Before Sir Lal Gopal Mukerji, Acting Chief Justice, Mr. Justice King and Mr. Justice Niamat-ullah

1933
January, 10

SITAL DIN AND OTHERS (DEFENDANTS) *v.* ANANT RAM (PLAINTIFF)*

Letters Patent, sections 10, 30—"*Judgment*"—*Order of remand—Appeal—Civil Procedure Code, section* 148: *order XLI, rule* 23—*Conditional order of remand, fixing a time for fulfilling the condition and in default the appeal to stand dismissed—Decree or order—Power to extend the time.*

An appeal lies under section 10 of the Letters Patent from an order of remand passed by a single Judge of the High Court under order XLI, rule 23 of the Civil Procedure Code. A final decision which effectually disposes of the appeal amounts to a "judgment" within the meaning of section 10 of the Letters Patent, whether it amounts to a "decree" or not. *Sevak Jeranchod Bhogilal v. Dakore Temple Committee*, 23 A. L. J., 555, explained and distinguished.

Where the lower appellate court remanded the suit on condition that the appellant should within one month file certain papers in the trial court, "and in case that is not done, the remand order shall not take effect and the appeal shall stand dismissed automatically upon a report being made by the court below that the order for filing the papers had not been complied with", and the condition was not complied with but an extension of time was prayed for, it was *held* that the order was not final and did not amount to a decree, and it was open to the court to extend the time.

The facts of the case are fully set forth in the following judgment of the single Judge from which the appeal under section 10 of the Letters Patent was filed :—

KENDALL, J. :—The plaintiff appellant brought a suit for demolition of the constructions on a certain plot. The suit was dismissed by the trial court, and on the plaintiff appealing to the District Judge an order was passed remanding the suit for re-trial, provided that within one month the plaintiff filed certain papers; "and in case that is not done," the order concludes, "the remand order shall not take effect and the appeal shall stand dismissed automatically." The

* Appeal No. 47 of 1931, under section 10 of the Letters Patent.

papers were not filed within the time given, and the plaintiff made an application for an extension of time. The Judge refused, saying that he had neither the power nor the wish to extend time, but held that the language of the order passed on appeal by himself was peremptory and left him no choice. He therefore dismissed the application, adding "The appeal stands dismissed automatically, requiring no further order of the appellate court."

An appeal has been preferred against this order, and a preliminary objection is raised on behalf of the respondents that no appeal lies from this order of the District Judge, which is merely an order refusing to extend time and has not the force of a decree. It is argued that the first order had the effect of a decree, and in fact was embodied in a decree, and as such was appealable, but that the second order was merely one refusing extension of time; and further that the Judge was, as he believed himself to be, bound by the decree which he had himself given.

It is argued on behalf of the appellant that the first order was an order of remand not amounting to a decree, and that it was the second order which had the force of a decree and which was subject to an appeal.

Counsel on either side have referred to the decisions in the cases of *Suranjan Singh* v. *Ram Bahal Lal* (1) and *Jagarnath Sahi* v. *Kamta Prasad Upadhya* (2). In the first of these cases a Full Bench of this Court held that section 148 of the Code of Civil Procedure does not entitle the court to extend the time fixed by the decree for payment of the purchase money in pre-emption suits and further that an order made under section 148 of the Code of Civil Procedure is not a decree, and that it is not appealable as an order under section 104 of the Code of Civil Procedure. In the second case a Bench of two Judges of this Court held that where an application had been made to set aside an *ex parte* decree, and the court passed an order in favour of the applicants conditional on their paying to the plaintiffs by a certain date a sum of money as damages, an appeal would lie from the order of the court refusing to receive the prescribed payment after the fixed date, and also that the court had jurisdiction to extend the time. The *ratio decidendi* in both cases clearly was whether the first order fixing the time for payment had the effect of a decree or not. In the case

(1) (1913) I.L.R., 35 All., 582. (2) (1913) I.L.R., 36 All., 77.

