

(1942) 06 CAL CK 0018
In the Calcutta High Court

Surendranath Sarkar and Others

APPELLANT

Vs

Sree Sree Iswar Laksmi Durga and Others Established by
Harachandra Kundu through their next Friend, Shebait
Sailendranath Kundu and Others

RESPONDENT

Date of Decision : 29-06-1942

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 109

Citation : AIR 1942 Cal 537

Judgement

1. Defendants 1 to 3 are the petitioners before us. They filed this application for leave to appeal to His Majesty in Council under the provisions of Section 109, Civil P.C. The judgment of this Court is not a judgment of affirmance. Besides, the proposed appeal to His Majesty in Council involves substantial questions of law. As it is a judgment of reversal, two questions will have to be determined before we can grant leave. The first question is whether the value of the subject-matter of the suit and of the proposed appeal is over Rs. 10,000; and the second is whether the proposed appeal is against a decree or final order of this Court. On the first question a report was asked for from the lower Court and that report is that the subject-matter of the suit and of the proposed appeal, which are three leasehold properties is valued at Rs. 35,000. The plaintiff opposite party does not challenge the report of the learned Subordinate Judge. The first condition, therefore, is satisfied. The only other point for consideration is whether the proposed appeal is against a decree or final order passed by this Court. On that point, the parties, viz., the petitioners to England and the plaintiff opposite party are at issue. The contention of the petitioners is in the first instance that the challenge order amounts to a decree and, secondly that in any event it is a final order. Both these positions are controverted by Mr. Gupta who is appearing for the plaintiff opposite party.

2. For the purpose of deciding this question, it is necessary to state in brief the nature of the suit, the contentions of the respective parties therein and the decision arrived at by this Court by Mukherjea and Biswas JJ. The plaintiff

instituted the suit as the next friend of a number of deities Sree Sree Iswar Lakshmi Durga and others. The suit was for the recovery of the temple in which those deities were located, for moveable properties belonging to the said deities described in schedule kha and immovable properties which the plaintiff described in schedule "ka" of the plaint. His case was that he was the sole shebait of the said deities at the time of his suit, inasmuch as the other shebait had forfeited their rights, that some of the former shebait had unlawfully alienated the temple and the immovable properties belonging to the deities by granting four leases to the defendants. On a declaration that those leases were not binding on the deities he prayed for the recovery of the properties covered by those leases, also of the temples and the moveable properties. The defence of the defendants was, first, that the plaintiff was not the shebait of the deities; secondly, that he was estopped from challenging any one of the aforesaid four leases and that in any event the four leases were valid leases and binding on the deities. It is not necessary to state the other defences which were raised in the suit. No question turns upon the first lease now, because the final decision of this Court was that that lease which was for a term of years had spent itself before the suit.

3. All the three Courts, viz., the Court of the Subordinate Judge who heard the original suit, the Court of the Additional District Judge of the 24 Parganas who heard the first appeal and this Court which heard the second appeal came to the conclusion that the plaintiff was the sole shebait of the deities and that the fourth lease was inoperative. The learned Subordinate Judge and the learned District Judge, however, held that the second and the third leases were binding on the deities. On that finding both the Court of first instance and the first appellate Court dismissed the plaintiff's claim to possession of the immovable properties covered by the second and the third leases. The second appeal was first heard by a Division Bench consisting of S.K. Ghose and Mukherjea JJ., who kept the appeal on their file but requested the lower appellate Court to determine certain questions of fact and to send the findings on those questions to this Court. The findings on those points which had been remitted to the lower Court were received and another Division Bench of this Court, viz., Mukherjea and Biswas JJ. (S.K. Ghose J. having then retired), heard the case and pronounced their judgment on 19th March 1941, which is reported in *Iswar Lakshmi Durga Har Tatneswar v. Surendra Nath* ("41) 45 C.W.N. 665. The learned Judges came to the conclusion that the second and the third leases were inoperative. A further point which was raised by the defendants in the lower Court but not decided by it was then considered. It was to this effect, namely, whether the plaintiff could recover possession of properties included in the second and third without indemnifying the defendants for the sums of money which they had spent in repairing the temple, in carrying on the debsheba or in recovering the immovable properties of schedule "ka" from persons who were possessing them as trespassers at a time when the defendants obtained their leases from some of the shebait and which leases were ultimately declared void by this Court. As we have stated above, this Court found that the plaintiff was the sole shebait, that

no estoppel operated against him ; that the first lease which was for a term had spent its force ; and that the second, third and fourth leases were void and not binding on the deities.

