

MISCELLANEOUS CIVIL

Before Mr. Justice Ziaul Hasan, Acting Chief Judge, and
Mr. Justice J. R. W. Bennett

BHAIYA HARI SARAN DAS (APPLICANT) v. HARI KISHAN
DAS (OPPOSITE-PARTY)*

1939
July, 25

Civil Procedure Code (Act V of 1908), section 109(a) and (c) and order 41, rule 23—Appeal to His Majesty in Council from an order remanding suit under order 41, rule 23 Civil Procedure Code, whether lies—Certificate under section 109(c) when can be granted.

An order of an appellate court is not a final order within the meaning of section 109(a), Civil Procedure Code, unless it finally disposes of the rights of the parties in relation to the whole suit and consequently an appeal does not lie from an order under order 41, rule 23, reversing a decree which dismisses a suit upon a preliminary point and remanding the suit for trial. *Abdul Rahman v. D. K. Cassim & Sons* (1), followed.

A case should be certified to be a fit one for appeal to His Majesty in Council under clause (c) of section 109 only when it is 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 the public at large. When the question involved in a case is not even a substantial question of law but a matter depending on the interpretation to be put on the previous judgment of court which is said to be a bar in *res judicata* it is not a question of law affecting a large body of the public. *Ruchha Saithwar v. Hansrani* (2), *Radhakrishna Ayyar v. Swaminatha Ayyar* (3), *Durga Chowdhrami v. Jewahir Singh Chowdhri* (4), *Banarsi Prasad v. Kashi Krishna Narain* (5), *Sheopujan Upadhiya v. Bhagwat Prasad Singh* (6), *Maung Ba Than v. The District Council of Pegu* (7), *Ramanathan Chettiar v. Audinatha Ayyangar* (8), and *Mathura Kurmi v. Jagdeo Singh* (9), relied on.

Messrs. M. Wasim and Bisheshwar Prasad Misra, for the applicant.

Messrs. Ganga Dayal Khare, Karta Krishna and Rameshwar Dayal Khare, for the opposite-party.

*Privy Council Appeal No. 11 of 1938, for leave to appeal to His Majesty in Council.

(1) (1933) 10 O.W.N., 195.

(3) (1920) I.L.R., 44 Mad., 293.

(5) (1900) I.L.R., 28 All., 227.

(7) (1927) I.L.R., 6 Ran., 43.

(2) (1928) J.L.R., 50 All., 640.

(4) (1890) I.L.R., 18 Cal., 23.

(6) (1931) I.L.R., 54 All., 459

(8) (1931) A.I.R., Madras, 642.

(9) (1927) I.L.R., 50 All., 208.

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ZIAUL HASAN, A.C.J. and BENNETT, J.:—This is an application for leave to appeal to His Majesty in Council against an order of remand passed by a Bench of this Court, of which one of us was a member, in a suit brought by the opposite-party Mahant Har Kishen Das against the applicant Bhaiya Hari Saran Das. The suit was tried by a learned Judge of this Court sitting singly on the original side and was dismissed on the ground that it was barred on account of a previous judgment of this Court. The plaintiff preferred an appeal and the Bench which heard the appeal came to the conclusion that the suit was not barred by *res judicata* and remanded it under order 41, rule 23, Civil Procedure Code, for trial on the merits. It is against this order that the present application has been brought.

We have heard the learned counsel for parties at length and are of opinion that the leave applied for cannot and should not be allowed. Their Lordships of Privy Council have laid down very definitely in *Abdul Rahman v. D. K. Cassim & Sons* (1) that an order of an appellate court is not a final order within the meaning of section 109(a), Civil Procedure Code, unless it finally disposes of the rights of the parties in relation to the whole suit and that consequently an appeal does not lie from an order under order 41, rule 23 reversing a decree which dismisses a suit upon a preliminary point and remanding the suit for trial. Their Lordships at page 81 of the report say—

“The finally must be a finality in relation to the suit. If after the order the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it under section 109(a) of the Code.”

It was urged that even if the order of the Bench be not considered to be a final order, leave might be granted under clause (c) of section 109 of the Code, that is to say, it might be certified that the case is a fit one for

(1) (1932) L.R., 60 I.A., 76= (1933) 10 O.W.N., 195.

appeal to His Majesty in Council. On this point also we do not agree with the learned counsel for the applicant. There is a concensus of opinion in the various High Courts in India that a case should be certified to be a fit one for appeal to His Majesty in Council under clause (c) of section 109 only when it is 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 the public at large (vide *Ruchha Saithwar v. Hansrani* (1), *Radha Krishna Ayyar v. Swaminatha Ayyar* (2), *Durga Chowdhri v. Jewahir Singh Chowdhri* (3), *Banarsi Prasad v. Kashi Krishna Narain* (4), *Sheopujan Upadhiya v. Bhagwat Prasad Singh* (5), *Maung Ba Than v. The District Council of Pegu* (6), *Ramanathan Chettiar v. Audinatha Ayyangar* (7) and *Mathura Kurmi v. Jagdeo Singh* (8)). The question involved in the present case is not even a substantial question of law but a matter depending on the interpretation to be put on the previous judgment of this Court which is said to be a bar in *res judicata*. It is not a question of law affecting a large body of the public.

Further, it is conceded on behalf of the applicant that the decision of the learned single Judge of this Court did not dispose of the entire case and that even if the former judgment of this Court be held to be a bar in *res judicata* some of the issues will still remain to be decided between the parties. This being so it is a further reason why the plaintiff-opposite party should be saved from the harassment of having to defend an appeal unnecessarily before their Lordships of the Privy Council.

We therefore dismiss this application with costs.

Application dismissed.

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