

(1962) 04 AHC CK 0014

In the Allahabad High Court

Case No : Supreme Court Appeal No. 119 of 1961

Mazhar Husain and Others

APPELLANT

Vs

Sahu Jagdishwar Nath and Another

RESPONDENT

Date of Decision : 09-04-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 109, 110
Constitution of India, 1950 — Article 133, 135

Citation : AIR 1963 All 191

Hon'ble Judges : B. Dayal, J;A.P. Srivastava, J

Bench : Division Bench

Advocate : A.K. Kirty, for the Appellant; N.P. Asthana, for the Respondent

Final Decision : Dismissed

Judgement

B. Dayal, J.—This is an application under Article 133(1)(a) and (c) of the Constitution for a certificate either that the case fulfils the requirements of Article 133(1)(a) of the Constitution or in the alternative that the case is fit one for appeal to be Supreme Court.

2. The proceedings out of which this application has arisen had a very chequered career. Only the very relevant facts may be briefly stated. The applicants were judgment-debtors in a decree passed under Order 34. Rule 5. C. P. C. dated the 23rd of October, 1935 for more than rupees twenty seven thousand. On the 6th of November, 1941, the decree was put in execution. The judgment-debtors applied for amendment of the decree under the U. P. Debt Redemption Act. On the 26th of January, 1942, further proceedings in execution were stayed till the disposal of that application. The judgment-debtors contended that the decree had been fully satisfied. The decree-holders filed their objection to the application. Some orders were passed against the decree-holders which were not complied with and on the 28th of April, 1943, the objection filed by the decree-holders was struck off. On the 2nd of June, 1943, the application filed by the judgment-debtors was allowed ex parte and it was held that the decree-had been

satisfied. On the same date although it was not a date fixed for the hearing of the execution application itself, the Court passed the following order ex parte

"In view of the order on the application for amendment of the decree no amount is due on it. The execution proceedings therefore cannot continue. They are struck off on that ground. Costs with parties".

The decree-holders filed two appeals -- one-against the order, striking off the objection to the judgment-debtor's application and the other against the final order dated the 2nd of June, 1943 holding that the whole decree had been satisfied. But they did not file any appeal against the order passed in the execution case striking it off and consigning the papers to the record room. The two appeals filed by the decree-holders were ultimately allowed by the High Court on the 14th of February, 1950 and the amendment application of the judgment-debtors was sent back to the court below for decision on merits. This application was heard and the court dismissed it on 27th March, 1954, holding that the decree had remained unsatisfied and the decree-holders were entitled to execute it for the amount prayed for in the execution application. After dismissal of this application by the judgment-debtors, the decree-holders applied on the 30th of April, 1954 that the execution case be revived as it had been held by the Court that the amount claimed was due to the decree-holders. This application for revival purported to be u/s 151, C P. C. The Civil Judge who heard this application dismissed the same on two grounds; firstly that the execution case having been dismissed could not be revived and secondly that, in any case, the application for revival was beyond time under Article 181 of the Limitation Act. Against this order of the learned Civil Judge an Ex. First Appeal was originally filed in this Court which came up for hearing on the 8th of August, 1961.

On that date an objection was raised by the learned counsel for the respondent-judgment-debtors that no appeal lay against the order dismissing the decree-holders' application u/s 151, C.P.C, praying for revival. Learned counsel for the decree-holders at once conceded that no appeal lay--and prayed that his appeal may be treated as a application u/s 115, C. P. C. and the Court may exercise its revisional jurisdiction in the matter. This Court acceded to this request and permitted the learned counsel for the decree-holders to convert the appeal into a revision and to hear and decide it as such. This Court held that the order of the learned Civil Judge passed on the 2nd of June, 1943 on the execution application quoted above, did not amount to final disposal of the execution case and that the application made by the decree-holders was not one for which any period of limitation was prescribed by the Limitation Act it merely reminded the court of its duty to take up the matter in execution which was pending and this could be done even orally. In any case, right to make such an application arose in favour of the decree-holders only after the dismissal of the judgment-debtor's application for amendment on the 27th of March, 1954 and the application having been made within one month and a few days after that order was well within time even if Article 181 of the Limitation Act applied. Upon this finding the

revision was allowed and the executing court was directed to proceed with the execution. Against this order, the present application for certificate has been filed.

3. Learned counsel for the applicants has contended that this application is maintainable under Article 133(1)(a) of the Constitution as the valuation is over rupees twenty thousand and the order of the trial Court had been reversed by the High Court.

