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execution in regard to the immoveable property is concerned. I cannot regard the decree-holder's request that he should share rateably in the proceeds of the sale of the property already under attachment as amounting to an application for sale of the property attached before judgment in his own suit.

In these circumstances I disagree with the view of the Courts below. I reverse the decree, so far as the properties purchased from the judgment-debtor's heir are concerned, and direct that the plaintiff's suit should be dismissed. As the appeal has not been pressed with regard to the properties sold at the auction sale each party will bear its own costs.

The order in the other appeal will be that the plaintiff's suit is dismissed with costs.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Baker.

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January 25

LALLUBHAI PRAGJI AND OTHERS (ORIGINAL PLAINTIFFS NOS. 1 to 4), APPLICANTS *v.* BHIMBHAI DAJIBHAI (ORIGINAL DEFENDANT), OPPONENT.*

Civil Procedure Code (Act V of 1908), section 110—Privy Council, leave to appeal to—Suit for easement of light and air—Value of subject matter—Second Class Subordinate Judge—Jurisdiction.

In a suit for an easement of light and air claimed by the owner of property A against the owner of property B, it is the value of the easement and not the value of property A, that determines the appealable value for leave to appeal to the Privy Council under section 110 of the Civil Procedure Code, 1908.

De Silva v. *De Silva*[1] and *Manilal* v. *Banubai*,[2] followed.

Appaya v. *Lakhamgowda*,[3] distinguished.

In a suit for easement of light and air, the relief claimed by the plaintiff was valued at Rs. 5 and the suit was brought in the Court of a Subordinate Judge of Second Class. The plaintiff having lost in appeal and in Second Appeal to the High Court, applied for leave to appeal to the Privy

*Civil Application No. 727 of 1928.

(1) (1904) 6 Bom. L. R. 403. (2) (1920) 23 Bom. L. R. 374.

(3) (1922) 25 Bom. L. R. 77.

Council on the ground that the property in respect of which the easement was claimed, was of the value of Rs. 10,000.

Held, that the suit having been brought in the Second Class Subordinate Judge's Court, it was not open to the plaintiff to contend that the suit related to property the value of which was Rs. 10,000 or upwards.

Hirjibhai v. *Jamshedji*,[1] followed.

APPLICATION for leave to appeal to His Majesty in Council, against the decision of Patkar and Baker, JJ., in Second Appeal Nos. 864 and 914 of 1926.

In January 1924, one Bhimbhai Dajibhai filed a suit (No. 5 of 1924) in the Second Class Subordinate Judge's Court at Bulsar against Lallubhai Pragji and others (defendants), praying for an injunction restraining the defendants from opening two windows and two arches in the western wall of the defendants' house and for an order that the defendants may not obstruct the plaintiff while closing the said windows and arches.

In June 1924 Lallubhai Pragji and others filed Suit No. 289 of 1924 against Bhimbhai Dajibhai in the same Court for a declaration that they had acquired an easement as of right, openly and without interruption for the statutory period and therefore prayed for an injunction restraining the defendant from putting up any screen or interruption and for consequential reliefs. The plaintiffs valued the claim at Rs. 5 for all purposes.

Both the suits were tried together by the Subordinate Judge at Bulsar who dismissed Suit No. 5 of 1924 filed by Bhimbhai Dajibhai and decreed Suit No. 289 of 1924 filed by Lallubhai Pragji and others.

Against the judgment and decrees, Bhimbhai preferred two appeals to the District Court at Surat. The learned District Judge allowed the said appeals.

Against the judgment and decrees in appeals, Lallubhai and others preferred Second Appeals Nos. 864 and

[1] (1913) 15 Bom. L. R. 1021.

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914 of 1926 to the High Court. The appeals were heard by Patkar and Baker, JJ., who dismissed the appeals and confirmed the decrees passed by the District Judge.

Lallubhai and others, therefore, applied to the High Court for permission to appeal to His Majesty in Council.

