

(1944) 06 BOM CK 0007
In the Bombay High Court
Case No : Civil Application No. 859 of 1943

Maneklal Mansukhbhai

APPELLANT

Vs

Hormusji Jamshedji

RESPONDENT

Date of Decision : 13-06-1944

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 110(2)
Transfer of Property Act, 1882 — Section 53A

Citation : AIR 1945 Bom 113 : (1944) 46 BOMLR 798

Hon'ble Judges : Rajadnyaksha, J; Divatia, J

Bench : Division Bench

Judgement

Divatia, J.—This is an application by the defendant for leave to appeal to His Majesty in Council against a decree of this Court in Second Appeal No. 717 of 1940. The decree in so far as it adversely affects the defendant directs him to hand over to the plaintiff vacant possession of two Survey Nos. 223 and 225 after removing the superstructures standing thereon. The substructures consist of a ginning factory and its appurtenances. The decree of this Court has reversed the decree of the lower appellate Court dismissing the suit, and the only question is whether the defendant is entitled to leave on the ground that the decree of this Court involves directly or indirectly some claim or question to or respecting property of the value of Rs. 10,000 or upwards under paragraph 2 of Section 110 of the Civil Procedure Code, 1908. It is conceded by the defendant that the case does not fall under the first paragraph of that section, but Tie contends that although the suit was valued by the plaintiff at Rs. 330 on the assessment of these two and the other two suit fields, the loss to him on account of the decree of this Court is more than Rs. 10,000 or upwards. In order to appreciate this point it is necessary to see what the. real dispute was between the parties.

2. The plaintiff is the successor-in-title of the original owners of these fields. The defendant is the successor-in-title of a firm called Manilal Maganlal and Brothers which had claimed to take the fields on a permanent tenancy from their owners and on the strength of that permanent lease had erected a ginning factory on

them in 1916. The plaintiff's case in the trial Court was that the tenancy between the owners and the defendant's predecessor-in-title was a tenancy at will and was not a permanent tenancy. There was no document to evidence the alleged permanent tenancy. The trial Court held in the plaintiff's favour that there was no permanent tenancy and ordered the defendant to give vacant possession of the suit lands on removal of the buildings standing thereon. The lower appellate Court was of the opinion that although there was no regular lease of the two lands executed between the parties, still there was correspondence between the Talukdari Settlement Officer who was managing the original owner's estate and the Government, the contents of which showed that a permanent tenancy must have been created between him and the defendant's predecessor. It therefore allowed the appeal and dismissed the plaintiffs suit. In second appeal it was held by this Court that the Government Resolution on which the defendant relied for the creation of permanent tenancy was no evidence of the writing of a contract referred to in Section 53A of the Transfer of Property Act, 1882, and apart from that the defendant had no legal basis on which he can claim to hold the land either as a permanent lessee or for a particular period. A decree was, therefore, passed in the plaintiff's favour so far as these two survey numbers were concerned by which the defendant was to hand over vacant possession of them after removing the superstructures standing thereon. The decree really amounts to an order to the defendant to remove the superstructures and thereafter to give vacant possession of the lands to the plaintiff.

3. Now the defendant's case in this application is that although the plaintiff's claim, which is based upon the assessment of the lands in suit, is certainly less than Rs. 10,000, the value of the leasehold rights to him and the loss of business consequent on the removal of the ginning factory would be more than Rs. 10,000, and that therefore the decree of this Court involves either directly or indirectly a claim or question respecting property worth at least Rs. 10,000. Mr. R. J. Thakore on behalf of the applicant has relied on the decision in *Hari Mohan Misser v. Surendra Narain Singh* ILR (1903) Cal. 301. That was a case where an injunction was sought by the plaintiffs restraining the defendants from altering the character of a plot of land by erecting thereon buildings for the manufacture of indigo and for filling up certain excavations, ditches, etc. made by the defendants. The plaint was valued at Rs. 1,500 but the defendants alleged that they had constructed a factory and other necessary buildings at a cost of more than Rs. 16,000, and that therefore the value of the relief claimed in the suit judged from the practical results thereof to the defendants was much more than Rs. 10,000. The Court accepted one of the defendants' contention that Rs. 7,000 were expended on building the structures and that a portion at any rate of what was said to have been expended on implements for the manufacture of indigo might also be included. It was held on those facts that if the plaintiffs were entitled to a perpetual injunction practically restraining the defendants from carrying on the indigo business, it must be obvious that the defendants may sustain a loss far greater than the mere cost of the buildings. On that ground it