4. The scope of Article 133 of the Constitution came up for a very elaborate consideration by the Supreme Court in *Garikapatti Veeraya Vs. N. Subbiah Choudhury*, . In that case a suit had been filed on the 22nd of April, 1949. The trial Court decided it on the 14th of November, 1950, and the High Court reversed that decree on the 4th of March, 1955. The valuation of that case was more than rupees ten thousand but less than rupees twenty thousand. An application was made for a certificate and it was contended that the appellant was entitled as of right to appeal to the Supreme Court as the valuation was more than rupees ten thousand which was required before the Constitution came into force. The High Court refused to grant the certificate holding that Article 133 of the Constitution was applicable and since the valuation was less than twenty thousand rupees, no certificate could be granted as of right. When the matter came up before the Supreme Court, their Lordships of the Supreme Court held that the High Court was in error in holding that Article 133 of the Constitution was applicable to the case.

In that case one of the questions for consideration was whether a right of appeal vested in the litigant on the date of institution of the proceeding or on the passing of the final order and it was held that it vested on the institution of the proceedings and could not be taken away by Article 133 of the Constitution. In this connection, the scope of Article 133 came up for detailed consideration. At page 556 of the report, his Lordship the Chief Justice, who delivered the judgment for the majority posed the following question for consideration.

"The only question that remains is whether the right of appeal from the judgment of a High Court passed after the date of the Constitution in a civil proceeding arising out of a suit or proceeding instituted before the Constitution which had vested in persons falling within category IV is to be governed by Art 133 or by the old law under Article 135."

Dealing with the retrospective application of Article 133 his Lordship observed at page 560 of the report:

"Art. 133 only speaks of any judgment, decree or final order of a High Court. It does not say judgment, decree or final order passed after the Constitution. Therefore when an application for leave to appeal from a judgment, decree or final order of a High Court is made after the Constitution then at the date of the application surely the judgment, decree or final order passed before the Constitution can also be described literally and correctly as a judgment, decree or final order of a High Court. But it is said at once that the Constitution is

prospective and therefore the judgment, decree or final order contemplated therein can only be a judgment, decree or final order passed after the Constitution.

But if by reason of the theory that the Constitution is prospective we are to read the words "passed after the commencement of the Constitution" after the words "judgment, decree or final order", can there be any cogent reason why we may not also read the words " arising out of a suit or proceeding instituted in the court of first instance after the commencement of the Constitution" after the words "civil proceedings of a High Court in the territory of India"? If the Constitution is prospective with regard to the date of the judgment why should it not be also prospective with regard to the institution of the suit or proceeding out of which the civil proceeding before the High Court arises? To construe the language of Article 133 to cover all judgments, decrees or final orders made after the date of the commencement of the Constitution irrespective of the date of the institution of the proceedings in the court of the first instance will be to run counter to the earlier decisions referred to above."

Again at page 561 it was observed:

"If this is, as we apprehended it is, the correct view then to construe Article 133 as covering all judgments, decrees and final orders made after the Constitution irrespective of the date of the initiation of the proceedings in the original court will be to take away or impair the vested right of appeal from a judgment concerning property of subject-matter of the value of Rs. 10,000/- but below Rs. 20,000/- which had accrued to the aggrieved party long before the commencement of the Constitution. Such a construction plainly and surely amounts to giving a retrospective operation to Article 133. for so construed the Article will certainly destroy the right which was vested prior to the Constitution."

It is thus clear that the interpretation put upon Article 133 was that it did not apply to orders passed in proceedings which commenced before the Constitution came into force. It was held that if that view was not taken, the result would be that the vested right of appeal would be defeated. Attention of their Lordships was drawn to an earlier case of the Supreme Court reported in *Nathoo Lal Vs. Durga Prasad*, . In that case an objection to the maintainability of an appeal to the Supreme Court was raised. Proceedings had commenced in that case in 1945 and had concluded to a decision of the Jaipur High Court in 1949. It was held that Article 133 of the Constitution applied. Dealing with the case, their Lordships of the Supreme Court at page 564 observed as follows:

"That being the position it was a judgment with respect to which nobody had any vested right of appeal and, therefore, an appeal lay to this Court under Article 133 as construed above. It did not matter in that case whether the appeal was maintainable under Article 133 or Article 135 and the question that we are considering in the present appeal does not appear to have been urged by learned counsel or discussed by the court in that case and the cryptic observation quoted

above cannot be taken as a considered and final expression of opinion that whenever a judgment, decree or final order is passed after the date of the Constitution it must come within Article 133 no matter whether the proceedings were instituted before or after that date."

