

(1956) 09 AHC CK 0003
In the Allahabad High Court
Case No : F.A.F.O. No. 317 of 1951

Ram Prasad and Others

APPELLANT

Vs

Dr. Jagdish Prasad and after his death Bal Krishna and Others

RESPONDENT

Date of Decision : 17-09-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 104, 11, 115, 151, 30

Citation : (1956) 26 AWR 747

Hon'ble Judges : D.N. Roy, J

Bench : Single Bench

Advocate : S.N. Katju, for the Appellant; D. Sanyal, for the Respondent

Final Decision : Dismissed

Judgement

D.N. Roy, J.—Two questions arise for determination in this appeal. Firstly, whether the impugned order is appealable Under Order XLIII, Rule I(u) of the Code of Civil Procedure. Secondly, if it is not appealable, whether it is open to revision and whether in the circumstances of the case it should be interfered with and set aside in revision.

2. The facts are these. The Plaintiffs-Appellants instituted a suit in a representative capacity on behalf of the Hindu public of mohalla Shahpara claiming: (a) a declaration that Jagdish Prasad the Defendant first-party had no concern with the ownership of the temple and the houses attached to it as detailed at the foot of the plaint; and

(b) a permanent injunction restraining him from taking possession over the suit property and restraining him further from interfering with the right of the Hindu public of that locality in the darshan and worship of the deity.

3. The necessity for the suit, according to the Plaintiffs, arose because in an earlier uit between the Defendants first-party and the Defendants-second-party a decree was passed by the lower court in favour of the Defendant first-party holding that the property was his own and that, although a second appeal had

been instituted against that decision and was pending in the High Court on the date of the present suit, there were signs of collusion between the Defendants and if the property is made over to the Defendants first-party it would be detrimental to and against the interests of the Hindu public of that locality.

4. The suit was resisted by Defendant No. 1 alone. He denied the existence of any temple. He also denied that the Hindus had any right of worship in this property. He contended that the houses in suit were not attached to any temple. He pleaded Section 11, CPC as a bar to the suit.

5. The trial court held that part of the property is a public temple and the rest is dedicated property, the ownership of which does not vest in Defendant No. 1 that Section 11, CPC did not bar the suit and that the Plaintiffs were entitled to a decree. As against that decision an appeal was preferred in the lower appellate court where a preliminary point was taken that the deity of the temple was a necessary party. That point prevailed with the lower appellate court and it set aside the decree of the trial court and remanded the case for a retrial after giving an opportunity to the Plaintiff to implead the idol as a party within a certain time. It is from this order that the present appeal has been filed.

6. It is conceded that if the order of remand is an order Under Order XLI, Rule 23 of the Code it would be appealable u/s 104 read with Order XLIII, Rule I(u) of the Code. But if the order is one u/s 151, CPC its net open to appeal. Rule 23 of Order XLI as applicable to this Court is in the following terms:

Where an appellate court has reversed a decree and all questions arising in the case have not been decided, it may, if it thinks fit, by order remand the case, and further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the court from whose decree the appeal is preferred, with directions to readmit the suit under its original number in the register of civil suits, and proceed to determine the suit....

7. The provision for appeal in Order XLIII, Rule I(u) was for an appeal against an order Under Rule 23, of Order XLI remanding a case where an appeal would lie from the appeal of the appellate court. This Court amended this rule in the year 1926 so as to make all orders of remand appealable. But in the year 1935 it was discovered that such a rule was ultra vires because it was repugnant to the provisions of Section 104 of the Code of Civil Procedure. This Court by rule could not provide for an appeal against any order which was not made under one of the rules in the First Schedule and, therefore, it could not provide for an appeal against an order passed under the provisions of Section 151 of the Code. The result was that the rule in Order XLIII, Rule I(u) was again amended by Notification No. 5529, dated 24-9-1935, and the amended rule was made applicable to "an order Under Rule 23 of Order XLI remanding a case where an appeal would lie from the decree of the appellate court". This amendment was brought into force simultaneously with the amendment of Order XLI, Rule 23 and the amended rule has already been reproduced above. That is the rule which is

still in force. Sirkar in his CPC (Third Edition at p. 890) has incorporated an amendment to Order XLI, Rule 23 by this Court, which, if effective, will make Order XLI, Rule 23 read as follows:

Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, or where the appellate court while reversing or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case, it may, by order remand the case, and may further direct what issue or issues shall be tried in the case no remanded....

