APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

SYED KHAN
v.
SYED EBRAHIM.*

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Dec. 19.

Civil Procedure Code (Act V of 1908), ss. 105, 109—Decision of High Court upon a cardinal issue in a suit which cannot be questioned again whilst that decision stands is 'final'—Period for leave to appeal to Privy Council against 'final order', if expired, no leave to appeal can be given in respect of such order along with other points decided subsequently in the case.

Plaintiff-respondent filed a suit in a District Court claiming a right of pre-emption under Mahomedan Law. The District Court dismissed the suit on the ground that such right did not exist in Burma. In October 1925 the High Court on appeal held that the right of pre-emption did exist and reversing the decision of the District Court remanded the case for trial. Plaintiff won the case on the merits and the High Court on appeal confirmed the decision in May 1927. Defendant applied for leave to appeal to His Majesty in Council not only against the points decided in May 1927, but also against the point decided in October 1925.

Held, that assuming that the provisions of s. 105 of the Civil Procedure Code did not apply to appeals to His Majesty in Council, still the question as to the right of pre-emption was a cardinal issue between the parties and was finally decided in October 1925 and was a 'final order' within the meaning of s. 109 (*a*) of the Code. Petitioner could have then applied for leave to appeal to His Majesty in Council within the period of limitation allowed. This question of the right of pre-emption was not in dispute when the case was finally decided in May 1927, and petitioner could not raise the point over again in applying for leave to appeal against the points decided in May 1927.

Ahmed Husain v. *Gobind Krishna*, 33 All. 391; *Venkataranga* v. *Narasimha*, 38 Mad. 509; *Rahimbhoy* v. *Turner*, 18 I.A. 6—*referred to.*

Palker for petitioner.

Doctor for respondent.

RUTLEDGE, C.J., and BROWN, J.—The application before us is one for leave to appeal to His Majesty in Council.

The respondent brought a suit against the petitioner in the District Court of Pegu, in which he

* Civil Miscellaneous Appeal No. 112 of 1927.

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claimed a right of pre-emption under Mohammedan Law. The parties are Sunni Mohammedans and the District Court in the first instance dismissed the suit on the ground that the right of pre-emption could not be claimed under Mohammedan Law in Burma. The respondent appealed to this Court and orders were passed on the appeal on the 13th October 1925 reversing the orders of the District Court and remanding the case for trial. It was then held by a Bench of this Court that under Mohammedan Law the right of pre-emption did exist.* The case then went for trial on the merits and was eventually decreed in favour of the plaintiff. The petitioner appealed to this Court and after considering the case on the merits we dismissed the appeal on the 23rd May 1927. The petitioner now wishes for leave to appeal not only on the points decided by us in May 1927 but also on the points decided by a Bench of this Court in October 1925.

The period allowed by the Law of Limitation for appealing against the order of October 1925 has long expired, and the question arises whether the petitioner can call into question the correctness of that order in an appeal against our judgment of May last. In the case of *Ahmed Hussain and others* v. *Gobind Krishna Narain and others* (1), a suit had been dismissed by the Court of first instance on the ground that it was barred by the provisions of section 43 of the Code of Civil Procedure of 1882. That order of dismissal was set aside by the High Court on appeal and the case remanded for decision on the merits. It was decided that the defendant had then no right of appeal to His Majesty in Council under the provisions of section 109 of the Code of

* 4 Ran. 13.

(1) (1911) 33 All. 391.

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Civil Procedure and it was further held that the provisions of section 105 of the Code did not apply to Privy Council appeals. The same view of the law was taken by the High Court of Madras in the case *N. Venkataranga Row Garu* v. *Raja K. V. Narasimha Rao Garu* (1). But in that case it was pointed out that the order of remand was of the nature of an interlocutory order and did not decide the merits of the case between the parties in any way. The case was specifically distinguished from the Privy Council case of *Rahimbhoy Hibibhoy* v. *Turner* (2). In that case the Trial Court had found that the defendant must account to the plaintiff and a decree was passed for the taking of accounts. It was held that a decree of this nature did amount to a final order within the meaning of section 109, as the decree did definitely decide that if a balance were found against the defendant the defendant was bound to pay that balance. The same principle seems to us to be applicable to the present case. This Court in October 1925 definitely decided that the plaintiff had a legal right of pre-emption and that he would be entitled to a decree if he could establish that he had complied with the formalities required to be observed before that right could be exercised. The point decided was an important one on the merits of the dispute between the parties. It is not in fact seriously contended before us that the petitioner could not, if he had been so advised, have applied for leave to appeal against the order of October 1925, but it is contended that nevertheless he now has a further right of appeal, in which he can contest the correctness of that order. We do not wish to question the correctness of the view expressed by the High Courts of Madras and

(1) (1915) 38 Mad. 509. (2) (1891) 8 I.A. 6 ; 15 Bom. 155.

