

Durga Thathera Vs. Narain Thathera and anr.

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Court : Allahabad

Decided On : Jul-14-1931

Reported in : AIR1931All597; 136Ind.Cas.275

Appellant : Durga Thathera

Respondent : Narain Thathera and anr.

Judgement :

ORDER

Mukerji, J.

1. This appeal, the valuation of which is rather small, being only Rs. 49 and therefore cognizable by a single Judge, came for admission before Niamatullah, J., and he ordered that it should be put up before a Bench of two Judges for hearing. We are of opinion that it should be heard by a larger Bench, so that the question raised may be definitely decided so far as this Court is concerned.

2. This appeal arises out of a suit for redemption. The suit was dismissed by the learned Munsif, after he had written a judgment, covering 12 pages of the manuscript copy, which has been filed by the appellant. The learned Additional District Judge before whom the plaintiff's appeal came for hearing, dismissed the appeal under Order 41, Rule 11 by writing a judgment which covers seven typed lines. The judgment is simply to the effect that the learned Judge is satisfied, on reading the judgment and hearing the counsel for the appellant, that the case has

been properly decided, that the mortgage alleged by the plaintiff has not been satisfactorily proved and that it was not 'established that the 'site of the house in dispute was formerly covered by his father's house.'

3. Sitting in second appeal we are not in a position to know from the judgment of the lower appellate Court what were the points for determination, and how the learned Judge came to the conclusions at which he arrived.

4. As already stated, this was a suit relating to property, and was complicated. The alleged mortgage is said to have been made about 32 years prior to the institution of the suit.

5. The point taken by the plaintiff-appellant is that as the judgment is not in accordance with law the court below should be called upon to give a proper judgment.

6. Findings of fact are binding on second appeal, provided the findings are arrived at without any contravention of any rule of law; for example, the rule as to burden of proof, admission of evidence, and so on and so forth. In order to enable the High Court to see that a finding of fact has been properly arrived at, there should be a properly written judgment before it. This advantage is denied to us by the judgment complained of.

7. It has been held by a Bench of this High Court in *Samin Hasan v. Piran* that the rules laid down in Section 574 of the old Civil Procedure Code did not apply to an appeal which was heard under Section 551 of the old Code. Order 41, Rule 31 has now taken the place of the old Section 574 and Order 41, Rule 11 has taken the place of the old Section 551. The change in the law is not material, and the question is whether the decision in *Samin Hasan v. Piran* [1908] 30 All. 319 is good law.

8. With all respect, we doubt the correctness of this decision, and find it desirable that the case should go before a larger Bench, so that the point of law involved may be settled once and for all so far as this Court is concerned.

9. There is a conflict of decisions among several High Courts on this point, and some of these cases have been noted by Chari, J., in *Ma Saw v. Ma Bwin Byu* A.I.R. 1926 Rang. 129. The learned Judge agreed with some decisions and dissented from others, and held that a judgment pronounced after hearing under Order 41, Rule 11 must comply with the requirements of Order 41, Rule 31.

10. The argument in favour of the proposition that a decision given after a hearing under Order 41, Rule 11 may be a summary one, and it is not necessary to comply with the requirements of Order 41, Rule 31, is very often based on the headings to be found in Order 41, Schedule 1, Civil P.C.; for example, over the Section 16 we find the heading 'Procedure on hearing.' Over the Rule 9, similarly, we find the heading 'Procedure on admission of appeal' again over the Rule 30 we find the heading 'Judgment in appeal.' It has been sometimes argued on the basis of these headings that Rule 31 applies only when there is a contested appeal in which both the parties are represented.

11. These headings are no part of the enactment. They are on the same lines as the marginal notes to the sections or rules. They are never put to the vote in the legislature, and they are meant merely as guides for the person trying to find out a particular rule of law in a particular Code. That these headings are very faulty and have been prepared without much consideration will be apparent from the fact that the heading 'Procedure on hearing' comes between Rules 15 and 16. The heading would imply that previous to the stage to which Rule 16 is applicable there is no 'hearing' at all of the appeal. But if we look at Rule 11, we see that it distinctly requires that the appellate Court shall 'hear' the appellant or his pleader. Surely, then, there was a hearing at the stage for which Rule 16 is meant.

