

and in other respects his decision is upheld. Costs of the suit will not be borne by the parties but the appellants will get their costs out of the estate in the hands of the executors. Hearing fee in appeal no. 5 will be assessed at ten gold mohurs and in appeal no. 6 at 5 gold mohurs.

Appeals allowed in part.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Kulwant Sahay, J.

RAJNITI PRASAD SINGH

v.

NRISINGHA CHARAN NANDY CHAUDHURY.*

Code of Civil Procedure, 1908 (Act V of 1908), section 109(a)—appeal to Privy Council—order refusing the appointment of receiver, whether is "final order".

The appointment of a receiver is in the discretion of the court and the order is an interlocutory order which in no way decides any cardinal point arising for decision between the parties in the suit.

Held, therefore, that an order refusing the appointment of a receiver is not a final order within the meaning of section 109(a), Code of Civil Procedure, 1908.

Chundi Dutt Jha v. Padmanand Singh Bahadur(1), *Kishen Pershad Panday v. Tiluokdhari Lall*(2), *Rakimbhoy Habibhoy v. Turner*(3), *Mahomed Musaji Saleji v. Ahmed Musaji Saleji*(4) and *Magni Ram Bungar v. Sridhar Chaudhury*(5), followed.

Binoy Krishna Mukerjee v. Satish Chandra Giri(6) and *Binoy Krishna Mukerjee v. Satis Chandra Giri*(7), referred to.

* Privy Council Appeal no. 16 of 1932.

- (1) (1895) I. L. R. 22 Cal. 928.
- (2) (1890) I. L. R. 18 Cal. 182.
- (3) (1890) I. L. R. 15 Bom. 155, P. C.
- (4) (1911) 13 Cal. L. J. 507.
- (5) (1924) 6 Pat. L. T. 119.
- (6) (1926) 31 Cal. W. N. 540.
- (7) (1927) I. L. R. 55 Cal. 720, P. C.

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RAJNITI
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Application for leave to appeal to the Privy Council. The facts of the case material to this report are stated in the judgment of the Court.

Manohar Lal and *Bindeshwari Prasad*, for the applicant.

S. N. Bose, *G. P. Das* and *N. C. Roy*, for the opposite party.

COURTNEY TERRELL, C. J. AND KHAJA MOHAMAD NOOR, J.—This is an application for leave to appeal to the Privy Council against the decision of a Division Bench of this Court in the matter of the appointment of a receiver during the pendency of a mortgage suit. The plaintiffs instituted the suit to enforce two simple mortgages of an impartible raj which is now in the possession of the defendant no. 19, Nrisingha Charan Nandy Chaudhury, under a usufructuary mortgage executed by the mortgagors. The Subordinate Judge made an order for appointment of a receiver, but on appeal this Court has set aside that order, and the present application is for leave to appeal against that decision of this Court.

The only question for consideration is whether the decision of this Court can be construed to be a decree or final order within the meaning of section 109(a) of the Code of Civil Procedure. The question has been considered in several cases. In *Chundi Dutt Jha v. Pudmanund Singh Bahadur* (1) it was held that there was no appeal to the Privy Council against an order refusing the appointment of a receiver in a suit inasmuch as such an order does not finally decide any matter which is directly at issue in the case in respect to the right of the parties, and is not final within the meaning of clauses (a) and (b) of section 595 of the Code of 1882 and section 39 of the Letters Patent of the Calcutta High Court. The

(1) (1895) I. L. R. 22 Cal. 928.

learned Judges relied, amongst others, upon the decision of the Privy Council in *Kishen Pershad Panday v. Tiluckdhari Lall*(¹) and held that the order refusing to appoint a receiver was not an order which finally decided any question at issue in the case or the rights of any of the parties. They also referred to the Privy Council decision in *Rahimbhoy Habibhoy v. Turner*(²) in support of the proposition that the order was not a final order. In *Mahomed Musaji Saleji v. Ahmed Musaji Saleji*(³) the same view was taken and it was held that an order appointing a receiver was not a final order within the meaning of clause (a) of section 109 of the Code, and that where the question in controversy was whether a receiver should or should not be appointed in respect of the subject-matter of the litigation, and the Courts took divergent views upon the matters, certificate as to the fitness of the case for appeal to His Majesty in Council should not be granted. The same view was held by this Court in *Magni Ram Bungar v. Sridhar Choudhury*(⁴), where it was held that an order refusing or granting the appointment of a receiver does not fall within the provisions of section 109, Civil Procedure Code, as the appointment of a receiver is in no way a matter which finally determines the rights of the parties. There also a receiver had been ordered to be appointed by the Subordinate Judge and the High Court had on appeal set aside that order, and reliance was placed upon the decision of the Calcutta High Court in *Chundi Dutt Jha v. Pudamanund Singh Bahadur*(⁵) and *Muhammad Musaji Saleji v. Ahmad Musaji Saleji*(⁶), just referred to. In *Binoy Krishna Mukerjee v. Satish Chandra Giri*(⁶) the application for leave to appeal to the Privy Council against an

