

(1955) 03 RAJ CK 0011

In the Rajasthan High Court

Case No : Civil Miscellaneous Petition No. 12 of 1954

Prohit Swaroop Narain

APPELLANT

Vs

Subh Karan Radha Mohan

RESPONDENT

Date of Decision : 24-03-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 105, 109, 109(a), 109(c), 110
Constitution of India, 1950 — Article 132, 133, 133(1), 134, 135
Government of India Act, 1935 — Section 205, 205(1)

Citation : AIR 1955 Raj 208

Hon'ble Judges : Sharma, J;Ranawat, J

Bench : Division Bench

Advocate : D.M. Bhandari, for the Appellant; C.L. Agarwal, for the Respondent

Final Decision : Dismissed

Judgement

Sharma, J.—This is a petition by Prohit Swaroop Narain for leave to appeal to Supreme Court under Art. 133(1)(a) and (b), Constitution of India and S. 109(a), Civil P.C.

2. The order against which the leave to appeal is sought was pronounced by a Division Bench of this Court in Civil Revision No. 80 of 1954 on 25-11-1954. The applicant was a defendant in a suit brought by the opposite party M/s. Subh Karan Radha Mohan for the recovery of Rs. 28,9,711-10-3 by sale of certain property said to have been mortgaged by the applicant with the opposite party. Two issues namely Nos. 9 and 11 were framed by the Court of first instance on the preliminary objection of the defendant and they are as follows:

9. Whether the agreement referred to in issues Nos. 7 and 8 is sufficient to extinguish the mortgagee rights?

(10) Whether the suit is premature?

3. Issue No. 9 was decided in favour of the plaintiffs and it was held that the mortgagee rights had not been extinguished. A question was raised during the

decision of the said issue whether oral evidence could be led to prove an oral agreement subsequent to the mortgage deed. It was decided by the Court of first instance that the defendant was not entitled to lead any evidence to prove this subsequent oral agreement and thereafter held that the mortgage had not been extinguished.

4. As to issue No. 11, the Court came to the conclusion that the suit was premature so far as the sale of mortgaged property was concerned. But it held that the plaintiff could get a money decree for the amount sued for. Thereafter, the case was fixed for further evidence of parties.

5. In his application for revision before this Court, the applicant challenged the decision of the Court of first instance on both the above issues. A preliminary objection was raised on behalf of the opposite party that in view of the Full Bench decision of this Court in the Case of Purohit Swarupnarain Vs. Gopinath and Another, , as the two points can be raised under S. 105, Civil P.C. in an appeal after the trial Court has finally passed a decree the revision was not maintainable. This preliminary objection was accepted by the Division Bench and it dismissed the revision by the order dated 25-11-1954.

6. In this application, the applicant challenges the Full Bench Decision in Prohit Swaroop Narain's case (A) and says that it is against the view of most of the High Courts in India and therefore, the applicant's application, raises a question of law of general importance. It has, therefore, been submitted that the case is a lit one for leave to appeal to Supreme Court both under S. 109, Civil P.C. and Art. 133(1) of the Constitution of India.

7. A preliminary objection has been taken by Mr. C.L. Agarwal on behalf of the opposite party that the order of this Court against which leave is sought or appeal to Supreme Court is neither a judgment nor a decree nor a final order within the meaning of Art. 133(1) of the Constitution of India. It was argued that an appeal could lie to the Supreme Court under Art. 133(1) only against a judgment finally disposing of a case or a decree or a final order.

In the present case, the order against which permission to appeal is sought was only an interlocutory order which did not finally dispose of the suit but left it alive. No leave to appeal can, therefore, be given it was further argued that the provisions of S. 109, Civil P.C. are subject to Chap. IV Part V of the Constitution and as Art. 133 finds place in the said Chapter of Part V of the Constitution, S. 109 cannot confer any wider powers of appeal than Art. 133.

8. We have been taken through a very large number of authorities by the learned counsel for both the parties. Mr. D.M. Bhandari on behalf of the applicant relied upon the observations of Shearer, J. in the Full Bench case of Tobacco Manufacturers (India) Ltd Vs. The State, . The Full Bench consisted of three Judges namely Shearer, Sarjoo Prosad and Rai JJ. Sarjoo Prosad and Rai JJ. held the use of the term "judgment" or "final judgment" in the eye of law does not

bear any different significance, and the use of the word "final" as qualifying "judgment" is merely "ex cautela." It is in this orthodox and juristic sense that the term "judgment" appears to have been used in the sense in which it was used in S. 205, Government of India Act, 1935 and the dropping of the word "final" before the word "judgment" did not make any difference whatsoever.

In that case certain questions were referred to the High Court by the Revenue Authorities under S. 21(5), Bihar Sales Tax Act, and it was held that

the judgment was not a judgment in the technical sense of the term but merely a sort of opinion or advice.

It was further held that

the fact that under S. 21(3), Bihar Sales Tax Act, the High Court calls for a reference from the Revenue Authorities does not lend any additional finality to the judgment which the High Court comes to pronounce on the hearing of the reference.

