

(1909) 01 CAL CK 0006
In the Calcutta High Court

Golap Sundari Debi and Another

APPELLANT

Vs

Indra Kumar Hazra and Others

RESPONDENT

Date of Decision : 28-01-1909

Acts Referred:

Citation : (1909) 01 CAL CK 0006

Judgement

1. The litigation out of which the present appeal arises has been prosecuted by the parties during the last five years with varied fortune. The plaintiffs-appellants commenced an action for accounts and recovery of account papers from the defendants-respondents, who are alleged to have been their agents for the management of certain Immovable properties. The claim for account papers was valued at Rs. 50 and that for accounts at Rs. 150. The suit was instituted in the Court of the Munsiff, and as usual, the plaintiffs stated in their plaint that if the amount due from the defendants was ascertained to be in excess of Rs. 150, Court fees would be paid on such excess amount. The defendants resisted the claim of the plaintiffs on various grounds to which it is not necessary to refer in detail for our present purpose. The suit was heard ex parte and a preliminary decree for accounts made. The defendants then applied u/s 108 of the CPC of 1882 to have the ex parte decree set aside. This application was unsuccessful in the Court of First Instance, but on appeal the District Judge directed the case to be re-heard on the merits in the presence of the defendants. The case then came on for trial, and, by agreement of parties an order was made for reference to arbitrators, who were directed to submit their award on the 3rd November 1905. On that date, the plaintiffs made an application that the records might be sent to the arbitrators and the time for submission of the award extended. The Court refused this application and proceeded then and there to hear the suit on the merits. The defendants, however, were not represented before the Court, and the case was heard ex parte again with the result that a preliminary decree for accounts was made. The defendants subsequently applied u/s 108, C.P.C. to have the ex parte decree set aside, but they did not proceed with this application which was dismissed for default. The accounts were then examined by a

Commissioner appointed in accordance with the preliminary decree and his report was to the effect that Rs. 8,424 were due to the plaintiffs from the defendants. The Munsiff in dealing with this report held that it was not competent for him to make a decree in excess of Rs. 1,000, the pecuniary limit of his jurisdiction. The plaintiffs thereupon paid the balance of the Court fee to bring up the claim to the full amount of Rs. 1,000 and a decree for that sum was finally passed in their favour. Both parties were dissatisfied with this decree and two appeals were preferred to the Subordinate Judge. The defendants complained that the Court of First Instance ought not to have proceeded with the trial of the suit on the merits on the 3rd November 1905, upon the failure of the arbitrators to submit their award, inasmuch as no order had been made fixing that date for the final hearing of the case in the event of the failure of the arbitrators to submit their award. The plaintiffs denied the validity of this objection and complained in their appeal that the Munsiff ought not to have limited the decree to Rs. 1,000 but should have passed a decree for the whole sum of Rs. 8,428. The Subordinate Judge allowed the appeal of the defendants and dismissed that of the plaintiffs with the result that he directed the case to be remitted to the Court of First Instance for re-trial from the stage of the remand order made by the District Judge when he set aside the first ex parte decree on the 11th May 1905. He also left the parties at liberty to refer the matter to arbitration again, or if they liked, to go on to trial in Court. The plaintiffs have now appealed to this Court and on their behalf the decision of the Subordinate Judge has been challenged substantially on three grounds, namely, first, that the Subordinate Judge had no jurisdiction in an appeal against the final decree to set aside the preliminary decree, as no appeal had been preferred against the latter, and an application to vacate it u/s 108 had been dismissed for default; secondly, that the Subordinate Judge had no jurisdiction to question the preliminary decree u/s 591, Civil Procedure Code; and thirdly, that the question whether the Munsiff could pass a decree for any sum in excess of Rs. 1,000 should have been left open, and if it was decided at all, it should have been determined in favour of the plaintiffs.

2. As regards the first two contentions, it was argued by the learned Vakil for the appellants that inasmuch as the defendants did not proceed with their application u/s 108, they could not at a subsequent stage be allowed to challenge the validity of the preliminary decree, and in support of this view reliance was placed upon the case of *Caussanel v. Soures* 23 M. 260. In our opinion, this contention is unsound and must be overruled. It is clear from the provisions of Section 540, C.P.C., that the ex parte decree was appealable and it is further clear from the decisions of this Court in the cases of *Biswanath v. Banianta* 23 C. 406 and *Khadem Hossein v. Emdad Hossein* 29 C. 758, that in an appeal against the final decree the propriety of the preliminary decree might also be questioned. What then are the grounds upon which the preliminary decree could be questioned? The learned Vakil for the appellants contended that the preliminary decree could either be questioned by an appeal u/s 540 or set aside u/s 108; but inasmuch as

