APPELLATE CIVIL.

Before Mukerji A. C. J. and S. K. Ghose J.

BIBHOOTIBHOOSHAN DATTA

v.

SREEPATI DATTA.*

1934

July 24 ;
Aug. 1.

Privy Council—Leave to Appeal to His Majesty in Council—Decision of affirmance, Meaning of—Code of Civil Procedure (Act V of 1908), s. 110.

When the appellate court modifies the original decree upon some point and that completely in the applicant's favour, so that he has no further grievance in that matter, he cannot, because of that modification, have a right to an appeal to His Majesty in Council on other points, on which the courts have concurred, without showing a substantial question of law ; such a decision is one of affirmance within the meaning of section 110 of the Code of Civil Procedure.

In applying section 110 of the Civil Procedure Code, the court should not have regard to the subject-matter of dispute in the appeal to the Privy Council alone in considering whether a decision is one of affirmance or not.

The principle laid down in *Sree Nath Roy* v. *Secretary of State for India in Council* (1) has only partially been overruled by *Annapurnabai* v. *Ruprao* (2).

Annapurnabai v. *Ruprao* (2) discussed and explained.

Ali Zamin v. *Mohammad Akbar Ali Khan* (3), *Jamna Prasad Singh* v. *Jagarnath Prasad Bhagat* (4), *Perichiappa Chettiar* v. *Nachiappan* (5), *Homeswar Singh* v. *Kameshwar Singh* (6) and *Nathu Lal* v. *Raghubir Singh* (7) dissented from.

Narendra Lal Das Chaudhury v. *Gopendra Lal Das Chaudhury* (8) approved.

Karimbhai Shamsuddin v. *Rudra Pratap Singh* (9) and *Bansi Lal* v. *Gopal Lal* (10) referred to.

*Application for Leave to Appeal to His Majesty in Council, No. 1 of 1934, in Appeal from Original Decree, No. 271 of 1929.

(1) (1904) 8 C. W. N. 294.
(2) (1924) I. L. R. 51 Calc. 969 ; L. R. 51 I. A. 319.
(3) (1928) 116 Ind. Cas. 541 ; [1928] A. I. R. (Pat.) 609.
(4) (1929) 117 Ind. Cas. 193 ; [1929] A. I. R. (Pat.) 561.
(5) (1930) 139 Ind. Cas. 54 ; [1932] A. I. R. (Mad.) 46.
(6) (1933) 144 Ind. Cas. 320 ; [1933] A. I. R. (Pat.) 262.
(7) (1931) 29 All. L. J. 968.
(8) (1927) 31 C. W. N. 572.
(9) [1932] A. I. R. (Nag.) 118.
(10) (1928) I. L. R. 10 Lah. 688.

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Bibhootibhooshan Datta v. *Sreepati Datta.*

APPLICATION FOR LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL by the plaintiffs.

The material facts of the case are stated in the judgment.

Rajendrachandra Guha (with him *Mahendrakumar Ghosh*) for the applicants. There has been some variation of the decree of the trial court by the appellate Court in this case, *viz.*, some properties, which were kept joint, have also been ordered to be partitioned by metes and bounds by the appellate court, although it has dismissed my appeal. On the authority of *Annapurnabai* v. *Ruprao* (1), I submit that the decree of this Court is not a decree of affirmance and so it is not necessary for me to show that the appeal involves some substantial question of law and that I am entitled to leave to appeal to the Privy Council as a matter of course, as the subject-matter of the suit and the intended appeal is over Rs. 10,000. I also rely on *Ali Zamin* v. *Mohammad Akbar Ali Khan* (2), *Jamna Prasad Singh* v. *Jagarnath Prasad Bhagat* (3), *Perichiappa Chettiar* v. *Nachiappan* (4) and *Homeswar Singh* v. *Kameshwar Singh* (5).