H. C. Coyajee and *Gharekhan*, with *P. A. Dhruva*, for the petitioners.

D. A. Tulzapurkar, for the opponents.

BAKER, J. :—These are applications for leave to appeal to the Privy Council against the decision of this Court in Second Appeals Nos. 864 and 914 of 1926. The appeals arose out of two cross suits in respect of an easement, i.e., the right to open two windows and an arch in the western party-wall of the defendants' house. The first question which will arise in this case is whether the property is Rs. 10,000 or upwards in value. The learned counsel for the appellant has argued that in a suit for an easement of light and air claimed by the owner of property A against property B, it is the value of the property and not the value of the easement that determines the appealable value, and for that proposition he relies on the case of *Appaya* v. *Lakhamgowda*.[1] Now the trend of decisions in this Court has always been the other way. In *De Silva* v. *De Silva*[2] the point was directly in issue, and it was held, to determine the value prescribed by section 596 of the Civil Procedure Code, the decree is to be looked at as it affects the interests of the party prejudiced by it, and where the detriment to the party seeking relief is estimated at less than Rs. 10,000, the value of the matter in dispute in appeal is not of the prescribed value, the decree itself does not involve any claim or question to or respecting property

[1] (1922) 25 Bom. L. R. 77. [2] (1904) 6 Bom. L. R. 403.

of the prescribed value, and the case does not fulfil the requirements of section 596 of the Code. Sir Lawrence Jenkins in deciding the case said (p. 406) :—

> "The argument has been that inasmuch as the whole property is valued at Rs. 12,000 there is a compliance with the terms of section 596 (i.e., the present section 110), though the loss to the defendant by reason of the decree is limited to ⅓ of that property and profits. If we were to give effect to the contentions urged before us it would follow that if the sole subject-matter in dispute were an easement of trifling value, but affecting property worth Rs. 10,000 or upwards then a right to appeal to His Majesty in Council under the Civil Procedure Code would exist."

That ruling was followed in *Manilal* v. *Banubai*,[1] in which in an application for leave to appeal to the Privy Council the respondent contended that though the value of the easement of light and air claimed by him in the suit was less than Rs. 10,000, yet the suit involved a claim or question to or respecting property of the value of over Rs. 10,000, and he was, therefore, entitled to a certificate. It was held, rejecting the application, that in the case of an easement, the value of which fell much below Rs. 10,000, there was no right of appeal although it affected property worth over Rs. 10,000, and reference was made to the case of *De Silva* v. *De Silva*.[2] Now it appears that after leave to appeal in *Manilal* v. *Banubai*[1] had been refused by this Court special leave to appeal was granted by the Privy Council. But we are not in possession of the judgment, and we do not know what were the reasons which led their Lordships to grant special leave to appeal, but that is referred to in the case of *Appaya* v. *Lakhamgowda*.[3] This is a case on which the learned counsel for the applicant relies, and it is also the case which Mr. Mulla has quoted in his Civil Procedure Code, 8th Edition, at p. 299 in support of the proposition that in a suit for an easement of light and air claimed by the owner of property A, against the owner of property B, it is the value of property A and

[1] (1920) 23 Bom. L. R. 374. [2] (1904) 6 Bom. L. R. 403.
[3] (1922) 25 Bom. L. R. 77 at p. 79.

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not the value of the easement that determines the appealable value. With all respect, the case of *Appaya* v. *Lakhamgowda*[1] does not seem to me to support this proposition. In that case the dispute was between two persons as regards two properties in which the parties were held to be entitled to share equally, and it was found that the plaintiff's share was worth more than Rs. 5,000 and therefore the defendant's share was also worth more than Rs. 5,000 and so the total value of the property was over Rs. 10,000. The user referred to a well and to the open space in the compound adjoining the two houses. The property, therefore, in respect of which the easement was directly claimed and in respect of which the easement was exercised was worth more than Rs. 10,000. That is to say, the plaintiff claimed the right to use a well and compound the value of which was Rs. 10,000 and upwards, and this does not refer to the same thing as a dispute regarding two small windows in a particular room of a house. But as a matter of fact the judgment in *Appaya* v. *Lakhamgowda*[1] has not dissented from the rulings already quoted in *De Silva* v. *De Silva*[2] and *Manilal* v. *Banubai*,[3] nor does it seem to have been followed in subsequent cases. In *Nariman Rustomji* v. *Hasham Ismayal*,[4] which was decided two years later than *Appaya* v. *Lakhamgowda*,[1] *De Silva* v. *De Silva*[2] was again followed, and the principle laid down in *Nariman Rustomji* v. *Hasham Ismayal*[4] is not the principle laid down in *Appaya* v. *Lakhamgowda*.[1] It was held in that case that where in a partnership suit leave to appeal to His Majesty in Council was applied for, the petitioner contending that the decree involved a claim respecting property of the value of Rs. 10,000 within the meaning of the second paragraph of section 110 of the Civil Procedure Code, 1908, it was the value of

