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Next it is contended that if the claim for Rs.2-0-6 on account of weighment dues is not treated as rent the *qabuliat* in so far as it relates to an agreement for payment of this amount was inadmissible in evidence for want of stamp. It is argued that the promise to pay Rs.2-0-6 as weighment dues is an agreement independent of the lease and in order to make the agreement admissible it must be stamped as an agreement. Article 35 of the Stamp Act relating to leases contains an exmption in the case of a lease executed for the purposes of cultivation without the payment or delivery of any fine or premium, when a definite term is expressed and such term does not exceed one year, or when the average annual rent reserved does not exceed one hundred rupees. Though the weighment dues do not constitute rent yet there can be no doubt that the agreement for payment of these dues formed part of the consideration of the lease and is an integral part of it. In the circumstances I am of opinion that the case is covered by the exemption contained in Article 35 of the Indian Stamp Act. This contention also must therefore fail.

Srivastava, J.

The result is that I dismiss the appeal with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice G. H. Thomas

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October 29

MUSAMMAT KARIM JEHAN BEGAM AND ANOTHER (APPLICANTS) *v.* GIRDHARI LAL AND OTHERS (OPPOSITE-PARTY)*

Civil Procedure Code (Act V of 1908), section 109(a) and (c)—Appeal to His Majesty in Council—Limitation Act (IX of 1908), sections 3 and 5—Order rejecting an application for extension of time under section 5, Limitation Act and refusing to admit time-barred appeal—Order, whether appealable

*Privy Council Appeal No. 13 of 1935, for leave to appeal to His Majesty in Council against the decree of a Bench of this Court, dated the 4th of March, 1935.

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under section 109(*a*)—*Order, whether covered by section* 109, *clause* (*c*), *C. P. C.*

An order rejecting an application for extension of time under section 5 of the Indian Limitation Act and refusing to admit an appeal is not an order passed in the appeal on the merits and it does not come within the purview of clause (*a*) of section 109 of the Code of Civil Procedure and is not appealable under that section. *Radha Kishen* v. *Jamna Prasad* (1), and *Karsondas Dharamsey* v. *Gangabai* (2), relied on, *Ram Narain Joshi* v. *Parmeswar Narain Mehta* (3), distinguished, *Sunder Koer* v. *Chandishwar Prosad Singh* (4), and *Jai Pratap Narain Singh* v. *Rabi Pratap Narain Singh* (5), referred to.

Where no appeal is allowed by the Legislature from an order refusing to admit an appeal on the ground that it is time-barred it is not proper for the High Court to certify that it is a fit case for appeal to His Majesty in Council. *Saithwar* v. *Hansrani* (6), *Radhakrishna Ayyar* v. *Swaminatha Ayyar* (7), *Durga Choudhrani* v. *Jewahir Singh* (8), *Mathura Kurmi* v. *Jagdeo Singh* (9), *Banarsi Prasad* v. *Kashi Krishna Narain* (10), *Sheopujan Upadhyaya* v. *Bhagwat Prasad Singh* (11), *Maung Ba Than* v. *The District Council of Pegu* (12), *Ramanathan Chettiar* v. *Audinatha Ayyangar* (13), and *Banarsi Parshad* v. *Kashi Krishna Narain* (14), referred to.

Messrs. *Zahur Ahmad* and *Habib Ali Khan*, for the applicants.

Messrs. *Radha Krishna Srivastava* and *P. D. Rastogi*, for the opposite-party.

NANAVUTTY and THOMAS, JJ.:—This is an application under section 109 of the Code of Civil Procedure for leave to appeal to His Majesty in Council from an order of this Court, dated the 4th of March, 1935, rejecting the application of the applicants for admission of their appeal under section 5 of the Indian Limitation Act.

The facts out of which this application for leave to appeal to His Majesty in Council arises are as follows:

(1) (1910) 13 O.C., 59.
(2) (1907) I.L.R., 32 Bom., 108.
(3) (1909) I.L.R., 36 Cal., 309.
(4) (1903) I.L.R., 30 Cal., 679.
(5) (1933) A.L.J., 255.
(6) (1928) I.L.R., 50 All., 640.
(7) (1920) I.L.R., 44 Mad., 293.
(8) (1890) I.L.R., 18 Cal., 23.
(9) (1927) I.L.R., 50 All., 208.
(10) (1900) I.L.R., 23 All., 227.
(11) (1931) I.L.R., 54 All., 459.
(12) (1927) I.L.R., 6 Rang., 43.
(13) (1931) A.I.R., Mad., 642.
(14) (1900) L.R., 28 I.A., 11.

