

or prejudiced owing to the fact that after the mortgagor's death the mortgaged property was divided without the mortgagee's permission, into two separate shares and separately possessed by two persons. We, therefore, think that the decree of the lower court was right and we dismiss this appeal with costs.

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Appeal dismissed.

1913
May, 9.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

SRI KISHAN LAL (PETITIONER) v. KASHMIRO AND OTHERS (OPPOSITE PARTIES.)*

Civil Procedure Code (1908), section 110—Appeal to His Majesty in Council—Requirements to be fulfilled before grant of certificate—Decree involving some question respecting property of the value of ten thousand rupees or upwards.

The value of the subject matter of the suit in the court of first instance was over Rs. 10,000, but the value of the subject matter in dispute on appeal to His Majesty in Council was less than Rs. 10,000. On the other hand, the proposed appeal to His Majesty in Council necessarily involved a decision as to the validity of an award which dealt with property of far greater value and which had been declared by the High Court to be invalid.

Held that the provisions of section 110 of the Code of Civil Procedure applied and a certificate should be granted. It was not necessary that at the time of presenting the application for leave to appeal there should be pending in a court a dispute respecting other property of the value of Rs. 10,000. *Maefarlane v. Leolaire* (1), *Musammât Aliman v. Musammât Hasiba* (2) and *Ananda Chandra Bose v. Brough* on (3) referred to.

THIS was an application for leave to appeal to His Majesty in Council against a judgement of RICHARDS, C. J., and BANERJI, J., reversing a decree of the Subordinate Judge of Meerut.

The facts, so far as they are material to the purposes of this report, are as follows:—

There was a dispute between the heirs of one Harnam Prasad as to the division of the family property. The family was possessed of property worth over Rs. 1,60,000, among which were certain mortgagee rights. The matter was referred to arbitration by the male heirs, and an award was made in 1893, by which all the property, including the mortgagee rights, was divided among the defendant, Musammât Kashmiro, the widow of the deceased, and certain persons, who claimed to be members of the joint family with the deceased, the plaintiff being amongst them. The

* Privy Council Appeal No. 6 of 1913.

(1) (1882) 15 Moo. P. C., 181. (2) (1897) 1 C. W. N., (Notes) 93.

(3) (1872) 9 B. L. R., 423.

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lady was given an eight-anna share in the mortgagee rights, while the plaintiff was given four annas. The lady alone brought a suit upon the mortgage and recovered the money from the mortgagors. The plaintiff, thereupon, brought the present suit for recovery of his share (4 annas) in the mortgage money. The suit was valued at more than Rs. 10,000. The lower court gave the plaintiff a decree for Rs. 8,800. In appeal the High Court, holding that the award was fraudulent and collusive and that the family was a separate family, dismissed the suit.

The plaintiff applied for leave to appeal to His Majesty in Council. An affidavit was filed in the High Court along with this application that the decree would affect property valued at Rs. 40,000 in possession of the plaintiff under the award.

The Hon'ble Dr. *Sundar Lal*, for the appellant :—

In this case although the valuation of this particular appeal is below Rs. 10,000, yet the amount indirectly involved is over Rs. 10,000, inasmuch as the whole award has been declared to be invalid and that involves property worth over Rs. 10,000. The question of the validity or invalidity of the award cannot be raised in another suit. It is, therefore, a fit case in which leave to appeal should be granted. He cited *Andrew Macfarlane v. Francis Leclair* (1), *Musammât Aliman v. Musammât Hasiba* (2) and *Ananda Chandra Bose v. Broughton* (3).

Mr. *Nihal Chand*, for the respondent :—

The subject-matter in dispute means the property in dispute in the suit or appeal. Section 110 of the Code of Civil Procedure, 1908, refers to suits in existence and not to suits that may be brought in the future. Here the property in dispute was worth less than Rs. 10,000 and leave to appeal should not be granted; *Banarsi Prasad v. Kashi Krishna Narain* (4) and *Hanuman Prasad v. Bhagwati Prasad* (5).

RICHARDS, C. J. and BANERJI, J.—This is an application for leave to appeal to His Majesty in Council. The value of the subject-matter of the suit in the court below exceeded Rs. 10,000, but that of the proposed appeal to His Majesty in Council is Rs. 8,767-2-0, that is, below Rs. 10,000. The decree of this Court

(1) (1862) 15 Moo. P. C., 181.

(3) (1872) 9 B. L. R., 423.

(2) (1897) 1 C. W. N., (Notes) 93.