Bijankumar Mukherji (with him *Bhupendrakishore Basu, Birajmohan Ray, Dwijendranath Datta* and *Nukuleshwar Som*) for the proposed respondents. The case of *Annapurnabai* v. *Ruprao* (1) does not lay down the broad principle that wherever there is the slightest modification by the appellate court it is not a decision of affirmance. The principle laid down in *Sree Nath Roy* v. *Secretary of State for India in Council* (6) has not been wholly abrogated by *Annapurnabai's* case (1). If, at all, it has only been

(1) (1924) I. L. R. 51 Calc. 969; L. R. 51 I. A. 319.
(2) (1928) 116 Ind. Cas. 541; [1928] A. I. R. (Pat.) 609.
(3) (1929) 117 Ind. Cas. 193; [1929] A. I. R. (Pat.) 561.
(4) (1930) 139 Ind. Cas. 54; [1932] A. I. R. (Mad.) 46.
(5) (1933) 144 Ind. Cas. 320; [1933] A. I. R. (Pat.) 262.
(6) (1904) 8 C. W. N. 294.

modified. The decision of Rankin C.J. in *Narendra Lal Das Chaudhury* v. *Gopendra Lal Das Chaudhury* (1) is not in conflict with *Annapurnabai's* case (2) and is still good law.

Cur. adv. vult.

The judgment of the Court was as follows:—

This is an application for Leave to Appeal to His Majesty in Council from a decree made by this Court on a First Appeal. The suit was for partition of certain properties, the plaintiffs claiming a half share therein, and also for accounts. The Subordinate Judge made a decree declaring, in effect, the plaintiffs' share to be one-third, after excluding certain properties, which he found had been already partitioned, and also ordering accounts for a certain period. Of the properties, in respect of which he decreed partition, he ordered a few items to be kept joint and the others he ordered to be partitioned by metes and bounds. This Court, on an appeal by the plaintiff No. 1 and a cross-objection by the plaintiff No. 2, varied the decree of the trial court by dismissing the appeal, save and except that it ordered a partition by metes and bounds of all the properties found to be joint. The plaintiff No. 1 is the applicant for leave.

The appellant relies upon the decision of the Judicial Committee in the case of *Annapurnabai* v. *Ruprao* (2) for his contention that the decree of this Court is not a decree of affirmance and so it is not necessary for him to show that the appeal involves some substantial question of law and that he is entitled to leave as a matter of course, inasmuch as the subject-matter of the suit, as also of the intended appeal, is over rupees ten thousand in value. There is undoubtedly considerable force in this contention if the argument of the petitioner's counsel in that case is to be taken as having been accepted by their Lordships in its entirety in the order that was made. This

(1) (1927) 31 C. W. N. 572.

(2) (1924) I. L. R. 51 Calc. 969; L. R. 51 I. A. 319.

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Court, however, has refused on the strength of *Annapurnabai's* case (1) to break away from a long course of decisions of Courts in India, which have firmly laid down the principle that when the appellate court modifies the original decree upon a single point and that completely in the applicant's favour, so that he has no further grievance in that matter, he cannot, because of that modification, have a right to an appeal on other points on which the courts have concurred, without showing a substantial question of law. The enormity of the opposite view is so very great that a far more clear and express pronouncement of the Judicial Committee would be necessary to uphold it. *Annapurnabai's* case (1) has been referred to in some of the decisions of the Patna and the Madras High Courts as laying down that, unless the decree from which the appeal is sought to be taken is nothing but a decree which, in its entirety, and entirely, affirms the decree of the court immediately below it, leave cannot be withheld, if the requirement as to value is satisfied; or, in other words, that the incident as to affirmance is to be entirely ignored as soon as any variation is found. See *Ali Zamin* v. *Mohammad Akbar Ali Khan* (2), *Jamna Prasad Singh* v. *Jagarnath Prasad Bhagat* (3), *Perichiappa Chettiar* v. *Nachiappan* (4) and *Homeswar Singh* v. *Kameshwar Singh* (5).

Now, in the case of *Sree Nath Roy* v. *Secretary of State for India in Council* (6) the judge below had given an award of compensation at a certain figure and the High Court increased that amount. The applicant for leave wanted to go to the Privy Council, so that the amount might be further increased. For this excess, which was to be debated before the Privy Council, the two courts below were at one.