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Nanavutty and Thomas, JJ.

The present applicants filed an appeal against the order of B. Pratab Shankar, Additional Subordinate Judge of Lucknow, dated the 20th of September, 1933 (First Civil Appeal No. 118 of 1933). This appeal was dismissed by us on the 3rd of December, 1934, upon a preliminary objection that no appeal had been preferred against the order of the 24th of July, 1933, passed by the then Additional Subordinate Judge of Lucknow, Dr. Abdul Azim Siddique, rejecting the plaint of the plaintiffs-appellants. Arguments in Appeal No. 118 of 1933 were heard by us on the 30th of November, 1934, judgment being reserved. Fearing that the preliminary objection raised in First Civil Appeal No. 118 of 1933 might be successful, the plaintiffs-applicants filed an appeal (First Civil Appeal No. 117 of 1934) on the afternoon of the 1st of December, 1934, against the order of the learned Additional Subordinate Judge of Lucknow, dated the 24th of July, 1933. As this appeal was obviously filed beyond time, an application was also filed along with it by the appellants under section 5 of the Indian Limitation Act for extension of time on the allegation that they had sufficient reasons for not filing the appeal against the order of the 24th of July, 1933, within time By our order, dated the 4th of March, 1935, we disallowed the application of the appellants-applicants under section 5 of the Indian Limitation Act, and we therefore refused to admit First Civil Appeal No. 117 on the ground that it was time-barred. It is against this order that the present application for leave to appeal to His Majesty in Council has been filed.

We have heard the learned counsel of both parties at some length. The learned counsel for the applicants has sought to bring his application within the purview of clause (*a*) of section 109 of the Code of Civil Procedure, and has argued that as the order refusing to admit the appeal of the applicants has resulted in a decree being passed dismissing their appeal as being time-

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barred, the applicants have a right to appeal to His Majesty in Council from such a decree or final order passed on appeal by a High Court or any other Court of final appellate jurisdiction. On the other hand the learned counsel for the respondents has pointed out that in the present case there has been no adjudication on the merits, and that the order rejecting the application filed by the applicants for extension of time under section 5 of the Indian Limitation Act and refusing to admit their appeal is not an order passed on appeal but arises out of a miscellaneous application presented by the applicants for extension of time, and that there is no order or decree of this Court confirming or reversing the judgment and decree of the trial Court. The learned counsel for the opposite parties has relied upon a ruling of the Bombay High Court reported in *Karsondas Dharamsey* v. *Gangabai and others* (1), as also upon a ruling of the late Court of the Judicial Commissioner of Oudh reported in *Radha Kishen* v. *Jamna Prasad and others* (2). In the latter case it was held, that where an appeal had been rejected for failure on the part of the applicant to furnish security for costs under order XLI, rule 10 of the Code of Civil Procedure, that the order rejecting the appeal was not one confirming the decision of the Court below within the meaning of the last paragraph of section 110 of the Code of Civil Procedure, and that the order in question was also "not a final order passed on appeal" within the meaning of section 109 of the Code of Civil Procedure. The learned Judges in that case (CHAMIER, J.C. and EVANS, A.J.C.), made the following observation at page 61 of the ruling cited:

"The words 'final order passed on appeal' have always been confined to orders disposing of an appeal at the hearing. In the present case there was no hearing of the appeal. The Court declined to hear it because the appellant failed to furnish security for the costs of

(1) (1907) I.L.R., 32 Bom., 108. (2) (1910) 13 O.C., 59.

his opponents. An order rejecting an appeal under rule 10 of order XLI seems to stand on the same footing as an order rejecting an appeal under rule 3 or declining to admit a time-barred appeal

In our opinion the order of this Court was not a final order passed on appeal and therefore the applicant is not entitled to a certificate under section 110 of the Code of Civil Procedure (Act V of 1908)."

Nanavutty and Thomas, JJ.

These observations apply with full force to the facts of the present case. Here too we did not decide the appeal of the applicants on the merits, but merely rejected the memorandum of appeal as being time-barred for the reasons recorded in our order of the 3rd of March, 1935.