the remedies given by these two sections are alternative and not cumulative and as the defendants made their election when they applied u/s 108, upon failure to prosecute such application, they could not avail themselves of the benefit of an appeal u/s 540. In our opinion there is no foundation for this contention. It may be assumed that if the defendants had prosecuted their application u/s 108, if it had been heard on the merits, and if a decision had been given thereon either by the Court of First Instance or by the Court of appeal below that decision would have been final and binding upon the parties in the sense that any question directly determined in those proceedings could not be raised again in the appeal u/s 540. This was in fact what happened in the case of *Caussanel v. Soures* 23 M. 260. The defendants there got an adverse decision in the proceeding u/s 108, and then in the appeal against the ex parte decree raised precisely the same question as had been, at their invitation decided in the proceedings to set aside the ex parte decree. In the case before us however, the position is entirely different. The application u/s 108 was not prosecuted. There was no enquiry into the merits and no adjudication by the Court as to whether the defendants were prevented for sufficient cause from appearing when the suit was called on for hearing. They were, therefore, in our opinion, in the position which they would have occupied if there had been no application u/s 108. But apart from this, the ground upon which they now challenge the propriety of the ex parte decree is one which could not have been urged u/s 108. They now contend that before the Court could proceed to hear the suit on the merits, a date ought to have been fixed for the trial. Apparently, so far as we can gather from the judgment of the Subordinate Judge, this had not been done. The Munsiff had recorded an order that the arbitrators were to submit their award on the 3rd November 1905. That order, however, did not state what would have happened upon the failure of the arbitrators to carry out the order of the Court. It appeared no doubt that the Munsiff had warned the parties on the previous day that the case might be heard if the arbitrators failed to decide the dispute, but no entry was made to this effect in the order sheet; and on this ground the learned Subordinate Judge held that the Court ought not to have proceeded with the trial of the suit on the day fixed for the submission of the award by the arbitrators. This was a ground of attack patent on the face of the record, and in our opinion, it could be, and was rightly taken against the validity of the decree. As was pointed out by Their Lordships of the Judicial Committee in *Radha Raman v. Pran Nath* 28 C. 475 and *Khagendra v. Pran Nath* 29 C. 395, in spite of the fact that an application u/s 108 has been unsuccessful, an ex parte decree may be challenged, if there are good grounds, in a proper proceeding for instance in a regular suit on the ground of fraud. The test is whether the refusal of the application u/s 108 has already determined the question raised in the subsequent proceeding. In the first of these cases, it had been pointed out by this Court *Pran Nath v. Makes Chandra* 24 C. 596 that the dismissal of an application u/s 108, or omission to prefer an appeal against such order of dismissal, does not bar another remedy on suitable grounds, and that, when the law provides an appeal against a decision, the effect of the omission to appeal is that the decision holds good for what it is worth So

far, therefore, as concerns any other mode of relief available, the person who does not appeal is in no worse position than if he had appealed and failed. In the case before us, the ground upon which the Subordinate Judge was invited to vacate the ex parte decree was one apparent on the face of the record, and we must hold that it was competent to him to set it aside on that ground. It was, however, suggested to us by the learned Vakil for the appellants that the Subordinate Judge has not exercised a proper discretion in reversing the decision of the Court of First Instance. But even if we assume that we are entitled in second appeal to enter into questions of discretion, a matter upon which there is apparently some divergence of judicial opinion *Monilal v. Khiroda* 20 C. 740 and *Taylor v. Sarat Chunder* 20 C. 745. Note we do not think that it can be successfully contended that the decision of the Subordinate Judge can be challenged on the ground that there has been a substantial error or defect in the procedure which may possibly have produced error or defect in the decision of the case upon the merits. In this view of the matter, it is unnecessary for us to consider whether the Subordinate Judge would have been competent u/s 591 of the CPC to enter into the question of the propriety of the order of dismissal of the application to set aside the ex parte decree. The first and second grounds taken on behalf of the appellant must, therefore, be overruled.

3. In support of the third ground taken on behalf of the appellants it was suggested in the first place that the matter ought to have been left open. But this is obviously a position which they can not consistently take up. The question was raised at their instance in the Court of First Instance as well as in the Court of Appeal below, and after an adverse decision had been given, they could hardly invite the Court to leave the matter open for future controversy. It was suggested in the second place, though very faintly, that the question ought to have been decided in favour of the plaintiffs. As we have already; stated the plaintiffs valued their claim at Rs. 200 approximately, as they were entitled to do u/s 50, C.P.C. After the ex parte decree had been made and the accounts investigated by a Commissioner duly appointed, the Commissioner's report showed that the plaintiffs would be entitled, subject to the objection of the defendants, to a sum of Rs. 8,424. The question, thus necessarily arises, was it competent to the Court of the Munsiff to give a decree for this sum? Our attention was invited to the provisions of Section 7, Sub-section (IV) Clause (f) and Section 11 of the Court Fees Act of 1870 and Section 8 of the Suits Valuation Act of 1887. Section 7, Sub-section (IV) Clause (f) of the Court Fees Act provides that the amount of Court fee payable in a suit for accounts is to be computed according to the amount at which the relief sought is valued in the plaint and that in such a suit the plaintiff shall state the amount at which he values the relief sought: Section 11 then provides that, in a suit for accounts if the amount decreed is in excess of the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable, had the suit comprised the amount so decreed, shall have been paid to the proper officer. Section 8 of the

