Daudas Vs. Punamchand

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Court : Rajasthan

Decided On : May-06-1952

Reported in : AIR1954Raj47

Judge : Wanchoo, C.J. and; Bapna, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 47, Rule 1; Evidence Act, 1872 - Sections 90

Appeal No. : Civil Review Case No. 36 of 1950

Appellant : Daudas

Respondent : Punamchand

Advocate for Def. : Murlimanohar, Adv.

Advocate for Pet/Ap. : Inder Nath Modi, Adv.

Judgement :

Wanchoo, C.J.

1. This is a review application by Daudas against the judgment of a Division Bench of this Court which was delivered on 31-7-1950 and has arisen in the following circumstances.

2. A suit was brought by Punamchand against Motilal, his mother Mst. Dhapo, Sunder Lal, Daudas, Gulabdas and Hemraj defendants for possession of a certain house. Punamchand claimed to be the owner of the house by virtue of it being ancestral property which had come to him. The suit was resisted by Daudas and his case was that the house had been sold in his decree against Sangidas. He put the decree in execution against Gulab Das, son of Sangidas, and attached the house and it was sold by auction and purchased by Hemraj defendant. Sangidas in his turn had purchased this house by a private sale from Motilal and Mst. Dhapo, his mother. The further case of Daudas was that there had been a separation in the family of Punamchand and Motilal long before the sale to Sangidas and this house had come to the share of Motilal's grandfather. The trial court dismissed the suit and there was a first appeal to this Court. That appeal was allowed and the suit was decreed. Thereafter, the present application for review was made and the same learned Judges, who decided the appeal, issued notice. The case has now come before us to decide whether review should be granted or not as the two learned Judges who decided the appeal are no longer on the Beneh of this Court.

3. Learned counsel for the applicant urges that there are errors apparent on the record and this Court should grant the review. He has particularly pointed out two matters where according to him the learned Judges while deciding the appeal had made errors apparent on the record. He contends that it is an undisputed fact in this case that the joint family of Punamchand, Motilal and others had separated as far back at least as 1900 and the learned Judges have not considered this undisputed fact at all anywhere in the judgment. Secondly, he urges that the trial Court had raised the presumption of Section 90, Evidence Act, in favour of two documents Ex. D-1 and D-2. The learned Judges who heard the appeal did not raise that presumption for certain reasons and even then did not give him an opportunity to prove the documents. He, therefore, urges that in view of at least these two errors apparent on the record, the review should be granted.

4. So far as the first point is concerned learned counsel for the applicant referred to the statement of Punamchand plaintiff himself to the effect that there had been complete separation in the family and that this separation took place in smt. 1957,

i.e., 1900 A.D. Learned counsel for the opposite party urges that in view of the decision of this Court in -- 'Hariram v. Mst. Nathi'. AIR 1952 Raj 39 (A) this only amounts to overlooking certain evidence and, therefore, is not a ground for review. Both of us were a party to the case of Hariram and we held there that the mere fact that a Judge has not in terms referred to certain evidence in favour of one party or the other is not a sufficient reason for granting a review. We, however, further pointed out that the matter would be difficult if certain undisputed facts, which were on the record, had not been taken into consideration.

The present case is, in our opinion, of the second kind, namely, certain undisputed facts have not been taken into consideration in the judgment under review. The case of the defendants was that there had been a separation in the family in Smt. 1924. The statement of the plaintiff in the witness-box was to the effect that there had been a separation in the family and that this separation took place in Smt. 1957. It was, thus, undisputed between the parties that the family was separate at least since 1900 and certainly in the relevant years, namely, 1914 and 1915 when the alleged sale to Sangidas was made. Though, therefore, it may in a sense be argued that the learned Judges, who delivered the judgment under review, did not refer to evidence, the fact that that evidence is the statement of the plaintiff in the case turns this into a case of undisputed facts. Under these circumstances 'Hariram's case (A)' has no application to the facts of the present case, and, we are of opinion that as the learned Judges, who gave the judgment under review, did not consider an undisputed fact, namely, that the family had been separate since 1900 and on the material dates, and which fact was of material importance in deciding the controversy between the parties, there has been error apparent on the record and review should be granted.

5. The other point that has been urged is that the learned Judges did not give an opportunity to the applicant to prove the two documents Ex. D-1 and D-2. The trial court presumed the documents to be proved under Section 90, Evidence Act, and must, therefore, be deemed to have held that they were more than 30 years old and came from proper custody. Learned Judges when dealing with this aspect of the matter remark that in each case it is to be seen whether or not the two conditions of age and proper custody are fulfilled with respect to a particular

document. They then go on to observe as follows:

'If they are fulfilled, the discretion of the trial court in raising a presumption under Section 90 of the Evidence Act may not be interfered with or if interfered with, the respondent may have to be given an opportunity to prove the document. On the other hand, if any of the conditions is not fulfilled, the lower court was not at all empowered to raise any presumption whatsoever, and the question of giving any opportunity to the respondent to prove execution of the documents does not at all arise.'

6. Learned counsel for the applicant urges that the second proposition of law laid down by the learned Judges is obviously incorrect and the learned Judges, therefore, were influenced by this apparent error on the record to refuse to give him an opportunity to prove the two documents. We agree with the contention of the learned counsel for the applicant and are of the view that the proposition of law laid down in the second part of the above observations is not correct. It has not been supported by any authority; and on general principles it appears to us that where a document has been presumed genuine under Section 90, Evidence Act, by the trial court, it is but fair if the appellate court is going to upset that presumption either on the ground of age or on the ground of proper custody that the party producing the document should be given an opportunity to prove it. In this connection we may refer to -- 'Rajendra Prasad Bose v. Gopal Prasad Sen', AIR 1929 Pat 51 (B) and -- 'Mt. Gomti v. Megraj Singh', AIR 1933 All 443 (C). Learned counsel for the opposite party has not been able to cite a single case in support of the view taken by the learned Judges who gave the judgment under review. On general principles, therefore, the applicant was entitled to be given an opportunity to prove the two documents when the appellate court came to a different conclusion on the question of proper custody and did not apply the presumption of Section 90, Evidence Act. This, in our opinion, is another ground why review should be granted in this case.

7. A third point was also raised on behalf of the applicant but we do not think it necessary to decide that matter.

8. We, therefore, grant the review and orderthat the appeal will be re-fixed for rehearing indue course.