In the ruling of the Bombay High Court cited above it was held by Sir LAWRENCE JENKINS, C.J., that an order of the High Court refusing to admit an appeal after the period of limitation prescribed therefor by the Limitation Act was not "a decree passed on appeal" by the High Court within the meaning of section 595 of the old Code of Civil Procedure, and there was therefore no jurisdiction to grant leave to appeal therefrom to the Privy Council under clause (*a*) or (*b*) of that section, and the ruling of the Calcutta High Court reported in *Sunder Koer* v. *Chandishwar Prosad Singh* (1), was followed in this case. The learned counsel for the applicants seeks to distinguish his case from the facts of the case decided by the Bombay High Court on the ground that in the present case a decree was prepared by this Court dismissing the appeal, whereas in the case before the Bombay High Court no such decree was apparently prepared. We are not prepared to accept that contention. The appeal (No. 117 of 1934) having been dismissed under section 3 of the Indian Limitation Act as being beyond time, a decree had obviously to be prepared accordingly, and similarly in the case before the Bombay High Court a decree must also have been

(1) (1903) I.L.R., 30 Cal., 679.

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prepared refusing to admit the appeal and rejecting it as being time-barred.

Reliance has also been placed by the learned counsel for the applicants upon a ruling of the Calcutta High Court reported in *Ram Narain Joshi* v. *Parmeswar Narain Mahta and others* (1). The facts of that case were very peculiar and the decision in that case does not in any way help us in the decision of the present case.

Nanavutty and Thomas, JJ.

In *Jai Pratap Narain Singh* v. *Rabi Pratap Narain Singh* (2), decided by a Bench of the Allahabad High Court, to which the present Hon'ble the Chief Judge of this Court was a party, it was held that an order dismissing an application for restoration of an appeal was no doubt passed by the High Court in its appellate jurisdiction, but it was not "a final order *passed on appeal* within the meaning of section 109(*a*) of the Code of Civil Procedure", and an application for leave to appeal to His Majesty in Council was accordingly refused.

We are therefore clearly of opinion that the case of the applicants cannot come within the purview of clause (*a*) of section 109 of the Code of Civil Procedure.

It was also argued in the alternative that the application of the applicants may also be permitted under clause (*c*) of section 109 of the Code. We are of opinion that the present application cannot also come within the purview of clause (*c*). In *Ruchcha Saithwar and another* v. *Hansrani and others* (3), it was held that only when a case was of considerable importance and the principle, when finally decided by their Lordships of the Privy Council, would be of benefit, not only to the people who were directly involved in the litigation, but to a considerable body of other people, that leave to appeal should be granted, and the ruling of the Madras High Court reported in *Radhakrishna Ayyar* v. *Swaminatha Ayyar* (4), and of the Calcutta High Court

(1) (1902) I.L.R., 30 Cal., 309.
(2) (1933) A.L.J., 255.
(3) (1928) I.L.R., 50 All., 640.
(4) (1920) I.L.R., 44 Mad., 293.

reported in *Durga Chowdhrani* v. *Jewahir Singh* (1), and of the Allahabad High Court reported in *Mathura Kurmi* v. *Jagdeo Singh* (2) and *Banarsi Prasad* v. *Kashi Krishna Narain* (3), were followed. Similarly in *Sheopujan Upadhyiya and others* v. *Bhagwat Prasad Singh and others* (4) it was held that where the questions sought to be agitated in the appeal to the Privy Council were substantial questions of law involving matters of principle which not only affected the parties to the litigation but were likely to concern a large class of persons who are or may be in the same situation as the plaintiffs and in whose case the decision of the Privy Council was sure to be a guiding precedent, that it was a fit case under section 109(*c*) of the Code of Civil Procedure for appeal to the Privy Council. In our opinion no such substantial question of law of wide and general interest arises in the present case as would justify us in certifying that this is a fit case for appeal to His Majesty in Council.

Similarly the Burma High Court in a ruling reported in *Maung Ba Than* v. *The District Council of Pegu* (5), held that clause (*c*) of section 109 contemplates cases where there are questions, for example, relating to religious rights and ceremonies, to caste and family rights or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money, and that such a case could be certified as a fit case for appeal to His Majesty in Council.