(1) (1924) I. L. R. 51 Calc. 969; L. R. 51 I. A. 319.
(2) (1928) 116 Ind. Cas. 541; [1928] A. I. R. (Pat.) 609.
(3) (1929) 117 Ind. Cas. 193; [1929] A. I. R. (Pat.) 561.
(4) (1930) 139 Ind. Cas. 54; [1932] A. I. R. (Mad.) 46.
(5) (1933) 144 Ind. Cas. 320; [1933] A. I. R. (Pat.) 262.
(6) (1904) 8 C. W. N. 294.

It was held that, that being the position, the decree to be appealed from was one of affirmance, or, in other words, that section 110 of the Code was to be construed with reference to the subject-matter in dispute in appeal to the Privy Council. In *Annapurnabai's* case (1), the position was that the person claiming to have been adopted by the senior widow brought a suit claiming the property. The junior widow and the person, whom she said she had adopted, resisted the claim and the former claimed maintenance at Rs. 3,000 per annum. The first court decided in favour of the plaintiff upon the question of adoption, but decreed to the widow maintenance at the rate of Rs. 800 per annum. The appellate court increased the maintenance to Rs. 1,200 per annum, but, in all other respects, affirmed the decree of the first court. The junior widow and her alleged adopted son applied for Leave to Appeal to the Privy Council. If *Sree Nath Roy's* case (2) was to be applied, the only matter of substance in the proposed appeal to the Privy Council, namely, the excess amount of maintenance that was being claimed, being one in respect of which both the courts had been in agreement, the decree sought to be appealed from was to be regarded as a decree of affirmance. The Privy Council appears to have been of opinion that it was not to be so regarded. The particular application made in *Sree Nath Roy's* case (2) of the principle that, in applying section 110 of the Code, you have to have regard to the subject-matter of dispute in the appeal to the Privy Council, must be taken to have been overruled. But does *Annapurnabai's* case (1) go any further than that and does it lay down that, in every case where the decree of the High Court is not a mere decree dismissing the appeal, you are to take it that it is not a decree of affirmance, so as to take the case out of the third paragraph of that section and bring it within the first? Rankin C. J., in the case of *Narendra Lal Das Chaudhury* v. *Gopendra Lal Das Chaudhury* (3),

(1) (1924) I. L. R. 51 Calc. 969; L. R. 51 I. A. 319.

(2) (1904) 8 C. W. N. 294.

(3) (1927) 31 C. W. N. 572, 576.

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was not prepared to hold on the authority of *Annapurnabai's* case (1) that such a position could be affirmed. He observed :—

> It appears to me that the case of *Annapurnabai* v. *Rupraо* (1) is not in itself a sufficient authority to justify this Court in abandoning the principle which it has with other High Courts acted upon ; that is to say, I do not think that it shows that it is an erroneous view that we have to look to the substance and see what is the subject-matter of the appeal to His Majesty in Council.

In *Annapurnabai's* case (1) the appeal to be preferred was on the question of maintenance, and the two courts had differed on the question of the amount of the maintenance, the High Court in favour of the intending appellant. In the case before Rankin C.J., the original decree gave the appellant a certain share in the property in suit, but the appellate Court, while it confirmed the original decree in every other respect, modified it in respect of the share, giving him the whole share he claimed, so that, on that point, he had no further grievance. The question was whether the appellate decree was nevertheless one varying the original decree and the applicant was entitled to leave to appeal without proving that a substantial question of law was involved. Rankin C.J. held in the negative and observed :—

> We may take it, I think, that where the amount is a question in dispute, the fact that the courts differ and that the higher court differs in favour of the applicant does not mean that the decision is one of affirmance, but I am not in a case of this kind prepared to say that because on a totally different point, namely a point about the share, the applicant has succeeded and succeeded altogether so that he has no further grievance in that mattor, he can without showing a substantial question of law havo a right to litigate upon other points upon which the courts havo been in agreement.

