MISCELLANEOUS CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice Ziaul Hasan

1935 April 30

BISHESHWAR BAKHSH SINGH (APPELLANT) *v.* THAKUR BISHWANATH SINGH AND OTHERS (RESPONDENTS)*

Civil Procedure Code (Act V of 1908), section 110—High Court partly affirming and partly modifying decree of trial court—Decree of High Court, whether one of affirmance within the terms of section 110, C. P. C.—Leave to appeal to Privy Council against the part affirmed, whether to be granted.

Where the High Court varies the decree of the trial court as regards a portion of the subject-matter of the dispute and affirms it with regard to the rest, the decree of the High Court is not one of affirmance within the meaning of section 110 of the Code of Civil Procedure and the party aggrieved is entitled to leave to appeal to His Majesty in Council even though the appeal is directed only against that part of the decree which affirms the decision of the trial court. Case law discussed.

Mr. *M. H. Kidwai,* for the appellant.

Mr. *Radha Krishna,* for the respondents.

SRIVASTAVA and ZIAUL HASAN, JJ.:—This is an application by the defendant for leave to appeal to His Majesty in Council. It arises out of a suit brought by the plaintiffs for possession of an estate known as Mindauli in the Hardoi district and certain moveables The plaintiffs claimed title to the properties in suit as reversioners of the last male owner. The defendant claimed to have been adopted by the widow who was last in possession of the estate. The trial Court held the adoption not proved and further that the widow had no authority to make it. He found the plaintiffs entitled only to a ten annas share in the estate and decreed the plaintiffs' claim to that extent. He further ordered that in case the defendant failed to deliver to the plaintiffs their share in the moveables, the plaintiff would be entitled to recover from the

*Privy Council Appeal No. 17 of 1934, for leave to appeal to His Majesty in Council.

defendant the sum of Rs.9,455-3-9 being the 5/8ths of the value of the moveables in suit. The defendant appealed to this Court and a Bench of this Court in agreement with the lower Court held that the defendant had failed to establish his case about adoption. As regards the moveables this Court reduced their value from Rs.15,144-6-0 to Rs.6,500. As a result of this the decree of the trial Court was modified to this extent, namely that in case of the defendant's default in delivering the moveables in suit it was ordered that the plaintiffs would be entitled to recover from the defendant the sum of Rs.4,062-8-0 instead of Rs.9,455-3-9. In all other respects the decree of the lower Court was upheld.

The defendant seeks to question the decision as regards matters relating to adoption. The parties are agreed that the value of the subject-matter of the suit in the Court of first instance as well as of the subject-matter in dispute on appeal to His Majesty in Council is over Rs.10,000. The applicant claims that the decree of this Court has varied the decree of the lower Court and therefore he is entitled to appeal as of right. The plaintiffs opposite party, on the other hand, contend that as the variation made by this Court was in favour of the applicant, and as the proposed appeal is confined to the question of adoption in respect of which the decree of the trial Court was upheld by this Court, the decree must be regarded as one of affirmance, and the leave for appeal must be refused as the appeal does not involve any substantial question of law. We must say at once that in our opinion no substantial question of law is involved in the appeal. The only question is whether "the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order", within the terms of the last paragraph of section 110 of the Code of Civil Procedure. The argument on behalf of the opposite party that the applicant can have no just

1935

BISHESHWAR BAKHSH SINGH v. THAKUR BISHWANATH SINGH

Srivastava and Ziaul Hasan, JJ.

grievance when the variation has been made in his favour and that the appeal being confined to a matter on which both the Courts have concurrently found against the applicant the decree is virtually one of affirmance is no doubt attractive. But it seems to us that we should not allow our judgment to be influenced by any general or *a priori* considerations and must base our opinion strictly on the terms of the Statute. The decree of this Court in terms modified the decree of the trial Court. The decision of the trial Court related not only to the question of adoption but also to the question of the value of the moveables in suit. This decision was upheld as regards the matter of adoption but modified as regards the value of the moveables. Can it in these circumstances be said that the decree of this Court affirms the decision of the lower Court? It appears to us that the question can admit only of one answer. It may be that such a case was not thought of by the Legislature, but whatever might have been the intention we are bound to give effect to the language of the Statute as it stands. The decree of this Court in form as well as in substance varies the decree of the lower Court as regards a portion of the subject-matter of the dispute between the parties. In these circumstances on the language of the last paragraph of section 110 we feel constrained to hold that the decree of this Court is not a decree in affirmance of the decision of the lower Court. Moreover the matter seems to us to be concluded by the decision of their Lordships of the Judicial Committee in *Annapurnabai* v. *Ruprao* (1). In this case the plaintiff instituted a suit for possession of half the property of one Shankar Rao Patel and alleged that he had been adopted by Patel's senior widow. He denied the adoption of defendant No. 2 by defendant No. 1 who was the junior widow of the aforesaid Patel. The trial Court held that the plaintiff's adoption was proved and that