Shearer J., however, held that

Art. 133(1) of the Constitution confers, like S. 205, Government of India Act, 1935, a general right of appeal. In his view the words "judgment, decree or final order" must be read together as a single phrase compendiously including every decision except a decision which is an order and is not a final but a preliminary or interlocutory order.

9. On behalf of the opposite party reliance has been placed by his learned counsel on a very large number of rulings both of English as well as Indian Courts and it has been argued that the appeal could lie to the Supreme Court by virtue of Art. 133 of the Constitution of India only against the judgments which finally dispose of the case or against decrees or final orders. If the judgment does not finally dispose of the case and keeps it alive, no appeal can lie. A ruling of (Calcutta High Court has been relied on in support of the view that nothing in S. 109, Civil P.C. can confer any wider powers of appeal than what are given by Art. 133. Rulings relied on are as follows:-

"Saloman v. Warner", 1891-1 QB 734 (C); "Bozsm v. Altrincham Urban District Council", 1903-1 KB 547 (D); "Issacs & Sons v. Salbstein", 1926-2 KB 139 (E); "Firm Ramchand Manjimal v. Firm Goberdhandas Vishandas "Ratanchand", AIR 1920 PC 86 (F); "Tata Iron and Steel Co. Ltd. v. Chief Revenue Authority of Bombay", AIR 1923 PC 148 (G); " AIR 1925 155 (Privy Council); AIR 1933 58 (Privy Council); AIR 1939 43 (Federal Court); AIR 1949 11 (Federal Court) "Mohammad Amin Brothers Ltd. v. Dominion of India", AIR 1950 FC 77 (L); Chandra Singh Dudhoria and Others Vs. The Midnapore Zemindary Co. Ltd., ; Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others, ; H. Chandanmull and Co., by Proprietor, C. Laxmichand Mehta Vs. Mohanlal M. Mehta and Others, ; "Laxmi Kumar v. Jamunadas", AIR 1953 MP 45 (P); "Vishwanath v. Kanakamal", AIR 1953 MP 204 (Q); Basudevanand Vs. Raghubir Saran Rastogi

and Others, ; "West Jamuria Coal Co. v. Bholanath Roy", AIR 1954 Cat 424 (S); Mulugu Raghavacharyulu Vs. Mulugu Sri Venkata Ramanuja Charyulu and Others, ; Ratanlal Vs. Bhairondan and Others,

10. Taking up these authorities in the order mentioned above, in the case of " 1891-1 QB 734 (C)", the defendants raised by their defence the point of law that the statement of claim did not disclose any cause of action. A Judge at Chambers ordered that the point should be set down for argument and disposed of before the trial. It accordingly came on before the Divisional Court, who after argument ordered under O. 25, R. 3, that the action should be dismissed with costs.

Thereupon, the plaintiff gave a four days" notice of appeal as from an interlocutory order. A preliminary objection was taken that the notice of appeal should have been a 14 days" notice, the order being a final order, as there had been a final decision of the rights of the parties inasmuch as the action was dismissed with costs. It was held by Lord Esher, M.R. that the question whether the order is preliminary or final must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. It was observed that

If their decision, whichever way, it is given, will, if it stands, finally dispose of the matter in dispute that for the purposes of the above mentioned rules, would be final and 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 it is not final, but interlocutory.

11. In the case of " 1903-1 KR 547 (D)", mentioned above, an order was made in an action brought to recover damages for breach of contract that the questions of liability and breach of contract only were to be tried, and the rest of the case, if any, was to go to, an official referee. At the trial the judge held that there was no binding contract between the parties and made an order dismissing the action. Against this order an appeal was made and it was held that the order was a "final order". In defining the words "final order" Lord Alverstone C.J., observed that

The real test for determining this question whether the order is final or not is "does it finally dispose of the rights of the parties?" If it does, then it ought to be treated as a final order, but if it does not it was then an interlocutory order.

12. In the case of " 1926-2 KB 139 (E)", the order was held to be an interlocutory order and therefore, it was held that no appeal lay against it.

13. The test laid down by the above English authorities is that a "final order" is one which finally disposes of the suit and does not keep it alive. If it keeps it alive and does not dispose it of, it is not a final order. The above three decisions of English Courts are therefore useful only so far as they illustrate the difference between the final order and the interlocutory or preliminary order.

14. Now we come to the authorities of the Privy Council and those of Indian High

Courts referred to by the learned counsel for the opposite party.

15. In chronological order, the first case is that of "AIR 1920 PC 86 (E)". In that case, an order was made refusing stay of suits under S. 191, Arbitration Act. It was held that it did not finally dispose of the rights of the parties and as orders refusing stay of suit do not finally dispose of those rights, but leave them to be determined by the Courts in the ordinary way, they are not final orders. Although a certificate had been granted under S. 110, Civil P.C., yet the appeal was rejected, on the above ground by the Privy Council.

16. In the case of AIR 1923 PC 148 (G) an appeal was taken against the judgment of the High Court on a question referred to it under S. 51, Indian income tax Act of 1918. It was held by their Lordships that the judgment of the High Court did not finally dispose of the case and the income tax authorities were to decide it in accordance with the opinion of the High Court. No appeal therefore, lay against the judgment of the High Court on the points stated.

