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SADANAND PANDURANG v. PARASHRAM PANDURANG

Attorneys for defendants Nos. 1-4 : Messrs. *Ardeshir, Hormusji, Dinshaw & Co.*

Attorneys for defendant No. 5 : Messrs. *Matubhai, Jamietram & Madan.*

Summons discharged.

J. S. K.

APPELLATE CIVIL

Before Mr. Justice Fawcett and Mr. Justice Mirza.

1928

January 13

RAOJI BIN BHAGU MORE (ORIGINAL DEFENDANT), APPLICANT *v.* RAGHUNATH VITHAL KATHALE (ORIGINAL PLAINTIFF), OPPONENT.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 53, 74—Revision—District Judge—Power of District Judge to call for additional evidence—Procedure—Civil Procedure Code (Act V of 1908), section 115, and Order XLI, Rule 28.

Under section 53 of the Dekkhan Agriculturists' Relief Act, 1879, the District Judge can exercise his discretion in allowing a plaintiff an opportunity of calling an expert witness in order to enable him to ascertain whether the view taken by the Subordinate Judge that the thumb impression on a promissory note differed from the thumb impression on the summons and on another document where the thumb-impression had admittedly been made by the defendant was correct or not; and it cannot be said that in calling in this aid to the determination of that point the District Judge would be exercising his jurisdiction illegally or with material irregularity, so as to enable the High Court to interfere under section 115 of the Civil Procedure Code. The mere fact that section 53 does not give him express power to call for additional evidence such as an appellate Court has under Order XLI, Rule 28, of the Civil Procedure Code, 1908, is not a sufficient basis for holding that the District Judge has no such power.

Babaji v. *Babaji*,[1] *Ramsing* v. *Babu Kisansing*[2] and *Gurubasaya* v. *Channalappa*,[3] discussed.

Held, further, that regarding the point whether the consideration of the promissory note was proved, the District Judge acted illegally and with material irregularity inasmuch as he reversed the decree and allowed the plaintiff's claim without discussing that point at all.

CIVIL Revision Application against the order of K. Barlee, the District Judge at Satara, reversing the decree passed by B. R. Mehendale, First Class Subordinate Judge at Satara.

Suit to recover money.

*Civil Revision Application No. 275 of 1926.

[1] (1891) 15 Bom. 650.

[2] (1893) 19 Bom. 116.

[3] (1894) 19 Bom. 286.

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The plaintiff sued to recover Rs. 150 due on a promissory note purporting to have been passed by the defendant on May 10, 1920.

The defendant denied execution and consideration of the promissory note.

The Subordinate Judge held that the consideration was not proved on evidence and as to the execution, the Judge held that the promissory note was suspicious as the thumb impression of the defendant on the note differed from his thumb impression taken in Court (Exhibit 7) and that on the summons.

In the application made to the District Judge, the learned Judge allowed the plaintiff to call an expert witness from Poona. The witness stated that the thumb impression on the promissory note was that of the defendant. The learned Judge agreeing with the evidence, reversed the decree and allowed the plaintiff's suit.

The defendant applied in revision to the High Court.

B. G. Rao, for the applicant.

P. B. Shingne, for the opponent.

FAWCETT, J. :—The plaintiff sued in the Court of the First Class Subordinate Judge at Satara to recover a sum of Rs. 150 upon a promissory note, which he alleged was executed by the defendant on May 10, 1920. The defendant denied the execution of the promissory note and the receipt of any money from the plaintiff. Evidence was taken before the First Class Subordinate Judge, and among other things the defendant was made to impress his thumb-mark upon a paper in the Subordinate Judge's Court. The Subordinate Judge came to the conclusion that the promissory note was at least suspicious and that no consideration had been proved. In his judgment he discussed the oral evidence that had been given before him, and in regard to the question of

the thumb-impression upon the promissory note he remarked :—

"It is not a very certain test. But leaving out the thumb-impression on defendant's written statement and Vakalat as being not very clear, the thumb-impression on the summons and that specially taken in Court Exhibit 7 somewhat differ from that on the promissory note marked A."

He dismissed the suit with costs. The suit was one that fell under the Dekkhan Agriculturists' Relief Act, and, therefore, the plaintiff made an application to the District Judge for the exercise of his powers of revision under section 53 of that Act. Among the grounds of appeal was one that the lower Court was wrong in holding that the promissory note was not proved, and in holding that the consideration was not proved; also there was a specific ground that the Subordinate Judge was in error in holding that the thumb-impression of the defendant taken before the Court (Exhibit 7) somewhat differed from that on the promissory note. It appears that, when the case was first taken up for arguments, the District Judge gave the applicant-plaintiff an opportunity of calling an expert witness from Poona in regard to the question whether the thumb-impression upon the promissory note was shown to be the defendant's, as being identical with the thumb-impression that he had made in the Subordinate Judge's Court. The District Judge says that he allowed this because the thumb-impression on the promissory note was exceptionally clear. The expert witness gave his positive opinion that the thumb-impression on the promissory note was the defendant's, after comparing it with the thumb impression on Exhibit 7. The District Judge also says that he has no doubt that the expert's opinion was correct, as even to his eyes the two thumb-impressions seemed the same. Thereupon, he reversed the decree of the lower Court and allowed the claim in full with costs throughout.

