

Before Sir Greenwood Meares, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

SAJJAD ALI KHAN, AND OTHERS (DEFENDANTS) v. ISHAQ KHAN AND OTHERS (PLAINTIFFS) \*

1919  
November, 22.

Civil Procedure Code (1908), section 109—Appeal to His Majesty in Council—  
“ Final order ”— Order of remand—Interlocutory order.

Appeals on matters interlocutory in their nature should be allowed to be preferred to His Majesty in Council only when their decision will put an end to the litigation and finally decide the rights of parties.

*Kausella v. Ram Sarup* (1), *Almad Husain v. Gobind Krishna Narain* (2), *Nuri Miah v. The Ganges Sugar Works, Ltd., Cawnpore* (3) and *Danby v. Tufazul Husain* (4) referred to.

THE plaintiffs in this case filed a suit for the recovery of mesne profits. The defendants, *inter alia*, raised a plea that the suit was barred by reason of there having been a previous suit between the same parties. This question of *res judicata* was decided first by the court of first instance, which found against the plaintiffs and then and there dismissed the suit without going into any of the other issues which arose in it. The plaintiffs appealed to the High Court, which disagreed with the finding of the court below on the question of *res judicata* and accordingly set aside that court's decree and remanded the suit for disposal upon the remaining issues. Against this order of remand, the defendants applied for a certificate of leave to appeal to His Majesty in Council.

Babu Satya Chandra Mukerji, for the appellants.

Dr. Kailas Nath Katju, for the opposite parties.

MEARES, C. J., and BANERJI, J.:—This is an application by the parties who were defendants in the court of the Subordinate Judge for leave to appeal to His Majesty in Council against a decision of this Court, dated the 9th of January, 1918. It appears that an action was commenced on the 3rd of July, 1915, for the recovery of mesne profits, and when that action came on, the defendants took as their first point that this action was barred by reason of there having been a previous action between the same parties, and they relied upon section 11, Explanation V, of the Code of Civil Procedure. They succeeded in persuading the learned

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Application No. 8 of 1918, for leave to appeal to His Majesty in Council.

(1) (1907) 5 A. L. J., 57.

(3) (1910) I. L. R., 38 All., 150.

(2) (1911) I. L. R., 38 All., 391. (4) (1916) 45 Indian Cases, 290.

Subordinate Judge that he ought to regard the claim as falling within the principle of *res judicata*. In that way the plaintiff's action came to a sudden termination. Thereupon the plaintiff moved the High Court and on the appeal it was held that the claim was not barred by reason of the previous action and the case was remanded for the decision of the Subordinate Judge. The result of the High Court's decision was of course to place the parties exactly as they were when first the case was opened before the lower court, with the exception that the issue of *res judicata* was settled in the plaintiffs' favour. The defendants now apply for leave to take this point on appeal to the Privy Council. Now a reference to the pleading shows that *res judicata* was only one of several issues put forward by the defendants. They contend, for instance, that the claim for mesne profits for the years 1912 and 1913 is barred by lapse of time, that the suit is not cognizable by the learned Subordinate Judge but is a matter within the province of the Revenue Court. There are other matters of substance which must be dealt with, involving much more than mere arithmetical calculations or perfunctory apportionment of liability amongst the defendants. In these circumstances it remains to be seen what are the principles which should govern an application of this kind. The application is based upon section 109 of the Code of Civil Procedure and turns upon the meaning to be given to a "final decree" in that section. Now this question, under varying circumstances, has been frequently litigated, and if ever a point of law can fairly be said to be crystallised, it would seem that the time has arrived when it can be said that this matter is demonstrated clearly and definitely in a consistent series of decisions.

The defendant's counsel quite naturally drew our attention to *Sayid Muzhar Hossein v. Mussamat Bodha Bibi* (1), and if he could have shown us that a decision on the *res judicata* point would in any event have settled the rights of the parties except as to the mere mechanical working out of the decree, we should have granted the defendants a certificate and allowed the appeal to go to the Privy Council. A decision of the Privy Council, affirming that of the High Court, would, however, leave

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the various issues above referred to still in contention between the parties. The plaintiff's counsel who opposed the application referred us to several cases beginning with that of *Kausella v. Ram Sarup* (1), *Ahmad Husain v. Gobind Krishna Narain* (2), *Nuri Miah v. The Ganges Sugar Works, Ltd., Cawnpore*, (3) and finally the case of *Darby v. Tajazul Hussain* (4). Now, in each of those authorities there was a decision on some one point, just as in the case now under consideration there was a decision that the claim was barred, but there were also outstanding points of considerable importance and of such a character that it could not be said that, whichever way the decision of the Privy Council went, the matter would be concluded. All of these cases are conveniently grouped up in the Patna decision and there is thus a uniform consensus of opinion that appeals on matters interlocutory in their nature should be allowed to be preferred to His Majesty in Council only when their decision will practically put an end to the litigation and finally decided rights of the parties. In this view it follows that the appeal must be rejected. We accordingly dismiss the application with costs.

*Application rejected.*

*Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.*

DIRGPAI SINGH (DEFENDANT) v. PAHLADI LAL (PLAINTIFF) AND LARAITI KUNWAR AND OTHERS (DEFENDANTS).\*

1919  
November, 24.

*Civil Procedure Code (1908), section 103—Application for leave to appeal to His Majesty in Council—“Final order”—Order of remand—“Substantial question of law”—Registration—Fraud regarding registration committed by the mortgagor but not participated in by the mortgagee.*

A mortgagor committed a fraud on the Registration law in that he caused to be entered in the mortgage deeds certain property which did not belong to him and was only entered for the purpose of having the deeds registered in a particular district. It was found, however, that the mortgagee was not a party to or cognizant of the fraud, and the High Court held that he ought not, by reason of the conduct of the mortgagor alone, to be deprived of his right of suit on the mortgages. The High Court, therefore, reversed the

\*Application no. 13 of 1918, for leave to appeal to His Majesty in Council.

(1) (1907) 5 A. L. J., 57.

(3) (1916) I. L. R., 38 All., 180.

(2) (1911) I. L. R., 38 All., 321. (4) (1916) 45 Indian Cases, 290.