MANU/BH/0118/1932

Equivalent Citation: AIR1933Pat67

IN THE HIGH COURT OF PATNA

Decided On: 05.04.1932

Appellants: **Debi Prasad Pandey**
Vs.
Respondent: **Gaudharn Rai and Ors.**

Hon'ble Judges/Coram:
Mohamad Noor, Jwala Prasad and A.E. Scroope, JJ.

JUDGMENT

Mohamad Noor and A.E. Scroope, JJ.

1. In this appeal there is difference of opinion between us as to the decree to be passed in the case. We have in fact differed on all the points involved in the appeal. The question is, what should be the decree of the Court? It was settled law, at least as far as this Court was concerned, that Section 98, Clause (2), Civil P.C. applied in such a case and not Section 28, Letters Patent, and that the decree appealed from was to be confirmed when there was no majority in favour of a reversal. A somewhat different situation has arisen by an amendment of Section 98,"Civil P.C. to which a Sub-clause (3) has been added by Act 18 of 1928. That sub-clause runs thus:

> Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court.

2. The question is whether by addition of these words the legislature intended to remove the chartered High Courts, where their Letters Patents provide for a difference of opinion between the Judges, from the operation of Section 98, Civil P.C. The practice in force in the Calcutta High Court was that in case of appeals from the original side of that Court the provision of Section 36, Letters Patent, of that Court (corresponding to Section 28, Letters Patent, of this Court) applied, but in case of appeals from the Mofussil Courts which were governed by the Civil P.C. Section 98 of that Code applied: 'see Prafulla Kamini Roy v. Bhabani Nath Roy A.I.R. 1926 Cal 121, though contrary views had also been expressed. This was also the practice in this Court till the amendment of 1928. We have not been able to find out any case on the point since then. It is not necessary to elaborate the reason, on which the practice of the Calcutta High Court was based. In short the ground was that an appeal from the decision of a Judge in the original side was itself allowed by the Letters Patent and therefore the procedure prescribed therein applied, but appeals from Mofussil Courts were governed by the Civil P.C. and therefore Section 98 of the Code applied. Now the question is whether the amendment left the law as it was interpreted and simply re-affirmed it or altered it, making the Letters Patent control the provision of the Code. Much can be said from both points of view.

3. Since aforesaid amendment the only judicial pronouncement to which our attention has been drawn is the decision in Dhanaraju v. Batakissendas MANU/TN/0022/1929 : AIR 1929 Mad 641 where a Full Bench of the Madras High Court held that the effect of the amendment of the Code was to make Section 36,

Letters Patent, of that Court (corresponding to Section 28 of our Letters Patent) apply to appeals from the decisions of the Mofussil Courts as well. There being no other decision to the contrary, we think that we ought to follow it. It has been held that the legislature has deliberately made the Letters Patents of the chartered High Courts in this respect override Section 98 of the Code. The was the view of the Allahabad High Court even prior to the amendment: Lachman Singh v. Ram Lagan [1903] 26 All 10.

4. It has been contended by the respondents that Section 28, Letters Patent, only applies when there is difference on a point and not when difference is about the result of the appeal. In our opinion point includes points and in the Madras case above referred to the difference under consideration was about the result' of the appeal. The order of the Court is that the record of this case be laid before the learned Chief Justice so that the points on which we have differed may be heard and decided by such Judge or Judges as he directs and a decree may be passed as provided by Section 28, Letters Patent, of this Court.

Jwala Prasad, J.

5. This case has come to me on account of a difference between Mohammad Noor and Scroope, JJ., who originally heard the appeal. The appeal arises out of a simple money suit based on an adjusted account embodied in a chita, Ex. 3. The defendants are members of one family, the karta or head member being defendant 1, Gaudham Rai. Deep Rai was uncle of Gaudham. He is dead and during his time he was the karta of the family. The chita in question, Ex. 3, is dated 30th Bhado 1331. At that time Deep Rai was alive and the chita purports to have been signed by Gaudham Rai and Deep Rai by their own pen (bakalam khas). In the signature portion it is stated that those persons understood the account showing Rs. 5,416 as due from them which they acknowledged.

6. The defendants deny their signatures on the chita and also the transactions mentioned therein. They also deny the previous chitas, Exs. 6(a) to 6(d) upon which the plaintiff relies as showing the previous transactions and lender between the parties. The suit was tried by the Subordinate Judge, second Court, Saran and the principal issues raised were whether (1) the chitas in question were genuine and for consideration, and (2) whether the defendants were liable for any sum to the plaintiff. The Subordinate Judge answered these issues in the negative and dismissed the suit. The plaintiff filed an appeal to this Court and as observed above, the case was heard by a Division Bench of this Court presided over by the learned Judges referred to above.

