

APPELLATE CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Sen.

GANGA RAM (PLAINTIFF) v. MUTESRA (DEFENDANT).*

*Practice and pleading—Point of law raised for the first time in first appeal—Civil Procedure Code, order II, rule 2—
Mesne profits—Maintainability of separate suit.*

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June, 16.

A suit for possession and past mesne profits was decreed. A second suit was brought for mesne profits for the period following the institution of the first suit and up to the date of recovery of possession. This suit was decreed by the trial court. In appeal therefrom the defendant raised the plea for the first time that the suit was barred by order II, rule 2 of the Civil Procedure Code.

Held that the point could be raised in first appeal; it was a pure question of law to be argued on admitted facts, and went to the root of the case.

Held, also, that the suit was not barred by order II, rule 2.

This appeal was first heard by a single Judge, who referred it to a Bench by the following Referring Order :—

KING, J. :—This appeal arises out of a suit for mesne profits. The plaintiff Ganga Ram brought a suit against Mst. Mutesra, the defendant, on the 29th of January, 1926, claiming possession of certain property and mesne profits up to the date of suit. The suit was decreed by the Subordinate Judge and the appeal was dismissed by the District Judge. On the 12th of May, 1927, Ganga Ram got possession of the property in suit.

Subsequently Ganga Ram instituted the present suit on the 9th of August, 1927, claiming mesne profits from the date of the institution of the former suit, *i.e.*, from the 29th of January, 1926, up to the date of his obtaining possession of the property, *i.e.*, up to the 12th of May, 1927.

The trial court decreed the suit. In appeal before the learned District Judge a new plea was taken, namely that the claim was barred by the provisions of order II, rule 2 of the Code of Civil Procedure. The lower appellate court held that the provisions of order II, rule 2 were clearly applicable

* Second Appeal No. 451 of 1929, from a decree of T. N. Mulla, District Judge of Gorakhpur, dated the 2nd of January, 1929, reversing a decree of Thakur Prasad Dube, Additional Munsif of Deoria, dated the 25th of January, 1928.

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to the case as the plaintiff might have claimed mesne profits in his former suit up to the date of delivery of possession and therefore he was prohibited from bringing a fresh suit under order II, rule 2. The lower appellate court, therefore, dismissed the plaintiff's suit.

In second appeal it has been argued that the court below was wrong in allowing the new point of law to be raised in appeal when it had not been raised and considered in the court of first instance. In support of that contention the learned advocate for the appellant has relied upon the Full Bench ruling in *Ram Kinkar Rai v. Tufani Ahir* (1). It appears that the decision in that case is not directly applicable to the facts of the case before me. In the Full Bench case the question for determination was whether a point of law, which has never been taken in either the trial court or the lower appellate court, can be raised in second appeal. In the case before me the point of law was raised for the first time in the court of first appeal, so it is clear that the Full Bench ruling does not apply in terms. It is contended, however, that in the Full Bench ruling the previous decision of a Division Bench in *Balkaran Singh v. Dulari Bai* (2) was cited with approval, and that ruling certainly does support the appellant's contention. It was there held that a lower appellate court ought not to entertain points which should have been alleged in the pleadings and made the subject of issue and argument and decision by the trial court. Sitting singly I should be bound by this Bench ruling which seems to me directly applicable to the facts of this case.

For the respondent two Privy Council decisions have been cited. One is the case of *Surajmull Nargoremull v. Triton Insurance Company* (3). In that case a point of law was raised for the first time before their Lordships of the Privy Council and it was held that it could be raised and decided even at that stage. The other authority is the case of *Nuri Mian v. Ambica Singh* (4) where a ruling of the Judicial Committee is relied upon as having laid down that "When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea." In the present case there is no dispute

(1) (1930) I.L.R., 53 All., 65.

(2) (1926) I.L.R., 49 All., 55.

(3) (1924) I.L.R., 52 Cal., 408.

