
(1922) 11 PAT CK 0022
In the Patna High Court
Case No : Civil Rev. No. 213 of 1922

Mt. Ayodhya Kuar

APPELLANT

Vs

Durga Prasad

RESPONDENT

Date of Decision : 22-11-1922

Acts Referred:

Citation : (1922) 11 PAT CK 0022

Final Decision : Dismissed

Judgement

Bucknill, J.—This was an application in civil revisional jurisdiction made by one Musammatt Ajodhya Kuwar widow of the late Munshi Negi Prasad asking that an order dated the 11th March 1922 passed by the Subordinate Judge of the 2nd Court of Patna should be set aside or otherwise dealt with. The circumstances which have given rise to this application are in themselves very simple, but raise an interesting though well defined point of law, which has been ably placed before me by the learned Counsel for the petitioner. In order to understand exactly how the question which has been argued before me arises, it is necessary shortly to refer to the facts in this case and to the somewhat lengthy course which the litigation has already passed through.

2. A certain Durga Prasad, who is the respondent to this application brought an action against the petitioner and other defendants claiming that certain land belonged to him as his bakasht as the result of a partition. The present petitioner, who was a defendant, as I have said, in that suit was a pardanashin lady. The plaint was admitted in May of 1919 and there were frequent applications for time, not, I may point out, entirely made by the petitioner or the other defendants. However on the 8th September 1919 the plaintiff was, according to the Munsif's order sheet, ready for trial, although the defendants still prayed for time to adduce evidence. The last of November was fixed for the trial and on that date the defendant was not ready and prayed for time for calling for certain papers from the Collectorate and the District record room. The Munsif, after shortly discussing the delays which had already taken place, came to the

conclusion that this petition for time made on behalf of the defendant was frivolous and he accordingly rejected it. The Munsif then proceeded with the case and I am sorry to see that those who represented the defendant stated that they had no instruction other than to apply for adjournment and withdrew from the suit.

3. Although this conduct has very little to do with the point in this case, I think it is not out of place to indicate that to take up such an attitude, which often greatly embarrasses one who desires to try, and to retreat from the position in which this behaviour puts him, is a mistake. It is far better, if in any way possible so to do, for those representing a litigant in such circumstances to continue the conduct of the case as far as may be possible and then to intimate clearly the reasons for which it is found that the case can be at that stage carried no further by him. If his petition for adjournment under such circumstances is then rejected, it may well become a matter for serious consideration as to whether the rejection of such an application was appropriate or the reverse.

4. To return now to the course which this litigation has pursued; the Munsiff's order in the suit made on the 1st of November 1919 was that,

the suit be decreed ex-parte with costs and Rs. 253 mesne profits, and future mesne profits to be ascertained hereafter in execution department. The plaintiff's title to the suit be declared and he do recover possession of the same on ousting the defendant.

5. Now apparently on the 29th of November the defendant filed an application for review before the Munsif of this order and on or about the same date an appeal was also entered against this decision. On the 5th of January, 1920, the Munsif notes in his order sheet that an intimation had been received from the appellate Court calling for the record and he accordingly ordered the record to be sent to the higher Court and stayed the proceedings for setting aside the ex-parte decree which had been put forward before him and of which he had then fixed provisionally the hearing for the 17th of January. The matter seems to have come before the Subordinate Judge of Patna a good many months later; for it is found that by a judgment dated the 18th January, 1921, that Judge disposed of the appeal. He went into the merits of the case and came to the conclusion that on the merits the Munsif was right and he affirmed the Munsif's decision. He states, however, at the conclusion of his decision that he observes that an application for re-hearing under Order IX rule 13 of the CPC was still pending before the Munsif. He adds that although in the appeal before him no case had been made out for remitting the suit for a fresh trial upon the merits and that, therefore, he found himself unable to accede to the appellant's request for a remand, yet he thought that the learned Munsif might re-consider this matter if he (the Munsif) thought that it was a fit case for setting aside the ex-parte decree which he had made. On the 14th July, the record having been received back by the Munsif, he, guided presumably by what had fallen from the Subordinate Judge, decided to consider whether or not he ought to set aside his