As regards the cases cited on behalf of the applicant, the leave that was granted in them may perhaps be justified upon other grounds than upon the applicant's contention as regards *Annapurnabai's case* (1). But whether that is so or not we need not pause to consider, because it cannot be denied that the cases do support the view which the applicant contends for. On the other hand, there have been decisions in which

(1) (1924) I. L. R. 51 Calc. 969 ; L. R. 51 I. A. 319.

the view taken by Rankin C.J., as to the true effect of *Annapurnabai's* case (1), has been adopted. For instance, in *Karimbhai Shamsuddin* v. *Rudra Pratap Singh* (2), it has been said—

> Where the modification of a decree of a lower court consists of a modification of a pecuniary nature in the appellant's favour on a matter to be debated before the Privy Council, it amounts to a variation of the decree of the trial court, and it is immaterial as far as that point is concerned, whether under section 110 any substantial question of law is involved. But the appellant cannot make that decision a basis of appeal to the Privy Council on grounds unconnected with or dissociable from those on which he has succeeded and on which the courts were of one mind.

In *Bansi Lal* v. *Gopal Lal* (3), the trial court's decree was for Rs. 13,000 and the appellate court varied it by ordering, in accordance with the award on which it was founded, that, if the defendant did not give possession to the plaintiff within a certain time, he would have to pay him that amount. Leave was refused, as it was thought that the variation was not a substantial one.

A Special Bench of the Allahabad High Court, however, in the case of *Nathu Lal* v. *Raghubir Singh* (4) has taken the view that *Annapurnabai's* case (1) is an authority for the proposition that, if the decree of the court below has been varied, no matter to what exetent, the decree cannot be one of affirmance and there is no reason why words should be read into the section which are not there.

The above in short is the position of authorities bearing on the point. We have carefully considered the matter and are inclined to agree in the view of Rankin C.J. as to the true effect of *Annapurnabai's* case (1) and we would prefer to adhere to it until a more definite and authoritative pronouncement is made by the Judicial Committee to the contrary.

We proceed next to consider whether there is a substantial question of law involved in the proposed appeal. The substantial question in controversy between the parties is whether the properties in suit

(1) (1924) I. L. R. 51 Calc. 969; L. R. 51 I. A. 319. (2) [1932] A. I. R. (Nag.) 118. (3) (1928) I. L. R. 10 Lah. 688. (4) (1931) 29 All L. J. 968.

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belonged to one Harinath or to his wife Jagatmohini. The plaintiffs claimed a half share on the footing that the properties belonged to Harinath, while the defendants' case was that the plaintiffs' share amounted to only a third, the properties having belonged to Jagatmohini and not to Harinath.

The applicant for leave takes as his first ground that the onus of proof has been wrongly placed on the plaintiffs, and that, in any event, such burden, as rests on them, is not the same in respect of all the properties. In our opinion, no two views are possible on the question of onus; and the different items of properties have been separately considered in order to find out to what extent the burden lies on the plaintiffs and to what extent it has been discharged.

It is then said that, so far as properties standing in Mahendra's name are concerned, the plaintiffs, as heirs of Mahendra, should get a larger share. But this argument overlooks the common case of both parties—a case which has also been found to be true—that Mahendra was not the owner of the properties, but only a *benâmdâr*, either for Harinath or for Jagatmohini and that the plaintiffs have never come forward to claim as Mahendra's heirs.

Thirdly, it has been argued that the decision overlooks the fact that Jagatmohini, having come into possession of some of the properties as guardian under Act XL of 1858, had assumed a fiduciary character, of which she could not divest herself without first making over possession to the beneficial owners and getting herself discharged from that character, and, therefore, the defendants, who claim through her, are estopped from setting up her title to the properties. This contention was never raised at any point of time till now and depends on facts which have never been investigated.

Nextly, it has been said that, from the facts found, no inference in the nature of a family arrangement should have been inferred. What is wanting to

warrant such inference is said to be this that a dispute, such as would justify a family arrangement, has not been sufficiently proved by evidence. There is, however, a finding, rightly or wrongly arrived at, that there was an apprehension of a dispute. We, therefore, cannot see that any question of law arises.

Fifthly, it is said that mere acting for a number of years under the said family arrangement could not effect a change of title unless limitation or adverse possession for the statutory period or some doctrine of estoppel intervenes and it is urged that, in the decision, there are findings which go to show that these extraneous incidents are absent. The answer to the contention is that part performance has been found. The question, though one of law, is not in our judgment a substantial question of law.

We, accordingly, do not see our way to grant the leave asked for.

The application is dismissed with costs—hearing fee 5 gold mohurs.

Application dismissed.

A. A.