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NOOR, J.

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- (1) (1890) I. L. R. 18 Cal. 182.
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(3) (1911) 13 Cal. L. J. 507.
(4) (1924) 6 Pat. L. T. 119.
(5) (1895) I. L. R. 22 Cal. 928.
(6) (1926) 31 Cal. W. N. 540.

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order of a Division Bench of the High Court setting aside the order of the District Judge for the appointment of a receiver was entertained and leave was granted under clause (c) of section 109 of the Code. When this matter went before the Privy Council, their Lordships entertained the appeal but in disposing of it, Viscount Sumner made the following observations:—

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“ Their Lordships remark that it was with some doubt in the mind of at least one of the Judges of the High Court that leave to appeal to His Majesty in Council was given in this case, and they think it right to add that, as a general rule and in the absence of special circumstances or some unusual occasion for its exercise, the power of making interlocutory order is one which is not a suitable subject for review by the Judicial Committee. Not only are the practice of the Court and the manner in which experience has shown that it is wise to apply it, better known to the High Courts in India than they can be to their Lordships, but the delay occasioned by taking this additional appeal adds gravely to the procrastination, which is already the bane of Indian litigation ”—*Benoy Krishna Mukherjee v Satish Chandra Giri*(1).

It is clear from the decisions cited above that an order refusing the appointment of a receiver is not a final order within the meaning of section 109(a) of the Civil Procedure Code. The appointment of a receiver is in the discretion of the Court and the order is an interlocutory order which in no way decides any cardinal point arising for decision between the parties in the suit. In the present case it has been observed by the Division Bench that the suit was instituted in March, 1931, and must be ripe for hearing. Mr. Manohar Lal for the petitioners states that some preliminary points have yet to be determined before the suit can be heard and that there will be delay in the

(1) (1927) I. L. R. 55 Cal. 720, P. C.

actual hearing of the suit. Even so, the delay in the disposal of the suit cannot be so great that it cannot be disposed of before the disposal of an appeal to the Privy Council against the order of this Court. Under the circumstances of the case it does not appear desirable that leave should be granted under clause (c) of section 109 of the Code, and, in fact, Mr. Manohar Lal has not pressed for a leave under this clause.

We rejected the application and stated that the reasons will be given later on. We, therefore, record the above reasons for rejecting the application. The opposite party is entitled to his costs. Hearing fee five gold mohurs.

Leave refused.

LETTERS PATENT.

Before Kulwant Sahay and Khaja Mohamad Noor JJ.

RADHA MADHAB JIU

v.

REJENDRA PRASAD BOSE.*

Hindu Law—adoption—widow having authority to adopt according to the opinion or advice of husband's father—adoption by widow after death of husband's father—adoption whether invalid—deed, construction of—surrounding circumstances—Hindu widow, limitations to the power of, to dedicate property for pious and charitable purposes—Letters Patent of the Patna High Court, clause 9—failure to record reasons, whether a mere irregularity not affecting jurisdiction—decree obtained against a person in one capacity, whether can be resisted by him in another capacity—Specific Relief Act, 1887 (Act 1 of 1887), section 56(b), whether applicable where both proceedings pending in one court—suit for declaration and perpetual injunction—plaintiff, whether entitled to mere declaration when injunction cannot be granted—right to sue, when is deemed to accrue.

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Feb. 28.

March, 9.

* Letters Patent Appeals nos. 86 and 87 of 1932, from a decision of His Lordship the Chief Justice, dated the 20th April, 1932.