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Court : Allahabad

Decided On : Dec-31-1969

Reported in : (1885)ILR7All649

Judge : W. Comer Petheram, C.J.,; Straight,; Oldfield,; Brodhurst and; Mahmood, JJ.

Appellant : Nivath Singh

Respondent : Bhikki Singh

Judgement :

W. Comer Petheram, C.J.

1. The question raised by this reference is, whether this Court is at liberty, in second appeal, to look into the evidence in the cause for the purpose of ascertaining whether the lower Courts have found the facts correctly.

2. I am of opinion that the question must be answered in the negative. I am aware that this opinion differs from many rulings of the High Courts in India, and from that of my brother Judges, but as I think the words of the statute are clear, and that if they are liable to create injustice, the remedy should be applied by the Legislature, I feel it to be my duty to disagree with the many authorities which I have mentioned. Section 585 of the Civil Procedure Code provides that no second appeal shall lie except on the grounds mentioned in Section 584, so that the question resolves itself into one of the construction of that section, and of that

section alone. There are only three grounds of appeal mentioned in it, and it will be as well to examine them in detail.

(A) The decision being contrary to some specified law or usage having the force of law. By 'specified law,' the Legislature would seem to mean the statute law, and by 'usage having the force of law' the common or customary law of the country or community, and, in my opinion, the ground is confined to cases in which the Lower Appellate Courts have either misconstrued a statute or a written document, or have come to a wrong conclusion as to what is the customary law of the country or community with reference to questions at issue between the parties.

(B) The decision having failed to determine some material issue of law or usage having the force of law. The meaning of this is very obscure, but, whatever it means, it can only refer to mistakes in law. Probably it was intended to meet cases in which the lower Courts had treated the question as one of fact, when it was really one of law, but my opinion is that it does not extend the operation of (A) and is included in it.

(C) A substantial error or defect in the procedure as prescribed by the Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits. Procedure is a perfectly well known word among lawyers, and means the practice followed by the Courts in the trial of cases which come before them; but, until it became necessary for the purpose of extending second appeals under the Code to questions of fact, I am not aware that the mental process by which a Judge and Jury came to a conclusion on a question of fact was ever called a matter of procedure, and, in my opinion, it is impossible to fix that meaning to the word.

Straight, Oldfield and Brodhurst, JJ.

3. This being my view of the meaning of the grounds of appeal provided by Section 584, it of course follows that no question of fact is included in either of them, and it would seem that the intention of the Legislature was that in small causes the finding of the lower Courts on questions of fact should be absolutely final; and, having regard to the fact that forty per cent, of the second appeals filed

in the High Court relate to property of less value than Rs. 100, I cannot but think that the provision was a wise one. If a remedy is needed, the most useful one would probably be to abolish second appeals altogether, and to reduce the amount above which a first appeal would lie to the High Court to a much smaller sum than Rs. 5,000; but, if this were done, all appeals which did not come to the High Court ought, of course, to be heard by the district Judge.

4. The question raised by this reference is, whether it is competent for this Court to entertain pleas in second appeals which impeach the findings of fact recorded by the Lower Appellate Court, on the ground that such findings are conjectural, that they ignore the evidence, and that the Court has given no reasons for the conclusions at which it arrived. Assuming these allegations to be sustained, we are of opinion that our answer should be in the affirmative. By Section 584 of the Civil Procedure Code, it is provided that an appeal lies to this Court from an appellate decree when, among other matters, there has been 'a substantial error or defect in the procedure prescribed by this Code or any other law, which may possibly have produced error or defect in the decision on the merits;' and by Section 574 it is enacted that the judgment of a first appellate Court shall contain 'the reasons for the decision.' We think that where a Lower Appellate Court has drawn strained or unreasonable conclusions from the evidence, or has discredited or disbelieved witnesses or documentary proof upon capricious or unsustainable grounds, or has perversely interpreted or shut its eyes to proved facts, or has stated no intelligible reasons for arriving at its findings of facts, this Court may take notice of all such matters in second appeal. Such has long been the view of this Court, as numerous rulings will show, and the same view has been held at *Calcutta Futtehma Begum v. Mohamed Ausur* I.L.R. 9 Cal 309 : *Assanullah v. Hafiz Mahomed Ali* I.L.R. 10 Cal. 392 and *Lal Mahomed Bepari v. Shoila Bewa* 11 Cal. L. Rep. 104. In the first of these cases Wilson, J. remarks: 'We are well within the scope of the authorities in holding that where the Lower Appellate Court has clearly misapprehended what the evidence before it was, and thus has been led to discard or not give sufficient weight to important evidence to which it is not entitled, and has thus been led, not into any mere incidental mistake, but totally to misconceive the case, this Court may interfere.' It seems to us that if the judgment of a Lower Appellate Court is marked by the defects we have already-adverted to,