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The defendant has come to us in revision, and the main contention of Mr. Rao on his behalf is that the District Judge had no power to allow additional evidence to be taken in the revisional proceedings before him under section 53 of the Dekkhan Agriculturists' Relief Act. He contends that section 74 of the Act shows that the provisions of the Civil Procedure Code do not apply to proceedings before a District Judge in revision, and he also relies upon the ruling in *Babaji* v. *Babaji*[1] (an analogous case under section 54), that the Special Judge had no jurisdiction to grant a review of a decree or order once made by him on the ground of the discovery of new evidence. He, however, rightly drew our attention also to the Full Bench decision in *Ramsing* v. *Babu Kisansing*,[2] where the Special Judge had granted a review of a previous decree that he had passed under section 53 on the ground of a mistake that had led him to wrong conclusions upon the merits of the case. It was held by the Full Bench that in granting a re-hearing the Special Judge had exercised a reasonable discretion, with which the High Court could not interfere in its extraordinary jurisdiction. It also held that the Civil Procedure Code was not applicable to proceedings before the Special Judge, and that the conduct of such proceedings rested within his discretion. In the judgment delivered by the Chief Justice, Sir Charles Sargent, the case of *Babaji* v. *Babaji*[1] was referred to, but he said that it was not necessary for him to express an opinion whether a re-hearing could be granted on the ground of new evidence. Fulton J. concurred with Sir Charles Sargent's judgment, but Parsons J., one of the Judges who decided the case of *Babaji* v. *Babaji*,[1] stated that he adhered to that decision and considered it to be correct. In a subsequent case, *Gurubasaya* v. *Chanmalappa*,[3]

[1] (1891) 15 Bom. 650. [2] (1893) 19 Bom. 116.
[3] (1894) 19 Bom. 286.

Sargent C. J. and Fulton J. held that under section 53 of the Dekkhan Agriculturists' Relief Act, the Special Judge has a revisionary power in all cases where a failure of justice appears to have taken place; it is for him to decide whether a finding on a question of fact by a Subordinate Judge is of that nature, and in doing so he is entirely within his jurisdiction.

It seems to me that these two decisions interpret section 53 as giving a very wide jurisdiction to a District Judge in exercising revisionary powers under that section. Also I do not think that the ruling in *Babaji* v. *Babaji*[1] has any application whatever to the point that is raised in this application. There is no question here of the District Judge having reviewed a prior decision made by him, on the ground of discovery of new evidence, such as was the question in *Babaji* v. *Babaji*[1]; and the mere fact that it has some reference to the question of further evidence is not logically a reason for saying that the ruling should also be held to cover the present question. As I have already noted, the majority of the Bench in *Ramsing* v. *Babu Kisansing*[2] declined to go into the question whether the decision of *Babaji* v. *Babaji*[1] was correct; and they left that particular question open.

The later decision in *Gurubasaya* v. *Chanmalappa*[3] says that it is for the District Judge to decide whether the finding on a question of fact is one where a failure of justice appears to have taken place; and it seems to me that this implies that a District Judge has all necessary powers, such as can usually be exercised in a Court of Justice, to ascertain whether or not a particular finding is one in regard to which a failure of justice has taken place. The District Judge, in the present case,

[1] (1891) 15 Bom. 650. [2] (1893) 19 Bom. 116.
[3] (1894) 19 Bom. 286.

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thought it advisable to have the evidence of an expert before him in order to enable him to ascertain whether the view taken by the Subordinate Judge that the thumb-impression on the promissory note differed from the thumb-impression on Exhibit 7, and on another document where the thumb-impression had admittedly been made by the defendant, was correct or not; and, in my opinion, it cannot be said that in calling in this aid to the determination of that point the District Judge has exercised his jurisdiction illegally or with material irregularity, so as to enable this Court to interfere under section 115 of the Civil Procedure Code. The mere fact that section 53 does not give him express power to call for additional evidence such as an appellate Court has under Order XLI, Rule 28, is, in my opinion, not a sufficient basis for holding that the District Judge had no such power. The power was properly exercised, because the parties had notice of this expert being called and had the opportunity of being present when he was examined and of putting questions to him. The fact that the District Judge did this on the application of the plaintiff does not, in my opinion, make any difference. Having regard to the rulings in the Full Bench case of *Ramsing* v. *Babu Kisansing*[1] and the subsequent ruling in *Gurubasaya* v. *Chanmalappa*[2] I am of opinion that the objection taken before us to the examination of the expert fails.

The second ground on which objection is taken to the District Judge's decree is that he has not considered the point whether the consideration of the promissory note was proved. There had been an issue as to consideration in the Subordinate Judge's Court, and the memorandum of appeal took the point that the Subordinate Judge had wrongly decided that the consideration was not proved.

[1] (1893) 19 Bom. 116.

[2] (1894) 19 Bom. 286.

Therefore, the same question arose as an issue in appeal. But the District Judge, without discussing this point at all, reversed the lower Court's decree and allowed the claim in full with costs. It may, of course, be that the District Judge believed the plaintiff and his witnesses as to cash payment at the time of the passing of the promissory note; but there is nothing in the judgment to show this and, that being so, I do not think that we would be justified in holding that he did, in fact, consider this particular question. His revisionary powers under section 53 depend upon the District Judge satisfying himself that a particular finding of the Subordinate Judge is one where there appears to have been a failure of justice. The District Judge has satisfied himself that the finding about the note not being executed by the defendant is one of that character, but it cannot be said that there is anything in his judgment to show that he regarded the finding as to non-payment of consideration to be one which amounted to a failure of justice. Therefore, to this extent, the applicant has shown that the District Judge has acted with material irregularity and illegally, and this justifies our interference in revision. Accordingly, I would set aside the decree of the District Judge on this last ground, and direct the District Judge to take the application again upon his file and to pass a further decree after giving the parties an opportunity of being heard upon this question of consideration and any other question that legitimately arises in regard to the suit and appeal before him. Costs of this application to abide the result of the further hearing by the District Judge.

MIRZA, J. :—I agree.

Decree set aside.

J. G. R.