Suits Valuation Act lays down that in all cases where in suits, other than those referred to in Section 7 paragraphs 5, 6 and 9 and para. 10 Clause (d) of the Court Fees Act, 1870, Court fees are payable ad valorem, the value as determinable for the computation of Court fees and the value for purposes of jurisdiction shall be the same. Besides these Statutory provisions, our attention was also invited to the decision of this Court in *Rameswar v. Dilu* 21 C. 550 and of the Madras High Court in *Arogya v. Appachi* 25 M. 543. After careful consideration of the arguments addressed to us on both sides we are of opinion that the Statutory provisions as well as the judicial decisions referred to do not support the contention of the appellants. No doubt, under the Court Fees Act, in a suit for accounts, the plaintiff has to state the amount at which he values the relief sought and has to pay Court fees on that footing. He cannot also execute the decree for an amount in excess of the amount claimed, until he pays the Court fees upon the difference. The provisions, however, do not touch the fundamental question which arises in the present case, namely, what is the highest amount for which a Court of restricted pecuniary jurisdiction is competent to make a decree. The provision of the Suits Valuation Act to which reference was made, only shows that, for purposes of jurisdiction, the value of the suit must be taken to be determined by the value determinable for the computation of Court fees. This does not by any means lend support to the contention of the appellants. In the first place the section does not say expressly that the value determinable for purposes of jurisdiction is the value determinable for the purpose of the initial payment of Court fees. In the second place, even if we assume that this was the intention of the Legislature, the section taken along with the provisions of the Court Fees Act to which we have referred, only shows that the jurisdiction of the Court as determined by the value stated, is regulated by the amount at which the plaintiff values the relief sought. But this does not conclude the question, whether a Court of restricted pecuniary jurisdiction, like the Court of the Munsif, is competent to make a decree in a suit for accounts, valued at less than Rs. 1, 00 for an amount in excess of Rs. 1,000, which is the pecuniary limit of its jurisdiction. Upon first principles, we are of opinion that the Munsiff has no power to do this. This jurisdiction of a Court is the authority to hear and determine a cause. Such authority is conferred by the Sovereign power which organises the Court and is to be sought for in the general nature of the powers of the Court or in statutory provisions specially enacted for the purpose. To render the jurisdiction of a Court complete, it must have jurisdiction over the subject-matter, that is, it must have power to deal with the subject involved in the action. This jurisdiction over the subject matter can be given only by law and cannot be conferred by consent. If a Court of limited pecuniary jurisdiction, therefore, took cognizance of a suit in which the sum claimed was larger than the amount over which the Court had jurisdiction, any judgment it might give would be void. Now in the case before us, what is the extent of the pecuniary jurisdiction of the Court? Section 19 of the Bengal Civil Courts Act of 1887 provides that the jurisdiction of a Munsiff extends to all suits of which the value does not exceed Rs. 1,000, the word "value" being then defined as meaning--see

