

Before Sir Grimwood Mears, Chief Justice, and Mr. Justice Sen.

1931
November,
24.

RAI MAHADEO SAHAI (APPLICANT) v. SECRETARY OF STATE FOR INDIA AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, sections 109 and 110—“Final order passed on appeal”—Order of dismissal of appeal for failure to furnish security for costs—Such order is one “affirming the decision of the court below”.

An order dismissing an appeal for the appellant's failure to furnish security for costs under the provisions of order XLI, rule 10, of the Civil Procedure Code is an order which has the effect of confirming the decision of the court below. The words used in section 110 are “affirms the decision of the court” and not “affirms the decision of the court on the merits”.

The words “final order passed on appeal” in section 109 (a) of the Civil Procedure Code should be construed broadly so as to include an order directing the dismissal of the appeal consequent upon the failure of the appellant to furnish security for the costs of the respondent.

The applicant appeared in person.

Messrs. U. S. Bajpai and Kedar Nath Sinha, for the opposite parties.

MEARS, C. J., and SEN, J. :—This is an application for leave to appeal to His Majesty in Council from an order of this Court, dated the 17th of June, 1931. The applicant prayed for a certificate under section 109 of the Code of Civil Procedure. An ancillary prayer is contained in paragraph 17 of his petition which is somewhat curious: “That the applicant solicits the favour of appointing a receiver, and the printing and legal charges of both the parties be realised from the estate and justice be done to the case.”

The subject matter of this suit consisted principally of a property in Taluqa Imampur, pargana Ungli, in the district of Jaunpur.

* Application No. 34 of 1931, for leave to appeal to His Majesty in Council.

After various defeats in the revenue court going back nearly 15 years the applicant had instituted a suit in the court of the Additional Subordinate Judge of Jaunpur for declaration of title to the aforesaid properties. The suit was directed against the Secretary of State for India and against Mst. Tula and Mst. Sumitra. The plaintiff applicant had asked for leave to sue *in forma pauperis*. Upon a contest raised in the case, the court held that he was not a pauper. The result was that his application to sue as a pauper was dismissed with costs in favour of the Secretary of State and the other two defendants.

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The plaintiff then instituted a regular suit on payment of the proper court fee. This suit was numbered and registered as 57 of 1929. The material allegations on which the claim was founded were that the property in Taluqa Imampur was owned by his maternal grandfather, Rai Hingan Lal, who acquired the property for loyal and meritorious services during the Sepoy Mutiny under a grant by the Government, dated the 9th June, 1860; that after the death of Hingan Lal this property was settled upon Rai Daya Kishen, his son; that after the latter's demise his son Rai Madan Makund became the owner; that the last named person died without leaving any issue; that Mst. Tula and Mst. Sumitra were not his wedded wives and that the property had devolved upon the plaintiff by force of the Crown Grants Act and the Pensions Act.

The defendants contested the suit upon the following grounds: (a) The property was acquired by Rai Daya Kishen under the grant, dated the 9th of June, 1860, and devolved upon Mst. Tula and Mst. Sumitra, who were the widows of Rai Madan Makund and that the plaintiff had no place in inheritance; (b) the defendants Nos. 2 and 3 were in possession of the property and the suit for a mere declaratory relief was barred by

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section 42 of the Specific Relief Act; and (c) the plaintiff's claim was barred by order XXXIII, rule 15, of the Code of Civil Procedure. These pleas found favour with the trial court and the plaintiff's claim was dismissed on the 14th of May, 1930. The plaintiff preferred an appeal to this Court, which was duly admitted on the 21st of July, 1930, and was registered as First Appeal No. 378 of 1930.