exparte decree made on the 1st November, 1919; and, accordingly, he fixed a date for the hearing of the application. After some delay the matter came up for his decision on the 6th September and the learned Munsif then dealt with the case somewhat exhaustively. He points out in a careful judgment that the application before him had been opposed on two grounds: firstly on legal grounds and secondly on merits. Dealing with the former ground of opposition he came to the conclusion, on the authority of the case of Mathura Prasad v. Ram Chandar Lal (1915) 37 All. 208: 3. A.L.J. 283: 28 I.C. 261 that the order of the Court of appeal was final and that the applicant before him having appealed from his exparte decree and the appellate Court having considered the case on its merits and dismissed the appeal, the case for reinstatement had gone out of his (the Munsif's) hands and that he had no further seisin of it. He, therefore came to the decision that on this legal ground the application must be rejected; but in addition to thus deciding the matter on this ground of objection he also considered the merits of the case; and after having given a lengthy summary of what had taken place before him and the causes which had given rise to the substantial delay between the date when the plaint was entered and the hearing of the suit, he was of the view that he saw absolutely no ground for restoration of the matter. The defendant appealed from this decision to the Subordinate Judge and on the 11th of March of this year that Judge decided against the appellant. The Subordinate Judge did not think that it was worth while to go into the question of the merits because he was satisfied that the legal grounds upon which the Munsiff had dismissed the appellant's application were sound and should be affirmed. He held, therefore that the Munsif was right in refusing to restore the suit.

6. It may perhaps, in passing, be desirable to mention that it apparently suggested to the defendant that a second appeal should have been presented from the judgment of the Subordinate Judge of the 18th January 1921. The time, however, for filing such an appeal had expired; an application to this Court was made in June of this year asking that under the circumstances the time should be extended so as to allow the entry of the appeal. The application, however, was rejected on the 31st July by Mr. Justice Das and Mr. Justice Adami, on the ground that under the provisions of the Limitation Act the circumstances under which extension of time was sought had no application in a case of this nature.

7. As a last resort the defendant has now brought this matter before this Court, asking that it should exercise its revisional jurisdiction.

8. I need not, I think, refer, for it is strictly speaking hardly material so to do more than casually, to the allegations of hardship which have been suggested in this application: it is sufficient to state that it is now said that principally owing to fact that the applicant is a pardahnashin lady and on that account unacquainted with legal or business affairs, certain important documents of title, which would have assisted her most materially in connection with her contention, which she would have desired to adduce in defending herself in the original suit, had been

mislaidd and had not been discovered in time for their presentation before the Munsif in 1919, I can only say in comment upon this statement that it does not, so far as I can see, appear clearly from any of the records which have been placed before my notice that the exact nature of these documents was explicitly characterised.

9. The only point which has been pressed before me is that in this matter it was incumbent upon the Subordinate Judge to have considered the decision of the Munsif so far as it related to the reasons why he had originally decided to hear the case ex-parte and to reject the application originally made for further time and to refuse to set aside the application for re-in statement on questions relating to the facts of the case; und that the subordinate Judge should not have dealt solely with the question of law and affirmed the decision of the Munsif on the legal ground alone, because, so it is argued, both the Munsif and the Subordinate Judge were wrong in thinking that the Munsif was debarred by what had taken place from reinstating the case before him. This contention formed the subject matter of spirited argument; and there seems little doubt that, unless one looks very carefully into the present position of the law as referred to in the recent decisions, there has been some discrepancy of opinion. Put very broadly the position may thus be stated; the Munsif may perhaps be entitled to consider an application made to him to review his decision even where an appeal has been lodged; but where such an appeal has been actually decided the Munsif has no power to entertain such an application. The line of cases to which reference has been made in this case to me may, for practical purposes, be regarded as commencing with that of Ramanadhan Chetti v. Narayan Chetti [1904] 27 Mad. 602: 14 M.L.J. 321. In that case in 1904 it was held that it must on principle be considered that after the due tiling of an appeal and during its pendency the power of the inferior Court in any way to deal with the litigation is completely in abeyance other than in connection with the carrying out of its decree. This case was followed by that of Sankara Bhatta v. Subroya Bhatt and others [1907] 30 Mad. 535: 17 M.L.J. 436 where it was held that after an appeal had been filed against the decree of a lower Court the power to set aside the original decree on an application u/s 108 CPC (new Order IX, rule 13, becomes vested in the appellate Court. In the other direction, however, were cited the case of Zendulal Nandlal v. Kishorilal Mehtehrai and another [1899] 23 Bom. 716: 1 Bom. L.R. 213 where it was held that when an exparte decree had been satisfied there was still nothing to disentitle a defendant from applying successfully to a Court to set it aside u/s 108 of the Civil Procedure Code. Far more important however than this case was that of Chenna Reddi v. Peddaobi Reddi and another [1909] 32 Mad. 416: 6 M.L.T. 135: 19 M.L.J. 388: 2 I.C. 802. In that case it was held in 1909 that where an application for review had been presented by a party to a suit and an appeal had afterwards been preferred, the Court to which the application for review is made was not thereby deprived of jurisdiction to entertain the application. The case of Ramanathan Chetti v. Narayan Chetti [1904] 27 Mad. 602: 14 M.L.J. 321 to which I have already made reference was