[1] (1922) 25 Bom. L. R. 77.
[2] (1904) 6 Bom. L. R. 403.
[3] (1920) 23 Bom. L. R. 374.
[4] (1924) 49 Bom. 149.

the appellant's share in the partnership that must be looked to and not the value of the whole partnership property. It has just been pointed out that in *Appaya* v. *Lakhamgowda*[1] what was held was that it was the value of the whole property and not the value of the plaintiff's share which for this purpose must be taken to apply. So the principle laid down in *Nariman Rustomji* v. *Hasham Ismayal*[2] is the same principle as that laid down in *De Silva* v. *De Silva*,[3] and *Manilal* v. *Banubai*[4] expressly follows *De Silva* v. *De Silva*,[3] and makes no reference to *Appaya* v. *Lakhamgowda*.[1] In these circumstances it appears that this Court has with this one exception, for which no reasons are given, always followed *De Silva* v. *De Silva*,[3] which is still good law. In addition to this the Privy Council in *Mirza Abid Husain Khan* v. *Ahmad Husain*[5] has proceeded on much the same principle as *Nariman Rustomji* v. *Hasham Ismayal*,[2] holding that section 110 of the Civil Procedure Code applies to the value of the annuity which is sought to be recovered, and not to the value of the property upon which that annuity is charged. And that case distinguishes the case of *Radhakrishna Ayyar* v. *Sundaraswamier*,[6] the case upon which the learned counsel for the applicant has relied, and in which it was laid down that the sum of money actually at stake represents the true value. In these circumstances I am of opinion that the case of *De Silva* v. *De Silva*[3] is still good law, which has been uniformly followed in this Court, and the principle which that decision lays down is that in the case of an easement it is not the value of the whole property which is to be taken into consideration. In addition to this the learned counsel for the respondent has quoted *Hirjibhai* v. *Jamshedji*,[7] which

(1) (1922) 25 Bom. L. R. 77.
(2) (1924) 49 Bom. 149.
(3) (1904) 6 Bom. L. R. 403.
(4) (1920) 23 Bom. L. R. 874.
(5) (1923) 26 Bom. L. R. 781.
(6) (1922) L. R. 49 I. A. 211.
(7) (1913) 15 Bom. L. R. 1021.

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lays down that the amount of value of the subject-matter of the suit cannot be larger than what the Court in which the suit is brought has jurisdiction to try and decree, and where it is open to the plaintiff to place his own valuation on his suit, and he elects to value it at an amount which is within the jurisdiction of a Subordinate Judge of the Second Class, it is not open to him afterwards to say that it is of the value of Rs. 10,000 or upwards. In the present case the relief sought was valued at Rs. 5. The suit was valued at Rs. 5 for all purposes, and was brought in the Court of the Second Class Subordinate Judge. Hence it would not be open now for the applicant, who was plaintiff in one suit and defendant in the other, to contend that the suit related to property of the value of Rs. 10,000 or upwards, in which case the suit should have been brought in the First Class Subordinate Judge's Court. In these circumstances I am of opinion that the value of this appeal must be taken to be less than Rs. 10,000, and, therefore, it does not fulfil the requirements of section 110 of the Code of Civil Procedure, and that it does not involve any claim or question to or respecting property of the like amount or value. Secondly, in this case the decree which has been passed by this Court confirmed the decision of the Court immediately below, and, therefore, in order that a certificate might issue that this is a fit case for appeal to the Privy Council the appeal must involve some substantial question of law. Now the point in this case was only this, that at the time the plaintiff brought a suit, by plaintiff I mean the servient owner, the defendant applicant had not enjoyed the easement for 20 years, and that was found by all three Courts. After the institution of the opponent's suit the applicant brought a cross suit or another suit to establish his right to the easement, and at the time when he brought

that suit, which was some months later than the institution of the opponent's suit, the period of 20 years had elapsed, and it was held that it was not open to him to add on to the period which had expired at the time of the institution of the opponent's suit the subsequent period after the institution of that suit. Now there is a decision of the Court of Chancery to that effect, and although there is a point of law, as there must necessarily be in every case, I am not prepared to hold that it is a substantial point of law. Then it is contended that the appeal might at any rate fall under section 109 (*c*), which provides for an appeal from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council.