On the 23rd of October, 1930, two of the respondents, namely Mst. Tula and Mst. Sumitra, applied to this Court under order XLI, rule 10, of the Civil Procedure Code, that the plaintiff appellant be directed to furnish security for the costs of this Court as also of the court below for a total sum of Rs. 2,500. This application was supported by an affidavit sworn by Dwarka Prasad in which he brought out very clearly the fact that the sanad, dated the 9th of June, 1860, had been granted to Rai Daya Kishen and not to Rai Hingan Lal and that the plaintiff's suit was bound to fail. It had also been rightly dismissed by the court below as the plaintiff had contravened the imperative provision of order XXXIII, rule 15, of the Code of Civil Procedure. The application was heard by a Division Bench which upon a consideration of the application, the affidavits and the judgment of the court below came to the conclusion that this was a fit case in which security should be ordered. An order was accordingly made on the 5th of December, 1930, directing the appellant to furnish security for the respondent's costs "of this appeal" to the extent of Rs. 2,500 within three months "of this date". It may be mentioned that Rs. 2,500 did not represent the costs of the appeal only but included also the costs allowed by the trial court.

The plaintiff appellant moved this Court to revise the order dated the 5th of December, 1930.

By its order dated the 11th of March, 1931, this Court refused to revise the order in question but granted the plaintiff a further period of three months to furnish the required security. The plaintiff appellant failed to furnish the required security and his appeal was dismissed with costs on the 17th of June, 1931. It is against the order of this date that the plaintiff prays for leave to appeal to His Majesty in Council.

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The value of the subject matter of the suit in the court of first instance was above Rs. 10,000. The value of the proposed appeal is also above Rs. 10,000. It is debatable whether an order rejecting an appeal for the appellant's failure to furnish security for costs of the respondents amounts to an affirmance of the decision of the court below.

A preliminary objection has been taken by the respondents that the order dated the 17th of June, 1931, is not a "final order" within the meaning of section 110 of the Code of Civil Procedure and that an application for leave to appeal from such an order is therefore incompetent. Our attention has been drawn to a decision of the late court of the Judicial Commissioners of Oudh in *Radha Kishen v. Jamna Prasad* (1). It has been held in this case that an order rejecting an appeal for failure to furnish security for costs is not an order affirming the decision of the court below within the meaning of the last paragraph of section 110, nor is such an order "a final order passed on appeal" within the meaning of section 109 of the Civil Procedure Code. This decision, in our opinion, hinges upon a very narrow and technical construction of sections 109 and 110. Where an order of this Court dismisses an appeal it has the effect of confirming the decision of the trial court. It should be noticed that the words in section 110 are "affirms the decision of the court" and not "affirms the decision of the court on the merits".

(1) (1910) 5 Indian Cases, 940.

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Similarly, we are inclined to think that the words "final order passed on appeal" in section 109 (a) may admit of a broader construction, so as to include an order directing the *dismissal of the appeal* consequent upon the appellant's failure to furnish security for the costs of the respondents.

The appellant, however, has founded his application upon section 109 (c) which provides for a right of appeal from any *order*, when the case is certified to be a fit one for appeal to His Majesty in Council. This clause evidently embraces cases other than those provided in clauses (a) and (b), and the order sought to be appealed need not be a final order passed by a High Court or a final order affirming the decision of the lower court.

We are, however, of opinion that the application should be dismissed, the applicant having failed to satisfy this Court either that a substantial question of law was involved in the case or that it was otherwise a fit case to appeal to His Majesty in Council.

[The rest of the judgment, not material for the purpose of this report, is omitted.]

REVISIONAL CIVIL.

Before Mr. Justice Kendall.

HUBRAJI (APPLICANT) v. BALIKARAN SINGH
(OPPOSITE PARTY).^{*}

Civil Procedure Code, section 115 and order XLIV, rule 1, proviso—Application for leave to appeal as a pauper—Summary rejection after issue of notice to opposite party and Government pleader—Proviso does not apply after issue of notice—Revision—Practice and pleading—Plea taken in revision but not in lower court.

In an appeal filed in *forma pauperis* the appellate court, after issuing notice to the opposite party and the Government pleader, summarily rejected the appeal on the ground that

^{*}Civil Revision No. 217 of 1931.