

MISCELLANEOUS CIVIL.

Before Shadi Lal C. J. and Broadway J.

GOPAL LAL (DECREE-HOLDER) Petitioner

versus

BAL KISHEN AND OTHERS (JUDGMENT-DEBTORS),

Respondents.

Civil Miscellaneous No. 502 of 1930.

Civil Appeal No. 1382 of 1929.

Civil Procedure Code, Act V of 1908, section 110—Privy Council—appeals to—against judgment of Division Bench (Letters Patent) confirming that of a single Judge—whether leave can be claimed as of right.

Held, that for the purpose of deciding whether leave to appeal to the Privy Council should be granted, the judgment of a Single Judge of the High Court is that of a Court "immediately below" the Division Bench of the same Court, within the meaning of section 110 of the Civil Procedure Code, and as, in this case, two Courts had concurred in the finding in question, the certificate could not be claimed as of right.

Tulsi Persad Bhakt v. Benayek Misser (1), and Minna Heatherly v. B. C. Sen (2), followed.

Debendra Nath Das v. Bibudhendra Mansingh (3), referred to.

Application under section 110 of the Civil Procedure Code, for leave to appeal to His Majesty in Council, against the decision of a Division Bench, dated 2nd May 1930.

JAGAN NATH AGGARWAL, for Petitioner.

SHAMAIR CHAND, and QABUL CHAND, for Respondents.

BROADWAY J.

BROADWAY J.—This is an application under section 110 of the Civil Procedure Code for leave to appeal

(1) (1896) I. L. R. 23 Cal. 918 (P.C.). (2) (1928) 109 I. C. 863

(3) (1916) I. L. R. 43 Cal. 90.

to His Majesty in Council against a decision of a Division Bench of this Court, dated the 2nd of May 1930, which dismissed an appeal from a decision of Mr. Justice Johnstone sitting alone, thus affirming Mr. Justice Johnstone's decision.

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It appears that one Gopal Lal sued Bansil Lal for recovery of Rs. 13,000. The matter was referred to arbitration. The arbitrator, one *Lala Mela Ram*, made his award on the 23rd of June 1926. Under the award Gopal Lal was to be given possession by Bansil Lal of a certain factory. Delivery of possession was to be made on the 15th of July 1926. In default of possession being delivered by that date Bansil Lal was to pay Gopal Lal a sum of Rs. 13,000. If Gopal Lal was given possession of the factory he was to run that factory for his own benefit for a period of three years.

Objections were lodged against the award and the matter was not finally decided till 1928 when a decree in the terms of the award was passed by a Division Bench of this Court, the date for delivery being that fixed by the arbitrator although it had expired. In execution of that decree the executing Court held that Bansil Lal having failed to give delivery in the terms of the decree was liable to pay the sum of Rs. 13,000.

Against this decision Bansil Lal preferred an appeal to this Court which was disposed of by Mr. Justice Johnstone on the 23rd of October 1929. He held that Bansil Lal had done all in his power to give delivery of the factory within the time prescribed and that it was due to Gopal Lal's action that he had not taken delivery. He accordingly accepted the appeal

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and directed that Gopal Lal should be given possession of the factory for a period of five years and two months in all.

It was against this decision that an appeal was filed under clause 10 of the Letters Patent to this Court which was dismissed on the 2nd of May 1930.

It has been urged by Mr. Jagan Nath *Aggarwal* that the appellants are entitled as of right to the certificate prayed for on the ground that the ultimate decision of the High Court was that arrived at by the Letters Patent Bench on the 2nd of May 1930, and that as that decision reversed the finding of the executing Court the provisions of section 110 applied and the certificate should be granted. He further contended that a substantial question of law was involved in the case. He supported his first contention by a reference to *Debendra Nath Das v. Bibudhendra Mansingh* (1), and urged that the Court of a single Judge of a High Court could not be regarded as a Court 'immediately below' the Court of a Division Bench of the same High Court. This matter has, however, been concluded, as far as this Court is concerned, by *Mrs. Minna Heatherly v. Doctor B. C. Sen* (2), where, after a full discussion of the question involved, it was definitely laid down that a single Judge of the High Court is a Court "immediately below" the Division Bench of the same Court within the meaning of section 110 of the Civil Procedure Code. This decision was based on *Tulsi Persad Bhakt v. Benoyek Misser* (3). I would, therefore, hold that the Court of Mr. Justice Johnstone sitting alone was a Court immediately below the Court of the Division Bench which dealt with this appeal;

(1) (1916) I. L. R. 43 Cal. 90. (2) (1928) 109 I. C. 863.

(3) (1896) I. L. R. 23 Cal. 918 (P.O.).

and that, therefore, the decision of the second of May 1930 affirmed that of Johnstone J., dated the 23rd of October 1929. The principle underlying the provisions of section 110, Civil Procedure Code, is clearly that when two Courts have concurred in a finding of fact, that finding cannot again be attacked. As the two Courts have concurred, the certificate cannot be claimed as of right.

Further, I am unable to see that any substantial question of law is involved. The findings arrived at by the Single Judge and affirmed by the Division Bench were purely findings of fact.

I would, therefore, dismiss this application with costs.

SHADI LAL C.J.—I concur.

SHADI LAL C.J.

N. F. E.

Application dismissed.

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