APPELLATE CIVIL.

Before Buckland J.

SHOBHARANI DATTA

v.

SANTOSHKUMAR BAKSHI.*

1933
Dec. 22.

Second Appeal—Admission—Practice—Rule Judges, Difference between—Procedure—Code of Civil Procedure (Act V of 1908), s. 100—Letters Patent, 1865, cl. 36.

Per BUCKLAND J. On the question of admission of an appeal to the High Court, three courses are open to the Judges constituting a Division Bench of two Judges:—(*i*) either to concur in rejecting it, (*ii*) to concur in admitting it or (*iii*) to differ.

If they differ, it is possible for the one to give way to the other: but that is a matter purely between the Judges themselves and it is not a "practice" in the technical sense, so as to impose a rule upon the Bench.

If one of the learned Judges will not give way to the other and they deliver dissentient judgements, the case must be referred under clause 36 of the Letters Patent to a third Judge to decide whether the appeal ought to be admitted.

Per BUCKLAND, LORT-WILLIAMS AND M. C. GHOSH JJ. In a Second Appeal, the High Court cannot interfere with findings of fact unless those findings have been based upon a misconception of the evidence or upon some mistake, which has arisen in the consideration of that evidence in the lower court.

The provisions of the Code of Civil Procedure with regard to the admission of Second Appeals in the High Court ought to be strictly enforced.

Per BUCKLAND AND LORT-WILLIAMS JJ. (M. C. GHOSE J *contra*). A Second Appeal ought not to be admitted merely on a question of the genuineness of a signature, which is a question of pure fact.

Per BUCKLAND J. It is not the duty of an appellate court by its judgment to scrutinise the evidence with the same elaboration of detail as is to be expected from a court of first instance.

SECOND APPEAL by the defendant.

The facts of the case and relevant portions of arguments advanced at the two hearings under

*Appeal from Appellate Decree, No. 1855 of 1933, against the decree of Basantakumar Ray, Additional Subordinate Judge of Burdwan, dated May 11, 1933, reversing the decree of Gobindaprasad Palit, Second Munsif of Burdwan, dated Aug. 11, 1932.

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Order XLI, rule 11, of the Code of Civil Procedure— (*i*) before Lort-Williams and M. C. Ghose JJ. and (*ii*) thereafter before Buckland J. on the former two differing as to its admission,—appear sufficiently in the judgments.

On this Second Appeal coming on for hearing on the 15th December, 1933, under Order XLI, rule 11, of the Code of Civil Procedure, the following dissentient judgments were delivered by Lort-Williams and M. C. Ghose JJ. :—

LORT-WILLIAMS J. This is an appeal from a decision of the Officiating Additional Subordinate Judge, Burdwan, reversing a decision of the Munsif of Burdwan.

The suit was for a declaration that a mortagage bond, alleged to have been executed by Panchukrishna Bakshi, who was the plaintiff's fourth brother, was a spurious and fabricated document, that there was no consideration for it, and that it was void. The bond purported to have been given on the 10th *Foush*, 1337, in favour of the defendant Sreemati Shobharani Datta for a sum of Rs. 150, which, it was alleged, had been lent by this woman to Panchukrishna. Panchukrishna died within two months of the alleged date of the bond and it was registered after his death.

The plaintiff's allegation was that the alleged signatures of Panchukrishna on the bond did not tally with his admitted signatures on other documents and that, consequently, the document was a fabrication, and the allegation that this woman lent Panchukrishna Rs. 150 upon it was untrue.

The Munsif came to the conclusion that the signatures were genuine and that, consequently, the document was genuine, and had been given in respect of the loan alleged to have been made by Sreemati Shobharani Datta.

The Officiating Additional Subordinate Judge disagreed with this finding and came to the conclusion that all the signatures upon the document, except one, were forgeries, and that no loan had been made by this woman to Panchukrishna. The reasons why he came to this conclusion were the following :— Panchukrishna's alleged signature upon the first page of the bond, upon which the stamp appears, was genuine, as it tallied with Panchu's admitted signatures. The rest of the signatures were forgeries, because they differed altogether from his admitted signatures and from the first signature on the bond. The learned judge deduced from these and other facts, to which I will refer in a moment, that Panchu signed the first page with the stamp upon it in blank and that, after his death, the other pages were added to the bond, and the signatures forged upon them, in furtherance of a conspiracy between the defendant's uncle, one Phakir Mitra, and the defendant and the witnesses called on her behalf. In confirmation of the truth of this deduction, there was the fact that the document was not registered until after Panchu's death: Secondly, that Panchu did, in fact, owe Rs. 150 to Phakir Mitra for medicines supplied to him, which sum coincided exactly with the sum alleged to have been lent by the defendant Phakir contradicted another of defendant's witnesses, one Jateendramohan De, on the point whether Rs. 150 was owing by Panchu to Phakir. Phakir alleged that only Rs. 40 was due. The probable reason for this was that he appreciated how damaging was the coincidence between the amount of the debt owed by Panchu to him, as stated by Jateendra, and the amount of the loan which was alleged to have been made by the defendant. Further, the judge found that

