any of the plaintiffs' settled estates and that they had been rightly and legally assessed to revenue. On these pleadings issues were framed and it is necessary to refer only to two of them. Issue No. 7, as originally framed, was "Whether the lands in suit or any part thereof are re-formations in situ of the plaintiffs or any other permanently settled estates and are covered by the Thakbust boundaries of any of the plaintiffs' mouzas." Issue No. 8 was in these words: "Whether the lands in suit have been rightly and legally resumed and assessed by Government?" Before the suit came on for hearing the plaintiffs brought to the notice of the Court that Issue No. 7 as originally framed required an amendment. There was a good reason why this prayer was made. It is clear and it cannot be disputed, whether the lands appertain to the plaintiffs' estate or not, if it can be shown that they formed part of their estate permanently settled, that they could not be assessed to revenue and upon this ground this application was made for amendment of Issue No. 7. This amendment appears to have been allowed presumably without opposition from the defendant and evidence was led upon the issue so amended. On such amendment the issue was worded thus: "Whether the lands in suit or any part) thereof are re-formations in situ of the plaintiffs or any other permanently settled estate, and are covered by the thakbust boundaries of any of the plaintiffs' or other mouzas". The Court of first instance came to the conclusion upon the evidence that although the plaintiffs had failed to prove that the lands formed part of their permanently settled estate they must have been included in some one or other of the mouzas that were

permanently settled. The learned Judge on appeal, however, thought that the suit should have been tried upon the issues as originally framed. I am unable to find any justification for ordering an amendment of the issues upon which the suit had already been triad without any objection of any of the parties and for directing that the suit might be re-triad upon imperfect issue framed on the pleadings of the parties. It cannot be disputed that an issue may be framed not merely by reference to the pleadings but also by reference to other matters and so long as any amendment, that is made, does not prejudice the parties it cannot be said that the trial held upon the issue amended in that way was not a proper trial I am, therefore, of opinion that this part of the order of the learned Additional District Judge directing an amendment of the Issue No. 7 should be set aside.

7. With this modification the appeal, in my opinion, should be dismissed.

8. Each party will bear its own costs in this appeal.

Greaves, J.

9. I agree.