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Allahabad as to the inapplicability of section 105 of the Code of Civil Procedure to appeals to His Majesty in Council. If that section applied there would be no doubt that leave to appeal on this ground could not now be given.

The question before us is whether the same principle applies in view of the wording of section 109. Under that section an appeal lies from any decree or final order passed on appeal. An appeal does lie against the final orders passed by us in May last, and the question is whether in that appeal it is open to the appellant to question the correctness of the orders passed in October 1925, which were final orders and against which an appeal might then have been filed. Under the provisions of section 110 the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards, or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of the like amount or value. In the appeal before us, in which we passed orders in May last, the question of the right of pre-emption was not in dispute. That has been decided, and finally decided, by the order of October 1925, and the petitioner in seeking to raise again this point as to the right of pre-emption is not attacking the correctness of our decree but the correctness of the decree of October 1925. If the decree of October 1925 had not been a final order in itself and therefore appealable in itself, it would clearly only have become final when the case was finally decided in May last. But in the view we take the question as to the right of pre-emption was finally decided in October 1925. Our decree of

May last is not a final order on this point as we had no jurisdiction to consider the point, and in raising this point now it seems to us that the petitioner is in no sense trying to contest the correctness of our order against which he wishes to appeal. The correctness of the order of October 1925 is no more open to dispute than if it had been passed in an entirely different suit between the same parties. We are therefore of opinion that it is not competent for the petitioner to challenge the correctness of that order now and that leave to appeal on this ground cannot be given.

Leave to appeal has, however, also been asked for on other grounds in which the correctness of our decision of May last has been directly challenged. So far as the value of the subject-matter is concerned the conditions prescribed by section 110 of the Code of Civil Procedure are admittedly fulfilled. We have confirmed the decision of the Trial Court and the question for decision therefore is whether the appeal involves a substantial question of law. Two essential formalities are required before the right of pre-emption can be claimed. These two formalities are the "*talab-i-mowasibat*" or the immediate demand, and the "*talab-i-ishhad*" or the demand before witnesses. The law requires that the former of these demands shall be made immediately. In the present case there was an interval of perhaps a minute between the time when the respondent heard of the sale and the time when he made the demand. We were of opinion that this was to all intents and purposes an immediate demand by the plaintiff. This view was opposed to the the strict letter of the law as laid down in a passage from the Hedaya, which states that if the news of a sale was conveyed by letter and the recipient proceeded to read the letter to a finish without

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shouting out his right of pre-emption, the delay would be fatal. It is argued that the right of pre-emption is a special right and is of such a nature that all the technicalities prescribed by law must be strictly complied with before it can be exercised. Looked at from this point of view the point is perhaps an arguable one and it is an important point of law affecting the rights of Mohammedans generally. We think therefore that there is here a substantial point of law, on which leave to appeal should be granted.

The same remarks apply to the second point raised, which is that, when the second demand was made, the first demand was not specifically referred to in clear terms. There is a further point raised and that is that the right of pre-emption should not have been allowed because it was claimed in relation to an estate which consisted of both moveable and inmmoveable properties. It is urged that according to the Hanafi School of Mohammedan Law there can be no pre-emption in moveables. The view we took was that the vastly preponderent part of the estate consisted of immoveable property and that it was impracticable to separate the small item of moveable property from the remainder. But the point whether, with regard to an estate comprising in part, however small, of moveable property, the law of pre-emption applies, does seem to be a substantial point of law. On this point also we think that leave to appeal must be given.

The result is that on usual terms as to security and deposits of the necessary expenses we grant leave to appeal to His Majesty in Council. In the circumstances we pass no orders as to the costs of this application.

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Feb. 6.

[Petitioner failed to furnish security and to deposit the costs, and the application was therefore rejected.]