
(1950) 07 CAL CK 0005

In the Calcutta High Court

Case No : Appeal from Original Decree No. 185 of 1940

Raj Kumar Chandra Singh and Others

APPELLANT

Vs

The Midnapore Zemindary Co. Ltd.

RESPONDENT

Date of Decision : 21-07-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 109, 109(a), 110
Constitution of India, 1950 — Article 133, 133(1)

Citation : 54 CWN 874

Hon'ble Judges : Harries, C.J.; Mitter, J

Bench : Division Bench

Advocate : Benoyendra Prosad Bagchi with Amiya Kumar Mukherjee, for the Appellant; Jnanendra Nath Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

Harries, C.J.—This is an application for leave to appeal to the Supreme Court from a decree of an Appellate Bench of this Court dated November 22, 1949. It would appear that the amount involved far exceeds Rs.20,000. But in my view we cannot grant leave to appeal in this case because the order is not a final order and it is not a case in which we could grant a certificate that the case was a fit one for appeal.

2. The litigation has had a long history. A suit was originally brought by the proposed Respondents Midnapore Zemindary Co. Ltd. as far back as the year 1930 claiming possession of five thousand bighas of land which was said to have emerged from the river Padma sometime before the year, 1927. The claim was dismissed by the trial Court, but on appeal a Bench of this Court came to the conclusion that these lands were accretions to lands of the proposed Respondents and, therefore, that the proposed Respondents were entitled to recover possession of the lands in suit, and made a decree for possession. The Bench then went on to consider the question whether the Midnapore Zemindary Co. Ltd. were entitled to mesne profits. They came to the conclusion that there

was a prayer for mesne profits; but instead of deciding the question themselves they directed the Court below to start an enquiry into the mesne profits. They further directed that it would be open to the Court below to decide whether there was any liability for mesne profits and of course it was only if they held that there was a liability that the question of amount would arise. The case, therefore, was remanded to the Court of the learned Subordinate Judge who first considered whether there was a liability to pay mesne profits. He held that as the Plaintiff had obtained a decree for possession the Plaintiff was entitled to mesne profits up to the date of delivery of possession. The learned Judge, however, was of opinion that no rent had been paid and that there had not even been an offer to pay rent. The Court held following certain decisions, that the Appellants could claim a set-off against their liability to pay mesne profits and in the result the learned Judge was of opinion that no sum was payable for mesne profits. In short he held that though the Plaintiff being entitled to possession would normally be entitled to mesne profits, nevertheless as the other party, the proposed Appellants, had a right to set-off no account was due.

3. From that decision of the learned Subordinate Judge an appeal was preferred to this Court and this Court decided that the view taken by the learned Subordinate Judge was not right and remanded the case of the learned Subordinate Judge to ascertain the amount of mesne profits to which the proposed Respondents were entitled. It is from that order that the proposed Appellants ask for leave to appeal to the Supreme Court.

4. The order of this Court was made long before the Constitution came into force, but the application for leave to appeal was not made until after the Constitution came into force. However, I do not think that it is necessary to decide whether this application is governed by Section 109 and 110 of the CPC or by Article 133 of the Constitution because the result in my view would be the same whichever provision applies.

5. The point taken against the proposed Appellants is that the order is not a final order and on the face of it, it clearly is not a final order. The formal order drawn up by this Court is in these terms:

It is ordered that the decree of the Court below be set aside and the case is hereby sent back to that Court to be dealt with in accordance with the directions contained in the judgment of this Court of this day's date in this appeal pronounced, a copy whereof is annexed hereto.

6. The formal order of this Court is in the ordinary form of orders of remand.

7. Normally an order of remand cannot be described as a final order; but it is contended in this case that that the order is final because it has decided that the proposed Respondents were entitled to mesne profits. There does not seem to have been any doubt that as the proposed Respondents obtained a decree for possession the proposed Appellants were liable to pay mesne profits. The only dispute was whether having regard to a right of set-off any amount was actually

due. The Subordinate Judge held that there was a liability to pay mesne profits, but he held that owing to a set-off no amount was actually due. This Court has held that that view was erroneous and the learned Judge of the Court below has been directed to ascertain the amount of mesne profits due to in accordance with the provisions of the judgment. What is said is that the judgment of this Court finally decided the question as to liability to pay mesne profits and that being so, it is said that it is a final order. The matter decided by this Court went to the root of the whole case and, therefore, it is said that though there was a remand the order can be regarded as a final order.