17. In AIR 1925 155 (Privy Council) Letters Patent of Bombay High Court gave a right of appeal against the judgment of a single Judge to a Division Bench and it was held by their Lordships of the Privy Council that "the term 'judgment' in the Letters Patent of the High Court meant in civil cases a decree and not a judgment in the ordinary sense."

18. In AIR 1933 58 (Privy Council) it was held that

the test of finality is whether the order "finally disposes of the rights of the parties"; where the order does not finally dispose of those rights, but leaves them "to be determined by the Courts in the ordinary way", the order is not final. That the order "went to the root of the suit, namely, the jurisdiction of the Court to entertain it," is not sufficient. The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it under S. 109(a).

In that case the suit was brought for damages but the plaintiff became insolvent during the pendency of the suit. The suit was dismissed for the Official Assignee's failure to furnish security. The appellate Court, however, held that the claim being one for damages did not vest in the Official Assignee and remanded the case for trial on merits. It was held that

the order of remand did no doubt decide an important and even a vital issue in the case, but it left the suit alive, and provided for its trial in the ordinary way and hence no appeal lay against it under S. 109(a).

19. In AIR 1949 11 (Federal Court) an appeal was filed against the order of a Magistrate in a criminal case repealing the objection of the accused that the High Denomination Bank Notes (Demonetisation) Ordinance III of 1946 under which the accused was being prosecuted was no longer in force. It was held that the order of the Magistrate was neither a judgment nor a decree nor a final order and therefore, no appeal lay under S. 205(1), Government of India Act, 1935.

It may be noted that S. 205(1) provided for an appeal to Federal Court from any judgment or decree or final order of a High Court in British India and the same words have been used in Art. 133 of the Constitution of India.

20. In AIR 1950 FC 77 (L), an appeal to Federal Court was directed against a decision of a Bench of Calcutta High Court by which the winding up order of a single Judge under the Companies Act was set aside and the application for winding up was directed to be kept on the file. It was held that the order appealed from was not a final order and the appeal was incompetent under S. 205(1) even though the High Court had granted a certificate in terms of that special section.

Further, it was held that if the order which was made in the case was interlocutory order, the judgment must necessarily be held to be an interlocutory judgment and no appeal is provided against the interlocutory judgment or order. The judgment was delivered by B.K. Mukherjea J. (the present Chief Justice of India) and it was held that

the test for determining the finality of an order is, whether the judgment or order finally disposes of the rights of the parties. The finality must be a finality in relation to the suit. The fact that the order decides an important and even a vital issue is by itself not material unless the decision puts an end to the suit.

It was held that no appeal lay to the Federal Court under S. 205(1), Government of India Act as the judgment or order of the High Court did not finally dispose of the petition for winding up.

21. In AIR 1920 PC 86 (F) referred to above, the decision turned upon the meaning of the word "final order" in S. 110, Civil P.C. In AIR 1923 PC 148 (G) the decision of the High Court on a reference under the Indian income tax Act was considered to be a mere opinion and not a final order disposing of the rights of the parties. In AIR 1925 155 (Privy Council) their Lordships were interpreting the meaning of the word "judgment" in the Letters Patent of Bombay High Court.

In AIR 1933 58 (Privy Council) their Lordships had again to consider the meaning of the word "final order" as used in S. 109 (a), Civil P.C. In AIR 1949 11 (Federal Court) their Lordships of the Federal Court had to consider the meaning of the word "judgment" or "final order" as used in S. 205(1), Government of India Act, 1935. Similarly in AIR 1950 FC 77 (L), their Lordships of the Federal Court had again to consider the meaning of the word "judgment" or "final order" in S. 205, Government of India Act, 1935.

22. Before the amendment of S. 109 by the Adaptation of Laws Order, 1950, only the words "decree or final order" were used in S. 109(a) and the word "judgment" was not used therein. These judgments which deal with S. 109 as it stood before the said amendment are therefore of use only so far as they define the term "final order" used in S. 109(a) or (b). After the amendment of S. 109 by the Adaptation of Laws Order, 1950, the word "judgment" has also been

embodied in cls. (a) and (b) of S. 109.

The same words have been used in Art. 133 of the Constitution. In S. 205, Government of India Act, 1935, too, the same words "judgment" decree or final order had been used and they are in the same sequence as in Art. 133 of the Constitution and Cls. (a) & (b) of S. 109, Civil P.C. Those judgments, therefore, which have defined the word "judgment" as used in S. 205, Government of India Act, 1935 are of very great help in deciding the question as to what is the meaning of the word "judgment" as used in Art. 133 of the Constitution.

As has been said above, in AIR 1949 11 (Federal Court) and that of AIR 1950 FC 77 (L), the term "judgment" as used in S. 205, Government of India Act, 1935 directly came up for interpretation and it was decided that a judgment or order against which an appeal could be filed in the Federal Court under S. 205, Government of India Act, 1935, should be one by which the rights of the parties have been finally determined and the case has not been left alive for further prosecution. As the same words have been used in Art. 133 of the Constitution, there is no reason to depart from the definition of these terms as given to them under S. 205(1), Government of India Act, 1935 by the Federal Court.

