
(1951) 08 MAD CK 0037

In the Madras High Court

Case No : Civil Miscellaneous Petition No. 5764 of 1951

Rm. Nl. Ramaswami Chettiar and Others

APPELLANT

Vs

The Official Receiver and Others

RESPONDENT

Date of Decision : 24-08-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 109

Constitution of India, 1950 — Article 133, 133(1), 134, 135, 372

Citation : AIR 1951 Mad 1051 : (1953) ILR (Mad) 65 : (1951) 64 LW 934 : (1951) 2 MLJ 479

Hon'ble Judges : Govinda Menon, J; Basheer Ahmed Sayeed, J

Bench : Division Bench

Advocate : K. Bhashyam and C.S. Rama Rao Sahib, for the Appellant; T.M. Krishnaswami Iyer, M.S. Vaidhyanatha Iyer and K.C. Srinivasan, for the Respondent

Final Decision : Dismissed

Judgement

This Judgment has been overruled by : Garikapatti Veeraya Vs. N. Subbiah Choudhury, AIR 1957 SC 540 : (1957) 1 SCR 488

Govinda Menon, J.—This is an application for leave to appeal to the Supreme Court under Article 138 of the Constitution of India and Sections 109 and 110 read with the rules under Order XLV, CIVIL P. C. against the order of this Court in C. M. A. No. 332 of 1945.

2. E. P. No. 90 of 1944 in of O. S. 14 of 1926 was dismissed by the Subordinate Judge of Devakottai on the ground that it was barred by limitation and in appeal against that order this Court found that the execution petition was in time and remanded the same to the Subordinate Judge to take steps in furtherance of execution. The only question that was decided by this Court is one of limitation and in that controversy the view taken was different from that of the Subordinate Judge.

3. A preliminary objection was taken that the order that this Court is not a "final order" within the meaning of Article 133 of the Constitution of India and therefore even if we are convinced that the case is a fit one for appeal to the Supreme Court, no leave can be granted. It is undisputed that the amount or value of the subject matter of the dispute in the Court of first instance and still in dispute on appeal was, and is not less than, Rs. 20,000. Unless therefore we are convinced that the order of remand passed by this Court is a "final order", the provisions of Article 133 cannot be invoked. In class (1) of Article 133 it is clearly stated that an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court if it satisfies any of the three conditions contemplated in Sub-clauses (a), (b) and (c) which follow. The point for decision, therefore, is whether the decision of this Court remanding the execution petition for a further hearing and disposal by the Subordinate Judge is a final order.

4. Mr. Bhashyam for the petitioners relies upon a decision in *Sathappa Chetti v. Subramaniam Chetti*, 43 Mad 758. In that case Oldfield and Ramesam JJ. considered certain English and Indian decisions and held, that where in a suit for dissolution of partnership and connected reliefs, including the taking of an account, the Court of first instance held that the suit was barred by limitation, but the High Court, in appeal, reversed the finding on limitation and declared the plaintiff's right to relief and remanded the case to the lower Court to frame a preliminary decree and take further proceedings according to law, the order of the High Court is a final order within the meaning of Section 109, Civil P. C. as it then stood. This decision considered the meaning of the words "final" and "interlocutory" and referred to Wharton's Law Lexicon regarding the meaning of the term "interlocutory". In the well known case in *Firm Ramchand Manjimal v. Firm Goverdhandas Ratanchand*, 47 Cal. 918, Viscount Cave in delivering the judgment of the Judicial Committee referred to *Salaman v. Warner*, (1891) 1 Q. B. 734 and *Bozon v. Altrincham Urban District Council No. 1*. (1903) 1 K. B. 547 and held that an order is final if it finally disposes of the rights of the parties. The genesis of this definition can be traced to the expression of opinion by Lord Esher M. R. and Fry L. J. in *Salaman v. Warner*, (1891) 1 Q. B. 734, At p. 735, Lord Esher M. R. says that if their decision, whichever way it is given will, if it stands, finally dispose of the matter in dispute, then for the purposes of the rules, it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then, it is not final but interlocutory. Fry L. J. also took a similar view. The learned Lord Justice spoke as follows:

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

In *Bozson v. Altrincham Urban District Council No. 1*, (1903) 1 K. B. 647, the Court of Appeal consisting of Lord Chancellor, Lord Chief Justice and the President of the Probate Division following an earlier decision in *Shubbrook v. Tufnell*, (1882) 9 Q. B. d. 621 which was not cited in *Salaman v. Warner*, (1891) 1 Q. B. 734, held that the order appealed against there was a final one; but the Lord Chief Justice posed the same question regarding the finality in the following terms;

