APPELLATE CIVIL.

Before Wort, A. C. J. and Dhavle, J.

1936.

May, 5.

KRISHNA CHANDRA DEB

v.

RAJA RAJENDRA NARAYAN BHANJ DEO.*

Privy Council Appeal—leave to appeal—Code of Civil Procedure, 1908 (Act V of 1908), section 109, clauses (a) and (c), section 115—order passed in revisional jurisdiction, if appealable to the Privy Council.

Where *R* purchased a certain property in 1931 during the pendency of a suit brought by *P*, which suit was decreed in *P's* favour in 1933. *P* applied for delivery of possession and the writ of delivery of possession was issued to him. *R* applied under rules 99 and 101 of Order XXI of the Code of Civil Procedure and the Subordinate Judge although of opinion that the rules did not strictly apply allowed the application. *P* moved the High Court in revision which failed. *P* then applied for leave to appeal to His Majesty in Council.

Held, that the order of the High Court passed on an application under section 115 of the Code of Civil Procedure was not an order 'on appeal', inasmuch as section 115 is invoked where there is no right of appeal and therefore section 109, clause (*a*), of the Code had no application.

Held also that clause (*c*) of section 109 had no application as no question of public importance was raised.

Srinivasa Prasad Singh v. *Kesho Prasad Singh*(1), not followed.

Ramchand Manjimal v. *Ratanchand*(2), dissented from.

Karsondas Dharamsey v. *Gangabai*(3) and *Sunder Koer* v. *Chandishwar Prasad Singh*(4), followed.

Raja Enaet Hossein v. *Ranee Rowshan Jahan*(5) and

* In the matter of Privy Council Appeal no. 9 of 1936.

(1) (1911) 13 Cal. L. J. 681.
(2) (1920) 47 I. A. 124.
(3) (1907) I. L. R. 32 Bom. 108.
(4) (1903) I. L. R. 30 Cal. 679.
(5) (1868) 10 W. R. (F. B.) 1.

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Sheo Prasad Bungshidhur v. *Ram Chunder Haribux*(1), distinguished.

Suraj Singh v. *Phul Kumari*(2), relied on.

The facts material to this report are stated in the judgment of Wort, A. C. J.

P. R. Das and *G. P. Das*, for the appellant.

Dr. K. P. Jayaswal (with him *S. K. Mitra*, *G. C. Das* and *Mrs. Dharamshila Lal*), for the respondents.

WORT, A. C. J.—This is an application for leave to appeal to His Majesty in Council from an order made by this Court on the 7th of January, 1936, in an application in revision against the order of the Subordinate Judge of Cuttack made on the 10th of January, 1934. It is unnecessary to state elaborately the facts of the case; it is sufficient to say that the respondent (the Raja of Kanika) in this application, purchased a certain property in the year 1931, that is during the pendency of a suit brought by the petitioner on the 29th of March, 1930, in which suit a decree was pronounced in his favour in December of 1933.

Now there appears to have been an application for execution, that is to say for delivery of possession to the petitioner and this was anticipated by an application by the respondent under Order XXI, rule 100, of the Code of Civil Procedure. This application, however, it appears was dismissed but on what grounds it is immaterial to state; the fact is that the petitioner had no notice of the application. A subsequent application was made by the respondent the Raja after an application had been made and a writ of delivery of possession issued to the petitioner. The learned Subordinate Judge dealt with the matter under Order XXI. He expressed himself in these terms:

"I think the case should be decided according to the principles laid down in Rule 99 or 101 of Order XXI of the Civil Procedure Code,

(1) (1913) I. L. R. 41 Cal. 323.
(2) (1925) I. L. R. 48 All. 226.

although the present miscellaneous case does not strictly fall under either of these rules."

I understand him to have meant by those words that the case did not strictly come under Order XXI, rule 100, by reason of the fact that possession had not actually been delivered to the petitioner: at any rate that is the meaning attached to it by the parties to this application.

Now the learned Judge disposed of the application of the respondent in the respondent's favour, hence the application to this Court in revision. Saunders, J. who delivered the judgment of this Court made this statement:

> "It is argued that the Raja ought to have waited until an attempt was made to deliver possession to the petitioner and then to have resisted the delivery of possession, leaving it to the petitioner to make an application under Order XXI, rule 97. The court, however, merely anticipated a situation which would afterwards arise on the application that presumably would be made by the petitioner under rule 97 ".

The learned Judge then stated that there was no ground for interference by way of revision unless the order was without jurisdiction or it was the cause of a failure of justice. The learned Judge in his judgment, in which the learned Chief Justice concurred, came to the conclusion that there was no failure of justice, and as I understand the judgment, he came also to the conclusion that the learned Subordinate Judge did not act without jurisdiction.