23. Coming now to the decisions which directly bear upon the wording of Art. 133(1) of the Constitution, we first take up the case of Chandra Singh Dudhoria and Others Vs. The Midnapore Zemindary Co. Ltd., Out of the case cited this case is the first in chronological order in which the term "judgment or final order" as used under Art. 133(1) of the Constitution came up for interpretation. In that case, the decree of the original Court was set aside and the case was sent back to that Court to be heard in accordance with the directions contained in the judgment of the appellate Court and it was held that against that order of remand, no appeal lay to the Supreme Court. It was observed:

the finality of the order under Art. 133(1) must be in relation to the suit i.e., it must put an end to the suit altogether. An ordinary order of remand cannot be described as a final order and therefore, no appeal lies from it to the Supreme Court under Art. 133.

24. In H. Chandanmull and Co., by Proprietor, C. Laxmichand Mehta Vs. Mohanlal M. Mehta and Others, on a notice of filing an award in Court being served on the petitioner, he filed merely an application purporting to be under S. 5, Limitation Act for excusing the delay instead of filing an application to set aside the award within the time prescribed by Art. 158. This petition was dismissed by the High Court. The petitioner sought leave to appeal to Supreme Court. It was held that "the order did not amount to a final judgment that falls within the category of judgment referred to in Art. 133(1) of the Constitution."

25. In the case of AIR 1953 MP 45 (P), after the sale of the mortgaged property, the decree-holder applied to the executing Court for the sale of a house and a shop alleging that the decree in his favour contained a direction that if the proceeds of the sale of the mortgaged property were insullicient to satisfy the

decree, the deficient amount shall be realisable from the house and shop and that the decree had remained unsatisfied even after the sale of the mortgaged property.

When a proclamation of the sale of the property was issued, the applicant came forward and objected to the sale claiming that he was a bona fide purchaser of the property from the judgment-debtor and that the decree did not create a charge on the property and consequently it was not liable to be sold in execution of the decree. The Court executing the decree rejected the applicant's contention that no charge was created by the decree against the property. The applicant then filed an appeal to the High Court.

The High Court held that the decree created a charge on the property and directed the executing Court to decide the other objections of the applicant. It was held that the order which was passed by the High Court was on the face of it, not a final order as it did not put an end to all the points in dispute between the parties about the sale of the property. Leave to appeal to the Supreme Court was consequently, refused.

26. In AIR 1953 MP 204 (Q), a receiver of the mortgaged property was appointed. It was held that the order was not a final order and that no leave could be given to appeal to the Supreme Court.

27. In Basudevanand Vs. Raghubir Saran Rastogi and Others, the executing Court allowed an objection that the execution proceedings could no longer proceed in view of S. 4(d), Bihar Land Reforms Act and accordingly ordered the dropping of the proceedings but the High Court in appeal set aside the order of the executing Court on ground that the objection was not valid and was also concluded by res judicata.

It was held that "the order of the High Court was neither a "judgment" nor a "final order" within the meaning of Art. 133 of the Constitution and consequently, no leave to appeal to Supreme Court could be given under Art. 133 of the Constitution.

28. In West Jamuria Coal Co. Vs. Bholanath Roy and Others, the company prayed for leave to appeal to Supreme Court against an order of the Calcutta High Court passed in second appeal by which the case was remanded to the Court below for disposal in accordance with certain directions given. It was held that the order was neither a "judgment", nor a "decree" nor a "final order" within the meaning of Art. 133 as the orders which do not terminate the suit or proceedings are not within the contemplation of that Article. The argument that leave could be given under S. 109(c), Civil P.C. was repelled on the ground that S. 109(c), Civil P.C. does not prevail over Art. 133(1) of the Constitution.

29. In Mulugu Raghavacharyulu Vs. Mulugu Sri Venkata Ramanuja Charyulu and Others, the Court of first instance dismissed the suit on the ground that the plaintiff had failed to establish the adoption set up by him. The High Court on

appeal held that the adoption was established and remanded the case for trial to the lower Court. It was held that the word "judgment" in Art. 133 is used in the sense of a decree or order and not in the sense in which it is used in the CPC and because an appeal under Art. 133 could lie against the judgment, decree or final order only and the order in question was neither a judgment nor a decree nor a final order, therefore, no appeal lay against it.

30. In *Ratanlal Vs. Bhairondan and Others*, it was held by a Division Bench of this Court that

the word "judgment" used in Art. 133 cannot be taken in its widest possible sense as to include every order which terminates a proceeding pending in a High Court. The judgment must partake of the nature of finality attributed to a decree and a final order, when it is used in conjunction with the words "decree" or "final order"; otherwise the words "decree or final order" would become superfluous as every decision of the High Court in any case or proceeding before it would be a judgment.