Section 3, Clause (13) of the since repealed General Clauses Act of the same year--"the amount or value of the subject matter of the suit." If, therefore, the claim had been initially valued at more than Rs. 1,000, the Munsiff would not have been entitled to entertain the suit. He would not, therefore, have been in a position to make a decree for a larger sum than Rs. 1,000. The uncertainty as to the amount which a plaintiff suing for an account is entitled to recover doubtless makes a difference in view of which the Legislature allows him to value his suit at an approximate amount in the first instance; but does it follow that he can by reason of this circumstance ultimately obtain from the Munsiff a decree for a sum in excess of the limit of the Munsiffs pecuniary jurisdiction? In our opinion it does not. In a case of this description it is manifestly just on principle that if the result shows that the plaintiff is entitled to a sum in excess of the limit of the pecuniary jurisdiction of the Court in which he has instituted his suit, the judgment ought to be only for the sum which limits the jurisdiction. In other words, the plaintiff ought to be called upon to relinquish the excess and thus place the case formally within the pecuniary jurisdiction of the Court of his deliberate choice. The Court may in such a case remit the excess or presume the excess to be remitted. To put the matter in another way, when a plaintiff values his suit at an approximate amount and institutes it in a Court of limited pecuniary jurisdiction, he must be presumed to seek a decree for a sum which in no event will exceed the highest amount which limits the jurisdiction of the Court. To take any other view would enable the plaintiff to commit a fraud upon the Court and the law which regulates its jurisdiction and would forthwith lead to extraordinary complications. For instance, it would be open to a plaintiff to value his claim for accounts at an insignificant sum, to have his case tried in the Court of the lowest jurisdiction, and then to obtain a decree for a sum much in excess of the amount which the Legislature has fixed as the highest limit of the pecuniary jurisdiction of that Court and the anomaly would not stop here; for once such a decree has been obtained how is the forum of appeal to be determined? Under the Bengal Civil Courts Act an appeal from the decision of a Munsiff lies u/s 21 to the Court of the District Judge, and this rule will have to be applied, no matter how small or how large the sum decreed by him may be. This would obviously lead to extremely anomalous results. If a suit for account is valued at Rs. 6,000, tried in the Court of a Subordinate Judge, and a decree obtained for, say, Rs. 8,000, a first appeal lies to this Court. If the same suit is capriciously valued at Rs. 150, tried by a Munsiff, and a decree made for Rs. 8,000, a first appeal lies to the District Judge, and only a second appeal to this Court. The Legislature can hardly be taken to have anticipated consequences of this character. We think it is a manifestly reasonable view of the matter to take, that, although a plaintiff is, almost ex necessitate, permitted, at the initial stage, to value his claim approximately, and to obtain in the end a decree for a higher sum than what he had expressly claimed when he institutes his suit in a Court of limited pecuniary jurisdiction, he must by implication be taken to have restricted the highest sum, for which he could possibly obtain a decree, at the limit fixed by the Legislature as the limit of the pecuniary jurisdiction of the Court. The view we take is supported by the rule

which has been followed in other systems of jurisprudence. For instance, in the case of *Clarke v. Denure* 3 Denio. N.Y. 319, a suit for damages was instituted in a Court, the pecuniary jurisdiction of which was restricted to twenty-five dollars. The jury returned a verdict in favour of the plaintiff for damages for thirty-four dollars. The Supreme Court of New York held that the plaintiff must be taken to have remitted the amount in excess of the amount of the pecuniary limit of the jurisdiction of the Court, and that he was consequently entitled to a judgment for the residue only. A similar view has been taken in *Husseney v. King* 83 Maine 568; 22 Atlantic 476, *Hill v. Wilkinson* 25 Neb. 103: 41 N.W. 139, and in various other cases which will be found collected in the *Encyclopedia of Pleading and Practice*, Vol. I, p. 709. Substantially the same view has been taken in England, as is clear from the case of *Badger v. Niclolls* 28 L.T.N.S. 441. The cases of *Rameswar v. Dilu Mahto* 21 C. 550, and *Arogya v. Appachi* 25 M. 543, to which reference was made on behalf of the appellants are clearly distinguishable. In the first of these cases, the amount of mesne profits for which the Munsiff made a decree had accrued entirely after the institution of the suit and depended upon the length of time during which the defendant might manage to keep the plaintiff out of possession in spite of the decree in his favour. We must not, however, be taken to approve of decision in that case on principle, and we observe that it has already been doubted in the case of *Ijjatulla v. Chandra Mohun* 34 C. 954. As regards the decision of the Madras High Court in *Arogya v. Appachi* 25 M. 543, although it appears at first sight to lend some support to the contention of the appellants on closer examination, it turns out to be of no avail to them. In that case, the plaintiff valued his claim for accounts at Rs. 1,400, instituted his suit in the Court of the Munsif, and got a preliminary decree. The Commissioner, who examined the accounts, reported that the sum due was Rs. 8,000, whereupon the plaintiff obtained leave to amend the plaint. As soon as this was done, the Munsiff returned the plaint for presentation to the proper Court. When, however, the plaintiff took the plaint to the Subordinate Judge he declined to entertain it, as in his opinion, the jurisdiction of the Munsiff had not been ousted. The High Court held that the latter view was correct, and directed the Munsiff to strike out the amendment and resume the trial of the suit, but the learned Judges did not hold, either expressly or by implication that the Munsiff when he tried out the suit would have authority to make a decree for Rs. 8,000 or for any sum in excess of the amount which defined the highest limit of his pecuniary jurisdiction. This case, therefore, cannot be rightly treated as an authority for the proposition, which the appellants seek to establish. We must consequently hold, on all these grounds that the third point urged on their behalf completely fails.

4. The result is that this appeal cannot be supported, and must be dismissed with costs. We assess the hearing fee at two gold mohurs.