7. They differed on all the points involved in the case as well as about the result of the appeal. Mohammad Noor, J., held that the plaintiff's case was true. Accordingly he was of opinion that the appeal should be allowed and the plaintiff's suit should be decreed. Scroope, J., agreeing with the Subordinate Judge, would dismiss the suit. On account of this difference the learned Judges passed the following order:

> The order of the Court is that the record of this case be laid before the learned Chief Justice so that the points on which we have differed may be heard and decided by such Judge or Judges as he directs and a decree may be passed as provided by Section 28, Letters Patent of this Court.

8. At the outset in the order of reference the learned Judges say: "We have in fact differed on all the points involved in the appeal." These points have not been formulated in the order of reference and we have to gather them from the judgment

of the learned Judges. Broadly speaking the two issues referred to above upon which the parties went to trial before the learned Subordinate Judge are the principal points. Incidentally during the trial a question arose as regards the admissibility and value of Ex. 8, a certified copy of an Income Tax return purporting to have been filed on behalf of Ghina Rai, Deep Rai (one of the executants of Ex. 3) and Ambika Rai in which debts due to Mahajan Debi Prasad Pande from the persons on whose behalf the return was filed according to the adjustment of account up to 30th Baisakh, 1331, amounting to Rs. 4,500 with interest with five annas per cent, has been shown.

9. The learned Subordinate Judge held that the return was collusively brought into existence as against Gaudham and that it does not contain the complete account. Before the learned Judges this question was also raised as to the admissibility and proof of the document and Mohamad Noor, J. holds that Section 54 is no bar to its admissibility; that the document is admissible in evidence and it completely proves the plaintiff's case. Scroope, J., on the other hand, holds that it is unnecessary to decide whether the original would have been admissible in evidence had it been produced here but in his view the certified copy is not admissible in evidence; and he also holds that there has been some "trickery" in the matter of the Income Tax return.

10. Mr. S.M. Mullick argues that the reference is incompetent and the decision of the Subordinate Judge should have been confirmed under Section 98(2), Civil P C. Mr. Mullick also says that even if the reference is valid, it cannot be heard by a single Judge. As to the first point, Mr. Mullick relies on the case of Prafulla kamani Roy v. Bhabani Nath Roy A.I.R. 1926 Cal 121. In that case it was held that a difference of opinion having arisen between two Judges of the High Court in an appeal from a subordinate Court to the High Court, Section 98, Civil P.C. 1908, and not Clause 36, Letters Patent, 1865, applied. Now Clause 36, Letters Patent of the Calcutta High Court corresponds with Clause 28, Letters Patent of the Patna High Court. This decision was passed in 1925. At that time Clause 28 provided:

> that when the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there be a majority, but if the Judges be equally divided, then the opinion of the Senior Judge shall prevail.

11. In 1928 the clause was amended by providing that:

> If the Judges be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

At that very time Clause (3) was added to Section 98, Civil P.C. That clause runs as follows:

> Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court.

12. As to whether the provision contained in the Letters Patent prior to the amendment in 1928 of Section 98, Civil P.C. applied, there was a good deal of difference of opinion and Page, J., in the case referred to above in the opening paragraph of his judgment referred to this controversy as coming on from a long time observing that it can only be satisfactorily set at rest by the "action of the Legislature

now long overdue." The amendment both of Clause 28, Letters Patent and the addition of Clause (3), Section 98 purport to solve the controversy. The reference under the present clause of the Letters Patent is therefore competent. This view is supported by the recent decision of the Full Bench of the Madras High Court in Immidisetti Dhanaraju v. Sait Balakissendas Motilal MANU/TN/0022/1929 : AIR 1929 Mad 641 and the principle is also supported by the Privy Council decision in Bhaidas Shivdas v. Bai Galab A.I.R. 1921 PC 6 though it refers to a Letters Patent Appeal under Section 36.

13. The point was urged before the learned Judges who have made the reference under Clause 28, Letters Patent, and by their decision dated 22nd July 1931 they have overruled the objection of Mr. Mullick. The next point urged is that the reference cannot be heard by a single Judge. Clause 28, Letters Patent, says that the reference shall be heard by one or more of the other Judges. So under that clause a single Judge is competent to hear it. It is then urged that Ch. 2, Clause (1), High Court Rules, provides for the cases to be heard by a single Judge but does not refer to a reference under Clause 28. Reference is also made to Clause (6), Ch. 2, of the Rules which provides for appeals under Clause 10, Letters Patent, to be heard by a Bench of three Judges. That clause can have no application inasmuch as the present is not an appeal under Clause 10, Letters Patent, but a reference under Clause 28, Letters Patent.

14. True there is no specific provision made as regards reference under Clause 28; but at the time the rules were framed Clause 28 as now amended did not exist. Before the amendment there could be no reference under Clause 28 as the opinion of the senior Judge was to prevail.

15. There was no occasion therefore to provide for such a contingency as has now arisen by reason of the amendment. Section 108, Government of India Act, Clause (2), read with the saving provision in Clause 10, Ch. 2, of the Rules of the High Court, gives power to the Chief Justice to order a reference of this kind to be heard by a single Judge. This contention must therefore also be overruled. (It is not material to report the rest of the judgment.)