

(1956) 02 AHC CK 0027

In the Allahabad High Court

Case No : Supreme Court Appeal No. 35 of 1954

Mohd. Mohmood Hasan Khan

APPELLANT

Vs

Government of Uttar Pradesh

RESPONDENT

Date of Decision : 29-02-1956

Acts Referred:

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

Citation : AIR 1956 All 457 : (1956) 26 AWR 706

Hon'ble Judges : Randhir Singh, J; Kidwai Hari Shankar, J

Bench : Division Bench

Advocate : H.D. Srivastava, Kamla Krishan, Umesh Chandra and Sheoraj Bahadur Mathur, for the Appellant; B.K. Dhaon, for the Respondent

Final Decision : Dismissed

Judgement

Kidwai, J.—In proceedings under the Land Acquisition Act about 873 acres of land belonging to the petitioner were acquired by the State and a sum of Rs. 1739/10/- was assessed as compensation. The petitioner made a claim for Rs. 75,000/- as compensation and eventually had the matter referred to the District Judge u/s 18, Land Acquisition Act. The District Judge held that the proper compensation was Rs. 5365/8/- but that, in view of the provisions of Section 25(2) of the Act he could award only Rs. 1739/10/- and he made an award to that effect.

2. The petitioner appealed but he confined his appeal to a sum of Rs. 46,000/-. In this Court on the date fixed for hearing, one of the learned counsel for the petitioner did not appear and the two who did appear stated that they had no instructions to press the appeal. The appeal was accordingly dismissed for want of prosecution on 6-4-1954 by a Division Bench.

3. On 8-4-1954 an application was presented under Order 41, Rule 17 and Section 151, C. P. C., through another counsel for restoration of the appeal to its original number. It was stated in this application that the applicant had no

knowledge of the date of the hearing and that his counsel had given him no information with regard to it. This application was supported by an affidavit but it was dismissed by the same Bench on 19-7-1954, on the ground that no sufficient cause had been made out for a reconsideration of the matter.

4. The petitioner then applied on 18-10-1954, under Article 133 of the Constitution for leave to appeal to the Supreme Court from the order refusing to restore the appeal. The application gave all the material facts and also stated that the value of the subject-matter of the proposed appeal was over Rs. 20,000/-. It did not, however, set out the grounds of the proposed appeal.

5. The petition came up for hearing before a Division Bench of which one of us was a member. It was considered that the question raised called for the construction of the words "final order" used in Article 133 of the Constitution. The learned Judges referred to a large number of decisions. They held that most of the cases were distinguishable on the facts but that the principles to be deduced from them were that to make an order a final order three conditions must be satisfied, namely:

"(1) That it should not be an interlocutory order;

(2) That even though it is an order which disposes of the proceedings before a Court finally, it should not be an order which leaves the original proceedings in the Court below alive and

(3) That there should be a final determination of the rights of the parties or the order must of its own force affect the rights of the parties."

They then held:

"It seems to us that the order in question in the present case finally denies to the applicant the right of his appeal being re-heard and thus affirms the dismissal of the appeal which in its terms affirms the decision of the lower Court. This is a very serious matter for the applicant.

If the order in question can be considered a final order, we would have thought a substantial question of law arose in the case and we would have granted leave to appeal to the Supreme Court. In our view the cases of *Mt. Bismillah Begam v. Hira Lal* AIR 1917 All 313 and *Pt. Krishna Kant Malaviya Vs. Lala Amarnath and Others* require consideration."

6. The case was accordingly referred to a larger Bench and the present Full Bench has been constituted for the purpose of deciding the question.

7. By the enforcement of the Constitution the law relating to appeals from decisions of High Court has undergone a considerable modification. u/s 109, C. P. C., appeals lay only

"(a) from any decree or final order passed on appeal by a High Court.....

(b) from any decree or final order passed by a High Court in the exercise of

original jurisdiction; and

(c) from any decree or order, when the case, as hereinafter provided is certified to be a fit one for appeal....."