8. On behalf of the proposed Respondents reliance has been placed upon the case of Abdul Rahman v. D. K. Cassim and Sons, (1933) LR 60 IA 76; SC 38 CWN 405 and particularly upon the observations of Sir George Lowndes, who delivered the judgment of the Board, at page 81. Sir George Lowndes observed:

Lord Cave in delivering the judgment of the Board laid down, as the result of an examination of certain cases decided in the English Courts, that the test of finality is whether the order "finally disposes of the rights of the parties", and he held that the order then under appeal did not finally dispose of those rights, but left them "to be determined by the Courts in the ordinary way." It should be noted that the Appellate Court in India was of opinion that the order it had made "went to the root of the suit, namely, the jurisdiction of the Court to entertain it", and it was for this reason that the order was thought to be final and the certificate granted. But this was 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 u/s 109 (a) of the Code.

9. These observations of Sir George Lowndes were followed by the Federal Court in a case recently decided : Mohammad Amin Brothers Ltd. v. Dominion of India, (1949) F.C.R. 842 : S.C. (1950) SCR 166.

10. Learned Advocate for the proposed Appellants has, however, argued that we should look to earlier Privy Council cases and in particular the case of Rahimbhoy Habibhoyv. Turner, 1890 LR 18 IA 6, Sir George Lowndes, however, pointed out that that case was decided upon the wording of the CPC of 1882. It is true that Sir George Lowndes did say that the case of Rahimbhoy Habibhoy would have been decided in the same way under the present Code, but on the other hand, he does, in deciding the case, insist that the order must be final and further that the finality must be a finality in relation to the suit. Can it be said that the order of this Court was final and put an end to the suit altogether? It certainly did not result in the end of the suit and the finality cannot possibly be regarded as a finality in relation to the suit. All that this Court held was that the Id Subordinate Judge was wrong in holding that a set-off made a decree impossible. After the judgment of this Court the extent of the liability has still to be determined. In my view the order cannot possibly be described as a final order, but it is an ordinary order of remand and, therefore, no appeal would lie from it.

11. Learned Advocate for the proposed Appellants however, suggested that this was a preliminary decree and, therefore, being a decree an appeal would lie. But as I have said, the formal order of this Court is in the form of an order of remand and it does not purport to be a preliminary decree for ever settling certain issues. I do not think it can possibly be said that the order of this Court amounts to a preliminary decree and, therefore, no appeal lies because the order does not amount to a decree.

12. Learned Advocate for the Appellants, however, urged that if the case falls within Article 133(1) of the Constitution they would have a right of appeal because that article gives a right to appeal from any judgment, decree or final order in a Civil Proceeding of a High Court. If the High Court certifies, etc. The argument of the learned Advocate is that even if the order of this Court amounts to neither a decree nor a final order there is a judgment and that is appealable.

13. It appears to me that the word "judgment" must be differentiated from the words "decree" and "final order". If that is sought to be appealed from is neither a decree nor a final order, then it appears to me there can be no appeal because a judgment had been delivered in the case. If appeals lay from all judgments then the words "decree or final order" were unnecessary and it appears to me that if this Court holds that the order sought to be appealed from is not a final order, then no appeal can lie because there was a judgment upon which the order sought to be appealed from was drawn up. It is unnecessary in this case to consider in detail what meaning should be given to the word "judgment" in Article 133 of the Constitution, but it does seem to me that a meaning cannot be given to it so that a party would have a right to appeal from an order which was not final, though Article 133 only gives a right to appeal from a final order. To give the word "judgment" too wide a meaning would be to give a right of appeal from an order which was not final and from a formal adjudication which could not be described as a decree. Whatever meaning is given to the word "judgment" it must be some meaning which would give effect to the words following, namely, "decree or final order." In my view, as the order in question isn't a final order no appeal would lie under Article 133 of the Constitution though there was a judgment of this Court upon which the order was based.

14. In my view the proposed Appellants are not entitled to appeal and there is really no hardship. Once the Subordinate Judge has ascertained the mesne profits and made a decree it would be open to the proposed Appellants to appeal to this Court and then, to appeal to the Supreme Court, if they so desire. In that appeal the question of liability to pay mesne profits will be open to the proposed Appellant.

15. In the result, therefore, this petition fails and is dismissed with costs - the hearing-fee being assessed to four gold mohurs. The costs will include the costs of an application for stay of proceedings in the Court below. We assess the hearing-fee in that application at one gold mohur.

Mitter, J.

16. I agree.