It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties ? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

So far as the definition of "final order" is concerned, there does not seem to be any difference of view whatever, though on the applicability of the elaboration of that phrase the two decisions seem to have taken a contrary view. But so far as we are concerned, the authoritative decision of the Privy Council in *Firm Ramchand Manjimal v. Goverdhandas Vishandas Ratanchand*, 47 Cal. 918 followed as it is in *Abdul Rahman v. D. K. Cassim & Sons*, 11 Rang. 58 settles the matter. In the latter case Sir George Lowndes followed the dictum of Viscount Cave in *Ramchand Manjimal's* case, 47 Cal. 918, and held that the appeal was incompetent. Adverting to the decisions of our own High Court anterior to the Constitution, we have a judgment of Madhavan Nair, Officiating Chief Justice and Krishnaswami Aiyangar J. in *Ramanathan v. Palaniappa*, 1939 2 Mad.40, where the same definition of the words "final order" in Section 109, Clause (a), Cr. P. C. is given. After considering the decisions in *Ramchand Manjimal's* case, 47 Cal. 918 and *Abdul Bahman v. D. K. Cassim & Sons*, 11 Rang. 58, the learned Judges referred to two earlier Privy Council decisions in *Rahimbhoy Habibhoy v. C. A. Turner*, 15 Bom. 155 and *Syed Muzhar Hussain v. Radhabibi*, 17 ALL. 112 and distinguished them as cases decided with reference to the old Code. An exhaustive discussion of the subject under consideration is found in *Kuppuswami Rao v. The King*, 1948 Mad. 103 where the Chief Justice of India in a matter arising u/s 205, Government of India Act, 1935, reviewed all the earlier decisions on this and allied topics. In that judgment it is laid down that the expression "final order" in Section 205, Government of India Act, 1935, has to be given the same meaning both in civil and criminal cases, viz., it must be an order which finally determines the points in dispute and brings the case to an end. Though the facts of the case related to a criminal proceeding, so far as we are concerned, the authoritative pronouncement regarding the meaning of the term "final order" is binding upon us. A still later decision of the Federal Court is contained in *Mohammad Amin Bros. Ltd. v. Dominion of India*, A. I. R 1950 F. C. 77 where Mukherjea J. in delivering the judgment of the Full Court laid down the test for determining the finality of an order as that which finally disposed of the rights of the parties. The finality must be a finality in relation to the suit; and 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. His Lordship refers to the

pronouncement of the Chief Justice of India in *Kuppuswami Rao v. The King*, 1948 1 Mad. 103 as well as to the earlier cases on the point. Judged by this test, can it be said that our decision holding that the execution petition is not barred by limitation puts an end to all the points in dispute between the parties? We think not. We may also refer to the decision in *Moolji Jaitha & Co. v. K. S. and W. Mills Co.*, AIR 1950 F. C. 83 . It was urged before us that these decisions do not refer to proceedings in execution but that they related to orders of remand in suits and such being the case Mr. Bhashyam contended that they can have no relevancy so far as the present controversy is concerned. According to the learned counsel the suit had been finally determined when the decree was passed and the question is only whether a final order was made when this Court, disagreeing with the Subordinate Judge, allowed the appeal and held that the application is not barred by limitation, A comparatively recent pronouncement of the High Court of Assam reported in *Sindhuram Chaudhury Vs. Krishna Dutta* rules that an order passed by the High Court, deciding that an application for delivery of possession in execution of a decree for possession was not time barred, and remanding the case to the Court below for disposal of the application according to law is not a "final order" within the meaning of Article 183 of the Constitution of India and is not, therefore, open to appeal to the Supreme Court thereunder. Practically to the same effect is the pronouncement of Iqbal Ahmed C. J. and Sinha J. in *Narain Das v. Alla Uddin*, A. I. R. 1948 ALL. 401 where it was held that the execution proceedings which were remanded for disposal after the decision of certain points remained, despite the order of remand, live proceedings, since the order of remand was not final and therefore the case did not come within Sections 110 and 109(a). There the execution petition was sent back to the Court below with the direction that the application of the judgment-debtor u/s 8 , U. P. Debt Redemption Act be restored to its original number and the amount due to the decree-holder, after applying that section, be ascertained and the decree be amended, and after the decree has been so amended, execution should be allowed to proceed in due course of law. It is unnecessary to multiply authorities though it may be useful to refer to the observations contained in *Barkat Ram v. Bhagwan Singh*, AIR 1943 Lah. 140. These three decisions do not make any distinction between remand orders in suits and those in execution proceedings and we are in agreement with the principles underlying the decisions of the Assam, Lahore and Allahabad High Courts referred to above. In view of the pronouncement contained in *Abdul Rahman v. D. K. Cassim & Sons*, 61 M. L. J. 307 where at p. 808 it is mentioned that *Sathappa Chetti v. Subramania Chetti*, 43 M. L. J. 758 was referred to by the learned Judges of the Rangoon High Court in granting leave but that decision did not find favour with their Lordships of the Judicial Committee. We have to consider that *Sathappa Chetti v. Subramania Chetti*, 43 M. L. J. 758 can no longer be taken as laying down any guidance. Though the decision was not, in so many words referred to and dissented or overruled in the judgment of Sir George Lowndes, still the mere fact that the views of the Rangoon High Court based upon this decision did not find favour with the Privy Council is sufficient indication that *Sathappa Chetti v.*

