

(1877) 07 CAL CK 0002
In the Calcutta High Court

Lungessur Kooer

APPELLANT

Vs

Sookha Ojha
 Radhay Kishan Vs Kali Misser

RESPONDENT

Date of Decision : 19-07-1877

Acts Referred:

Citation : (1878) ILR (Cal) 152

Hon'ble Judges : Richard Garth, C.J;Markby, J;Macpherson, J;L.S. Jackson, J;Ainslie, J

Bench : Full Bench

Judgement

L.S. Jackson, J.—In answering on my part the question referred to the Full Bench, I have little to add to the reasons which I gave in referring this case. Those reasons, to my thinking, have not been answered. It is suggested that the question raised here has been virtually decided by a long course of practice, and also by the ruling of the Full Bench in the case of Brojo Misser v. Ahladi Misrani 13 B.L.R. 376; S.C. 21 W.R. 320; and that we ought not, whatever our view might have been, if the question were now raised for the first time, to disturb such a course of practice. It seems to me that, although it is extremely desirable to maintain a long settled ruling in regard to matters in which the security of titles depends, or even where to arrive at a contrary decision would disturb the practice of inferior Courts, it is not necessary to do so in the present instance, where no man's title can be affected, nor can any possible inconvenience arise by the mere admission of the present appeal. It seems to me that, in the first place, the question has not been expressly raised, and decided by a Full Bench; 2ndly, that if, as I think, the law allows an appeal, we are not competent to deprive the appellant of his right merely out of deference to the practice of the Court; and 3rdly, that to persist in an error, merely because that mistake has been committed for seven years, is a course in which I am not prepared to concur. I would admit this special appeal.

Macpherson, J.

2. In my opinion the questions which have been referred to us are concluded by

the uniform course of tire decisions of this Court ever since Bong. Act VIII of 1869 came into force, and cannot now be re-opened. Many thousands of suits under this Act have been disposed of annually, and tins Court has never, in any one of the numerous appeals which have come before it in these suits, doubted the power of the Bengal Council to pass the Act. If the uniform course of our decisions during these many years is wrong, it seems to me that it is a matter for the Legislature, and that it is too late for us now for the first time to say that the Act was made without jurisdiction in so far as it touches the High Court as regards the right of appeal or otherwise.

3. As to the particular issue arising on Section 102, it seems to me also to be concluded by the numerous decisions of the Court. See for example 18 W.R. 102: 8 B.L.R. 180 : 10 B.L.R. Ap. 29: 13 B.L.R. 377; and 23 W.R. 17, per Macpherson, J., (all taking the same view of the law) ending with the Full Bench case of Brojo Misser 13 B.L.R. 376 :S.C. 21 W.R. 320 which was heard in March, 1874. The question in that case was, whether an Additional Judge was a District Judge within the meaning of Section 102. The majority of the Court held that he was, and therefore that, under that section, no appeal lay, Mr. Justice JACKSON held that he was not, and therefore that the appeal did lie. But the report of that case does not show that any of the Judges doubted the effect to be given to Section 102, or conceived that, in cases falling within that section, there could be any appeal from the decision of the District Judge.

4. I consider that the matter referred to us has already been settled by these cases.

Markby, J.

5. I concur in the judgment of Mr. Justice Macpherson.

Ainslie, J.

6. By 24 and 25 Vict., c. 104, Section 9, the High Court is vested with all powers and authorities that may be conferred on it by Her Majesty's Letters Patent, and subject to the legislative control of the Governor-General in Council, with all the then existing powers of the Sudder Dewani Adawlut.

7. By Section 15 of the Letters Patent of 1862, this Court was constituted a Court of appeal from the Courts from which there was then an appeal to the Suddor Dewani Adawlut, and was directed to exercise jurisdiction in such cases as were then subject to appeal to the Sudder Dewani Adawlut by virtue of any ecexisting law, or which might thereafter be made subject to appeal by any law or regulation made by the Governor-General in Council.

8. By Section 16 of the Letters Patent of 1865, this Court is constituted a Court of appeal from all Courts subject to its superintendence, and directed to exercise appellate jurisdiction in such cases as were then (in 1865) subject to appeal to it by virtue of any law or regulation then in force.

9. In 1861, 1862, and 1865 alike, there was at least one class of suits in which the Sudder Dewani Adawlut or the High Court had no power to interfere on special appeal,--namely, the class of rent suits falling within the provisions of Section 153, Act X of 1859. This Court neither inherited a power to interfere in such suits from the Sudder Dewani Adawlut, which had not got it, nor took it as a new power under the first or second Letters Patent.