This explanation of the decision in the case of *Nathoo Lal Vs. Durga Prasad*, makes it quite clear that their Lordships did not approve of the inference that would normally be drawn from that case. That decision was justified on the basis that an appeal was entertainable under Article 135 of the Constitution.

5. In the present case, however, if Article 133 of the Constitution does not apply and the matter is governed under Article 135 by the pre-Constitution law no appeal lies to the Supreme Court at all because the order which is sought to be appealed from was passed not in appeal but in revision. Section 109(a) and Section 110 of the C. P. C. which will regulate the right of appeal, provided for an appeal to the Federal Court only from an appellate order of the High Court and not against a revisional order: vide AIR 1949 239 (Privy Council) *Suraj Singh and Another Vs. Phul Kumari and Another*, and *Atma Ram Vs. Beni Prasad and Others*, .

6. The contention of the learned counsel for the applicants, however, is that execution proceedings must be treated as independent of the suit and in the present case the execution case to which the proposed appeal relates must be deemed to have started when the application for execution was made. But even the execution application in this case was made on the 6th of November, 1941 when the Constitution had not come into force. The application for revival of this execution application had no doubt been made in 1954 but this application cannot be treated as an independent proceeding. This was merely a miscellaneous application in execution. We are, therefore, of opinion that the proceedings out of which the revision in the High Court arose commenced before the Constitution came into force. The contention of the learned counsel for the applicants in the alternative is that this order passed by the High Court was in a proceeding which started as an Ex. First Appeal in this Court. Although the appeal was incompetent yet the order must be treated as an order on appeal. For this proposition, learned counsel relied upon AIR 1932 165 (Privy Council) and other cases where it was held that an order passed in an incompetent appeal is an order "passed on appeal" within the meaning of Article 182 (2), Limitation Act. In the first place none of those cases is a case in which an appeal was held to be incompetent and the case was heard as an application for revision. Secondly entirely different considerations arise when interpreting Article 182 of the Limitation Act. Those considerations cannot be considered material so far as the point now before us is concerned. Moreover, when the execution First Appeal came up for hearing an objection was raised by the applicant himself to its maintainability. Learned counsel for the appellant then withdrew his appeal and asked for permission to convert it into a revision. The case was thereafter heard as a revision. Therefore, the only order which was passed in the appeal was to

permit its withdrawal and obviously the applicant could not be aggrieved by that order, because it was passed on his own preliminary objection and it cannot be said that this present application for a certificate is against that order permitting the appeal to be withdrawn. After withdrawal of the appeal, further hearing of the case continued in the revisional jurisdiction of this Court and not in the appellate jurisdiction. Even if this Court had dismissed that appeal as incompetent, it was open to this Court to exercise its revisional jurisdiction suo motu and to correct wrong orders passed by the court below. It cannot be said that the final order against which the present application has been filed was passed in the appeal which had originally been filed in this Court.

7. The next contention of the learned counsel for the applicants is that this is a fit case for appeal to the Supreme Court even u/s 109(c) of the C. P. C. We are unable to agree with this contention also. No important question of law of any general importance has been decided in this case. All that has been said is that the order dated the 2nd of June, 1943 striking off the execution case and consigning the record to the record room did not amount to final disposal of the execution application and that execution application should be revived. This depended upon the circumstances of the case and it was found that the intention of the court obviously was not to finally dispose of the execution application but merely to consign it to the record room till final disposal of the amendment application made by the judgment-debtors.

8. Learned counsel for the applicants referred in the end to three cases, AIR 1942 291 (Oudh) , AIR 1943 85 (Oudh) and Dila Ram and Others Vs. Atma Ram and Others, . All these cases arose out of proceedings under the U. P. Encumbered Estates Act. That Act was amended and a new right of second appeal was given which did not exist before the amendment. The question was whether such a second appeal could be entertained in proceedings which had started before the amendment. In those circumstances it was held that a second appeal could be filed in pending cases except those in which final orders had been passed before the amendment and a right had thereby vested in the other side. The circumstances here are quite different. Here a right of appeal existed under Sections 109 and 110, C. P. C. before the Constitution. It was preserved by Article 135 of the Constitution and as has been held by the Supreme Court, Article 133 was meant to be only prospective. The right of appeal to the Supreme Court given by that article cannot therefore be availed of by litigants whose proceedings started before the Constitution. The cases relied upon cannot therefore be of any help to the applicants in the present case.

9. We do not think that this is a fit case in which this court should grant a certificate that the case is fit one for appeal to the Supreme Court. This application is accordingly dismissed with costs.