It was further observed that.

when a High Court is dealing with a civil revision or appeal, the judgment, according to the Civil Procedure Code, is merely a statement given by the Judge of the grounds of decree or order. In such a case Court has to see whether there is a decree or a final order; the judgment containing merely reasons for the decree or order which follows upon it.

It is only in case of extra ordinary civil jurisdiction of the High Court, for example under Art. 226 of the Constitution that an appeal will lie from the judgment of the High Court finally deciding the dispute on the merits.

In that case an application was made to file a suit in "forma pauperis." That application was refused. Another application was made. It was also rejected, but the application was treated as a plaint and the applicant was allowed to pay the requisite court-fee stamp. The order regarding time to file the deficiency in court-fee was set aside by the High Court and leave was sought to appeal to the Supreme Court.

It was held that the order of the High Court could not be treated as a judgment within the meaning of Art. 133 of the Constitution. This ruling is a direct authority upon the point as to what is to be understood by the words "judgment or final order" as used in Art. 133(1) of the Constitution.

31. From the above, it will appear that there is overwhelming weight of authority in favour of the opposite party who contends that under Art. 133 of the Constitution of India leave to appeal can be given only against a decree or final order or a judgment which finally disposes of the case and does not keep it alive. Learned counsel for the applicant merely relied upon certain observations of Shearer J. in *Tobacco Manufacturers (India) Ltd Vs. The State*, The learned Judge says that:

"Judgment decree or final order" in Art. 133 must be read together as a single phrase compendiously including every decision except a decision which is an order and is not a final but a preliminary or interlocutory order.

It appears from the observations of this learned Judge himself that he was not prepared to say that every decision of the High Court came within the term "Judgment" as used in Art. 133 and an appeal lay to Supreme Court against every judgment. If we were to adopt the definition given to the term "judgment" under S. 2(9), Civil P.C. Court while considering the meaning of the term "judgment" as used in Art. 133(1) then appeal to Supreme Court should be allowed against every judgment because the term "judgment" within the meaning of S. 2(9), Civil P.C. means a statement given by the Judge of the grounds of a decree or order.

As the term order is unqualified it will include a statement given of the grounds of interlocutory or preliminary order as well, but in the opinion of Shearer J. himself, appeal under Art. 133 against a judgment which gives rise to interlocutory or preliminary order is not permissible under Art. 133. Therefore, in my view the observations of the learned Judge relied upon by the learned counsel or the applicant, do not wholly support him.

However, if, they are taken to mean that the term judgment in Art. 133 could include the statement given by the Judge of the grounds of an order which did not finally dispose of the case but kept it alive for further proceedings, with great respect I find myself unable to fall in line with him in face of the overwhelming authority including one of the Division Bench of this Court against such a view.

32. I now take up the argument of the learned counsel for the applicant that even though no certificate under Art. 133 of the Constitution can be granted for leave to appeal to the Supreme Court, yet the very wide words of S. 109(c), Civil P.C. authorise this Court to grant a certificate as the words judgment or final order" are not mentioned therein.

The words used in S. 109(c) are "from any decree or order". The order of this Court comes within the definition of the term "order" and the said order raises a question of law of great general importance. This Court can, therefore, grant a certificate under the provisions of S. 109(c), Civil P.C.

33. I have very carefully considered this argument of the learned counsel. There is no doubt that in S. 109(c) the words used are "decree or order." The words "judgment or final order" have not been used in this clause as they have been used in Cls. (a) and (b). This term "order" may be taken to be much wider than the terms "judgment or final order."

But in the opening paragraph, S. 109 says that an appeal shall lie to the Supreme Court under the said section subject to the provisions of Chap. IV of Part V of the Constitution and such rules as may from time to time, be made by the Supreme Court regarding appeals from the Courts of British India. Now the

Articles relating to appeal to the Supreme Court in Chap. IV, Part V of the Constitution are Arts. 132, 133, 134 and 136.

34. Article 134 relates to appeals in criminal cases and is, therefore, not applicable to the present case.

35. Under Art. 132 appeal lies to the Supreme Court from any judgment, decree or final order of a High Court whether in civil, criminal or other proceedings if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution. Under Art. 132, therefore, the High Court can certify the case as a fit one for leave to appeal to Supreme Court only when it involves a substantial question of law as to the interpretation of the Constitution.

38. Article 139 provides for a special leave to appeal to the Supreme Court and we are not concerned in this case with the said Article. The only Article besides Art. 132 which provide for leave to appeal to the Supreme Court in a Civil proceeding on a certificate from the High Court is Art. 133 of the Constitution. Sections 109 and 110, Civil P.C., also provide for appeal to the Supreme Court from the decisions of the High Court in civil proceedings. The question which has been decided by this Court in revision is simply a question of law, whether an application for revision lies in a case where the order in question can be challenged by way of appeal against the decree or final order under S. 105, Civil P.C.

No substantial question of law, as to the interpretation of the Constitution is involved and Art. 132 therefore does not apply. The only provision of Chap. IV of the Constitution, therefore, subject to which an appeal can be filed in the present case to the Supreme Court by virtue of the provisions of S. 109, Civil P.C., is Art. 133 of the Constitution.

