

Saherjan Bibi Vs. Gopal Chandra and ors.

Saherjan Bibi Vs. Gopal Chandra and ors.

SooperKanoon Citation : sooperkanoon.com/867716

Court : Kolkata

Decided On : Jun-28-1929

Reported in : AIR1930Cal424

Appellant : Saherjan Bibi

Respondent : Gopal Chandra and ors.

Judgement :

B.B. Ghose, J.

1. This is an appeal against an order granting review of a judgment by the Subordinate Judge which was passed on appeal. The application for review was made on the ground of discovery of fresh evidence. The learned Subordinate Judge allowed the application and after allowing the application for review he set aside his previous judgment and then allowed the plaintiff-appellant to withdraw his suit. He, however, did not grant the plaintiff any permission to bring a fresh suit upon the same cause of action, The appeal is by the defendant under Order 47, Rule 7, Civil P.C. The first objection that is taken to the order granting the review is that although the learned Judge has held that there was new evidence discovered, it is contended that the new evidence is not important evidence as mentioned in Order 47, Rule 1, Civil P.C. It has been pointed out in a series of cases that the grounds of appeal to which the appellate Court must be confined in an appeal against an order granting a review are limited to those provided in Rule 7, Sub-rule

(1), Order 47 of the Code. It is contended that the order now appealed against is in contravention of the provisions of Rule 4 : First, it is said that the application was granted - without a previous notice on all the opposite parties. That is a question of fact which does not appear to have been raised before the learned Subordinate Judge and no materials were brought to our notice on which we can hold that there was a contravention of that proviso.

2. The next point urged is that there was a contravention of proviso (b), Rule 4, Sub-rule (2), inasmuch as the new evidence is not important evidence. In my judgment whether a new evidence is important or not is not a question which an appellate Court on appeal from an order granting a review is free to decide. Our attention was drawn to the case of *Nandalal Mullick v. Panchanon Mukerji* [1918] 45 Cal. 60, by the learned advocate for the appellants in his careful argument. It seems to me, however, that it was not decided in that case that a Court on an appeal from an order granting a review can decide the question whether the new evidence is an important matter or not. The only question that was decided in that case was what the meaning of the words 'strict proof' in proviso (b), Rule 4, Sub-rule (2) is. That was an appeal from a final decree made upon a review of the previous decree and the learned Judges were quite free to give their opinion with regard to the value of the new evidence that was alleged to have been discovered. But it seems to me that the question whether a new evidence which has been discovered is important or not must be left to the judgment of the Court which decides the application for review. In my view there is no good ground for the appeal and the appeal must, accordingly, stand dismissed with costs, hearing fee being assessed at two gold mohurs.

3. There is also an application for revision of the order which was made by the Subordinate Judge after granting the application for review and restoring the appeal to its file. He made the order to the following effect : that the appeal along with the suit is allowed to be withdrawn without any permission to bring a fresh suit on the same causes of action. The learned advocate for the petitioner takes strong exception to this order on the ground that the leave to withdraw was granted without any reason whatsoever and that the effect of the order is that the petitioner would not be able to rely upon the decision arrived at both by the trial Court and

the appellate Court on first appeal in any subsequent suit between the parties; or in other words his contention is that the judgment passed between the parties would have operated as *res judicata* in any future suit which the plaintiff may be advised to bring against the defendants petitioners. The result of the order of the Subordinate Judge is that the decision of both the Courts is wiped out and he would not be in a position to raise the plea of *res judicata* in a future suit. In support of his contention two cases have been cited by the learned advocate. One is the case of *Satyabhamabai v. Ganesh Balkrishna* [1905] 29 Bom. 13. In that case a preliminary decree for partition was passed on an agreement between the plaintiff and the defendant. The plaintiff then appealed against the decree made by the trial Judge and then when the appeal was pending he withdrew the suit in the trial Court. The withdrawal by the plaintiff was without the leave of the Court. By this action of the plaintiff the appellate Court appears to have been considerably embarrassed and in the result it dismissed the appeal, but determined that the effect of the withdrawal was to set aside the decree of the first Court.

4. The contention before the High Court was that there was no right of second appeal. The High Court restored the decree of the trial Court nothing was said in the judgment as regards the power of the Court to grant leave to withdraw a suit at the appellate stage. The next case that was cited, was that of *Tukaram Mahadu v. Ram Chandra Mahadu* A.I.R. 1925 Bom. 425. That case also arose out of a suit for partition and there was an adjustment of the suit. After the plaintiff entered into an agreement to adjust the suit he applied for withdrawing the suit. The defendant put in the compromises and asked for the compromise being recorded. That was done by the trial Court and a decree made in terms of the compromise. The trial Court held that the plaintiff could withdraw from the suit if he wished, but that his withdrawal would not deprive the Court of jurisdiction to enquire into and record the compromise. In that case also it does not appear that the Court permitted the plaintiff to withdraw his suit either in the trial Court or in the appellate Court. Those cases are, therefore, no authority for the proposition that where the Court gives permission to the plaintiff to withdraw his suit either in the trial Court or in appeal in the exercise of its discretion, that order can be revised by this Court under Section 115, Civil P.C. It may be that by reason of the order allowing the plaintiff to withdraw the advantage which the defendant might have gained in any

subsequent suit that the plaintiff might bring against him, is lost to the defendant, i.e., the advantage of using the Judgment in the case in his favour. But that is a matter which the Court which, gave the permission should consider. The effect of the order simply is, as if the plaintiff did not bring the suit he brought; but he cannot bring a suit on the same cause of action. Whether the judgment which has been passed in this case would have operated as res judicata in a suit brought by the plaintiff for establishing his title to the property for which this rent suit was brought, is a question which we need not go into. But as I have already stated the only effect is that the defendant is deprived of the advantage of using this judgment in his favour. I doubt very much whether that is a sufficient ground for interference with the discretion of the Court below in making the order that it has made. It may be that we may not approve of the order made by the learned Subordinate Judge; but that would not be sufficient for interfering with that order. This rule is, accordingly discharged but with out costs.

Bose, J.

5. I agree.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com