1932

SHUKR-ULLAH v. ZOHRA BIBI.

right of Ismail's widow as an heir was denied. Similarly the right of Mst. Jumman as the heir to her father or to her brother Ismail does not appear to have ever been called in question. The same remarks apply to Zulekha, plaintiff No. 2, and Rahimullah, plaintiff No. 3. Accordingly we hold that the plaintiffs' suit is not barred by limitation and that the defendants have failed to establish adverse possession for more than 12 years of the properties now in dispute.

The result of our findings is that the appeal fails and is dismissed with costs.

MISCELLANEOUS CIVIL.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Mukerji.

1932
May, 27.

KISHAN CHAND AND ANOTHER (DEFENDANTS) *v.* LACHHMI CHAND AND ANOTHER (PLAINTIFFS).*

Civil Procedure Code, sections 109 *and* 110—*Appeal to Privy Council—"Final order"—Order setting aside an* ex parte *decree—Valuation.*

An order passed, on appeal, by the High Court setting aside an *ex parte* decree of the trial court is a final order within the meaning of the Civil Procedure Code and an appeal can lie from it to the Privy Council.

A final order within the meaning of section 109 of the Civil Procedure Code need not be a final order passed in the suit itself but may be a final order in any other proceeding or case arising subsequent to the suit. An application for setting aside an *ex parte* decree is a miscellaneous application, separately numbered, which is made after the suit has terminated for the time being, and which is a proceeding in itself. The matter in controversy in this new proceeding is not the merits of the original suit but the question whether the plaintiffs should be deprived of the substantive rights which

*Application No. 8 of 1932, for leave to appeal to His Majesty in Council.

1932

KISHAN CHAND v. LACHEMI CHAND.

had accrued to them by virtue of the *ex parte* decree. The order which finally terminates that proceeding and determines the rights of the parties so far as the question in controversy between the parties in that proceeding arose, is a final order within the meaning of section 109.

Section 110 of the Code of Civil Procedure does not speak of the valuation of the suit as put in the plaint but of the value of the subject matter in dispute or of the value of the property affected by it.

Mr. *Mansur Alam*, for the applicants.

Dr. *K. N. Katju* and Mr. *S. N. Seth*, for the opposite parties.

SULAIMAN, C.J., and MUKERJI, J. :—This is an application for leave to appeal to their Lordships of the Privy Council from an order passed by a Bench of this Court.

A suit was brought by the plaintiffs for a declaration of title as to property in schedule B attached to the plaint, on the basis of a private partition and for other reliefs against the defendant No. 1. At his own instance defendant No. 2, the son of defendant No. 1, was made a party. There was a written compromise filed and signed by the plaintiffs and defendant No. 1, which it was alleged at one time had been provisionally agreed to by the pleader for the defendant No. 2. This compromise, however, was not verified by the pleader, who was absent on the date fixed. The first court decreed the claim in terms of the compromise against the defendant No. 1 and decreed it *ex parte* against defendant No. 2 in terms of the compromise.

An application was later on filed on behalf of the defendant No. 2 for the setting aside of the *ex parte* decree passed against him. The court after considering the case came to the conclusion that the decree should not be set aside and it rejected the application. This application was numbered as miscellaneous application No. 200 in the original suit. A first appeal from

order was preferred to this High Court from the order rejecting the application and a Bench of this Court allowed the appeal and set aside the *ex parte* decree as against both the defendants, with the result that the original suit was restored to its original number to be tried *de novo*.

The defendants wish to appeal to their Lordships of the Privy Council from the order passed by the High Court.

Preliminary objections are taken by the learned advocate for the respondents that the valuation is less than Rs.10,000 and that there is no right of appeal because the order of this Court was not a final order within the meaning of section 109 of the Code of Civil Procedure.

As regards the first objection, no doubt the valuation of the suit as put down in the plaint was Rs.5,100 and the court fee paid was on the basis of the Government revenue. But it is conceded on behalf of the respondents that the value of the property in schedule B was more than Rs.10,000. It seems to us that the suit, being one relating to a declaration of title to the property in schedule B and for other reliefs in respect of it, was one involving directly or indirectly a claim or question to or respecting property of the amount or value exceeding Rs.10,000. Section 110 of the Code of Civil Procedure does not speak of the valuation of the suit as put in the plaint but of the value of the subject matter in dispute or of the value of the property affected by it. We, therefore, overrule this objection.

The second objection requires some consideration. Their Lordships of the Privy Council in the leading case of *Saiyid Muzhar Hossein* v. *Mussamat Bodha Bibi* (1) laid down that an order is a final order when it comprises the decision of the High Court upon a cardinal issue in a suit, that issue being one which goes

(1) (1894) I.L.R., 17 All., 112.

1932

KISHAN CHAND v. LACHHMI CHAND.

to the foundation of the suit, and one which can never, while this decision stands, be disputed again. In that case their Lordships actually entertained the appeal from an order remanding the case on a finding reversing the decree of the original court that the gift in dispute was valid. The only two cases which have been brought to our notice and in which their Lordships of the Privy Council held that no appeal could lie were *Radha Kishan* v. *Collector of Jaunpur* (1), and *Ramchand Manjimal* v. *Goverdhandas Vishandas* (2).