As has been said above, the said Article allows an appeal only against the judgments, decrees or final orders in civil proceedings of High Court. The Supreme Court is a creature of the Constitution and has only those powers of appeal which have been conferred by Arts. 132, 133 and 134 and in civil proceedings where no substantial question of law as to the interpretation of the Constitution is involved appellate powers other than those of special leave to appeal are given by Art. 133.

Section 109 therefore, can give only these powers of appeal to Supreme Court in cases of the present nature instituted after coming into force of the Constitution which do not go outside the scope of Art. 133. Article 133 as has been said above restricts the right of appeal to the Supreme Court in civil proceedings only against the judgments, decrees or final orders of the High Courts. It does not give Supreme Court power of appeal against any order whatsoever. By S. 109(c), the Legislature could not therefore confer power of appeal on the Supreme Court in a civil proceeding against any order of a High Court, which does not finally dispose of the civil proceedings.

Reading the provisions of S. 109(c), with the provisions of Art. 133(1) of the Constitution, therefore, the only orders against which an appeal can be preferred to the Supreme Court in a civil proceeding are the final orders. To the extent that S. 109(c) confers any wider powers of appeal on the Supreme Court, it is "ultra vires" the Constitution. We are supported in this view by a recent decision of Madras High Court in *Mulugu Raghavacharyulu Vs. Mulugu Sri Venkata Ramanuja Charyulu and Others*, .

There too, the case did not fall under Art. 133(1) of the Constitution because the order of the High Court did not amount to judgment, decree or final order. It was argued that under S. 109(c), Civil P.C., appeal could be taken to Supreme Court from any order of a High Court in a civil proceeding provided the decision raised a question of great private or public importance.

This argument was repelled and it was held that S. 109 was subject to the provisions of Chap. IV of Part V of the Constitution and therefore, if S. 109(c) conferred any wider powers than what were given by the said Article, to that extent the provisions of S. 109(c) were ultra vires the Constitution and were therefore, ineffective.

I perfectly agree with this view of Calcutta High Court. It appears that realising that the provisions of Ss. 109 and 110, Civil P.C. should be brought in line with the provisions of Art. 133 of the Constitution, an amendment was made in the said sections by the Adaptation of Laws Order, 1950. Section 109 before the said amendment ran as follows:

Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council:

- (a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction;
- (b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction; and
- (c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council.

Section 110 before the said amendment ran as follows:

In each of the cases mentioned in cls. (a) and (b) of S. 109, the amount or value of the subject matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

or the decree or final order must involve directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the decree or final order appealed from affirms the decision of the

Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

Now after the amendment by the Adaptation of Laws Order, 1950, the two sections run as follows:

Section 109-Subject to the provisions in Chapter IV of Part V of the Constitution and such rules, as may, from time to time, be made by the Supreme Court regarding appeals from the Courts of the States and to the provisions hereinafter contained, an appeal shall lie to the Supreme Court;

(a) from any judgment, decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction;

(b) from any judgment, decree or final order passed by a High Court in the exercise of original civil jurisdiction; and

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

Section 110-In each of the cases mentioned in cls. (a) and (b) of S. 109, the amount or value of the subject matter of the suit in the Court of the First Instance must be twenty thousand rupees or upwards, and the amount or value of the subject matter in dispute on appeal to the Supreme Court must be the same sum or upwards,

or the judgment, decree or final order must involve, directly or indirectly, some claims or question to or respecting property of like amount or value,

and where the judgment, decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some, substantial question of law.

37. Thus, it will be seen that in order to bring the two sections in line with the provisions of Art. 133 of the Constitution, the word "judgment" was added in Cls. (a) and (b) of S. 109 and in S. 110 the amount was raised from ten thousand rupees to twenty thousand rupees and the word "judgment" was also added wherever the words "decree or final order" were used in the said section.

It may appear to be simply a duplication to amend Ss. 109 and 110 in accordance with the provisions of Art. 133 of the Constitution because even if S. 109 and S. 110 had been altogether deleted, the Supreme Court would have had the powers of appeal under Art. 133 of the Constitution. If it was meant that wider powers of appeal should be given under S. 109 or S. 110 than those given by Art. 133 of the Constitution, conferring of such wider powers could not prevail against the provisions of the Constitution.

On reading the provisions of Art. 133 as well as the provisions of Ss. 109 and 110 as they originally stood and as they stand after the amendment made by the Adaptation of Laws Order, 1950, I am clearly of opinion that it was intended that

the provisions of Ss. 109 and 110 should be brought into line with the provisions of Art. 133 of the Constitution because otherwise the provisions of Ss. 109 and 110 would have been of no use as they conferred wider powers of appeals than those conferred under Art. 133.

It was clearly before the mind of the amending authority that under Art. 133 of the Constitution the word "judgment" has been added before the words "decree or final order". It is why the word "judgment" was also added in Ss. 109 and 110 wherever words "decrees or final orders" were used. It is also clear that it was considered necessary that the provisions of S. 109 should be made subject to the provisions of the Constitution which deal with the powers of appeal to the Supreme Court in civil proceedings.