was decided that the amount of loss which would be incurred by the defendants on account of the decree was more than Rs. 10,000, and a certificate was granted. No doubt the present is not a direct case of injunction. Nevertheless, in my opinion, the criterion laid down in that decision would apply to the present case as the decree against the defendant does direct him to remove the superstructures which according to him he is entitled to maintain on the lands for his factory. This principle accords with the observations of Sir Lawrence Jenkins in *De Silva v. De Silva* (1904) 6 Bom. L.R. 403 based on the decision in *Allan v. Pratt* (1888) 13 A. C. 780. The observations are that the decree is to be looked at as it affects the interests of the party who is prejudiced by it and who seeks to relieve himself from it by appeal. The particular passage in *Allan v. Pratt*, which elaborates this proposition following the decision in *Macfarlane v. Leclaire* (1873) 15 Moore P. C. 181 is as follows (p. 781) :-

...the judgment is to be looked at as it affects the interests at the party who is prejudiced by it, and who steeks to relieve himself from it by appeal. If there is to be a limit of value at all, that seems] evidently the right principle on which to measure it. The person against whom the judgment is passed has either lost what he demanded as plaintiff or has been adjudged to pay something or to do Something as defendant. It may be that the value to the defendant of an adverse judgment is greater than the value laid by the plaintiff in his claim. If so, which was the case in *Macfatlane v. Leclaire*, it would be very unjust that he should be bound, not by the value to himself but by the value originally assigned tot the subject-matter of the action by his opponent.

4. In my opinion, the same principle-applies to the present case, and the language of paragraph 2 of Section 110 is not violated by the application of that principle to it. The final order must involve at least indirectly a question respecting property worth Rs. 10,000. The word " involve " has been judicially interpreted to mean an adjudication by which the party who is adversely affected is bound on the principle of *ras judkata*, arid in the present case there is n6 doubt that the defendant's right to have the ginning factory on this land as a permanent tenant is finally adjudicated upon.

5. Mr. J.C. Shah on behalf of the opponent strongly relies upon a decision of the Lahore High Court in *Dhanna Mal v. Lala Moti Sagar* AIR [1923] Lah. 286. No doubt the facts of that case have a great resemblance to those of the present case. The suit there was one for ejection of the defendants from the site on which certain buildings stood, and it was ordered that the buildings should be "demolished and the materials removed. It was contended that the value of the buildings was nearly Rs. 23,000, and that inasmuch as those buildings! had been found to be of value of over Rs. 10,000, the defendants were entitled to a certificate under paragraph 2 of Section 110. That contention was negated on the ground that it cannot be said that the subiect-matter of the suit was other than that involved in the decision of the question whether the defendants were permanent tenants of the site or mere tenants at will, nor can it be contended