10. The words of the first Charter in such cases as are subject to appeal to the said Court of Sudder Dewani Adawlut distinctly limit the appellate power of this Court.

11. Under the second Charter it can only be held, that it gives a power of dealing in appeal with the class of cases now under consideration, if it was given by the laws in force in 1865. The general law of appeal was Section 23, Act XXIII of 1861;¹ but this general law was rendered inoperative in certain cases by Section 153, Act X of 1859, and as by this law there was no first appeal in certain cases, the special appeal Section (372, Act VIII of 1859) had nothing to operate upon.

12. By Section 33, Beng. Act VIII of 1869 the jurisdiction of the Collectorate Courts was brought to an end, and all suits theretofore triable in such Courts were made triable by the ordinary Civil Courts; and by the next section it was provided that the procedure was to be regulated by the CPC save as in this Act might be otherwise provided. The 102nd section is one of those sections in which a different procedure is provided; and, therefore, unless Section 34 can be got rid of, there can be no special appeal.

13. It seems to me that Section 372, Act VIII, 1859, does not override Section 34, Beng. Act VIII, 1869. In order to introduce Section 372, Act VIII, 1859, it must be held that the provisions of Section 153, Act X, 1859, were based on the constitution of the Court from whose judgment the appeal was taken away, and not on the character of the suits in which it was forbidden. Such a view scorns to me to be distinctly negatived by Section 27, Act XXIII, 1861,² as to which there can be no doubt that the character of the suit is the foundation of the law.

14. But if the limitation of appeals established by Section 153, Act X, 1859 of the Governor-General in Council, affected suits, and was not in respect of Courts, then Section 372 is as much qualified by Section 153, Act X of 1859, as it admittedly is by Section 271, Act XXIII, 1861, and the change of form introduced by Act VIII of 1869 has not the effect of removing the qualification. Section 34, Act VIII of 1869, as carried out by Section 102, left the jurisdiction of this Court intact, and is, therefore, not open to the objection that no legislative power except that of the Governor-General in Council can alter the jurisdiction of this Court.

15. If I entertained any doubt on the subject, I should feel bound by the long established and never-before-questioned (as far as I know) practice of the Court.

Garth, C.J.

16. But for the long course of practice which has prevailed in this Court since the year 1869, and the Full Bench decision in the case of Brojo Misser v. Ahladi Misrani 13 B.L.R. 376 S.C. :21 W.R. 320 I should have been disposed to hold with Mr. Justice JACKSON that a special appeal lay in a case like the present. But I think it so extremely important that the rules of law prescribed by this Court should be settled and uniform, that I am unwilling to disturb a course of practice which, as it seems to me, has been confirmed by a Full Bench decision.

17. It is true, that in that case the point now before us was not directly argued, because apparently it was not considered arguable; but the decision of it appears to me to have been involved in the Full Bench judgment, because the Court there held that, under circumstances similar to the present, a special appeal does not lie from an Additional Judge to this Court any more than from a District Judge. That ruling does, in my opinion, virtually determine the question now referred to us. The special appeal will, therefore, in conformity with the judgment of the majority of the Court, be dismissed with costs.

1. [Section 23: Except when otherwise expressly provided in this or any other Begulation or Act for the time being in force, an appeal shall lie from the Appeal to lie from all decrees of the Courts of original jurisdiction to the Courts autho-decrees, except when ex- rized to hear appeals from the decisions of those Courts. If the pressly prohibited. appeal lie to the Sudder Court, it shall be heard and determined by a Court consisting of two or moro Judges of that Court. If, Appeal to Sudder Court to when the Court consist of only two Judges, there is a difference be heard by two or more of opinion upon the evidence in cases in which it is competent to Judges. the Court to go into the evidence, and one Judge concur in opinion with the Lower Court as to the facts, the case shall be determined accordingly; if in a Court so constituted there is a difference of opinion upon a point of law, the Judges shall state the point on which they differ, and the case shall be re- argued upon that question before one or more of the other Judges, and shall be determined according to the opinion of the majority of the Judges of the Sudder Court by whom the appeal is heard.] 2. [Section 27: No special appeal shall lie from any decision or order which shall be passed on regular appeal after the passing of this Act by any Court No special appeal from subordinate to the Sudder Court, in any suit of the nature decision of any Court sub- cognizable in Courts of Small Causes under Act XLII of 1860 ordinate to the Sudder (for the establishment of Courts of Small Causes beyond the Court in certain suits. local limits of the jurisdiction of the Supreme Courts of Judi- cature established by Royal Charter), when the debt, damage, or demand for which the original suit shall be instituted shall not exceed five hundred rupees; but every such order or decision shall be final.]