

## APPELLATE CIVIL

*Before Justice Sir Edward Bennet and Mr. Justice Verma*

WIQAR ALI KHAN (DEFENDANT) *v.* NARAIN DAS  
(PLAINTIFF)\*

1933  
January, 3

*Civil Procedure Code, section 110—Appeal to His Majesty in Council—"Affirms the decision"—Decree of lower court modified in favour of petitioner in respect of amount of interest, but in other respects affirmed.*

In a suit for sale on a mortgage the trial court held that the mortgage was valid and granted a decree. In first appeal the High Court also held that the mortgage was valid, but modified the decree by reducing the interest. The amount of reduction was below Rs.10,000. The defendant applied for leave to appeal to the Privy Council on the question of validity of the mortgage. This question, however, did not involve a substantial question of law:

*Held*, that the case did not satisfy the requirements of section 110 of the Civil Procedure Code and there was no right of appeal.

*Kamal Nath v. Bithal Das* (1), affirmed.

Mr. *Mukhtar Ahmad*, for the applicant.

Mr. *P. L. Banerji*, for the opposite party.

BENNET and VERMA, JJ.:—This is an application for leave to appeal to His Majesty in Council under sections 109 and 110 of the Civil Procedure Code. The application prays that the applicant has a right to appeal. The facts are that the plaintiff, Narain Das, brought a suit for enforcement of a mortgage executed by defendant No. 1 Nanabhoy and the suit was brought against defendant No. 1 and defendant No. 2 Wiqar Ali Khan, wakil, as administrators of the property of the deceased father of defendant No. 1. The trial court granted a decree on the mortgage. Wiqar Ali Khan appealed and the main question was whether the mortgage was valid. In first appeal this Court held that the mortgage was valid but the amount of interest

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was reduced from 15 per cent. to 12 per cent. in favour of the appellant. The cross-objections were dismissed. The decree therefore was varied in favour of the appellant but the amount of variation was less than Rs.10,000. In the proposed appeal it is desired to raise the question of the validity of the mortgage. That is an issue on which the findings of the two courts were concurrent. Learned counsel relies on the ruling of their Lordships of the Privy Council in *Annapurnabai v. Ruprao* (1). In that case the plaintiff sued for possession of half the estate of a deceased person, alleging adoption. The defendants who were widows contested the validity of the adoption and one of the defendants claimed to be entitled to Rs.3,000 per annum as widow's maintenance, in case the adoption was held valid. The court of first instance decreed the suit of the plaintiff and decreed Rs.800 per annum maintenance to the widow. On appeal the Court of the Judicial Commissioner maintained the decree for possession of the plaintiff but increased the claim for maintenance of the defendant widow appellant from Rs.800 to Rs.1,200 per annum. An application was made to the Court of the Judicial Commissioner for leave to appeal to the Privy Council but the application was dismissed on the ground that the decree of the first court had been affirmed except in respect of a small charge in favour of one of the applicants and that no question of law was involved. An application for special leave was then made to their Lordships and it was stated by the applicants' counsel on page 971: "The value of the subject-matter of the suit exceeded Rs.10,000, as also did the subject-matter of the proposed appeal; even if the maintenance alone is regarded as in dispute, its value, having regard to the widow's prospects of life, exceeded Rs.10,000. The appellate court did not affirm the decree of the first court but varied it; consequently it is not material under section

(1) (1924) I.L.R. 51 Cal. 969.

110 whether any substantial question of law is involved. Having regard to the concurrent findings, the petitioners desire to appeal only with regard to the amount of the maintenance." On this their Lordships held: "In the opinion of their Lordships the contention of the petitioners' counsel as to the effect of section 110 of the Code is correct. They had therefore a right of appeal. Special leave to appeal should be granted, but should be limited to the question of maintenance." Now it is to be noted that the special leave to appeal was limited to the question of maintenance. Learned counsel argues that this limitation was imposed solely at the request of counsel for the applicants. We do not think that this can be deduced from the ruling. It appears to us that their Lordships imposed this restriction because they considered that it should be imposed. The case therefore is no authority for the present application in which the applicant desires to raise a question on which there have been concurrent findings by the two courts. Moreover in the present case the question of interest is not of sufficient value to amount to Rs.10,000 and therefore leave to appeal on the question of interest alone could not be granted. The argument of learned counsel was that from certain observations in Full Bench rulings of this Court the opinion had been expressed that the Privy Council overruled a Bench ruling of this Court in *Kamal Nath v. Bithal Das* (1). That ruling was in a case precisely similar to the present. In that case there had been a decree of the trial court on a simple mortgage and the validity of the mortgage was denied by the defendant. The defendant appealed and the High Court upheld the validity of the mortgage and the decree on the mortgage and merely reduced the rate of interest in favour of the defendant, the reduction amounting in value to Rs.300. It was held by the High Court that an appeal would not lie to His Majesty in Council because the

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proposed appeal was in regard to the validity of the mortgage on which the findings of both the courts were concurrent and the variation in the decree by the High Court was merely in favour of the defendant applicant to the Privy Council and the amount of variation was less than Rs.10,000. That case is precisely similar to the present. We see no reason to suppose that the very different case in *Annapurnabai v. Ruprao* (1) was intended to overrule the decision in *Kamal Nath v. Bithal Das* (2).

One further point was argued and that was that if an appeal did not lie as of right under section 110 of the Civil Procedure Code, still there was a substantial question of law. The substantial question of law is alleged to be in ground No. 3—"Because the deed in suit having been executed by the defendant No. 1 in his personal capacity was not binding on the estate." What is meant by this ground is that the mortgage deed of 1925, executed by defendant No. 1 in his personal capacity as was held by the High Court, would not affect the estate of the deceased father and that it should be considered that that estate for which probate had been granted in 1916 was still under administration in 1925. We do not think that this point is a substantial question of law. For these reasons we refuse this application for leave to appeal to His Majesty in Council with costs.

(1) (1924) I.L.R. 51 Cal. 969.

(2) (1921) I.L.R. 44 All. 200.