(4) (1916) I.L.R., 44 Cal., 47(53).

regarding the facts. *Prima facie*, therefore, the principle laid down by their Lordships of the Judicial Committee would be applicable and it would be permissible to raise the question of law for the first time in the lower appellate court. These findings were not discussed in the Bench ruling in *Balkaran Singh v. Dulari Bai* (1) and the question of law seems to me of sufficient importance to be referred to a larger Bench. I therefore refer the case for decision by a Bench of two Judges. As I was partly responsible for the decision in *Balkaran Singh v. Dulari Bai*, it would be preferable that I should not be a member of the Bench deciding the case.

The case was then put up before a Division Bench consisting of MUKERJI and SEN, JJ.

Mr. *Shiva Prasad Sinha*, for the appellant.

Messrs. *P. L. Banerji* and *Kedar Nath Sinha*, for the respondent.

MUKERJI and SEN, JJ. :—This appeal has been referred to a Bench of two Judges because a plea was taken for the first time in the lower appellate court that the suit was barred by the provisions of order II, rule 2 of the Code of Civil Procedure. The learned single Judge was not sure whether it was open to the defendant, the appellant before the lower appellate court, to raise the plea.

The facts are these. The plaintiff who is the appellant before us brought a suit for possession of a certain property. He asked for mesne profits up to the date of the institution of the suit, but did not ask for mesne profits for the period following the institution of the suit and till the recovery of possession. He brought a second suit for mesne profits for this period. The first court decreed the suit. In the lower appellate court the defendant, for the first time, took the plea that the suit was barred by order II, rule 2, of the Code of Civil Procedure. The District Judge gave effect to the defendant's plea and dismissed the suit, relying on the case of *Goswami Gordhan Lalji Maharaj v. Bishambar Nath* (2).

(1) (1926) J.L.R., 49 All., 55.

(2) (1927) J.L.R., 49 All., 597.

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In a recent Full Bench case, *Ram Karan Singh v. Nakchhed Ahir* (1) it has been held that in the circumstances of this case a second suit is not barred by the provisions of order II, rule 2, Code of Civil Procedure.

As regards the question whether the point could be raised in a first appeal, we are clearly of opinion that it could be raised. The point was a pure question of law to be argued on admitted facts, and went to the root of the case.

In the result we allow the appeal, set aside the decree of the court below and restore the decree of the court of first instance, with costs to the appellant throughout.

Before Sir Shah Muhammad Sulaiman, Acting Chief Justice and Mr. Justice Young.

BALKISHEN DAS (DEFENDANT) v. BECHAN PANDEY
(PLAINTIFF).*

1931
June. 22.

Specific performance—Contract to sell immovable property—Sale deed executed but not registered—Suit for compulsory registration of sale-deed—Decree defective and infructuous—Such suit not the only remedy of vendee—Registration Act (XVI of 1908) section 77—Res judicata.

Where a person enters into a contract to sell certain immovable property and executes a sale deed but wilfully abstains from getting it registered, section 77 of the Registration Act does not provide the only exclusive relief to the other party, and the latter is entitled to enforce specific performance of the contract and to obtain actual possession. So, where the decree in a suit under section 77 for the compulsory registration of the sale deed came to an infructuous termination, owing mainly to a defect in its form, it was held that the purchaser could maintain a suit for specific performance of the contract and for recovery of possession.

The mere failure of a suit under section 77 or its infructuous termination cannot operate as *res judicata* to bar a suit for specific performance of the original contract; that section is confined to a relief for the registration of a particular document which has been executed, and no other relief can be claimed under it.

*Second Appeal No. 887 of 1928, from a decree of Jagdishwar Nath Kaul, Additional Subordinate Judge of Benares, dated the 14th of April, 1928, confirming a decree of Bind Basni Prasad, Munsif of Haveli, dated the 23rd of November, 1927.

(1) (1927) I.L.R., 53 All., 951.