there have been defects in its procedure, which not only possibly but probably have produced error or defect in the decision of the appeal on its merits; or, in other words, that there has been no legal trial or determination of the appeal. For the expression 'determine any question of fact,' as used in Section 566 of the Code must, we take it, be construed to mean 'determine any question of fact in a legal manner,' that is to say, by the Court exercising its judicial mind in a rational and legal manner, and not deciding out of mere caprice or a perverse and obtuse interpretation of evidence. If this Court had not the power in second appeal we hold it has, to remand a case to a Lower Appellate Court for the preparation of a legal judgment properly determining the question or questions of fact, we know by experience that great injustice might often be done, and it would come to this,--that we should be bound by the mere ipse dixit of a Lower Appellate Court in respect of the issues of fact, no matter how preposterous its findings might be. We cannot believe it was ever intended by the Legislature that in a such case there should be an absolute defect of jurisdiction in this Court to examine such findings in second appeal. Our answer to the reference therefore is that the questions raised in S.A. No. 169 of 1884 by the pleas in appeal were questions that might be made the subject of second appeal.

Mahmood, J.

5. In answering the reference in these cases I do not think we are concerned with the merits of the case, because that is a matter which would be disposed of by the Division Bench. Treating the question therefore purely as a matter of interpreting the law, I am of opinion that the grounds of appeal urged in these cases are such as could be entertained in second appeal, provided of course that they arise out of the circumstances of the case.

6. In considering this matter, the first section to which I would refer is Section 574 of the Civil Procedure Code. The powers conferred by the Code upon the Court of first appeal are very extensive, and in cases which involve no complicated question of law, the decision of that Court is practically final, because it cannot be interfered with by the Court of second appeal, except upon such grounds as fall within the purview of Section 584 of the Code. The conclusions upon the facts of

the case at which the Court of first appeal arrives are binding upon the Court of second appeal, because of the provisions of Section 585 of the Code. This being the effect of the provisions of the law, it seems to me that the Legislature, by framing Section 574 of the Code, intended to guard against such failure of justice as might arise from the defective or arbitrary exercise of the extensive powers possessed by the Court of first appeal in cases which, with reference to their nature, would be proper subjects of second appeal. All that I have said so far is based upon the reasoning which I explained in *Ramnarain v. Bhawanidin* Weekly Notes 1882 p. 104 and in *Sheoambar Singh v. Lallu Singh* Weekly Notes 1882 p. 158 and which I need not repeat here. It is, however, a necessary corollary of the ratio decidendi adopted by me in those cases that a judgment of the Court of first appeal, which falls short of due compliance with the various clauses of Section 574, is essentially defective, and that such defect could properly be made the subject of complaint in second appeal within the purview of Section 584 of the Code. And it seems to me that any other view of the law would either render Section 574 inconsistent with Section 584, or reduce the former section to a mere superfluity or dead letter. I make this observation, subject of course to the effect which the provisions of Section 578 (read with Section 587) have upon the powers of the Court of second appeal, but we are not immediately concerned with that section in answering this reference

7. The most important section of the Code to be considered for the purpose of this reference is naturally Section 584, which corresponds with Section 372 of the old Code (Act VIII of 1859), and a comparison of the two sections shows that the provisions of the law have undergone no important change. It is clear that in this case the ground urged in second appeal could not be entertained under either Clause (a) or Clause (b) of Section 584; but Clause (c) of the section seems to me to be wide enough to include such grounds. The clause lays down that a second appeal would lie on the ground of 'a substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits.' The corresponding part of Section 372 of the Code of 1859 was very similarly worded, as it gave a right of second appeal on the ground 'of a substantial error or defect in law in the procedure or investigation of the case which may have produced error or defect in

the decision of the case upon the merits.' The absence of the phrase 'investigation of the case' in the present section of the Code might lead to the inference that the right of second appeal was intended to be more restricted than it was under the old Code, but, on the other hand, the insertion of the word 'possibly' would lead to the contrary inference. I am, however, of opinion that the change of language has introduced no material alteration in the law. Investigation, as I understand the word, simply means the process by which conclusions as to the merits of the case are arrived at; procedure means the rules by which that process is to be guided. The one is the subject of the other, and I take it that the law will presume that, where there is no defect of procedure, there is no defect of investigation. It follows therefore that the omission of the phrase 'investigation of the case' in Section 584 implies no intention on the part of the Legislature to restrict the right of second appeal by rendering it narrower than what it was under the Code of 1859. On the other hand, the introduction of the word 'possibly' does not go far to show that the present Code intended to extend the right of second appeal.