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before the Full Bench there was a decree for pre-emption and a time was fixed for payment of the purchase money. In the second case there was an order setting aside the *ex parte* decree conditional on payment being made within a fixed time. In the case before me now it is clear that the learned District Judge believed that the first order had the force of a decree, and that it was not an order of remand as the appellant claims that it was. It could, it is argued, only be changed into an order of remand if the plaintiff filed certain papers before a certain date. Like the order of the Subordinate Judge in the case of *Jagarnath Sahi* v. *Kamta Prasad Upadhya* (1) it is, however, open to criticism as a conditional order. If the District Judge had ordered the papers to be filed by a certain date and the appeal to be put up for final orders on that date there would have been no ambiguity. Under section 2 of the Code of Civil Procedure a decree is defined as "The formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit." The present case is not analogous to that of a preliminary decree in a mortgage suit or in a partition suit where the rights have been determined and only accounting remains. If the papers had been filed by the plaintiff in time the whole matter would have been re-opened, so that it cannot be said that the rights of the parties had been conclusively determined. This being so, it appears to me that the first order of the District Judge did not amount to a decree, and in consequence it was open to him to give further time. He did not wish to do so, though I am informed that the plaintiff was ready with the papers only one day after the allotted date. He has not, however, discussed the merits of the case as he would have done if he had believed himself competent to extend time. I therefore allow the appeal, remand the case under order XLI, rule 23 of the Code of Civil Procedure and direct the lower appellate court to re-admit the appeal under its original number and to determine on its merits the question of whether the plaintiff should be allowed an extension of time, and, if the answer to this question is in the affirmative, to remand the suit in accordance with the order of the 18th of January, 1929.

The appeal under section 10 of the Letters Patent from this judgment was heard by a Full Bench.

(1) (1913) I.L.R., 36 All., 77.

Mr. *B. Mukerji*, for the appellants.

Mr. *Shiva Prasad Sinha*, for the respondent.

MUKERJI, A. C. J., KING and NIAMAT-ULLAH, JJ. :— This is a Letters Patent appeal against the judgment of a learned single Judge of this Court. A preliminary point is taken that no appeal lay. The ground urged is that the order passed by the learned single Judge did not amount to a decree, inasmuch as he sent back the case to the lower appellate court under order XLI, rule 23 of the Code of Civil Procedure. It is pointed out that the order passed was an order of remand, and under the Code of Civil Procedure it did not amount to a "decree".

In support of this argument reliance is placed on the case of *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (1), decided by their Lordships of the Privy Council. That case arose in the following circumstances. There was a temple of a public character, and a suit under section 92 of the Code of Civil Procedure was filed in respect of the management of the temple. The case went up before their Lordships of the Privy Council, and their Lordships confirmed the scheme settled in India after some alterations. One of the provisions in the scheme was that the scheme might "be altered, modified or added to by an application to His Majesty's High Court of Judicature at Bombay". A temple committee was appointed, and it framed a body of rules according to the powers given to it. These rules came before the District Judge of Ahmedabad for his sanction, and he made certain alterations. Thereupon certain persons, who were dissatisfied with the alterations made by the District Judge, filed an appeal against the order. The High Court held some doubt as to whether an appeal lay; but nevertheless a learned Judge of the High Court "wrote and delivered a judgment in which he expressed his views as to the rules which had

(1) (1925) 23 A.L.J., 555.

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been sanctioned by the District Judge''. Then an appeal was taken to His Majesty in Council, and the Judicial Committee expressed the opinion that no appeal lay to the High Court and no appeal lay to the Privy Council. In pointing out the reason as to why no appeal lay to the Privy Council, their Lordships said as follows : ''The term 'judgment' in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense.'' Reliance is placed on this sentence, and it is urged that for an appeal to lie against the ''judgment'' of a single Judge the ''judgment'' must amount to a decree.

In our opinion this is not a correct reading of the judgment of their Lordships of the Privy Council. Although the judgment does not point out upon what clause of the Letters Patent of the Bombay High Court the remark was based, yet it seems to us that their Lordships had in their minds clause 39 of the Letters Patent of the Bombay High Court, which laid down the conditions under which an appeal could lie from a ''judgment'' of the Bombay High Court. It is true that clause 15 of the Letters Patent of that Court also mentions that in certain cases an appeal would lie to His Majesty; but that clause primarily mentions in what cases an appeal lies from a decision of one or more Judges of the High Court to the High Court itself, and then concludes by saying that in other cases an appeal would lie to His Majesty. It is really clause 39 which states in detail the circumstances in which an appeal would be competent to His Majesty in Council. There, not only the words ''final judgment'' are used, but also the words ''decree'' and ''order''. In clause 15 the only word used is judgment. We, therefore, think that when their Lordships of the Judicial Committee said that in order that an appeal might lie from a judgment of the High Court it should amount to a decree, they had clause 39 in their minds.