Subramania Chetti, 43 M. L. J 758 can no longer be considered as a binding decision.

5. It was farther contended that for the application of Sub-clause (c) of Clause (1) of Article 133, it is not necessary that the case should relate to a judgment, decree or final order. We are unable to follow this argument because the preamble portion as worded in Article 133(1) should be held applicable to the word "case" in Sub-clause (c). Reading the preamble and Sub-clause (c) together it comes to this: An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies that the case is a fit one for appeal to the Supreme Court. The word "case" should have reference to the judgment decree or final order. It is only such cases as are contemplated earlier, either a judgment, decree or final order, that can come within the operation of Sub-clause (c). We do not see any force in the argument of Mr. Bhashyam that leave should be granted under sub clause (c) even if the order is not a final one. Having regard to the authorities discussed above and the fact that it is possible for the judgment debtor to prove that the decree has been satisfied, we cannot lay down that our order finally determined the rights of the parties and has put a finishing seal upon the dispute between the parties.

6. Having failed in his contention that the order of this Court is a final order, the learned counsel for the petitioners fell back upon clause (c) of Section 109, Civil P. C. and contended that it is not necessary that the order should be a final one if this Court is of opinion that the case may be certified to be a fit one for appeal to the Supreme Court; in other words, if we are convinced that an important question of law affecting generally the rights of parties is involved, then despite the fact that it arises in an order which is not final, still on the importance attached to the points involved, it is open to this Court to grant leave under Clause (c) of Section 109, Civil P. C. Section 109 of the Civil P. C. 1908 had its predecessor in Sections 694 and 595 of the Code of 1882 and in the earlier section (Section 594) ""decree" is defined as including a judgment and an order. Sub-section (c) of Section 595 confers a right to the litigant of an appeal to Her Majesty in Council from any decree, when the case is certified to be a fit one for appeal to Her Majesty in Council. Such being the case it is contended that from 1882 onwards, and subsequently after the new Code of 1908, a right is given to a party to appeal to the Privy Council when a certificate is given even if the judgment, decree or order appealed against is not a final one. That prior to the coming into force of the Constitution of India a power like that lay is evident from various decisions one of which is in Annamalai Chettiar v. Ramanathan Chettiar, 1935 M. W. N. 796 In that case an order of remand in a suit was sought to be appealed against to His Majesty in Council. The learned Judges, after finding that it was not a final order, stated as follows :

It is no doubt open to us under Clause (c) of Section 109 to grant a special certificate in a proper case ; but the present case in our opinion, is not a proper

case and we must therefore decline to grant it

Mr T. M. Krishnaswami Aiyar for the respondents did not seriously contest the position that Clause (c) of Section 109 can be invoked for granting a special certificate if the Court is convinced that a question of law of great public importance is involved even in a case where the judgment, decree or order is not a final one. A recent Commentator on the Indian Constitution (Durga Das Basu) has expressed the opinion at p. 405 of his book "A Commentary on the Constitution of India" where he points out the difference between Section 109(c), Civil P. C. and Article 133(1)(c) of the Constitution, thus :

Another important difference is that while u/s 109(c), Civil P. C an appeal lay to the Privy Council upon the certificate of fitness even though the order was not a "final" one, under Article 133(1)(c) of the Constitution the certificate for appeal to the Supreme Court can be granted only if the order is a final one. There is no distinction in this respect between Sub-clauses (a), (b) and (c) of Article 133(1).