8. Even after enforcement of the new Constitution the provisions of Section 109, C. P. C., remain practically unaltered except that they are made, as they were bound to be, subject to the provisions of Chap. IV of Part V of the Constitution and that they would apply now only to the limited class of cases to which Article 135 of the Constitution makes them applicable.

9. After the enactment of the Government of India Act, 1935, a limited jurisdiction was also conferred upon the Federal Court by Section 205 of the Act but we are not concerned with this.

10. The law as to appeals to the Supreme Court, for the purposes of this case, since that was the only provision on which reliance was placed in the petition for leave to iappeal and in the arguments before the Division Bench and before us, is contained in Article 133(1) of the Constitution which reads as follows:

"133(1). An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies-

"(a) that the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law; or

(b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(c) that the case is a fit one for appeal to the Supreme Court; and, where the judgment, decree or final order appealed from affirms the decision of the Court immediately below in any case other than case referred to in Sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law."

11. It will be seen that, while Clause (a) is still confined, by necessary implication, to appeals from judgments, decrees and final orders passed on appeal Clause (b) is no longer limited to judgments, decrees and orders passed in the exercise of original jurisdiction but is wide enough to cover all judgments, decrees or final orders provided that there is some claim or question involving, directly or indirectly, property of the value of Rs. 20,000/-, Further, even in cases covered by Clause (c) the proposed appeal must be from a "judgment, decree or final order" and not merely from any decree or order.

12. We may note that in the instant case there is no question of an appeal from any judgment or decree and that it was not disputed before us that three conditions postulated by the Division Bench must exist before an order could be

called a final order. The learned counsel for the applicant contended that all the three conditions were satisfied while the learned Senior Standing Counsel urged:

- (a) that the order was an interlocutory one;
- (b) that the order did not of its own force determine the rights of the parties; and
- (c) that the order did not either directly or indirectly raise any claim or question to property of the value of Rs. 20,000/-.

13. In some early cases -- vide *Rahimbhoy v. Turner* 18 Ind App 6 (PC) (C) and *Syed Murzhar Husain v. Bodha Bibi* 22 Ind App 1 (PC) (D)--it was held that even orders which resulted in a remand of an appeal were final orders provided that some cardinal point affecting the rights of the parties was decided by the judgment of the High Court.

In later cases, however, it has been held that an order which keeps the case "alive" in the lower Court and the result of which is to allow the case to continue is not a "final Order"--Vide *Firm Ramchand Manjinal v. Firm Goverdhandas Vishundas Batanchand* AIR 1920 PC 86 AIR 1933 58 (Privy Council) *Mohammad Amin Brothers Ltd. v. Dominion of India* AIR 1950 FC 77 and AIR 1949 1 (Federal Court) (which was a criminal case but in which all the decisions relating to civil appeals were discussed). The order in the instant case does terminate the whole proceeding and does not keep either the original or any subsequent proceeding alive.

14. Mr. Dhaon, however, contended that the application of 8-4-1954 might have been disposed of in one of two ways: It could either be dismissed (as has been done) or it could have been allowed. If it had been allowed the appeal which had been dismissed for want of prosecution would have been revived and the matter would have been "alive". He, therefore, urged that according to the decision of Lord Esher, Master of Rolls, and the other Judges in *Salaman v. Warner* (1891) 1 QB 734 the order was merely an interlocutory order. In that case Lord Esher no doubt said:

"If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand if their decision, if given in one way, will finally dispose of the matter in dispute, but if given in the other will allow the action to go on, then I think it is not final, but interlocutory."

In the same case Fry, L. J. said:

"I conceive that an order is "final" only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is "interlocutory" where it cannot be affirmed that in either event the action will be determined."

15. The remarks of Lopes L. J. are to the same effect. The correctness of this

decision was not accepted by Lord Halsbury, Lord Chancellor, in *Bozson v. Altrincham Urban District Council* (1903) 1 KB 547 (J) who preferred to follow some earlier decisions. In that case Lord Alverstone C. J. held that the real test for determining the question was: "Does the judgment or order, as made, finally dispose of the rights of the parties".

16. Both the decisions were relied upon in AIR 1920 PC 86 and AIR 1949 1 (Federal Court) In both these cases, however, it was immaterial which of the two views was accepted because in either view the decision which was being considered was not final.