(1) (1924) L.R., 51 I.A., 319.

the alleged adoption of defendant No. 2 was not proved. It further held that the plaintiff was bound to provide maintenance for defendant No. 1 at the rate of Rs.800 per annum. Upon appeal to the Court of the Judicial Commissioner of the Central Provinces the decree was modified by increasing the maintenance from Rs.800 to Rs.1,200 per annum. In all other respects the decree was affirmed. The defendant's application for leave to appeal to the Privy Council was dismissed by the Judicial Commissioner on the ground that the appellate decree had substantially affirmed the decree of the trial Court and that no question of law was involved. On an application made for special leave to appeal Sir *George Lowndes* contended that the petitioners had a right of appeal to the Privy Council under sections 109 and 110 of the Code of Civil Procedure. He argued that the appellate Court did not affirm the decree of the first Court but varied it, and consequently it was not material under section 110 whether any substantial question of law was involved. He further stated to the Court that "having regard to the concurrent findings the petitioners desire to appeal only with regard to the amount of the maintenance". Their Lordships' judgment is a short one and may be reproduced in full:

"In the opinion of their Lordships the contention of the petitioners' counsel as to the effect of section 110 of the Code of Civil Procedure is correct, and the petitioners had a right of appeal. They should have special leave to appeal, but it should be limited to the question as to the maintenance allowance. Their Lordships will humbly advise His Majesty accordingly."

It has been argued that this case is distinguishable as the leave to appeal was limited to the question of maintenance only in respect of which the Judicial Commissioner had varied the decision of the trial Court. It seems to us clear from the statement of Sir *George Lowndes,* which we have quoted above, that the leave

1935

BISHESHWAR BAKHSH SINGH v. THAKUR BISHWANATH SINGH

in that case was limited to the question of maintenance because the applicants did not want to appeal on other points. This circumstance cannot in our opinion affect the unqualified approval given by their Lordships to the contention of Sir *George Lowndes* as to the effect of section 110 of the Code of Civil Procedure.

Srivastava and Ziaul Hasan, JJ.

The cases cited at the bar show that there exists a conflict of judicial opinion as regards the construction to be placed on the decision of their Lordships of the Judicial Committee in *Annapurnabai* v. *Ruprao* (1) as also in regard to the interpretation to be placed on the language used in section 110 of the Code of Civil Procedure, but it seems to us that the weight of authority is in favour of the view taken by us. In *Kamal Nath* v. *Bithal Das* (2) and *Chandrasekhar* v. *Ameer Begum* (3), both of which cases were decided before the decision of their Lordships of the Judicial Committee in *Annapurnabai* v. *Ruprao* (1), it was held by the Allahabad High Court that an appeal to His Majesty in Council will not lie against a decree which, in so far as it modified the decree of the Court below was in favour of the would-be appellant, but, in so far as it was against the would-be appellant, agreed with the decree of the Court below. But in a subsequent case *Nathu Lal* v. *Raghubir Singh* (4) a Full Bench of the Allahabad High Court took a different view and SULAIMAN, A.C.J., in his judgment referring to the case of *Annapurnabai* v. *Ruprao* (1) remarked that this case by implication overrules the cases of *Kamal Nath* v. *Bithal Das* (2) and *Chandrasekhar* v. *Ameer Begam* (3).

In *Jamuna Prasad Singh* v. *Jagarnath Prasad Bhawat* (5) the Patna High Court held that where a decision of the appellate Court affirms part of the decree of the lower Court and is at variance as to a part, it is not a decree of affirmance and an appeal to His Majesty

(1) (1924) I.L.R., 51 I.A., 319. (2) (1921) I.L.R., 44 All., 200.
(3) (1922) A.I.R., All., 243. (4) (1931) I.L.R., 54 All., 146.
(5) (1929) A.I.R., Pat., 561.

in Council against such a decree will not be limited to the part at variance. They also interpreted the decision of their Lordships of the Judicial Committee in *Annapurnabai* v. *Ruprao* (1) in the same way as it has been interpreted by us.

Srivastava and Ziaul Hasan, JJ.

