

QUAGRAINE v. DAVIES
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
31ST MAY, 1961

CORAM: VISCOUNT SIMONDS, LORD RADCLIFFE AND LORD GUEST

Practice and procedure | Whether appeal brought timeously | Ruling by judge "dismissing" review | Whether ruling constituted an order on the re-hearing | Supreme [High] Court (Civil Procedure) Rules, 1954, Order 39, rules 3 and 6.

CASE SUMMARY

On the 14th October, 1948, the appellant issued a summons for a claim in trespass for recovery of possession of certain land, relying on a judgment of the Privy Council given in 1929. In 1956, the case which was still pending in the native court, was transferred to the Land Court, Cape Coast, and after evidence on the 21st December, 1957 Acolatse J., gave judgment in favour of the respondent. On the 4th January, 1958, the appellant gave notice of motion under Order 39 of the Supreme [High] Court (Civil Procedure) Rules, 1954, for review of this judgment and on the 8th March, 1958, Acolatse J., in his order, after stating that what was involved was the physical identity and situation of the land, and ordering a plan to be prepared by surveyors, stated: "This motion is allowed to the extent of the order above."

At the hearing two surveyors gave evidence in regard to the boundaries of the parties' properties, but on the 10th October, 1959, counsel for the plaintiff was refused permission to call fresh evidence. Proceedings were, however, not terminated and on the 31st October, 1959, the learned judge gave his ruling which terminated with the words:

"I think this review does not justify me to vary the judgment I had given and there is no foundation whatever to say that the plaintiff was prevented from calling his witnesses. The review is dismissed."

An appeal was tabled on the 3rd November, 1959, and on the 13th June, 1960, the Court of Appeal dismissed the appeal on the ground that it had not been timeously taken, since by rule 9 of the Supreme Court (Court of Appeal) Rules, 1957, an appeal against a final judgment (which in their view was the judgment of the 21st December, 1957) must be taken within three months.

On appeal to the Privy Council,

Held:

(1) the ruling of the 31st October, 1959, was an order on the re-hearing and the time for appealing runs from that date;

(2) by his order dated the 8th March, 1958, the judge limited the review to settling the physical identity and situation of the land involved. This he was plainly entitled to do having regard to the terms of Order 39 rule 6. *Hurbans Sahye v. Thakoor Purshad* (1882) 9 Calcutta 209 and *Bhainram Rathi v. Ambica Charan Hazra* (1926) 53 Calcutta 856 cited;

(3) that the review was not granted for the taking of new evidence was borne out by the fact that after the judge refused to allow such evidence to be adduced, counsel for both parties made submissions in terms clearly indicating that in their view the judge was nevertheless conducting a review of his original judgment;

(4) the ruling of the 31st October, 1959, demonstrates that the judge was entering into the merits of the case, and the word "vary" in the last paragraph could no have been justified unless the judge had already granted the application for review, and a "dismissal" of the review can only be explained upon the basis that he had in fact been conducting a review.

Judgment of the Court of Appeal set aside.

CASES REFERRED TO

(1) *Hurbans Sahye v. Thakoor Purshad* (1882) 9 Calcutta 209.

(2) *Bhainram Rathi v. Ambica Charan Hazra* (1926) 53 Calcutta 856.

NATURE OF PROCEEDINGS

APPEAL (No. 48. of 1960) from the judgment of the Court of Appeal (Korsah, C.J., van Lare and Granville Sharp, JJ.A.) delivered on the 13th June, 1960 (reported at [1960] G.L.R. 171) dismissing an appeal from the judgment of Acolatse, J. given on the 21st December, 1957, in an action for recovery of land, on the ground that the appeal was not brought timeously. The facts, which are set out in the headnote are taken from the judgment of the Privy Council.

JUDGMENT OF LORD GUEST

Lord Guest delivered the judgment of their Lordships. The question raised in this appeal is a purely procedural point, whether an appeal by the appellants to the Court of Appeal, Ghana was timeous. But in order to appreciate the point it is necessary to rehearse briefly the circumstances under which it arises.