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all the defendant's witnesses were more or less under the influence of Phakir. It seems to me clear, therefore, that the decision of the learned Subordinate Judge turned solely upon questions of fact.

The only suggestion of a point of law, which the learned advocate for the appellant has been able to make, is that the judge wrongly put the onus of proof upon the defendant. He based that argument upon a statement made in the judgment to the effect that "the defendant did not also offer "any explanation for not examining herself and her husband in this suit "to clear their character. It is the positive case of the plaintiff that the "defendant is a mere tool in the hands of her relative, Phakir Mitra, and "that she did not lend any money to Panchukrishna. Under these "circumstances, it was the bounden duty of the defendant to come into "the witness box and to swear that the bond in suit was actually and really "executed by Panchukrishna, that she lent him the money from her own "pocket, and that she was not in collusion with her maternal uncle, "Phakir Mitra."

In my opinion, it is clear beyond doubt that the learned Subordinate Judge neither put, nor intended to put, any onus upon the defendant. What he meant, by this sentence in his judgment, was that, in face of the positive evidence given by the plaintiff that this deed was a fabrication and that the alleged signatures did not tally with the admitted signatures of Panchu, any court would expect the defendant to give some evidence on the point, and go into the witness box to contradict what amounted to an allegation of fraud against her. It follows, therefore, that no point of law arises upon this appeal.

It is necessary for me to point out, once again, that, on Second Appeal, this Court may consider only points of law. We cannot interfere with findings of fact, unless those findings have been based upon a mis-conception of the evidence or upon some mistake, which has arisen in the consideration of that evidence in the lower court.

I regret that my learned brother does not agree with me that this appeal ought to be dismissed under Order XLI, rule 11, of the Code of Civil Procedure. I am aware that the usual practice has been that an appeal is admitted, where there is disagreement between the Judges, who form the Bench hearing Second Appeals. During the period in which I have sat upon this Bench, I have been struck particularly with the looseness which appears, at times, to have been practised with regard to the admission of these Second Appeals. In a considerable proportion of the Second Appeals, which have come before us for hearing, no point of law has been discoverable, and the learned advocates for appellants have not even, with the greatest ingenuity, been able to direct our attention to any such points of law. In a large majority of the cases coming before us in the Order XLI list, there has not been the vestige of a point of law for us to consider. The result is that, owing to the practice, which seems to have been followed, the lists which have to be dealt with by this Bench have been swelled unconscionably, and there are a considerable number of arrears. I am convinced that, unless the provisions of the Code are more strictly enforced with regard to Second Appeals, it will not be possible for the Court to overtake these arrears.

For these reasons, I have thought it necessary to state why I consider that this appeal ought to be dismissed. As my learned brother does not agree, the matter will be referred to a third Judge, under clause 36 of the Letters Patent, to decide the point, whether the appeal ought to be dismissed, because no grounds for appeal exist within the meaning of section 100 of the Code of Civil Procedure.

M. C. Ghose J. I regret to disagree with my learned brother. I agree with him that the provisions of the Code ought to be strictly enforced before admitting Second Appeals and no appeal ought to be admitted, unless it

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appears to us that the court of appeal below has committed an error on a point of law or has made a manifest error in consideration of the evidence.

In this case, the plaintiffs sued for a declaration that a certain registered mortgage bond was spurious, without consideration, null and void. The Munsif, who heard the witnesses and tried the case, came to the conclusion that the bond was genuine, that it had been signed by the executant, and that he had received consideration for the same. The court of appeal below considered that of the four signatures on the bond, three were forgeries and that one had been obtained by fraud from the executant. On the question of the alleged forgery, the Munsif remarked that, in his opinion, the style and look of the signatures did not exhibit any marked difference and that, if the plaintiffs relied on the allegation of forgery, they should have obtained the help of an expert in the matter. No expert was examined on behalf of the plaintiffs. The court of appeal below examined the signatures, and upon such examination, came to the conclusion that three of the signatures were forgeries.