That is why in the very opening paragraph the words "subject to provisions of Chap. IV of Part V of the Constitution" were added. It seems, however, to have been overlooked that in Cl. (c) of S. 109, the words used were not "final order" but the word "order" only. It was, therefore, considered enough to say generally that for "decree or final order" the words "judgment, decree or final order" be substituted.

It appears that the fact that in one of the clauses, the word "order" was used and not the "final order" escaped notice. On a careful consideration, I am of opinion that it is not that the word "order" has been deliberately left in the amended section as it was in the original section, but it was only through an oversight that while making amendment in S. 109, it was not said that the word "final" be added to the word "order" in Cl. (c) of S. 109.

The intention of the Legislature appears to be quite clear, that is, to bring the two sections into conformity with the provisions of Art. 133 and as the powers of appeal under Art. 133 have been somewhat restricted, it was considered necessary that similar restrictions be placed in Ss. 109 and 110 by amending those sections. Even if it be supposed that the omission to amend S. 109(c) was deliberate, I am constrained to say that the omission cannot confer any greater powers of appeal on the Supreme Court than those given to it by the Constitution, and to the extent that the provisions of S. 109(c) exceed the powers given by Art. 133 of the Constitution, they are ultra vires.

38. Learned counsel for the applicant finally argued that Art. 135 of the Constitution was as much a part of Chap. 4 Part 5 of the Constitution as Art. 133. Therefore, if Art. 135 conferred wider powers of appeal on the Supreme Court which were exercisable by the Federal Court immediately before the commencement of the Constitution under any existing law, Supreme Court could also exercise them until some other law was enacted by Parliament which provided otherwise.

It was contended that cl. (c) of S. 109 as it stands at present found place in the Laws of India existing immediately before the commencement of the Constitution and the Federal Court had power of appeal under S. 109(c) from any decree or

order by virtue of the provisions of the Federal Court Enlargement of Jurisdiction Act and the. Abolition of Privy Council Jurisdiction Act, 1949.

As no law has yet been made by Parliament providing otherwise, the Supreme Court has the same powers as the Federal Court immediately before the Constitution in relation to such matters as are covered by S. 109(c) as it stands now and as it stood immediately before the Constitution. It was argued that the present matter is not covered by Art. 133 of the Constitution as under the said Constitution, an appeal can lie to the Supreme Court only from a judgment, decree or final order and not from an order generally.

Article 135 therefore applies and by virtue thereof, certificate can be granted for appeal to Supreme Court under S. 109(c), Civil P.C. Reliance has been placed upon a ruling of Bombay High Court in the case of Dajisaheb Vs. Shankarrao Vithalrao, On behalf of the opposite party, it has been argued that Art. 135 does not apply to the facts of the present case.

In the present case, Art. 133 is directly applicable as not only the judgment, decree or order was passed after the commencement of the Constitution but even the suit in which the order has been made was filed after the said commencement. Art. 135, it was argued, clearly excludes those cases to which Art. 133 is applicable. No advantage can, therefore, be taken of Art. 135 by the applicant. Mr. C.L. Agarwal who appeared for the opposite party relied upon a Full Bench decision of Madras High Court in the case of Gundapuneedi Veeranna and Others Vs. Gundapuneedi China Venkanna and Others, .

I have considered the arguments of both the learned counsel on this point. I am of opinion that Art. 135 of the Constitution does not apply to the facts of the present case. As has been argued by the learned counsel for the opposite party, not only the decision of this Court against which leave to appeal is sought was made after the commencement of the Constitution, but even the suit was filed after the Constitution had come into force.

Article 133 is, therefore, directly applicable and as it does not provide a right of appeal to the Supreme Court against the orders of this Court generally and gives a right of appeal only from the judgments, decrees or final orders, the applicant apart from the provisions of Art. 136 has no right to file an appeal against any order which does not amount to judgment, decree or final order. The ruling of the Bombay High Court upon which learned counsel for the applicant has relied does not apply to the facts of the present case.

On the date of the pronouncement of the order, the applicant in that case had a right to appeal to Federal Court. An application was, therefore, made for leave to appeal before the commencement of the Constitution but it could not be decided before the Constitution came into force. It was argued by the opposite party that as the Federal Court had ceased to exist and the Supreme Court had no right of appeal in suits the value of the subject matter of which was below Rs. 20,000, the application for certificate lapsed.

It was held that the right of appeal was a vested right and as it had accrued in the case in question before the Constitution came into force and as by Art. 135 the Supreme Court was given jurisdiction and powers in relation to matters which were exercisable by the Federal Court immediately before the commencement of the Constitution under any existing law, the applicant had a right to obtain certificate.

I am not concerned in this case to examine whether the view of Bombay High Court is correct or not because in this case no question of vested right of appeal arises and it cannot be said that any right of appeal had accrued to the applicant to appeal to Federal Court immediately before the commencement of the Constitution under any existing law. In the Bombay case, it was doubtful if the provisions of Art. 133 could be applied because the decree or final order had been passed before the Constitution came into force. In the present case there is absolutely no doubt that in the matter of appeal to Supreme Court Art. 133 is clearly applicable.