overruled; whilst that of *Sankara Bhatta v. Subraya Bhatta and others* [1907] 30 Mad. 535: 17 M.L.J. 436 was there distinguished. Now in the course of their Lordships' judgment, which was that of a Full Bench consisting of Mr. Justice Wallis, Mr. Justice Munro and Mr. Justice Sankaran Nair their Lordships referred to the intention of the framers of the Civil Procedure Code. Their Lordships say:-

This reference raises the question whether when an application for review of judgment has been made prior to the filing of an appeal, and an appeal is filed subsequently, the Court is precluded from proceeding to hear the application for review. Section 623 CPC provides for making an application for review before an appeal has been tiled, and Sections 624 and 630 provide that the Court is either to reject the application or to grant it and rehear the case. The Legislature has thus conferred upon the party a right to apply for review and upon the Court jurisdiction to entertain the application, and has directed how it shall be dealt with. When a right and a jurisdiction are conferred expressly by statute in this way it appears to me that they cannot be taken away or cut down except by express words or necessary implication. There are no express words and the question, therefore, is: Is there any necessary implication?

10. Their Lordships continue to consider why they regard implication as being absent, and after expressing their disapproval of the decision in the case of *Ramanadhan Chetti v. Narayan Chetti* [1904] 27 Mad. 602: 14 M.L.J. 321 they go on to add:-

Now after an appeal has been tiled the appellate Court is seised of the case and should no doubt be applied to rather than the Court of First Instance; but it is a very difficult thing to press this principle so far as to say that the act of a party in filing an appeal deprives the Court of First Instance of power to dispose of an application, which has been properly made to it ill the exercise: of its jurisdiction. Such a notion would never, I think have occurred to the framers of the Code.

11. Their Lordships then go on to consider what was the attitude of mind in which the English lawyers who were drawing up this Code must have been and they then make use of an expression (referring to the position under English law) upon which the learned Counsel for the applicant before me has very rightly laid great stress.

12. Their Lordships say:-

They were English lawyers engaged in conferring upon Indian Courts subject no doubt, to modifications and restrictions jurisdictions to grant relief by way of review of judgment similar to that which had been exercised by Courts of Equity in English and by the Supreme Courts in the exercise of their equitable jurisdiction. It is only necessary to refer to what is said in Mitford's Pleadings in Chancery, 5th edition, page 101, on bills of review or to the observations of Cozens Hardy, L.J., in *Bright v. Sellar* [1904] 1 K.B. 6 to set that Section 623 contains an adaptation of the practice as to bills of review in equity. Not only is there no warrant for the notion that the filing of an appeal deprived the Court of

Jurisdiction to proceed further with a bill of review but it was even held that a bill of review might be filed after the affirmance of the decree by the appellate Court. If the framers of the Code had intended to introduce any such rule I think they would have said expressly not only that an application for review should not ordinarily be made after the filing of an appeal but also that filing of an appeal should determine the jurisdiction to dispose of an application made before the filing of the appeal. On the whole it seems to me impossible to hold that there is any necessary implication that the filing of an appeal operates as a stay of proceedings on an application for review, especially as Section 623 itself provides for making certain applications for review even after the filing of an appeal.