8. The reference therefore resolves itself into the simple question whether the grounds of appeal indicate any such substantial error or defect in the 'procedure' as 'may possibly have produced error or defect in the decision of the case upon the merits.' I have emphasized the words which I think have to be considered in deciding the question. In my opinion the word 'procedure' as used in Clause (c) of Section 584 must be understood in its most generic sense, including all the rules contained in the Civil Procedure Code, or any other law regulating the investigation of cases by the Civil Courts. The duties and powers of a Court of First Instance in trying a cause are laid down in the Code at full length, and the effect of Section 582 is to render the same rules, *mutatis mutandis*, applicable to the Court of first appeal; and it follows that, upon matters which are common to both the Courts, what would constitute a substantial error or defect in procedure for the Courts of First Instance, would also apply in the Court of first appeal, The latter Court not being primarily concerned either with the framing of issues or with taking of evidence in trying those issues, its duties in regard to appeals are limited to matters described in Section 574 of the Code, so that when a Court of first appeal fails to consider the point for determination or to give reasons for its decision, its action or rather omission is tantamount to a defective trial of an issue

by a Court of First Instance. The action of a Court of first appeal in not considering evidence upon any point, or in assigning no reasons for its conclusions, bears a strong analogy to the action of a Court of First Instance in declining to frame any issue, or omitting to take evidence upon any issue necessary for a proper decision of the case. Such cases, I think, constitute a substantial defect or error in procedure, introducing the possibility of error or defect in the decision of the case within the meaning of Clause (c) of Section 584. And it seems to me that, under any other view, Section 566 of the Code could not be consistently employed by a Court of second appeal for the purpose of remanding issues of fact which it may consider necessary to ascertain for a proper adjudication upon the rights of the parties in second appeals. The uniform practice of this Court, as well as of the other High Courts, so far as I am aware, has been consistent with my view, and indeed the cases cited on behalf of the appellant go even further. The cases of Lal Mohamed Bepari v. Shoila Bewa 11 Cal. L. Rep. 104 : Ram Prosad Das v. Rajo Koer 5 Cal. L. Rep. 94 : Huopershad Roy Chowdhry v. Umatarra Dabi 8 Cal. L. Rep. 449 : Mahesh Singh v. Masri Singh Weekly Notes 1881 p. 14 : Behari Lal v. Sahu Bithal Das Weekly Notes 1882 p. 6 : Raj Rani Kuari v. Manni Sahu Weekly Notes 1882 p. 66 and the older case of Shoobul Chunder Kulleah v. Koylash Chunder Mal 14 W.R. 23 all go to support the contention of the learned pleader for the appellant. But perhaps the strongest case in support of the appellants contention is Futtehma Begum v. Mohamed Ausur I.L.R. 9 Cal. 309 in which Wilson, J., laid down that in exceptional cases the High Court will interfere in second appeal with findings of fact which have been arrived at by the Lower Appellate Court under a total misconception of the merits of the case. The latest case, however, is Assanullah v. Hafiz Mahomed Ali I.L.R. 10 Cal. 932 in which Field, J., laid down the rule that where the Lower Appellate Court omits to give reasons for its decisions, the High Court will retain the case in second appeal, and either require the Judge to state his reasons, or, in the event of his absence, refer the question to his successor for fresh trial.

9. Without discussing the various cases, I wish to say that I am not prepared to go the whole length of the rule laid down in some of them. The application of the provisions of Clause (c) of Section 584 of the Civil Procedure Code must necessarily depend in a great measure upon the particular circumstances of each

individual case; but I take it as a universal rule, applicable alike to all cases, that in acting under that clause the High Court cannot in second appeal deal with the lower Court's findings of facts as it could have done in first appeals, The law obviously aims at finality of decision upon questions of fact in cases which do not come up to the High Court in first appeal; and I should say that when the Court of first appeal, after having entered into the merits of the case, has considered the evidence and adjudicated upon the merits in the manner required by Section 574, the mere circumstance that the conclusions at which the Court has arrived are erroneous, or opposed to the weight of evidence, will not justify interference in second appeal, even though such conclusions proceed upon an improper conception of the exact effect and bearing of the case upon the merits. On the other hand, where the Court of first appeal, while adjudicating with due compliance with the provisions of Section 574, arrives at conclusions upon the merits ignoring any steps essential for justifying those conclusions, or where such conclusions are based upon evidence inadmissible by law, or proceed upon an erroneous view of the legal effect of any material part of the evidence, or are arrived at under a misconception either of the rules of evidence or of any other law, such conclusions, though they purport to be distinct findings of fact, would lay the judgment of the Lower Appellate Court open to second appeal under Clause (c) of Section 584, so long as the error is substantial enough to have possibly affected the justice of the case upon the merits. Beyond the rule which I have so endeavoured to enunciate, I am not prepared to go regarding the scope of second appeals, and as illustrating my view I may add that findings of fact which proceed upon no evidence at all, or upon ignoring the whole evidence, or upon erroneous conception of the rules of onus probandi, admissions, estoppels, conclusive proof and other such matters would, though findings of fact, be open to objection in second appeal.

10. Applying these principles to the cases to which this reference relates, I am of opinion that if the grounds urged can be substantiated, they form a proper subject of second appeal, and my answer to the reference is therefore in the affirmative.