(4) (1900) I. L. R., 23 All., 227, (231)

(5) (1902) I. L. R., 24 All., 236.

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reversed the decree of the court below. It is contended that, under section 110 of the Code of Civil Procedure, the appellant has a right to appeal to His Majesty in Council, because the decree of this Court involves, directly or indirectly, a claim or question respecting property of value exceeding Rs. 10,000. The question in this case was whether an arbitration award was binding upon Musammat Kashmiro, one of the respondents to the proposed appeal. It is admitted that the award relates to property far exceeding Rs. 10,000 in value. This Court held, reversing the decision of the court below, that the award was not binding on the lady for reasons stated in this Court's judgement. It is the correctness of this decision which is challenged in the proposed appeal. If the decree of this Court becomes final, the question of the validity of the award will also become final as regards property other than the property in dispute in the present suit. It is, therefore, clear that the decree of this Court does involve a question relating to property of a value exceeding Rs. 10,000.

It is contended on behalf of the opposite party that unless there is at the time of the presentation of the application for leave to appeal a dispute pending in some court respecting other property of the value of Rs. 10,000, leave cannot be granted under section 110. We are unable to agree with this contention. The first paragraph of the section provides for cases in which the value of the subject-matter of the suit and of the subject-matter in dispute on appeal to His Majesty amounts to Rs. 10,000, or upwards. The second paragraph was intended to provide for cases in which, although the value of the subject-matter of the suit or subject-matter in dispute on appeal to His Majesty was below Rs. 10,000, the decree or final order involved, directly or indirectly, a claim or question to or respecting property of the value of Rs. 10,000, or upwards. The paragraph to which we have referred is very wide and general, and it seems to us that it was clearly inserted in the section to meet a case like the present. The principle which underlies a question of this kind was discussed by their Lordships of the Privy Council in the case of *Macfarlane v. Leclair* (1), and it seems to us that, in view of the opinion of their Lordships in that case, the second paragraph of section 596

(1) (1862) 15 Moo. P. C., 181.

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of the Code of 1882, which corresponds to section 110 of the present Code, was enacted. A similar view to that held by us appears to have been taken by the Calcutta High Court in *Musammam Aliman v. Musammam Hasiba* (1) and *Ananda Chandra Bose v. Broughton* (2). As in the present case the decree involves a question respecting property of value exceeding Rs. 10,000, and as the decision of the court below was reversed by this Court, the case, in our opinion, fulfils the requirements of section 110 of the Code of Civil Procedure, and we so certify.

Leave granted.

1913
May, 24.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.
MISS EVA MOUNTSTEPHENS (PETITIONER) v. MR. HUNTER GARNETT
ORME (OPPOSITE PARTY)*

Act No. X of 1865 (Indian Succession Act), section 244—Civil Procedure Code (1908), section 2—Will—Probate—Application for probate dismissed—“Decree”—“Order”—Appeal.

Held that the order of a District Judge granting or refusing probate of a will on an application made under the provisions of section 244 of the Indian Succession Act, 1865, is a decree within the meaning of section 2 of the Code of Civil Procedure, 1908, and appealable as such.

Held also that the court fee payable on such an appeal is Rs. 10 under article 17, clause vi, of the second schedule to the Court Fees Act, 1870.

Umrao Chand v. Bindraban Chand (3), *Esoof Hashim Dooply v. Fatima Bibi* (4) and *Sheikh Asim v. Chandra Nath Namdas* (5) referred to.

THIS was an application in the court of the District Judge of Saharanpur for probate of the will of Miss Garnett Orme, who died at the Savoy Hotel, Mussoorie, on the 18th of September, 1911. The applicant was the executrix named in the will. The granting of probate was resisted by the brother of the testatrix upon various grounds, and on the 12th of October, 1912, the District Judge dismissed the application. The applicant appealed to the High Court, framing her appeal as a first appeal from order and paying a court fee of Rs. 2. Before the appeal came on for hearing, the opposite party raised a preliminary objection that the District Judge's decision amounted to a decree within the meaning of section 2 of the Code of Civil Procedure and should

*First Appeal No. 285 of 1913, from a decree of W. D. Burkitt, District Judge of Saharanpur, dated the 12th of October, 1912.

(1) (1897) 1 C. W. N., (Notes) 93. (3) (1895) 1 L. R., 17 All., 475.

(2) (1872) 9 B. L. R., 423. (4) (1896) 1 L. R., 24 Cal., 30.

(5) (1904) 8 C. W. N., 743.