4. With regard to the moveables described in schedule "kha" and the temple, an unconditional decree was passed in favour of the plaintiff. With regard to the rest of the immovable properties, this Court came to the conclusion that the plaintiff was also entitled to get possession of the same after evicting the defendants therefrom. But at the same time this Court came to the conclusion that the defendants were entitled to be indemnified for the monies which they had spent in recovering the properties from the possession of the trespassers. For the purposes of finding out what would be the amount to which the defendants would be entitled to, they gave certain directions in their judgment and decree. Those directions were to this effect, viz., that the Court of first instance would take accounts on certain heads indicated in the judgment and decree. The order which was made by this Court with regard to the immovable properties of schedule "ka" save and except the temple and its site in respect of which an unconditional decree was made in favour of the plaintiff was that if the plaintiff paid the sum that might be found so due to the defendant, he would get possession of those immovable properties. The order was in effect that if the plaintiff failed to pay according to the directions contained in the judgment of this Court, his claim to those immovable properties was to be dismissed. The defendants in their proposed appeal to the Privy Council challenge principally the findings of this Court relating to the validity of the aforesaid three leases. In these circumstances, the question is whether the order which has been passed by this Court against which the appeal is proposed to be taken to His Majesty in Council is a decree or at least a final order. In our judgment, it is a decree and a preliminary decree. The judgment of this Court has conclusively determined, as far as this Court is concerned all the rights in controversy. Only the amount, the payment of which has been made conditional for the recovery of the properties included in schedule "ka" save and except the temple and its site, has been left to be determined by the Court of first instance. In the view which we are taking, we are not only supported by the definition of a "decree" as contained in the CPC but also by the decision of the Judicial Committee in *Sanyasi Charan v. krishnadhan Banerjee* ("22) 9 AIR 1922 P.C. 237. The list of preliminary decrees mentioned in Order 20 of the Code did not exhaust the whole list of preliminary decrees.

5. In this view of the matter, it is not necessary for us to consider whether the order against which the appeal is proposed would have been a final order or not within the meaning of Section 109, Civil P.C. If that was necessary, we would have been inclined to hold that it was a final order. The two cases cited by Mr. Gupta, namely, *Ram Chand Manjimal v. Goverdhandas Vishindas Ratanchand* ("20) 7 AIR 1920 P.C. 86 and AIR 1933 58 (Privy Council) are distinguishable on facts. In the first case, the challenged order was an order refusing the stay of a suit based on a contract. In the second case, the only point that was decided by

the High Court related to an order of remand passed by the final Court in India after reversing the trial Judge on a preliminary point. There were thus in those two cases decisions only on issues which were issues in bar. No decision was arrived at by the High Court which related to the rights of the parties and there was no adjudication on their rights. In the last mentioned case, namely, in the case reported in AIR 1933 58 (Privy Council) the Eight Hon^{ble} Sir George Lowndes noticed two earlier decisions in *Rahimbhoy Habibhoy v. Turner* (91) 15 Bom. 155 and *Syed Muzhar Husein v. Bodha Bibi* ("95) 17 All. 112. Those cases were decided under the Code of 1882 where no distinction had been made between a preliminary decree and a final decree. But in referring to those cases, Sir George Lowndes said that there would have been no difficulty in the High Court itself giving leave if those cases had arisen when the Code of 1908 was in force. In the first case above mentioned, it was ruled that if the cardinal points in the case involving the rights of the parties to the suit had been adjudicated upon by the final Court of appeal in India, the matter could be taken on appeal to His Majesty in Council. Keeping in view those observations of Sir George Lowndes in respect of these cases and the fact that he relied expressly upon *Ram Chand Manjimal v. Goverdhandas Vishindas Ratanchand* ("20) 7 AIR 1920 P.C. 86 we have to see what meaning should be attributed to a later observation made by him at the bottom of p. 81 and the top of p. 82 of the report. The observations are to the following effect:

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?

6. In our judgment, these observations do not mean that an order cannot be regarded as "final" if it does not completely dispose of the suit. It would not be considered as "final" if the rights of the parties were left still to be determined. If the rights of the parties to the suit had been determined and the suit was not "finally" disposed of in the sense of its being finally terminated in the Courts of India, because certain subordinate matters of detail have not been disposed of, (points of the nature which were not disposed of in *Syed Muzhar Husein v. Bodha Bibi* ("95) 17 All. 112 above referred to) the order would still be regarded as final. But in the view that we have taken that the proposed appeal is against a decree of this Court, it is not necessary to rest our decision on the ground that the order proposed to be appealed against was a final order. We, accordingly,

allow this application for leave and grant the certificate. Let the necessary certificate be drawn up.