13. Now, it does certainly appear at first sight that these remarks constitute some foundation for the contention which has been urged upon me by the learned Counsel for the applicant here. There are, however, later cases, the trend of all of which appears to point in a somewhat different direction. The first of these is to be found in the decision in the case of 14 CWN 667 (Privy Council) . It is not necessary to refer in detail to the facts in that case, save to indicate that there was an order passed by the Subordinate Judge of Moradabad amending a decree of his Court and that previous to the order of amendment that decree had been affirmed on appeal by the High Court. The High Court of Allahabad has observed that the Subordinate Judge had no jurisdiction under such circumstances to amend his order, and their Lordships of the Privy Council (in commenting upon a peculiar anomaly which was observable between the position of two separate decree holders, one of whom had succeeded in obtaining an amendment of his order originally made by the Subordinate Judge, and the other of whom had not, remarked:-

Their Lordships have not had the advantage of hearing the case argued for the respondent, but they think the High Court have themselves said enough to make it clear that if the decree of the First Court was made without jurisdiction as altering a decree after it had been affirmed on appeal in the case of one of joint decree holders, so also the alteration in the case of another of joint decree-holders was equally ineffectual.

14. The observations to which their Lordships referred as having been made by the High Court of Allahabad were to the following effect:-

A Bench of this Court on the application by Lachman Das allowed the first application, holding that the Subordinate Judge had no power to modify his decree after it had been confirmed by the High Court and set aside the order complained of. In the other application, the Bench made an order rejecting it, holding that, under all the circumstances of the case, this was not a case in which they should exercise their discretionary power in revision. The consequence is that there are now two joint decree-holders, as to one of whom the decree contains a provision for future interest the value of which is Rs. 19,000 odd, whilst as to the other this provision does not exist. The provision of the decree, therefore, seems to be apparently inconsistent, as out of two joint

decree-holders one can execute the decree plus future interest, whilst the other cannot.

15. It would certainly seem from their Lordships' observations in that case that their Lordships did not necessarily associate themselves with the position which had been taken up by the High Court of Allahabad in their view that the decree of the inferior Court had been made without jurisdiction in altering that decree after it had been affirmed on appeal. The case was followed by that of *Kumud Nath Roy Chowdhury Vs. Jotindra Nath Chowdhury*, and decided in 1911. In that case, which was heard by Mr. Justice Mookerjee and Mr. Justice Teunon, it was declared that an original Court can entertain an application to set aside an *exparte* decree although an appeal by the contesting defendant is pending in the appellate Court. This decision may not, as I have just quoted it, appear to carry the matter in any way further; but there are words used in the judgment of the Court to which ray attention has been drawn by the learned Vakil for the respondent before me, and which certainly seem to assist in a proper consideration of the point which is now before me for my decision. Their Lordships say at page (sic):-

In so far as the second point is concerned it has been argued by the learned Vakil for the respondent that the Subordinate Judge had no jurisdiction to entertain the application to set aside the *exparte* decree, because the contesting defendants had preferred an appeal to this Court against the decree.....In our opinion, the objection by the respondent must be overruled.

16. Then their Lordships after referring to cases which were quoted before them and to which I have here already for the most part made some reference go on to remark:-

It has been broadly contended, however, by the learned Vakil for the respondent, upon the authority of expressions to be found in the judgments in *Dhonai Sardar v. Tarak Nath Chowdhury* (1910) 12 C.L.J. 53: 5 I.C. 525; *Ramanadhan Chetti v. Narayanan Chetti* [1904] 27 Mad. 602: 14 M.L.J. 321 and *Sankara Bhatta v. Subraya Bhatta* [1907] 30 Mad. 535: 17 M.L.J. 436 that the immediate effect of the presentation of an appeal to the superior Court against the decree of a subordinate Court, is to destroy the jurisdiction of the latter Court to deal with the judgment in controversy in any way. We are not prepared to accept this proposition as well founded on principle and it is, as a matter of fact, opposed to the decision of the House of Lords in *Mellish v. Richardson* (1832) 36 R.R. 111 in which it was ruled, that where the Court would otherwise have the authority to amend the judgment, it may be done after an appeal has been taken. This view is entirely inconsistent with the theory that the mere presentation of an appeal puts it beyond the power of the Original Court to deal in any manner with the judgment under appeal.