In *Ramanathan Chettiar* v. *Audinatha Ayyangar and others* (6), it was held by a Bench of two learned Judges of the Madras High Court that the existence of a question of law of some difficulty was not a sufficient ground for certifying the case to be a fit one for appeal to the

(1) (1890) I.L.R., 18 Cal., 23.
(2) (1927) I.L.R., 50 All., 208.
(3) (1900) I.L.R., 23 All., 227.
(4) (1931) I.L.R., 54 All., 459.
(5) (1927) I.L.R., 6 Rang., 43.
(6) (1931) A.I.R., Mad., 642.

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Privy Council unless that question was one of general and public importance.

In *Banarsi Parshad* v. *Kashi Krishna Narain* (1), LORD HOBHOUSE in delivering the judgment of their Lordships laid down that where the amount in question was below Rs.10,000 an erroneous certificate by the High Court to the effect that the case fulfilled the requirements of section 596 of the Code of Civil Procedure was ineffectual even if assented to by the respondent, and that there must be a special certificate under sections 595 and 600 of the old Code of Civil Procedure that the case was "otherwise" fit for appeal, and His Lordship observed:

Nanavutty and Thomas, JJ.

"It is of great importance not to allow litigants who have succeeded in the High Courts to be harassed by further appeal."

Finally in a recent application for leave to appeal to His Majesty in Council (Privy Council Appeal No. 14 of 1934) decided on the 18th of January, 1935, by the Hon'ble the Chief Judge and Mr. Justice ZIAUL HASAN, the learned Judges expressed themselves as follows:

"No appeal is provided by the legislature from an order passed under order XXII, rule 5 and it is argued that it would not be a proper exercise of discretion to certify the case as being a fit one for appeal. We think there is much force in this contention. If the legislature is of opinion that no appeal should be provided against an order passed under order XXII, rule 5, we think that it would not be proper for us to certify that this is a fit case for appeal."

This reasoning of the learned Judges is fully applicable to the present case also. No appeal is allowed by the legislature from an order refusing to admit an appeal on the ground that it was time-barred, and under these circumstances it would not be proper for us to certify that this is a fit case for appeal to His Majesty in Council.

(1) (1900) L.R., 28 I.A., 11.

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For the reasons given above we dismiss this application for leave to appeal to His Majesty in Council with costs.

Application dismissed.

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan

1935
October 29

THAKUR SHEO MANGAL SINGH (DEFENDANT-APPELLANT) *v.* THAKURAIN BODHI KUAR (PLAINTIFF-RESPONDENT)*

Hindu Law—Widow—Maintenance fixed by family settlement—Income of property subsequently reduced—Amount of maintenance, if can be reduced.

The amount of maintenance of a Hindu widow fixed under a family settlement can be subsequently reduced by the Court, if the income of the family property is considerably reduced. *Rajendra Nath Roy* v. *Rani Puttoo Soondery Dassee* (1), *Ruka Bai* v. *Ganda Bai* (2), and *Gopika Bai* v. *Dattatraya* (3), referred to.

Mr. *K. P. Misra,* for the appellant.

Mr. *L. S. Misra,* for the respondent.

ZIAUL HASAN, J.:—This is a second appeal against a decree of the learned Subordinate Judge of Rae Bareli.

One Thakur Gur Bux Singh had three sons, namely Sheo Narain Singh, Ram Ghulam Singh and Sheo Mangal Singh. Sheo Narain Singh, who was the eldest son, died in 1911 leaving his widow Musammat Bodhi Kuar, the present plaintiff-respondent, and his two brothers Ram Ghulam Singh and Sheo Mangal Singh. On the 7th of January, 1912, Musammat Bodhi Kuar executed a deed of relinquishment (exhibit 2) in respect of the property left by Sheo Narain Singh and on the same day Ram Ghulam Singh and Sheo Mangal Singh executed an agreement (exhibit 1) in her favour binding

*Second Civil Appeal No. 341 of 1934, against the decree of Babu Avadh Behari Lal, Subordinate Judge of Rae Bareli, dated the 17th of August, 1934, upholding the decree of Pandit Brij Nath Zutshi, Munsif, Dalmau, Rae Bareli, dated the 12th of May, 1934.

(1) (1879) 5 C.L.R., 18. (2) (1878) I.L.R., 1 All., 594.
(3) (1900) I.L.R., 24 Bom., 386.