In *Radha Kishan's* case an application for setting aside an *ex parte* decree was disallowed by the original court without the court's being satisfied by any investigation as to whether or not the defendant had been prevented by any sufficient cause from appearing when the suit was called on for hearing; and the High Court reversed that order and sent the case back for investigation as to whether the defendant had sufficient cause for non-appearance. It is noteworthy that the *ex parte* decree was not set aside by the High Court and the whole case was not reopened, but the application itself was sent back for further inquiry. Their Lordships of the Privy Council emphasised this distinction in their judgment on page 226 and pointed out that what was remanded was merely the application immediately before the court, to wit the application to set aside the decree, and that it was this application which the Subordinate Judge would under the remand proceed to dispose of. Such an order, therefore, was held to be a mere interlocutory order, directing procedure and not deciding the cardinal point in the case itself.

Ramchand's case (2) was entirely different. A suit for damages was brought in spite of a previous arbitration agreement between the parties. The defendant applied under section 19 of the Indian

(1) (1900) I.L.R., 23 All., 220. (2) (1920) I.L.R., 47 Cal., 918.

Arbitration Act for a stay of proceedings with a view to the issues being referred to arbitration under that section. The trial Judge granted the stay but the Judicial Commissioner reversed that order and refused to stay the proceedings. Their Lordships held that the order was not a final order as it did not finally dispose of the rights of the parties but left them to be determined by the courts in the ordinary way. It is to be noted that under section 19 of the Indian Arbitration Act the court had a discretion to stay proceedings where there had been a previous submission. The appellate court in the exercise of that discretion had declined to stay proceedings. That case, therefore, is clearly distinguishable.

It seems to us that as soon as the *ex parte* decree was passed by the court, the court became *functus officio* and the suit terminated for the time being. A fresh proceeding was initiated by an application under order IX, rule 13 of the Code of Civil Procedure for the setting aside of the decree. The application, of course, related to the previous suit but it was a miscellaneous application, separately numbered, which was a proceeding in itself. The matter in controversy in this new proceeding was not the merits of the original suit but the question whether the plaintiffs should be deprived of the rights which had accrued to them by virtue of this *ex parte* decree. If there was no sufficient cause for setting aside the *ex parte* decree, the decree would stand and the defendants would be bound by it and would not be allowed to re-agitate the matter by a separate suit. The rights acquired under an *ex parte* decree are substantive rights independently of the merits of the original suit. The trial court held that no good cause had been shown and that, therefore, the *ex parte* decree had been validly passed and the plaintiffs were entitled to the benefit of that decree. On appeal this Court came to a contrary conclusion.

1932

KISHAN CHAND v. LACHHMI CHAND.

The result is that the *ex parte* decree in favour of the plaintiffs has been finally set aside and, so far as the proceedings relating to the setting aside of that decree are concerned, they have finally terminated by the order of this High Court and now it is the original suit which has been reopened and restored to its original number. The order of this High Court is a final order so far as this High Court is concerned and cannot be questioned again in the course of the trial of the suit or by way of appeal, except to their Lordships of the Privy Council.

In the case of *Radha Mohan Datt* v. *Abbas Ali Biswas* (1) it was held by a Full Bench of this Court, of which one of us was a member, that the propriety of an order setting aside an *ex parte* decree under order IX, rule 13 of the Code of Civil Procedure cannot be questioned in an appeal from the decree ultimately passed in a suit and that the proceeding relating to the setting aside of the *ex parte* decree was a separate case which was decided by that order.

The learned advocate for the respondents further contends that an order cannot be a final order unless it actually decides the rights of the parties, that is to say, the merits of the case itself. He argues that in the present case all that has happened is that the defendants have been allowed a further opportunity to produce fresh evidence, which is a matter of procedure only. It seems to us that the final order within the meaning of section 109 need not be a final order passed in the suit itself but may be a final order in any other proceeding or case arising subsequent to the suit. If that order finally terminates that proceeding and determines the rights of the parties so far as the question in controversy between the parties in that proceeding arose, it is a final order within the meaning of that section.

(1) (1931) I.L.R., 53 All., 612

This view finds full support from two decisions which have been cited before us, *Meghraj* v. *Bhayabati Koer* (1) and *Lachmi Narain* v. *Bamakund* (2). In these cases the plaintiff's suit had been dismissed for default and the remand order by the High Court merely reopened the case. Nevertheless both the Calcutta and the Patna High Courts held that it was a final order inasmuch as the controversy between the parties in that proceeding was finally determined. We are not aware that any objection was taken before the Privy Council.

The language of section 109 of the Code of Civil Procedure is wide enough to cover this case, and in the absence of any clear authority to the contrary we must hold that the order in question is a final order and is, therefore, appealable.

It is not necessary for us to express any opinion whether when on appeal the High Court refuses to record a compromise which has been recorded by the court below an appeal would lie : vide *Bhagwati Dayal* v. *Dhan Kunwar* (3). We may have to consider this point when a question directly arises. We may in passing remark that the case cited above may be distinguished on a supposition that the alleged compromise was entered into in the course of the suit itself and not in any separate proceeding. Nor is it necessary for us to express any opinion whether when questions of *res judicata* or limitation arise and are disposed of by the High Court as a preliminary point a cardinal point has been decided.

In our opinion the case fulfils the requirements of sections 109 and 110 of the Code of Civil Procedure and the applicants are entitled to appeal, and we certify accordingly.

(1) (1914) 21 C.L.J., 279. (2) (1921) 6 Pat. L.J., 116.
(3) (1925) I.L.R., 48 All., 329.