We have to construe clause 10 of the Letters Patent of the Allahabad High Court, which is almost verbatim the same as clause 15 of the Letters Patent of the Bombay, Madras and Calcutta High Courts. If the appeal to His Majesty in Council is not confined to a decree alone, but if an order which is final is appealable to His Majesty in Council, and if the words "decree" and "order" appear in the same sentence as the word "judgment", we see no reason why we should read the word "judgment" in clause 10 of the Allahabad Letters Patent or clause 15 of the Letters Patent of the Bombay, Madras and Calcutta High Courts as meaning only a "decree" and not also a final "order". On a reading of several clauses of the Letters Patent of the Allahabad Court we have come to the conclusion that a final decision, which effectually disposes of the appeal before the High Court, should amount to a judgment, whether it amounts to a decree or not. If it does not amount to a decree, it would amount to an "order" in any case; and as we have already said, a final decree or order of the High Court is appealable to His Majesty under clause 39 of the Letters Patents of the Bombay, Madras and Calcutta High Courts and clause 30 of the Letters Patent of the Allahabad High Court, and there would be no valid reason to read the word "judgment" in clause 10 of the Letters Patent of the Allahabad Court in a restricted sense.

We may point out that the practice of this Court has always been to entertain an appeal against an order of remand passed by a single Judge of this Court under order XLI, rule 23 of the Code of Civil Procedure. This was pointed out in the case of *Ishwari Prasad* v. *Sheotahal Rai* (1), to which one of us was a party. In that case also the decision of their Lordships of the Privy Council in *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (2) was cited, but it was distinguished. It was stated in that judgment that nothing

(1) (1926) I.L.R., 48 All., 684. (2) (1925) 23 A.L.J., 555.

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had been shown to the Judges who decided the case, which ought to induce them to differ from the existing practice. We are of opinion that nothing has been shown to us which ought to induce us to differ from the existing practice.

The opinions in the other High Courts seem to support, in the main, the view taken by us. Cases decided before the decision of their Lordships of the Privy Council need not be considered. The Lahore High Court in *Shibba Mal* v. *Rup Narain* (1) had before them a question similar to the one before us, and they came to the conclusion that an appeal was maintainable under the Letters Patent of the Lahore High Court, clause 10 of which is similar in terms to clause 10 of our Letters Patent.

We hold, therefore, that the appeal is maintainable. Now we have to come to the merits of the case.

The facts of the case are given in the judgment of the learned single Judge, and we need not state them again. The difficulty in the case arose from the fact that the learned District Judge added the word "automatically" when revising his judgment. The judgment, as it stands, is somewhat ambiguous. The sentence by which the learned Judge made a remand to the court below runs as follows: "Accordingly I direct that the suit shall go back to the lower court for retrial on condition that within one month from today the plaintiff appellant shall place on the record all the papers that may be necessary for measurements being carried out from a 'sahadda', and in case that is not done, the remand order shall not take effect and the appeal shall stand dismissed automatically upon a report being made by the court below that the order of this court for filing papers had not been complied with."

It appears that some papers were filed in the court of first instance within the period allowed but some were filed beyond the month allowed. The learned Munsif refused to take the papers and made a report that the order

(1) (1928) I.L.R., 10 Lah., 132.

of the appellate court had not been complied with. An application was also made by the plaintiff to the lower appellate court to accept the documents he had brought. The learned Judge thought that the order of remand being a final order of the court, the time given by him by that order could not be extended by him under section 148 of the Code of Civil Procedure. He also said that even if he could extend the time, he did not wish to extend it. The learned single Judge of this Court was of opinion that the order was not final and time could have been extended if the learned District Judge was inclined to extend the period. We agree with the view taken by the learned single Judge of this Court. What the learned District Judge meant when he said "the appeal shall stand dismissed automatically upon a report being made . . . " was that he was passing a sort of a stop order, and at that moment he was not inclined to grant any further time to the plaintiff. The word "automatically" and the expression "upon a report being made" are somewhat contradictory. If the final order depended on receipt of a report from the court of first instance, it cannot be said that the order of the learned District Judge became operative, *by its own force*, without any report being received from the lower court.

Agreeing, therefore, with the learned single Judge of this Court we dismiss the appeal with costs.