Now the application to this Court is made under section 109 of the Code of Civil Procedure and it is suggested that it comes either under sub-clause (*a*) of section 109 or sub-clause (*c*). Dealing with the latter clause first, I am quite clearly of the opinion that it is not a case in which we should give a certificate of fitness to appeal to His Majesty in Council under clause (*c*), that is to say, the most that can be said with regard to the order of the learned Subordinate Judge is that he did in fact anticipate a state of affairs which would have obtained had the writ of delivery of possession been given effect to on behalf

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of the petitioner. Strictly as the learned Subordinate Judge points out, the matter did not come under Order XXI, rule 100, of the Civil Procedure Code; but that, in my judgment, would not entitle us to hold that the case was of such importance that we should give leave to appeal under clause (*c*) of section 109. But it remains to be considered whether the order of this Court is final order passed on appeal by the High Court under clause (*a*).

Mr. P. R. Das, appearing on behalf of the petitioner, has relied upon a decision of the Calcutta High Court in *Srinivasa Prasad Singh* v. *Kesho Prasad Singh*(1). There Mookerjee, J. discussed the question of whether the order there being considered was a final order. As I have already indicated, two questions arise: first, whether it was a final order and, secondly, whether it was an order passed on appeal. Mookerjee, J. in the course of his judgment appears to take this view that the question is to be determined upon a consideration of the question of whether the order was made in the appellate jurisdiction of the Court. Before dealing with that matter, reference should be made to a decision of their Lordships of the Judicial Committee of the Privy Council in *Ramchand Manjimal* v. *Ratanchand*(2). Their Lordships in that case were considering the question of what was a final order, and Lord Cave, who delivered the opinion of their Lordships of the Judicial Committee of the Privy Council expressed himself in these terms:

"The question as to what is a final order was considered by the Court of Appeal in the cases of *Salaman* v. *Warner*(3), *Bozson* v. *Altrincham Urban District Council*(4) and *Isaacs* v. *Salbstein*(5). The effect of those and other judgments is that an

(1) (1911) 13 Cal. L. J. 681.
(2) (1920) L. R. 47 Ind. Ap. 124.
(3) (1891) 1 Q. B. 734.
(4) (1903) 1 K. B. 547.
(5) (1916) 2 K. B. 139.

order is final if it finally disposes of the rights of the parties."

Mr. Das in this case contends that this order would in effect give delivery of possession to the respondent and thus finally disposed of the rights of the parties. But assuming that to be so for the moment, we have, as I have already stated, to consider the question of whether this order was passed on appeal.

I come back to the judgment of Mookerji, J. in the case of *Srinivasa Prasad Singh* v. *Kesho Prasad Singh*(1). There the learned Judge, as I have already stated, appears to have decided the question on the footing of whether the order was made in the appellate jurisdiction of the court or on its Original Side, having stated that the Letters Patent nowhere spoke of any revisional jurisdiction in contradistinction to the appellate jurisdiction. But with great respect to that very distinguished Judge, it seems to me that the test which the learned Judge was there applying is not a final test in the matter. An order may be made on the appellate side of the court without its being a final order passed on appeal. In this connection I propose to refer to a decision of the Bombay High Court in *K. Dharamsey* v. *Gangabai*(2). There the matter under consideration was an application to admit an appeal after the period of limitation prescribed by the Limitation Act; and it was there decided that an order made on such an application was not an order or decree passed on appeal. Sir Lawrence Jenkins, Chief Justice, in the course of his judgment made this observation:

"The meaning of the expression 'passed on appeal' has been settled by a line of authorities, which it is right that we should follow—*see Sunder Koer* v. *Chandishwar Prasad Singh*(3) and the cases

(1) (1911) 13 Cal. L. J. 681.
(2) (1907) I. L. R. 32 Bom. 108.
(3) (1903) I. L. R. 30 Cal. 679.

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there cited. And applying that interpretation to the circumstances of this case, it cannot (in my opinion) be said that there is here a decree passed on appeal by a High Court."

The case to which Sir Lawrence Jenkins referred is the case of *Sunder Koer* v. *Chandishwar Prasad Singh*(1).

Now reference was made to the case of *Rajah Enaet Hossein* v. *Ranee Rowshun Jahan*(2). This case was referred by Jackson, J. to a Full Bench and the reference was made in these words:

> "It was held that an order made by the High Court on an application to review its judgment in a case of appeal to the Privy Council previously heard is not an order made on appeal within the terms of clause 39 of the Court's Charter, so as to enable the Court to admit an appeal against such order to Her Majesty in Council."

In that case Sir Barnes Peacock, Chief Justice, drew attention to the language used in the Charter which is practically identical with that in section 595 of the Code and to the difference between the words 'made or passed on appeal' and 'made in exercise of its appellate jurisdiction'. In section 595 of the Code the language used is "passed on appeal" and not "passed in the exercise of its appellate jurisdiction". In my judgment there is a vast difference between an order made or judgment passed on the appellate side of a Court and the final order passed on appeal. The latter may be included in the former but the former is not necessarily the same as the latter.