In the instant case a conflict arises: if the earlier decision is accepted as correct then the order which we are considering is merely interlocutory while if the later decision is accepted the order in the present case is not interlocutory. We see no reason to differ from the view expressed by Lords Halsbury and Alverstone in the later case and we hold that the order in the present case is not an interlocutory order.

17. The next and most important question that arises for consideration is whether it is necessary that an order to be a final order must, of its own force, determine the rights of the parties.

18. The two Privy Council decisions in AIR 1920 PC 86 and AIR 1933 58 (Privy Council) are not of much assistance because though some remarks made in them might appear to be pertinent to the question before us, those remarks must be read in the light of the context.

The question involved in both these cases was whether an order which left the suit to be decided and did not terminate it could be treated as a "final order". Their Lordships held that it could not. The basis of the decision in each case was that the suit was still "alive" and that the rights of the parties had yet to be determined by the Courts in the ordinary manner. The principle laid down has no application to the present case.

19. The Federal Court decision in AIR 1950 FC 77 (AIR V 37) (G) also stands on the same footing.

20. The decision in AIR 1917 All 313 is also not of any assistance in determining the question. In that case leave to appeal to the Privy Council could not be granted because an order dismissing an application for restoration of an appeal was held to be an order passed neither "on appeal" within the meaning of Section 109(a), C. P. C. nor an order passed in the exercise of original jurisdiction within the meaning of Section 109(b), C. P. C. This case was followed in *Maung Saw Myaing v. Mg. Sein* AIR 1924 Rang 208 (AIR V 11) (K)

In view of the change in the law effected by the Constitution this ratio is no longer applicable.

20A. In *Pt. Krishna Kant Malaviya Vs. Lala Amarnath and Others* , the learned

Judges proceeded on the same basis but they added:

"The Court was not bound to restore the case and had discretion in the matter which of course had to be exercised judicially. No cardinal point between the parties was decided by the order dated 4-1-1937. "Nor have the rights of the parties in the case itself been adjudicated upon in that order." We are, therefore, unable to hold that the order in question was a final order within the meaning of Section 109(a)."

21. On the same lines is the decision in *Seth Premchand Satramdas Vs. The State of Bihar*, which is of considerable assistance. In that case the High Court declined to call upon the Board of Revenue to state a case u/s 21, Bihar Sales Tax Act. It is clear that the proceedings before the High Court came to an end with this order and further that the assessee had no remedy left against the order of the Board which became final. Nevertheless the Supreme Court held that the order of the High Court was not a final order. *Pazl Ali J.* said at page 15:

"In order to attract the provisions of this clause "(a clause in the Letters Patent of the Patna High Court) it is necessary to show, firstly, that the order under appeal is a final order; and secondly, that it was passed in the exercise of the original or appellate jurisdiction of the High Court. The second requirement clearly follows from the concluding part of the clause.

It seems to us that the order appealed against in this case, cannot be regarded as a final order because it does not "of its own force bind or affect the rights of the parties". All that the High Court is required to do u/s 21, Bihar Sale Tax Act is to decide the question of law raised and send a copy of its judgment to the Board of Revenue.

The Board then has to dispose of the case in the light of the judgment of the High Court. It is true that the Board's order is based on what is stated by the High Court to be the correct legal position but the fact remains that the "order of the High Court standing by itself does not affect the rights of the parties" and the final order in the matter is the order which is passed ultimately by the Board of Revenue."

22. Applying the ratio of this case to the instant case, it is clear that the order refusing to revive the appeal did not, standing by itself, affect the rights of the parties. Those rights had been disposed of by the dismissal of the appeal for want of prosecution; the order complained of only refused to allow the matter to be re-agitated. It is an order relating to procedure and not to the merits of the appeal, vide *M.A. Janaki Vs. M.A. Srirangammal*, .

23. We have accordingly come to the conclusion that the order against which the petitioner seeks to file an appeal to the Supreme Court is not a final order within the meaning of Article 133 of the Constitution. This application is dismissed with costs.