8. No such amendment has so far been introduced, and the proposition is still under consideration by the Rule Committee as to whether or not such an amendment should be introduced.

9. Rule 23 of Order XLI as applicable to this Court which is in force at present was interpreted by a Full Bench of this Court in Bishrvanath Singh v. Sheikh Abdul Jabbar 1947 A.W.R. (H.C.) 360 and the majority view was that the words: "all questions arising in the case have not been decided" in Order XLI, Rule 23 mean: "all questions arising in the case have not been decided by the trial court," and the rule does not embrace a case in which these questions have not been decided by the appellate court itself. The Full Bench held that such an order of remand as in the present case is passed by an appellate court under its inherent powers which are recognised and saved by Section 151 of the CPC and the order is not open to appeal. The order in question in the present case was obviously an order u/s 151 of the Code and is therefore not open to appeal.

10. It has to be seen whether the order is open to revision. The powers of the High Court on the revisional side are contained and enunciated in Section 115 of the Code of Civil Procedure. In a case u/s 115 the High Court could interfere if the subordinate court appears--

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity. In the present case it is not contended that the lower appellate court exercised a jurisdiction not vested in it by law or failed to exercise a jurisdiction so vested. What is contended is that it acted in the exercise of its jurisdiction illegally or with material irregularity, and this argument is founded upon the reasoning that the lower appellate court overlooked the clear provisions of Order I, Rule 9, CPC and failed to follow the law laid down by a Full Bench of this Court in Jawahra v. Akbar Husain ILR VII Alld. 178 which was followed by a Division Bench of this Court in Ram Chandra v. Ali Mohammad ILR 35 Alld. 197, by remarking that these are no longer good law in view of the pronouncements of the Privy Council in Pramatha Nath Mullick v. Pradyumna Kumar Mullick 52 Indian Appeals 245.

11. The limits of the jurisdiction conferred by Section 115 have been the subject of a number of judicial decisions. As long ago as 1894 the Privy Council in *Rajha Amir Hassan Khan v. Sheo Baksh Singh* 11 Indian Appeals 237 made the following observations:

The question then is, did the judges of the lower courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the case...and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity.

12. In 1917, in *Balakrishna Udayar v. Vasudeva Aiyar* LR 44 Indian Appeals 261 the Board observed:

It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.

13. In 1949, in *N.S. Vekatagiri Ayyangar v. Hindu Religious Endowments Board, Madras* LR 76 Ind App 67, the Privy Council again examined the scope of Section 115 and observed that they could see no justification for the view that the section was intended to authorise the High Court to interfere and correct gross and palpable errors of subordinate courts so as to prevent grave injustice in non-appealable cases; and that it would be difficult to formulate any standard by which the degree of error of subordinate courts could be measured. In examining S 115 of the Code the Board said that the section empowers the High Court to satisfy itself on three matters:

(a) that the order of the subordinate court is within its jurisdiction;

(b) that the case is one in which the court ought to exercise jurisdiction; and

(c) that in exercising jurisdiction the court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. The Board further observed that if the High Court is satisfied on those three matters it has no power to interfere because it differs, however profoundly, from the conclusions of the subordinate court on questions of fact or law.

14. Later in the same year in *Joy Chand Lal v. Kamalaksha Chaudhury* LR LXXVI Indian Appeals 131 their Lordships had again adverted to this matter and reiterated what they had said in their earlier decision.

15. The Supreme Court in *Keshardeo Chamria v. Radha Kissen Chamria* 1953 ALJ 101 approved of the view expressed by the Privy Council in the cases cited above. Applying those principles to the present case the question resolves itself into this. Did the lower appellate court act in the exercise of its jurisdiction