Mr. Das in this connection has referred to a decision of the Calcutta High Court in *Shew Prosad Bungshidhar* v. *Ram Chunder Haribux*(3). The matter there before the learned Judges was whether the order which was under discussion was a judgment within the meaning of clause 15 of the Letters Patent. They decided it was, but in the course of the judgment reference was made to a matter which is

(1) (1903) I. L. R. 30 Cal. 679.
(2) (1868) 10 W. R. (F. B.) 1.
(3) (1913) I. L. R. 41 Cal. 323.

under discussion in this case and there the learned Judges stated that it had been decided in the Calcutta High Court that an appeal lay from an order made under section 115 of the Code of Civil Procedure. With very great respect to that most distinguished Judge the point there was not necessary for the decision but perhaps the value of it is nonetheless having regard to the fact that the learned Judge there stated that it had been decided in the Calcutta High Court that an order made under section 115 of the Code was appealable to His Majesty in Council.

There is one decision, however, a decision of the Allahabad High Court in *Suraj Singh* v. *Phul Kumari*(1) which is directly in point in this matter. There the effect of the judgment of the learned Judges was this, that an order passed in revision is entirely distinct in its nature from an order passed on appeal and does not come within the purview of section 109 of the Code of Civil Procedure. The learned Judges in deciding that case made this observation:

" We are not prepared to take the view that an order passed by this Court in the exercise of its revisional jurisdiction is an order passed ' on appeal '. There is a substantial difference between the powers of this Court when exercised in appeal and when exercised in revisional jurisdiction. As was properly pointed out, the jurisdiction of this Court under section 115 is a discretional jurisdiction and the Court is not bound to interfere even if it is satisfied that an error of law has been committed by the court below."

In this connection I would make reference to section 115 itself. In my opinion with great respect to the decision upon which reliance is placed I hold the view that section 115 is conclusive of the matter and that an order made under this section can be made only when there is no appeal and it necessarily implies that an order made under the section is not

(1) (1925) I. L. R. 48 All. 226.

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an order made on appeal. Section 115 in my judgment quite clearly distinguishes between an order made under the revisional powers of the Court and an order made on appeal. It is true, as I have already stated and repeat, that an order made under section 115 of the Civil Procedure Code may well be an order made on the appellate side of the Court but it by no means follows that it is an order on appeal. In my judgment it is not. I come clearly to the conclusion that although it may be a final order, it was not a final order passed on appeal and therefore we have no jurisdiction to give leave to appeal to His Majesty in Council under section 109(*c*).

For the reasons which I have already stated, I think also it is not a fit case for appeal to His Majesty in Council. Saunders, J. in delivering the judgment of this Court referred to the fact that there was right of action in the plaintiff under section 103 of the Code of Civil Procedure, although I do not hold that that finally decided the matter or that it is a matter which ought to be taken into consideration in coming to a conclusion in the case.

For the reasons I have given this case should be rejected.

The application for leave to appeal is dismissed with costs: hearing fee ten gold mohars.

DHAVLE, J.—I agree. The course of decisions in Calcutta is by no means uniform and it is impossible to distinguish the case before us from that of *Suraj Singh* v. *Phul Kumari*(1). My lord the Chief Justice has pointed out a further reason for holding that the order under consideration was not an order passed on appeal within the meaning of clause (*a*) of section 109 of the Code of Civil Procedure in that the revisional jurisdiction of this Court is only invoked, as section 115 of the Code expressly provides, in cases where no appeal lies to this Court. As regards clause (*c*) of

(1) (1925) I. L. R. 48 All. 226.

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section 109, it is clear that the case does not raise any question of wide public importance nor any question of great private importance to which it is impossible to give a money value. The contest between the parties seems ultimately to have reduced to the question whether the applicant is to get the better of the other side by reason of the tactical move he adopted in dropping the mortgagee and the objector from his suit.

Leave refused.

DHAVLE, J.

REVISIONAL CIVIL.

1936.

May, 5.

Before Khaja Mohamad Noor and Saunders, JJ.

CHHOTI RANI SAHEBA

v.

KUMAR BRIJDEO NARAYAN SINGH.*

Court of Wards Act, 1879 (Act IX of 1879), sections 51 and 52—power of Court of Wards to appoint a guardian for a suit—power of appointment if includes a power of dismissal—civil court, if can appoint a guardian ad litem of a minor whose estate is under the Court of Wards—Civil Procedure Code (Act V of 1908), Order XXXII.

Where the Court of Wards appointed a Board of Guardians to represent the minor in place of the manager under section 52 of the Act and subsequently dismissed the Board of Guardians and appointed one G, and an application was made for substitution of G as guardian ad litem and the Subordinate Judge appointed G as guardian ad litem.

Held (*i*) that Order XXXII has no application to the case of a minor whose estate is under the Court of Wards and therefore the order of the Subordinate Judge was without jurisdiction.

(*ii*) that section 52 of the Court of Wards Act authorised the Court of Wards to appoint a guardian to defend a minor

* Civil Revision no. 23 of 1936, from an order of Babu Bansi Prasad, Deputy Magistrate-Subordinate Judge, Daltonganj, dated the 11th November, 1935.