I think, in this case, we ought to send for the record and satisfy ourselves whether the court of appeal below was correct in his estimation of the alleged signatures.

It appears that the court of appeal below has also made an error in consideration of the question whether there was consideration for the bond. On this point, he has not at all met the evidence which was carefully considered by the trial court.

On these grounds, I think, that this appeal should be admitted and heard in the presence of both parties.

Thereupon, under clause 36 of the Letters Patent, the case was referred to the Honourable the Chief Justice, who sent it to the Honourable Mr. Justice Buckland for disposal, who heard it on the 22nd December, 1933.

Samarendrakumar Datta and *Tarakeshwarnath Mitra* for the appellant.

BUCKLAND J. My learned brothers, Lort-Williams and M. C. Ghose JJ., have unfortunately differed on the question whether this appeal should be admitted and it has been placed before me under clause 36 of the Letters Patent. On the question of the admission of the appeal, there are three courses open to the Judges constituting a Division Bench of two Judges:—either to concur in rejecting it, or to concur in admitting it or to differ. If they differ, it is possible for the one to give way to the other. But that, I conceive, is a matter purely between the Judges themselves; and though my learned brother, Lort-Williams J., has referred to that as a practice,

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it is not, in my opinion, a practice in the technical sense, so as to impose a rule upon the Bench. If one of the learned Judges will not give way to the other and they deliver dissentient judgments, the present situation arises and the case must be referred under the Letters Patent to a third Judge to decide whether the appeal should be admitted. It is no doubt usual, I do not say the "practice", for that is a technical term, the use of which might lead to misconception, where Judges differ as to the admission of an appeal, for the Judge who would reject it to give way. But, for reasons which he has expressed, my learned brother, Mr. Justice Lort-Williams, on this occasion, has declined so to do and it has been argued that, in accordance with such practice, the appeal should have been admitted. That argument ignores entirely the question whether the appeal is one in which a point of law arises and, therefore, is an appeal which should be admitted. In my judgment, there is no rule of practice such as that for which the learned advocate contends, binding upon the Judges who differ, and I, therefore, come back to the question whether or not there is a point of law upon which the appeal should be admitted and heard. Having now heard the learned advocate for the appellant and read the judgment of my learned brothers, not only do I agree with the view which my learned brother, Lort-Williams J., has taken, but, if I may, for it is not strictly within my province, I desire to express my agreement with the course he has adopted, for the reasons which he has stated. As to the facts of the case, reference may be made to the judgment of Lort-Williams J. His colleague M. C. Ghose J. would admit the appeal, in order that the Judges of this Court, by whom the appeal may be heard, for it is by no means certain, indeed it is improbable that it would be heard by the same Bench, may themselves inspect the mortgage bond in suit and satisfy themselves "whether the court of appeal "below was correct in his estimation of the alleged "signatures." If ever there is a question of pure

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fact, the question of the genuineness of a signature is such a question. The rule is that the findings of the lower appellate court, on questions of fact, are to be accepted by this Court on Second Appeal and, unless that rule is to be ignored and such findings of fact reviewed by this Court, it would serve no useful purpose to send for the document, for the learned Subordinate Judge has found as a fact against the appellant on this question. My learned brother, M. C. Ghose J., has also observed:

> It appears that the court of appeal below has also made an error in consideration of the question whether there was consideration for the bond. On this point, he has not at all met the evidence which was carefully considered by the trial court.

In this connection, the learned Subordinate Judge, in his careful judgment, has considered the evidence very fully and has observed :—

> I am also fully satisfied that Panchukrishna did not receive any consideration in cash from the defendant in respect of the bond in suit.

Here is another finding of fact, by which this court is bound. I must frankly admit that I do not appreciate what my learned brother, Mr. Justice M. C. Ghose, means when he says that the lower appellate court has not at all "met" the evidence which was carefully considered by the trial court. The Subordinate Judge, in his judgment, says he has "very carefully considered the entire oral and "documentary evidence adduced by the parties," upon which he bases his findings, and he has also discussed it at some length. I reject any suggestion, if such is intended to be made, by my learned brother, that it is the duty of an appellate court by its judgment to scrutinise the evidence with the same elaboration of detail as is to be expected from a court of first instance. Sufficient reasons for his findings have been given by the learned Subordinate Judge and, as there is no point of law to be argued, I agree with my learned brother, Mr. Justice Lort-Williams, that this appeal should be dismissed.

Appeal dismissed.

G.S.