
(1932) 09 BOM CK 0012
In the Bombay High Court
Case No : Civil Application No. 176 of 1932

Jivanlal Vrajrai Desai

APPELLANT

Vs

Vrajlal Pochalal Patel

RESPONDENT

Date of Decision : 23-09-1932

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 105(2), 109

Citation : AIR 1933 Bom 251 : (1933) 35 BOMLR 415 : 145 Ind. Cas. 258

Hon'ble Judges : Nanavati, J;Murphy, J

Bench : Division Bench

Judgement

Nanavati, J.—Applicants ask for leave to appeal to His Majesty in Council against a decree of this Court for a sum of Rs. 32,791-15-6. This Court reversed the decree of the original Court, and prima facie leave would be granted as a matter of course. But Mr. Desai for the repondent has objected to the grant of leave, on the ground that on January 14, 1931, this Court passed an order, which he contends was a final order u/s 109 of the Civil Procedure Code, against which the applicant was bound to appeal, and that he not having done so, is now barred by limitation from challenging that order. He urges that the points taken in the memorandum of appeal are all directed against the finding reached in the order of January 14, 1931, and he therefore contends that such an appeal is now barred. The judgment of this Court of January 14, 1931, is headed "Interlocutory Judgment." It set aside the conclusion of the trial Court that the defendants- lessors were under no liability to replace the buildings and machinery on a certain piece of leased land, which had been destroyed or damaged by fire. The trial Court had not gone into the questions whether the plaintiff had spent the amount mentioned by him in the. plaint on the building and the machinery, and whether the defendants were bound to pay this sum or any portion thereof, and had dismissed the suit with costs. The High Court having come to the conclusion that the defendants were liable sent down the following issue for a finding to be returned to this Court within three months :-

What amount had the plaintiff-appellant expended on the building and the chimney in 1924 and how much are the defendants liable to repay under Clause 18 of the agreement (Exhibit 38) ?

On the finding of the trial Court being returned by its judgment, dated November 18, 1931, this Court made the decree in favour of the plaintiff for Rs. 32,791-15-6 with interest and costs.

2. In the first place, I cannot agree with Mr. Desai's contention that the order of January 14, 1931, was a final order of the kind referred to in Section 109. Although it says, "we allow the appeal," and mentions that costs were to abide the final decree, yet it did not in terms set aside the decree of the lower Court. All that the Court purported to do was to send down an issue for a finding, under Order XLI, Rule 25. Mr. Desai has relied on two cases for the view that such an order must be regarded as a final order, viz., Saiyid Muzhar Hossein v. Mussamat Bodha Bibi ILR (1894) All. 112 and Rahimbhoy Habibbhoy v. C.A. Turner ILR (1890) Bom. 155 In Saiyid Muzhar Hossein v. Mussamat Bodha Bibi the order of the High Court remanding the case to the lower Court was u/s 562 of the old Code which corresponds to Order XLI, Rule 23. When acting under that section, the Court reverses the decree of the trial Court and remands the suit to that Court with directions to re-admit the suit under its original number and proceed to determine it. The appellate Court, therefore, when passing such an order, washes its hands of the matter, and directs the Subordinate Court to dispose of it according to law. That is not what happens when an order is made under Order XLI, Rule 25, nor has it happened in the case before us, because the order of the High Court of January 14, 1931, left the decree of the trial Court standing, which was in favour of the applicant. It would be a most anomalous position if a party were bound to go in appeal to His Majesty in Council when he had a decree standing in his favour.

3. In the Bombay case relied on by Mr. Desai, there had been a preliminary decree for accounts which on appeal was confirmed and leave to the Privy Council was refused by the High Court at that stage, but the appeal was admitted by Privy Council on an application for special leave. Now, I do not think that an interlocutory order sending down an issue to the lower Court can be put on the same footing as a decree confirming a preliminary decree for accounts. The High Court had dismissed the appeal and disposed of the case as far as that Court was concerned. But in the case before us the High Court disposed of the appeal only by its judgment of November 18, 1931. I do not think, therefore, that either of the two cases really supports Mr. Desai's contention.

4. The second answer of Mr. Thakor to the objection taken is that it is not disputed that his client has a right of appeal against the decree passed by this Court on the judgment of November 18, 1931, and that when he has that right, it is for the Court to which he appeals to consider what points he is entitled to urge in such an appeal. I think this contention is right, Moreover, if the principle of Section 105 (1) of the CPC applies, it is clear that in an appeal from a decree

the appellant is entitled to challenge it on the ground of any error, defect or irregularity in any order affecting the decision of the case. It is true that Section 105 (2), Civil Procedure Code, does not apply to appeals to the Privy Council, but I see no reason why the principle of Section 105 (1) should not be applicable to such appeals. Indeed the fact that Section 105 (2) does not apply to Privy Council appeals is an argument against Mr. Desai's present contention. If an appeal to that tribunal cannot be ruled out on the ground that the party concerned did not appeal against an order of remand by which the case was disposed of as far as the appellate Court was concerned, much less can it be barred by reason of the party not having appealed against an order sending down an issue to the lower Court. The former is clearly better entitled to the description "final order" than the latter kind of order.

5. The third ground taken by Mr. Thakor was that if he was obliged to appeal against the order of January 14, 1931, it was not possible for him to put a valuation on the appeal, because it had not then been determined what sum he was liable to pay. There might be an answer to this contention, but I think that on both the grounds mentioned before, the applicant has a right to go to His Majesty in appeal, though he did not file any appeal against the order of January 14, 1931. In my opinion, therefore, the objection has no substance, and the application must be granted. A certificate will be granted that as regards amount or value and nature the case fulfils the requirements of Section 110, Civil Procedure Code. Costs to be costs in the appeal.

Murphy, J.

6. I agree.