The history starts with a Privy Council judgment in 1929, in a litigation between a caretaker on behalf of the present respondent in regard to the title to Agissu land. The Board decided in favour of the appellant but no declaration of title was made. On the 14th October, 1948, the appellant issued a summons for a claim in trespass for recovery of possession of the Agissu land relying on the judgment of the Privy Council. In 1956, the case was still pending in the native court and it was thereafter transferred to the Land Court. In the statement of claim the plaintiff claimed recovery of possession of the Agissu land relying on the Privy Council judgment and alleging that the respondent was estopped from claiming ownership of the Agissu land. The respondent in his defence denied that he was occupying Agissu land. The Land which he occupied consisted of three parcels of land known as Nanado, Abberzaboasie and Abiswa. A dispute was thus disclosed as to the boundaries of the Agissu land and respondent's land.

After evidence Acolatse, J., on the 21st December, 1957, gave judgment in favour of the respondent. The appellant on the 4th January, 1958, gave notice of motion under Order 39 of the Rules of the High Court of Ghana for review of the judgment of Acolatse, J. Affidavits were lodged in support of this motion and on 8th March, 1958, the judge made an order which concluded with these words: "This motion is allowed to the extent of the order above". The order will be more fully referred to later. Thereafter evidence was taken by the judge and on 31st October, 1959, the judge gave a ruling dismissing the review. An appeal was tabled on 3rd November, 1959 and on 13th June, 1960, the Court of Appeal dismissed the appeal on the ground that it had not been timeously taken. By Rule 9 of the Supreme Court (Court of Appeal) Rules, 1957 an appeal against a final decision must be taken within three months.

When a case is reheard on review, the order on the rehearing is a new decree and the time for appealing runs from the date of the order. The question which sharply arises is thus whether the "ruling" of the 31st October, 1959, is an order on the rehearing. If it is, then the appeal was brought timeously. If it is not, the appeal is incompetent, as no appeal lies against a refusal to grant a motion for review. In these circumstances the final judgment would be that of the 21st December, 1957, in which case the time for appealing had long expired.

Order 39 of the Supreme Court (Civil Procedure) Rules, 1954, is in the following terms:—

"1. (1) Any person considering himself aggrieved—

(a) by a judgment or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a judgment or order from which no appeal is allowed; and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the judgment was given or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the judgment given or order made against him, may apply for a review of the judgment or order to the Judge who gave judgment or made the order.

(2) A party who is not appealing from a judgment or order may apply for a review of the judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appeal Court the case on which he applies for the review.

2. An application for review of a judgment or order of a Court or Judge shall be made only to the Judge who gave the judgment or made the order sought to be reviewed.

3. (1) Where it appears to the Judge that there is not sufficient ground for a review, he shall dismiss the application.

(2) Where the Judge is of opinion that the application for review should be granted, he shall grant the same: Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the judgment or order was given or made, without strict proof of such allegation.

6. When an application for review is granted, a note thereof shall be made in the register and the Court or Judge may not at once rehear the case or make such order in regard to the rehearing as it thinks fit, and upon such rehearing the Court or Judge may reduce, vary or confirm its previous judgment or order.

7. No application to review an order made on an application for a review of a judgment or order passed or made on a review shall be entertained."