illegally or with material irregularity. The suit, as I have already said, was a representative suit in which the relief was claimed in favour of the Hindu public of that locality. There was already a previous suit about the same property between the Defendants inter se. A second appeal was pending in the High Court when the suit was instituted. The allegation was that the necessity for the present suit arose because there were signs of collusion between the two Defendants and that if the property was made over to the Defendant-first-party, it would be detrimental to, and against the interests of, the Hindu public. If under such circumstances the court below came to the conclusion that in order to avoid multiplicity of suits and future controversies about the matter the deity should be made a party, it cannot be said that the court below acted in the exercise of its jurisdiction illegally or with material irregularity. Order I, Rule 9 of the Code no doubt says that no suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The rule should be read along with Rule 10 which gives wide powers to the court to remedy misjoinder or nonjoinder of parties by striking out unnecessary parties or adding necessary parties. One of the controversies in the suit was whether there is a temple and an idol, and whether the properties are attached to the temple. The Defendant denied the existence of the idol and also the existence of the temple. Having regard to the previous history of the matter and to the trend of events as depicted in the pleadings of the parties, the order of the court below that the idol should be impleaded as a party and that the suit, ought to be determined thereafter does not seem to be an order which can be said to have been passed in the exercise of jurisdiction illegally or with material irregularity.

16. The lower appellate court in observing that the Full Bench decision of this Court in *Jawahra v. Akbar Husain* ILR VII All. 178 and the Division Bench ruling in *Ram Chandra v. Ali Muhammad* ILR XXXV All. 197 are no longer good law in view of the Privy Council decision in *Pramatha Nath Mullick v. Pradyumna Kumar Mullick* 52 Indian Appeals 245, seems to me to have overlooked the real import of these decisions. In the Full Bench case the question was whether a Mohammedan who has a right to use a mosque for the purposes of devotion is entitled to exercise such right without hindrance and is competent to maintain a suit against anyone who interferes with its exercise irrespective of the provisions of Section 30 of the CPC (now Order I, Rule 8 of the present Code), and it was held that Section 30 applied to cases where no individual right was interfered with, and where an individual right has been violated it has no application. That decision is still good law and it has not been dissented from either by this Court or by any other Court so far. The lower appellate court overlooked the point that the present suit was a representative suit and here the provisions of Order I, Rule 8 of the Code (equivalent to Section 30 of the old Code) must of necessity be applied. As I have already said, the Full bench decision was followed later by a Division Bench of this Court in *Ram Chandra v. Ali Muhammad* ILR All. 197,

where the question was of the application of Order I, Rule 8 of the present Code of Civil Procedure, and it was held that if the suit is brought in a personal capacity and not on behalf of the whole Mohammedan community, the decision will be binding only as between the Plaintiff and the Defendant and cannot be taken advantage of by, or be binding on, the Mohammedan community in general.

17. In the present case the question was somewhat different. Here the question was whether the idol should be made a party. For that proposition the lower appellate court relied upon the decision of the Privy Council in *Pramatha Nath Mullick v. Pradyumna Kumar Mullick* 52 Ind App 245, which was later relied upon by the Board in *Kanhaiya Lal and Anr. v. Hamid Ali X Oudh Weekly Notes* 622. In the latter case it was observed that in a contest to establish individual rights and to eject worshippers as trespassers demanding also demolition of the building, the result might conceivably vitally, effect the interests of the Idol and it would be in the interests of all concerned that the Idol should appear by dis-interested next-friend appointed by the court; and that where a case is decided without doing so, it must be remitted with directions as to a new trial with the appropriate parties added. As was pointed out by Ghose, J. in delivering judgment in *Brojendra Nath Seal and Another Vs. Lalit Mohan Seal and Others*, , the decision of the Judicial Committee in *Pramatha Nath Mullick v. Pradyumna Kumar Mullick* 52 Indian Appeals 245 is no authority for the broad proposition that in every case where questions of deb-sheba arise, the Idol is a necessary party to be brought on the record.

18. Here the question of worship in a given property depends upon the determination of the question as to whether there is an Idol and a temple in that property and whether the right of worship vests in the Hindu public of that locality unhampered by any restrictions on the part of the Defendant. Under such circumstances the idol was a necessary party. Consequently I am of opinion that the impugned order is not open to appeal but is open to revision, but no ground has been made out why the order should be interfered with in revision and it has not been shown that the lower appellate court acted in the exercise of its jurisdiction illegally or with material irregularity. The appeal which is treated as a revision is therefore dismissed with costs. The record will be sent down to the trial court through the lower appellate court for proceeding with the matter in accordance with law.