On behalf of the opposite party Mr. C.L. Agarwal has relied upon the Full Bench case of Madras High Court in Gundapuneedi Veeranna and Others Vs. Gundapuneedi China Venkanna and Others, . In that case the suit was filed before the commencement of the Constitution but the order of the High Court against which leave was sought was made and the application for leave filed after the Constitution had come into force. It was held that to such a case Art. 133 was applicable and therefore, the provisions of Art. 135 did not apply.

An argument was made on behalf of the applicant in that case that because the suit had been filed before the Constitution came into force, the applicant had a vested right of appeal to Privy Council on the date of the suit under the law then in force and after the passing of the Federal Court (Enlargement of Jurisdiction) Act 1947, that right was transferred to the Federal Court which had appellate jurisdiction immediately before the Constitution by virtue of the provisions of S. 109(a) under which pecuniary limit was that of Rs. 10,000 or above.

Simply because after the passing of the Constitution, the pecuniary limit had been raised to Rupees 20,000 by Art. 133 of the Constitution and by the amendment of S. 110 by the Adaptation of Laws Order, 1950, it cannot be said that Art. 133 applied and not Art. 135. This argument was repelled and it was held that in a case where the order of the High Court was made after the coming into force of the Constitution, appeal lay to Supreme Court in a civil proceeding under Art. 133 and simply because the pecuniary limit had been raised it could not be said that Art. 133 did not apply.

Very lucid reasons have been given by the learned Chief Justice who delivered the judgment in that case but for our purposes it is not necessary to say whether Art. 133 applied to a case like the one which was before the Full Bench of Madras High Court. In the present case even the suit was filed after the Constitution had come into force and therefore, there could be no question of vested right to

appeal to Privy Council or Federal Court under the law existing immediately before the Constitution.

To my mind, Art. 135 did not confer any jurisdiction and powers on the Supreme Court with respect to any matter to which the provisions of Art. 133 were directly applicable but for the limits laid down by the said Article. If we were to so construe Art. 135 that it gives jurisdiction and powers to Supreme Court in matters to which Art. 133 applied but for the limits laid down therein then the provisions of Art. 133 could have been easily nullified, if Ss. 180 and 110, Civil P.C. had been left as they were before the Constitution came into force.

I do not think that it was the intention of the constitution makers to leave the applicability of Art. 133 to the vagaries of Legislature. The language of Art. 133 is quite clear and there is nothing therein to say that it was intended to suspend the applicability of that article till the Legislature amended Ss. 109 and 110 Civil P.C. The Article came into force as soon as the Constitution came into force and no law which went beyond the scope, of the said article could be enforced to the extent it transgressed the provisions thereof.

In my opinion in civil cases filed after the coming into force of the Constitution, appeal could be filed to the Supreme Court under a certificate from the High Court only if conditions laid down in Arts. 132 and 133 were satisfied. In matters to which Art. 133 was clearly applicable but for the limits laid down therein, power of appeal could not be enlarged by virtue of Art. 135.

In my opinion, the application has no force and it should be dismissed but in view of the fact that hitherto there had been no authoritative decision of this Court wherein the provisions of S. 109(c) and Art. 135 of the Constitution have been considered in a case of this kind, I order the parties to bear their own costs.

Ranawat, J.

39. I agree that this application should be dismissed. The point regarding interpretation of S. 115 Civil P.C. which is desired to be agitated in an appeal before the Supreme Court is no doubt of very great importance and there is conflict of judicial opinion in this behalf in the various High Courts in India. A decision by the Supreme Court on this point would certainly bring about uniformity in the work of the various High Courts in India.

In view of the importance of the matter I very much wished that the petitioner had succeeded in obtaining leave to appeal to the Supreme Court but it is clear that leave to appeal cannot be granted by this Court in this case unless the petitioner can make out a good case in the meaning of Art. 133 of the Constitution of India or S. 109, Civil P.C. Mr. Bhandari having vehemently argued his case under Art. 133 ultimately agreed that he had not a very good case for leave to appeal under the provisions of that Article.

He however, tried to argue that the import of S. 109, Civil P.C. was wider than that of Art. 133 and he could claim permission to appeal to the Supreme Court

under S. 109, Civil P.C. It may be pointed out that the latest amendment to S. 109 has made the provision of that section subject to the provisions of Art. 133 of the Constitution. It is, therefore, difficult to hold that the scope of S. 109 can be regarded as wider than that of Art. 133. The term judgment, decree and final order in Art. 133 would only apply to such decrees, orders or judgments as are final.

In the present case the suit is still pending in the trial Court and it cannot be said that the order against which the petitioner wants to file an appeal to the Supreme Court is final in the meaning of Art. 133 of the Constitution of India. The authorities cited at the Bar have been thoroughly considered in the judgment of my learned brother and I need not discuss them here.

I would, therefore, dismiss the application.

40. The application is dismissed. No order as to costs.