But the difficulty arises from the fact that Section 109 as amended by the Adaptation of Laws Order, 1960, now provides that it is subject to the provisions in chap. 4 of Part 5 of the Constitution and such rules as may from time to time be made by the Supreme Court regarding appeals from the Courts of States. The preamble portion to the amended Section 109 is as follows :

Subject to the provisions in Chap. 4 Part 5 of the Constitution and such rules as may from time to time, be made by the Supreme Court regarding appeals from the Courts of States, and to the provisions hereinafter contained, an appeal shall lie to the Supreme Court, etc.

Therefore, if under Article 133(1) no appeal can lie to the Supreme Court except from a final order, can it be said that Section 109 Clause (c) derogates from it and gives a right of appeal on a special certificate even if the decision of the High Court is not a final order ? The learned counsel for the petitioner contends that the rights conferred by the CPC of 1882 and 1908 have not been taken away by the amendment of Section 109 after the inauguration of the Constitution but that they are preserved and kept in tact by Article 372 of the Constitution which provides that subject to the provisions of the Constitution all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority. It is therefore argued that if prior to 26-1-1950 leave can be granted in special cases where the decision is not a final order, then such rights are still retained by Article 372 since no competent legislature or authority has repealed that law.

But even here, the governing clause "subject to the other provisions of this Constitution" should be construed as meaning that Article 133 should be deemed to be the dominant statutory provision and ail the other provisions can be understood only as subject to the provision. It was also sought to be argued that by Article 135 the right to get leave u/s 109, Clause (c) is maintained. On this

aspect of the question, in a recent case decided by us, we have not agreed with the view taken by another Bench in *Ramasami Chettiar v. Ramanathan Chettiar* 1950-2 Mad L. Jour. 400 regarding the interpretation of Article 135. Vide judgment in C. M. P. Nos. 3345, 3346 and 3347 of 1950. We adhere to our view expressed therein, which is in the following terms :

By a process of reasoning based upon necessary and explicit exclusion, if we are to consider the meaning of the word "matter" in Article 135, it seems to us that the word "matter" used in Article 135 should not be understood as meaning a civil or criminal proceeding, because both these subjects were specifically dealt with under Articles 133 and 134. Article 132 refers to civil, criminal or other proceeding and is all comprehensive and therefore in whatever nature of proceedings, be it civil, criminal, admiralty, intestate or matrimonial, a question regarding the interpretation of the Constitution arises, then an appeal will lie under Article 132. So far as other proceedings are concerned, Article 133 lays down the scope and limit of the right of appeal in civil appeals. In the same way, does Article 134 provide for the scope and limit of the right of appeal in a criminal proceeding ? Therefore it seems to us that the matter referred to in Article 135 should be understood as meaning a matter which is neither civil nor criminal and by the application of the maxim *expressio unius est exclusio alterius*--the express mention of one thing implies the exclusion of another--it seems to us that the word "matter" in Article 135 should be deemed to exclude both civil and criminal proceedings.

Such being the case, though by the federal Court (Enlargement of Jurisdiction) Act, Act I of 1948, in all cases where an appeal lay to the Privy Council it was provided that an appeal shall lie to the Supreme Court and therefore even where the order is not a final one special leave can be granted in exceptional cases u/s 109, Clause (c), still we feel that Article 372 read with Article 135 does not retain that right where the provisions of Articles 133 and 134 can be invoked. We have to recognise the fact that prior to the Constitution there was no enactment in force except the CPC and the Letters Patent of the High Courts conferring and regulating the rights of appeals from the High Courts. But now as a result of chap. IV of Part V of the Constitution the right of appeal to the Supreme Court is crystallised in clear cut terms. If Article 133 prohibits an appeal to the Supreme Court where the decision is not a final order, it cannot be said that any earlier statutory provisions repugnant to that Article can hold the field any further despite Article 372. In our opinion Article 135 does not refer to civil or criminal proceedings and has therefore to be excluded from consideration when taking into account the subject-matter of the present appeal. We are alive to the circumstance that a right of appeal which existed to the Federal Court under the Federal Court (Enlargement of Jurisdiction) Act, Act I of 1948, is, by this process of reasoning, rendered non-existent. But to compensate for that there, is always the right to the party to apply to the Supreme Court for special leave as contemplated by Article 136 of the Constitution, Special leave can be granted in the discretion of the Supreme Court, to appeal from any judgment, decree,

determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India. Probably the reason for restricting the power of the High Court to grant leave to Supreme Court where the decision is not a final one was made on account of the power of the Supreme Court to grant special leave. This argument for the petitioners also fails.

7. This petition is, therefore, dismissed, but in the circumstances without costs.