

1919  
July, 15.

*Before Justice Sir Pramada Charan Banerji and Mr. Justice Walsh.*  
JANG BAHADUR RAI AND ANOTHER (DEFENDANTS) v. RAJ KUMAR RAI  
(PLAINTIFF) AND PARWATI KUNWAR (DEFENDANT)\*  
*Civil Procedure Code, section 107, order XLI, rule 27—Appellate Court—Power  
of, to examine or re-examine parties to the suit.*

An appellate court is competent to examine (or re-examine) any of the parties if it considers it necessary for the ends of justice to do so.

THE facts material for the purposes of this report may be stated as follows:—The plaintiff sued for a declaration that his brother Deo Saran Rai had never adopted Jang Bahadur as his son. The defendants were Jang Bahadur and Mt. Parwati, widow of Deo Saran Rai. The court of first instance held that the adoption was proved, and dismissed the suit. Mt. Parwati had been examined by that court, and she had stated that the adoption had been made. On appeal, the lower appellate court also examined her, and she then stated contrary to what she had said in the first court. The lower appellate court found against the adoption and decreed the claim.

The defendants appealed to the High Court.

Pandit *Uma Shankar Bajpai*, for the appellants, contended that it was not open to the lower appellate court to take additional evidence in the way it did. The case did not come within clauses (a) and (b) of order XLI, rule 27, of the Code of Civil Procedure. There was no inherent *lacuna* in the evidence. Mt. Parwati had already been examined by the court of first instance and no reasons were assigned by the lower appellate court for re-examining her. The finding of the lower appellate court was based mainly on her evidence. Reference was made to *Kessouji Issur v. Great Indian Peninsula Railway Co.*, (1).

Mr. *M. L. Agarwala*, for the respondents, was not called upon, but he invited the attention of the Court to section 107 of the Code of Civil Procedure under which the powers of an appellate court included that of the first court to examine parties to a case. That power was not modified by order XLI, rule 27, of the Code.

---

\* Second Appeal No. 949 of 1917, from a decree of G. C. Badhwar, District Judge of Ghazipur, dated the 11th of June, 1917, reversing a decree of Kunwar Sen, Subordinate Judge of Ghazipur, dated the 19th of February, 1916.

BANERJI and WALSH, JJ. :—The suit out of which this appeal has arisen was practically a suit for a declaration that the adoption of the defendant, Jang Bahadur Rai, alleged to have been made by Deo Saran Rai, did not in fact take place and that Jang Bahadur is not the adopted son of Deo Saran Rai. The plaintiff is the brother of Deo Saran Rai, who is now dead. Musammat Parwati, defendant, is Deo Saran's widow. She executed a document in which she declared that her husband had adopted Jang Bahadur Rai, son of another brother of Deo Saran Rai, and that Jang Bahadur was Deo Saran's adopted son. The plaintiff's allegation was that he and Deo Saran were joint and that in fact Deo Saran never adopted any boy. The court of first instance held in favour of the adoption and dismissed the claim. The lower appellate court was of opinion that no adoption took place and that the allegation of an adoption was untrue. It, however, held that the two brothers were separate and not joint as alleged by the plaintiff. The defendant, Jang Bahadur, has preferred this appeal and the main contention is that the court below was not justified in examining the defendant, Musammat Parwati, who in the appellate court gave evidence contrary to her allegations in the court of first instance. In our opinion the appellate court was competent to examine any of the parties if it considered it necessary for the ends of justice to do so. Musammat Parwati was a party to the suit, and the learned Judge had the power to examine her for the purpose of ascertaining the facts. He, however, did not decide the case solely or mainly on the evidence of Musammat Parwati, but on other evidence to which he refers in his judgment. His finding upon the question of adoption is a finding of fact and must be accepted by us in second appeal. In this view the appeal fails. We dismiss it with costs.

*Appeal dismissed.*

1919

---

JANG  
BAHADUR  
RAI  
v.  
RAJ KUMAR  
RAI.