1930.

RAI BAHADUR DEBI PRASAD DHANDHANIA v. THAKURAIN KUSUM KUMARI.

JWALA PRASAD AND ROSS, JJ.

good until the interest has reached the *Damdupat* level cannot change its character when that level has been passed, though interest may cease to run. The argument is in our opinion wholly without substance.

The accuracy of the figures arrived at by the Subordinate Judge was not questioned by the appellants and they have been shown by the respondent to be correct. It follows, therefore, from the conclusions arrived at above that the appeal must be dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

MUKHLAL SINGH

v.

KISHUNI SINGH.*

1930.

June, 24.

On Appeal from the High Court at Patna.

Privy Council Practice—Appeal by Special Leave—Dismissal at Hearing for Incompetence—Right of Appeal under Code—"Value of Subject-matter of the Suit"—Code of Civil Procedure (V of 1908), section 110.

In section 110 of the Code of Civil Procedure, 1908, dealing with appeals to the Privy Council, the "value of the subject-matter of the suit" means the value at the institution of the suit; consequently, mesne profits accruing after the date of the plaint cannot be added to the value of immovable property in suit for the purpose of showing that the value of the subject-matter exceeds Rs. 10,000.

Gudivada Mangamma v. *Maddi Mahalakshmamma*(1), followed.

Where, on an application made ex parte, special leave to appeal had been granted on the ground that there was a right

*PRESENT: Viscount Dunedin, Sir John Wallis, Sir Lancelot Sanderson, Sir George Lowndes and Sir Binod Mitter.

(1) (1929) I. L. R. 53 Mad. 167; L. R. 57 I. A. 56.

of appeal under section 110 of the Code, but it appeared at the hearing that the appellants had not that right, the Board dismissed the appeal as incompetent, the respondents having given due notice of the objection.

Zahid Husain v. *Mohammad Ismael*(1), followed.

Appeal (no. 162 of 1927) by special leave from a decree of the High Court at Patna (December 8, 1925) reversing a decree of the Subordinate Judge of Shahabad, at Arrah.

A Hindu widow governed by the Mitakshara transferred certain immovable property, purporting to do so as heir of her husband, who she alleged had separated from his joint family. The present suit was brought by the appellants, members of the joint family, who claimed that there had been no separation, and that they were, therefore, entitled to the property by survivorship. They claimed possession and a declaration of the invalidity of the transfer. They valued the property at Rs. 6,500. The questions arising were questions of fact, namely, whether there had been a separation, also whether two female defendants were daughters of the deceased.

The trial Judge decreed the suit and the plaintiffs were put into possession. Subsequently they sued to recover from the defendants Rs. 3,890 as mesne profits; that suit was pending at the date of an appeal by the respondents to the High Court. The High Court allowed the appeal and dismissed the suit; the suit for mesne profits was thereupon dismissed also.

The High Court on March 23, 1926, dismissed an application by the plaintiffs for a certificate that the case was a fit one for appeal to the Privy Council. The learned Judges held that the value of the property in suit being only Rs. 6,500 there was no right of appeal under section 110 of the Code of Civil Procedure.

(1) (1930) I. L. R. 52 All. 8; L. R. 57 I. A. 186.

1930.

MUKHLAL SINGH v. KISHUNI SINGH.

On December 2, 1926, the plaintiffs applied to the Judicial Committee for, and obtained, special leave to appeal. The ground of their application was that they had a right of appeal as, if the mesne profits were added to the value of the property, the value of the subject-matter exceeded Rs. 10,000.

1930, *June* 24. *Wallach* for respondents no. 2-7: There was no right of appeal under the Code; the special leave should be rescinded and the appeal dismissed as incompetent. It was held by the Board in *Gudivada Mangamma* v. *Maddi Mahalakshmamma*(1) that the value of the subject-matter of the suit for the purposes of section 110 of the Code means the value at the institution of the suit; consequently the mesne profits cannot be added to the value which was only Rs. 6,500. In *Zahid Hussain* v. *Mohammad Ismael* (no. 2)(2), although special leave had been granted, the Board dismissed the appeal as incompetent upon its appearing at the hearing that there was no right of appeal under the Code and there had been no other ground for granting it. That course was taken also in *Lord Strickland* v. *Grima*(3). The respondents, it is true, have not, as in *Zahid Husain's* case (2), put forward the present contention in their case upon the appeal, but the appellants have been informed in writing that the contention would be raised at the hearing.

Dunne K. C. and *Hyam* for the appellant: The appellants have special leave to appeal by Order in Council. That leave should not be rescinded in the circumstances of this case which differ materially from those in *Zahid Husain's* case(2). In that case the ground upon which leave was granted was that the title to other properties was indirectly involved. It was only after two days of argument of the appeal that the facts were sufficiently elucidated to show that no

(1) (1929) I. L. R. 53 Mad. 167; L. R. 57 I. A. 56.

(2) (1930) I. L. R. 52 All. 8; L. R. 57 I. A. 186.

(3) (1930) A. C. 285.

other property was involved. Further, the respondents were a very numerous body of small proprietors. In this case the facts relevant to the right of appeal were clear, and leave was granted with full knowledge of them. *Lord Strickland* v. *Grima*(1) also is distinguishable as in that case there was no right of appeal to the Privy Council from the tribunal appealed from(2).

June 24. The judgment of their Lordships was delivered by—

VISCOUNT DUNEDIN.—In this case the question has been raised as to whether the appeal is competent. Special leave to appeal was granted on an *ex parte* application; but it has been settled in a judgment of this Board that that does not preclude the Board, when the true facts are brought before it, from going into the question of whether the appeal is competent or not. [*Shah Zahid Husain* v. *Mohammad Ismail*, (no. 2)](3). Upon that question the present case seems to be entirely covered by another decision of the Board in *Gudivada Mangamma* v. *Maddi Mahalakshmamma*(4). Under these circumstances their Lordships will humbly advise His Majesty that the appeal is incompetent and should be dismissed with costs.

Solicitors for appellants: *Barrow, Koyiri* and *Nevill.*

Solicitors for respondents nos. 2 to 7: *Derylan Grant* and *Dolal.*

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(1) (1930) A. C. 285.

(2) It was not pointed out that the petition for special leave in the present case being after January 1, 1926, notice of it was given to the respondents or their agents or solicitors under the new provision of rule 4 of the Judicial Committee Rules, 1925, and the respondents therefore had an opportunity of opposing the petition; whereas in *Zahid Husain's*(3) case the petition was in 1923, consequently the respondents there would have no notice of the petition, unless (which was not the case) they had entered a caveat under rule 48.

(3) (1930) I. L. R. 52 All. 8; L. R. 57 I. A. 186.

(4) (1929) I. L. R. 53 Mad. 167 L. R. 57 I. A. 56.