In *Raja Shree Nath Roy Bahadur* v. *The Secretary of State for India in Council* (2) it was held by the Calcutta High Court that where the applicant desires to appeal to the Privy Council against the decision of the High Court only in so far as it affirmed the decision of the Court below and not as regards the portion which was varied in the appeal the decree should be treated as a decree of affirmance of the first Court's decree as regards the subject-matter of the proposed appeal, and leave ought to be refused, if there was no question of law involved in the appeal.

In *Narendra Lal Das Chaudhury* v. *Gopendra Lal Das Chaudhury* (3) RANKING, C.J., referring to the Privy Council decision in *Annapurnabai* v. *Huprao* (1) remarked as follows:

"The High Court, however, treated the case as one where the two Courts in India had been in agreement and refused leave to appeal. The Privy Council appears to have been clearly of opinion that that was not so and it does seem to me therefore that the particular application made in *Sree Nath Ray's case* (3) of the principle that you have to have regard to the subject-matter of dispute in appeal to the Privy Council must be taken as overruled."

He further went on to remark:

"It appears to me that the case of *Annapurnabai* v. *Ruprao* (1) is not in itself a sufficient authority to justify this Court in abandoning the principle which it has with other High Courts acted upon; that is to say, I do not think that it shows that it is an erroneous view that we have to look to the substance and see what is the subject-

(1) (1924) L.R., 51 I.A., 319. (2) (1904) 8 C.W.N., 294.
(3) (1927) 31 C.W.N., 572.

1935

BISHESHWAR BAKHSH SINGH v. THAKUR BISHWANATH SINGH

Srivastava and Ziaul Hasan, JJ.

matter of the appeal to His Majesty in Council. I have, I confess, some doubt as to whether in the end even that principle would be found to be in accordance with the construction to be put upon section 110 but this Court and other High Courts have for many years acted upon that principle and I am not prepared to accept the case of *Annapurnabai* (1) as going further than this that where there is a dispute as to the amount of the decree or as to the amount of damages the reasoning of *Sree Nath Ray's* case (2) is not a correct application of that principle. We may take it, I think, that where the amount is a question in dispute, the fact that the Courts differ and that the higher Court differs in favour of the applicant does not mean that the decision is one of affirmance, but I am not in a case of this kind prepared to say that because on a totally different point namely, a point about the share, the applicant has succeeded and succeeded altogether so that he has no further grievance in that matter, he can without showing a substantial question of law have a right to litigate upon other points upon which both the Courts have been in agreement."

As we have already remarked we are unable to find any support in the terms of section 110 for drawing a distinction between a variance on a point under appeal and a variance on a different point for the purpose of determining whether the decision is one of affirmance or not. Of course a variation on a question of costs or other subsidiary matter stands on a different footing.

In *Asa Ram* v. *Kishen Chand* (3) the Lahore High Court also doubted the correctness of the Calcutta decisions in view of the decision of their Lordships of the Judicial Committee in *Annapurnabai* v. *Ruprao* (1). For the rest the facts of that case are different inasmuch as there were two appeals, and although a consolidated decree was drawn up, it was held that in reality there

(1) (1924) L.R., 51 I.A., 319. (2) (1904) 8 C.W.N., 294.
(3) (1930) I.L.R., 11 Lah., 465.

were two decrees. It is not necessary for us to express any opinion in respect of such a case.

We believe that the view adopted by us has also been acted upon in this Court for many years. For instance in the Gangwal Case Dulahin Jadunath Kuar was held entitled to appeal to the Privy Council as of right even though the variation which had been made in appeal was in her favour (P. C. Appeal No. 38 of 1927, decided on the 20th January, 1928). We are not aware of any case and none has been cited in which a contrary view might have been taken by this Court.

For the above reasons we are of opinion that the decree of this Court did not affirm the decision of the trial Court. The applicant is therefore entitled to appeal as a matter of right. We accordingly order that the applicant should be granted a certificate that as regards the value and nature the case fulfils the requirements of section 110 of the Code of Civil Procedure. No order as to costs.

Appeal allowed.

APPELLATE CRIMINAL

Before Mr. Justice E. M. Nanavutty

HARI KRISHNA (APPELLANT) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT)*

1935 *May* 8

Evidence Act (I of 1872), sections 17 and 18—Criminal Procedure Code (Act V of 1898), section 164—Explosive Substances Act (VI of 1908), section 5, prosecution under—Accused wounded by explosion—Statement of accused recorded before any offence registered and before investigation started—Statement not bearing certificate under section 164, Cr. P. C. and not read over to accused—Admissibility of statement in evidence either as dying declaration, confession or admission—Suspicion, whether can be basis of decision.

*Criminal Appeal No. 350 of 1934, against the order of Babu Gopendra Bhushan Chatterji, Sessions Judge of Sitapur, dated the 26th of September, 1934.