12. It is not necessary to discuss the point at length, because we are of opinion that the question is of such importance as requires the decision of a larger Bench. We direct that the record be laid before the Hon'ble the Chief Justice for the formation of a Pull Bench for the decision of the following point, namely:

Whether in a judgment delivered on hearing an appeal under Order 41, Rule 11, Civil P. C, by a Court Subordinate to the High Court, compliance with the provisions of Rule 31, Order 41 is necessary.

Sulaiman, Ag. C.J.

13. The question referred to the Full Bench is:

Whether in a judgment delivered on hearing an appeal under Order 41, Rule 11, Civil P.C. by a Court Subordinate to the High Court, compliance with the provision of JR. 81, Order 41, is necessary.

14. The question which we have to answer is whether Rule 31, Order 41 requiring that the judgment of the appellate Court shall be in writing and shall state the points for determination, the decision thereon, the reasons for the decision and, where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated, applies to a dismissal of an appeal under Order 41, Rule 11.

15. The answer will depend on the question whether, when an appeal is dismissed summarily under Order 41, Rule 11, there is a judgment delivered and Rule 31 applies to such a judgment.

16. There can be no question that in dismissing an appeal under Order 41, Rule 11 the appellate Court delivers a judgment, in accordance with which the decree is prepared. Such a judgment is treated as a judgment from which a Letters Patent Appeal could be entertained, and a certified copy of it is required under the law when a second appeal is to be filed. It is unthinkable that there could be a decree passed dismissing the appeal, without there having previously been a judgment. If a judgment has to be delivered by the appellate Court, there seems to be no reason why Rule 31, which applies to judgments of appellate Courts, should not be applicable. Our attention has been drawn to the case of *Samin Hasan v. Piran*, and some cases of other High Courts where the view has been taken that Section 574 of the old Code corresponding to this rule was not applicable in its entirety. On the other hand, there are a larger number of cases which have held the other view.

17. The learned Judges, who have taken a view in conformity with the view taken in *Samin Hasan's* case, have relied mainly on the effect of the headings which precede the groupings of the rules in this order. No doubt headings in the body of

an Act are of some help in clearing up obscurities when there is an ambiguity, but they cannot control the provisions of the sections when they are unequivocal and clear. The headings are like preambles which supply a key to the mind of the legislature, but do not control the substantive sections of the enactment. As has been pointed out by the learned Judges referring this case, the groupings of the sections under various headings in this order are not at all happy and cannot be relied upon in order to control the effect of the provisions.

18. If Rule 31 were not to apply to judgments delivered under Order 41, Rule 11, the necessary result would be that there would be no provision of law which would require such judgments to be in writing or to be signed and dated by the Judge. A judgment under Order 41, Rule 11 could then be pronounced orally. This could not possibly have been intended by the legislature.

19. Furthermore, a second appeal is allowed from such decrees under Order 42, Civil P.C. and before the appellate Court in second appeal can make up its mind as to whether there are grounds for interference under Section 100, Civil P. C, it must know the points which were for determination and the decision of the lower appellate Court on each of those points in order to decide whether the decree can be affirmed or not. If the appellate Court were simply to dismiss the appeal summarily without pointing out what its decisions are, the result would be that it would be impossible to know what findings of fact are binding upon the second appellate Court and what questions of law have been decided and how.

20. The question whether in a particular case there has been a substantial compliance with the provisions of Rule 31 is a (different one depending on the nature of (the judgment delivered in each case. A (non-compliance with the strict provisions of this rule may not vitiate the judgment (and make it wholly void, and the irregularity may be ignored if there has been a substantial compliance with it and the second appellate Court is in a position to ascertain the findings of the lower appellate Court. Our attention has not been drawn to any reported case of this Court after the passing of the new Code, in which the case of Samin Hasan has been followed. Our answer to the question referred to us is in the affirmative.