It is not altogether clear whether the proceedings took a consistent course after the application for review was made and the headings of the various stages in the proceedings are in some cases misleading. The affidavits in support of the notice for review made it clear that the ground upon which review was sought was a patent error on the face of the record. (See Order 39, rule 1 (1)). The essential question being what was the effect of the orders of Acolatse, J. on the 8th March, 1958, and the 31st October, 1959, their Lordships prefer to take what the Judge said when he gave judgment. In his order dated the 8th March, 1958, the judge stated that it was evident that the issue involved was the physical identity and situation of the Agissu land and the three plots belonging to the respondent. He ordered the boundaries of the respondent's land and the Agissu land to be delineated on a plan to be prepared by the surveyor. The concluding sentence of his order is in the following terms: "This motion is allowed to the extent of the order above". Their Lordships view is that the judge was then granting the application for review, but was limiting the review to the extent mentioned in the order. The judge was plainly entitled to limit the rehearing having regard to the terms of Order 39, rule 6. There is clear authority in India that under section 630 of the Civil Procedure Code, which is in substantially similar terms to Order 39, rule 6, it is in the discretion of the court to rehear the whole case or only the particular point on which review has been granted (*Hurbans Sahye v. Thakoor Purshad1* ; *Bhainram Rathi v. Ambica Charan Hazra2.*)

It is necessary to consider whether the subsequent steps in the procedure bear out this interpretation of the order of the 8th March, 1958. Two surveyors then gave evidence at length in regard to the boundaries of the respective properties of the appellant and respondent in an endeavour to clear up the confusion in the identity of the lands. But on the 10th October, 1959, there occurred a development which has to some extent obscured the issue. Plaintiff's counsel asked to call fresh evidence. Defendant's counsel objected on the ground that the order of the 8th March, 1958, did not entitle the plaintiff to adduce evidence which was within his knowledge at the date of the original hearing. The Judge refused to allow the plaintiff to adduce fresh evidence presumably in reliance on the proviso to Order 39, rule 3. It was suggested that if the judge had on the 8th March, 1958, granted the application for review, he would not have been entitled to refuse to hear such evidence. There may have been some confusion, but one possible explanation is that the plaintiff was seeking to support the review by appealing to new evidence and that this really was an application to call fresh evidence within the hearing of a review. But in any event the review had only been granted for a limited purpose.

If this had been, as the respondent suggested, an application for review on the ground of the discovery of new evidence, it might have been expected that the proceedings would terminate at this point with a refusal of the application for review. But counsel for both parties thereafter made submissions, the terms of which clearly indicate that in their view the judge was conducting a review of his original judgment.

The ruling of the 31st October, 1959, in their Lordships' opinion also demonstrates that the judge was entering into the merits of the case and was in fact reviewing his original judgment. It is sufficient to quote this passage from his judgment:

"In my opinion the plaintiff failed to satisfy this court, upon the record upon which the court based its judgment, to justify a review of that judgment. Counsel for the plaintiff had every opportunity of raising points taken by him in this review in the trial and in truth some of the points taken in this review are the same submissions made in the trial. I think this review does not satisfy me to vary the judgment I had given and there is no foundation whatever to say that the plaintiff was prevented from calling his witnesses. The review is dismissed."

The word "vary" in the last paragraph could not have been justified unless the judge had already granted the application for review and a "dismissal" of the review can only be explained upon the basis that he had in fact been conducting a review.

Their Lordships are always reluctant to differ from the opinion of the Court of Appeal upon a matter of procedure with which they are very familiar. But they are not satisfied that the appeal court has given the correct interpretation of the words used by the judge in his ruling. Their judgment nowhere refers to the order of the 8th March, 1958 or explains the statement of the judge, "This motion is allowed to the extent of the order above". They appear to think that the ruling of the 31st October, 1959, dealt only with the applicability of the proviso to rule 3 (2) of Order 39, failing to notice that this matter was dealt with by the judge on the 10th October, 1959. They also rely on the fact that the judge did not alter his judgment in any way. But

the judge may under Order 39, rule 6 confirm his judgment and he could only do this, if he had been conducting a review of his previous judgment.

Their Lordships are of opinion that the appeal to the Court of Appeal was not time barred and that the Court of Appeal ought to have heard the appeal.

DECISION

Their Lordships will report to the President of Ghana as their opinion that this appeal ought to be allowed, the judgment of the Court of Appeal, Ghana set aside and the case remitted to that court for hearing and that the respondent ought to pay the appellant's costs of this appeal.

COUNSEL

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