that the decree of the Court involved directly or indirectly any claim or question to or respecting property of the value of Rs. 10,000 or upwards. With great respect I am unable to see why on the facts of that case it did not fall within the second paragraph of Section 110. Under that paragraph a certificate can be granted if the decree or final order indirectly involves a question respecting property of the amount or value of Rs. 10,000 or upwards. As I have said before, the value of the claim so far as the unsuccessful litigant is concerned is the value of the loss to the property which he would possess, and if that amount is more than Rs. 10,000, I fail to see why his case should not fall under that paragraph. I am therefore unable to agree with the view taken in *Dhama Mai v. Lala Moti Sagar*. Although there is no direct authority of this Court, on this point, there are some observations in *Mahmadalli Isabhai Vs. Abdul Rahim Funumulla*, which would support the defendant's case. In that case a tenant, who had leased the lands for twenty-five years and had erected buildings thereon at a cost of nearly Rs. 25,000, obtained a decree that he was entitled to remain on the land as long as he lived after the expiration of the period of the lease. He applied for leave to appeal to the Privy Council contending that his firm was entitled to remain in possession while it lasted. It was found that the value of the land demised was Rs. 4,000. In the application for leave to appeal by the tenant his case was that the tenancy should last not simply during his life but so long as the firm lasted. It was held that the condition laid down in Section 110 was not satisfied inasmuch as the decree did not involve indirectly any claim or question respecting the building but involved a claim to land itself which was valued at Rs. 4,000. Mr. Justice Patkar in his judgment referred to the case of *Dhanna Mal v. Lala Moti Sagar* and he applied the principle of that case to the facts before him holding that the value of the claim was only Rs. 4,000 and not more. At the same time he was of the opinion that the decision might have been otherwise if "the suit had been by the landlord against the tenant for ejectment and for removal of the superstructure. He observes (p. 1193):-

No decree was passed for evicting the tenant from possession of the land. If the tenant had been evicted from the land, it might have been possible to hold that the decree not only involved directly some claim or question relating to land which was worth Rs. 4,000 but also indirectly involved some claim or question to or respecting the buildings erected thereon of the value of more than Rs. 10,000 in the present case. Until the landlord brings a suit to evict the present plaintiff from the possession of the land leased to him, there is no necessity for him either to remove the structure or to give vacant possession of the land to the landlord.

6. Those observations would apply to the facts of the present case, and with great respect I think they are correct. Mr. Justice Baker also, although he applied the case of *Dhanna Mal v. Lala Moti Sagar* to the facts of the case before him, observed that the decree was not one for ejectment and further proceedings "would be necessary before the question of removing the buildings standing on the land would arise. I think, therefore, that the decision in *Mahtnadalli v. Abdul*

Rahim does not assist the opponent because the Facts in that case were different; on the other hand, the observations made by Patkar J. would assist the defendant's case.

7. Mr. J.C. Shah lastly relied upon the decision of this Court in Lallubhai Pragji v. Bhimbhai Dajibhai ILR (1929) 53 Bom. 552 . That was an easement case and it was held that in a suit for ;an easement of light and air claimed by the; owner of the property A against owner of property B, it is the value of the; easement and not the value of the property A, that determines the appealable value for leave to appeal to the Privy Council u/s 110 of the Civil Procedure Code. That is no doubt a correct principle because it cannot be said that the pecuniary value of the easement claimed must be measured in terms of the value of the dominant tenement to which it is attached. But that decision has got nothing to do with a decree where the defendant is expressly ordered to remove a superstructure and hand over vacant possession of the land to the plaintiff. In my opinion, therefore, if it is proved by the defendant that the decree passed against him indirectly involves a question relating to property worth Rs. 10,000 or upwards, his case would fall under the second paragraph of Section 110, and he would be entitled to a certificate. We have no materials before us to decide the value of his property affected by the decree or the pecuniary value of the loss which he would sustain by the decree, and we, therefore, direct that this matter should be sent to the Court of the Subordinate Judge at Ahmedabad for ascertaining the amount of the alleged loss which the defendant might sustain on account of the removal of the superstructures standing on Survey Nos. 223 and 22S. The loss is to be ascertained not only at the date of the suit in 1933 but also at the date of the decree of this Court. The finding should be sent directly to this Court within three months after the record is received by the Court.

8. The defendant has filed Civil Application No. 1196 of 1943 for staying the execution, of the decree of this Court till the final decision of the application for leave to appeal to the Privy Council, But this application can be finally disposed of only after the finding of the lower Court is received. In the meantime we direct that only that part of the decree of this Court which relates to the removal of the superstructures standing on Survey Nos. 223 and 225 should be stayed. The plaintiff would be entitled to execute the rest of the decree. Final orders on this application will be passed after the finding is received.

Rajadhyaksha, J.

9. I agree.