
(1931) 03 BOM CK 0020
In the Bombay High Court
Case No : Civil Application No. 140 of 1929

Hanmant Shriniwas Deshpande	Vs	APPELLANT
Shriniwas Lakshmipati Deshpande		RESPONDENT

Date of Decision : 10-03-1931

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 111
Letters Patent Act, 1865 — Clause 39

Citation : (1931) 33 BOMLR 1106

Hon'ble Judges : Patkar, J; Baker, J

Bench : Division Bench

Judgement

Baker, J.—This is a petition for leave to appeal to the Privy Council against two orders passed by a single Judge rejecting the application of the applicant for revision of an order of the First Class Subordinate Judge of Dharwar, and for excuse of delay in filing a petition.

2. The facts of this case are rather peculiar. The applicant filed a suit in forma pauperis in 1910 for partition against his bhaubands. The suit was contested by his nephews and by certain alienees of part of the family property. The suit was referred to arbitration, and an award was passed on September 2, 1913 ultimately followed by a decree in terms of the award on July 31, 1916. Against that decree First Appeal No. 41 of 1917 with Civil Revision Application No. 330 of 1916 was made to the High Court by the plaintiff to set aside the award. The award was ultimately set aside on August 12, 1919. Defendant No. 1 applied for leave to appeal to the Privy Council. The leave was refused on July 10, 1922. The record was returned to the lower Court in September 1922, by which time defendants Nos. 6, 7, 15 and 18 were dead. Notices were ordered to be issued to their heirs, but as the process fees were not paid, due, as is said, to the illness and subsequent death of the plaintiff's pleader, the suit was dismissed for want of prosecution on January 8, 1925, as against all the defendants. The plaintiff then made an application under Order IX, Rule 4, for restoration on payment of the process fees. This was refused by the Subordinate Judge on February 6,

1925. He then again made an application to the same effect or rather to the effect that the hearing of the suit should be resumed as against the remaining defendants who were served, and that the suit should be restored to the file and a date fixed for the hearing of the case again. This application was granted, and the suit restored to the file on March 6, 1925. Upon this order defendant No. 1 filed Revisional Application No. 222 of 1925 to the High Court, and also an appeal from the order. Both these were summarily rejected on September 28, 1925. But on February 18, 1926, defendant No. 21, who was an alienee of some portion of the property and not a member of the family, filed a revision application to the High Court against the order restoring the suit to the file. That is the same order as that against which the revision application of defendant No. 1 had been already dismissed. No notice, it is stated, was given to the plaintiff regarding the delay in filing this application by defendant No. 21, but a notice of the hearing of the application was given to him, and he did not appear. On August 19, 1927, a divisional bench of this Court consisting of Marten C. J. and Crump J. set aside the order of restoration and directed that the suit should be dismissed. That order is at page 30 of the record, and is to the effect, "Rule absolute with costs. Order set aside. Former order dismissing the suit with costs restored." In pursuance of this order of the High Court the Subordinate Judge, after recording the order, dismissed the suit on July 12, 1928. An application for review of this order of the High Court dated August 19, 1927, was rejected. This order of the divisional bench of this Court stands, and so does the order of the Subordinate Judge dismissing the suit passed in consequence of the High Court's decision. No appeal was made to the Privy Council against the High Court's decision, and therefore the order setting aside the restoration of the suit and directing that the original order of dismissal should stand has become final. Nevertheless the plaintiff made two applications, one was Application No. 135 of 1928 for revision of the order passed by the Subordinate Judge in January and February 1925 dismissing the suit for want of prosecution, accompanied by an application to excuse the delay of over two years and a half in making the application. Both these applications came before me sitting as a single Judge and were dismissed on August 22, 1928. From the orders of dismissal the plaintiff made Letters Patent Appeals Nos. 4 and 5 of 1929. These appeals were dismissed by a divisional bench on the ground that no appeal lies. The judgment of the bench will be found at page 37 of the record, dated February 26, 1929. The plaintiff now applies for leave to appeal to the Privy Council against the orders of August 22, 1928, passed by a single Judge rejecting his application for excuse of delay and his application to set aside the orders of the Subordinate Judge of Dharwar dismissing the suit for want of prosecution in January 1925. It will be seen that the plaintiff having failed to appeal against the order of the divisional bench of August 19, 1927, directing the suit to be dismissed, which order was recorded and an order of dismissal made by the Subordinate Judge on July 12, 1928, is now seeking to appeal against a preliminary order in the same suit while the final order has become absolute, not having been appealed against. This would create a very difficult position, as so long as the order of the divisional bench of August

1927 stands, that order could only be modified by the Privy Council. It would be idle to attempt to set aside an earlier order of the Subordinate Judge in the same suit while the final order could not be contested. But apart from this, the present application must fail, because u/s 111 of the CPC no appeal shall lie to his Majesty in Council from the decree or order of one Judge of a High Court. The learned advocate for the petitioner has referred to Clause 39 of the Letters Patent, and to Section 109 of the Civil Procedure Code, and he has referred to Secretary of State for India in Council v. British India Steam Navigation Company (1911) 13 C.L.J. 90, Srinivasa Prosad Singh v. Kesho Prasad Singh (1911) 13 C.L.J. 681, and Lachmi Narain Marwari v. Balmakund Manwari (1921) 6 P.L.J. 116 as showing that an appeal lies. None of these cases, however, makes any reference to Section 111. The terms of Section 111 are clear, and they have been interpreted both in the case of appeals and in the case of revisional applications in two recent cases of the Calcutta and the Madras High Courts, In Sadar Ali v. Dalimuddin ilr (1928) Cal. 512 it was said by Rankin C.J. (p. 619):-"Section 111 of the Code, however, definitely prohibits an appeal to the Privy Council from a single Judge and to this extent overrides Clause 39 of the Letters Patent." It has been argued by the learned advocate for the petitioner that that was a case of second appeal, but so also in the case of revisional applications it has been held by the High Court of Madras in Satyanarayana Varapramda v. Venkata Bhashyakarla ilr (1923) Mad. 958 that the High Court has no power to grant leave to appeal to his Majesty in Council against an order of a single Judge of the High Court passed in the exercise of its revisional jurisdiction. The Letters Patent are, under Clause 44, subject to modification by an Act of the Indian Legislature, and the latter has, by Section 111 of the Civil Procedure Code, abrogated the right of appeal to His Majesty in Council against orders passed by a single Judge of the High Court.

3. In these circumstances, it is clear that no appeal lies to the Privy Council in the present case, and the application must, therefore, be dismissed, and the rule discharged with costs.

Patkar, J.

4. I agree,