and then their Lordships use words here of considerable importance. They add:-

The position is obviously different after the adjudication of the appeal, when the original judgment has been superseded by the judgment of the Court of Appeal:

14 CWN 667 (Privy Council)

17. The matter does not, however, altogether remain there. In the case of Mathura Prasad v. Rum Charan Lal, (1915) 37 All 208: 13 A.L.J. 283: 28 I.C. 261 the question here seems to have been considered by Mr. Justice Chamier and Mr. Justice Piggott Their Lordships there held that when once the High Court had confirmed a decree on appeal it was not open to the Court which passed the decree to entertain an application to set the decree aside and it made no difference that the application to set the decree aside was filed before the appeal was disposed of. Their Lordships in that case had cited before them practically all the cases to which I have referred, and in their judgment they remarked.

This case was decided by the Court of 8rst instance on the 20th September 1911. On the 30th of November, 1911, present appellant presented his application to have the decree set aside as against him. When the application was called on for hearing it was discovered that the file of the original suit had been sent to this Court in consequence of an appeal which had been filed by other defendants. The hearing of the application was put off from time to time, the Court apparently being of opinion that it was unnecessary or impossible to take up the application until after the appeal had been disposed of by this Court. The appeal was disposed of by this Court on the 24th of February 1913, and after the record had been returned to the Court below the applicant's application was taken up. It was dismissed by the Subordinate Judge on the ground that he had no jurisdiction to alter or set aside the decree passed by him inasmuch as it had been confirmed by, and become, as he says, merged in, the decree passed by this Court We have been referred to several decisions bearing on the question whether a Court of first instance has power to alter or set aside its decree after an appeal has been filed against that decree. There seems to be some difference of opinion on the question whether a lower Court can entertain an application for review or to set aside or alter its decree while an appeal against the decree is pending in a superior Court, but all the authorities seem to be agreed that when a decree has been passed by the superior Court the lower Court cannot alter, or amend its decree.

18. Now, when their Lordships make use of the expression "all the authorities" they are evidently referring to the cases which were quoted before them by the respondents to the appeal which they were hearing. Those cases as set out in the report are: 14 CWN 667 (Privy Council) , Sankar Bhatta v. Subraya Bhatta [1907] 30 Mad. 535: 17 M.L.J. 436, Dhonai Sardar v. Tarak Nath Chowdhury (1910) 12 C.L.J. 53: 5 I.C. 525 and Kumud Nath Roy Chowdhury Vs. Jotindra Nath Chowdhury, to which I have just referred.

19. I have now completed the review of this legal point which has been placed before me. I think there can be no doubt that on a proper survey of the result of the decisions to which I have been referred and to which I have referred, the contention put forward by the learned Counsel for the applicant here must fail I am of opinion that the Munsif and the Subordinate Judge were both right in the

legal decision to which they came namely, that after the original appeal to the Subordinate Judge from the Munsif's exparte decree had been dealt with by the Subordinate Judge and decided by him on the merits as well as on the question of the Munsif's decision refusing the application of the defendant for further time, it was not open to the Munsif to entertain the application which had been made to him to set aside his exparte decree I think further that the Subordinate Judge was in no way incorrect in view of the opinion which he had formed as to the correctness of the Munsif's attitude in refusing to entertain the application to reopen his order, in dismissing the appeal which was made to him solely on the ground that the Munsif was right in considering that the decision of the appeal in the original suit had debarred him from exercising further jurisdiction over the matter.

20. This application to me must, therefore, fail with costs, and I must decline to interfere. Hearing fee three gold mohurs.