The same ruling which I quoted just now, *Hirjibhai* v. *Jamshedji*,[1] deals directly with this point, and says what is contemplated in clause (*c*) of section 109 of the Civil Procedure Code is a class of cases in which there may be involved questions of public importance or which may be important precedents governing numerous other cases or in which while the right in dispute is not exactly measurable in money it is of great public or private importance. A case was quoted in the course of the arguments in this case which referred to the right of management of a Parsi fire temple, which naturally would be a matter of great importance to the Parsi community. But I do not think it can for a moment be urged that the present case, which relates to the right to open two small windows in a loft or gallery in a house, is a case of great public importance. It can hardly be said to be an important precedent governing numerous other cases. The circumstances of this case are, as I think I pointed out at the time of my judgment, very peculiar. It is very

[1] (1913) 15 Bom. L. R. 1021.

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rare that such a question as two suits brought by two persons would involve questions such as arose in the present case. The point on which the Subordinate Judge felt some difficulty was that the applicant was entitled to a decree if the opponent had not brought a suit, and that is a point which I should think is hardly ever likely to arise again. Cases of easements of light and air are of daily occurrence in this Court, but they are not usually of great public or private importance. They may be important to the parties themselves, but not to the community as a whole. I do not think the case can be brought under section 109 clause (*c*), and I think that argument was raised as a last resource in case the case did not fall under section 110.

I do not wish to deal with the question of one of these two applications being barred. As a matter of fact there is only one judgment of this Court in the two cases, and the delay was excused by the Registrar. Apart from this, on the grounds which I have already given, I am of opinion that in this case the value of the property is not Rs. 10,000 or upwards, that no substantial question of law is involved, and that the certificate asked for should be refused, and the rule discharged with costs.

PATKAR, J. :—I agree. These are two applications for leave to appeal to the Privy Council. It is urged on behalf of the opponents that one of the applications is beyond time. The Registrar has excused the delay, and for the determination of the question involved in these applications I consider that both the applications are within time. The applications for leave to appeal in this case do not ask for a certificate under section 109 clause (*c*), of the Civil Procedure Code. Leave can be granted under section 109 clause (*c*), in very special cases. It was held in *Banarsi Parshad* v. *Kashi Krishna Narain*[1] that it is clearly intended to meet

[1] (1900) L. R. 28 I. A. 11 at p. 13.

special cases such as for example those in which the point in dispute is not measurable by money though it may be of great public or private importance. I may also refer to the case of *Hirjibhai* v. *Jamshedji.*[1] I do not think that this is a case which can be considered to be of great public or private importance. The case does not admittedly fall under the 1st clause of section 110 of the Civil Procedure Code. It is urged that it falls under the 2nd clause of section 110 on the ground that the decree involves indirectly some claim to or respecting property of Rs. 10,000 or more. The earlier decisions of this Court in *De Silva* v. *De Silva*[2] and *Manilal* v. *Banubai*[3] are opposed to that contention. In *De Silva* v. *De Silva*[2] Sir Lawrence Jenkins observes (p. 406) :—

"If we were to give effect to the contentions urged before us it would follow that if the sole subject-matter in dispute were an easement of trifling value, but affecting property worth Rs. 10,000 or upwards then a right to appeal to His Majesty in Council under the Civil Procedure Code would exist. It appears to me that this would be giving to the words of the section an operation that could not have been intended, ..."

The same view was taken by Macleod C. J., in *Manilal* v. *Banubai.*[3] Reliance, however, is placed on the later decision of Macleod C. J., in *Appaya* v. *Lakhamgowda,*[4] where reference is made to leave given by their Lordships of the Privy Council in *Manilal* v. *Banubai.*[3] The judgment of their Lordships of the Privy Council has not been reported, and the copy of the judgment has not been produced before us. The decision, however, in *Appaya* v. *Lakhamgowda*[4] is inconsistent with the later decision of this Court in *Nariman Rustomji* v. *Hasham Ismayal,*[5] which follows the previous decision in *De Silva* v. *De Silva*[2] and cannot be reconciled with the decision of the Privy Council

[1] (1913) 15 Bom. L. R. 1021.
[2] (1904) 6 Bom. L. R. 403.
[3] (1920) 23 Bom. L. R. 374.
[4] (1922) 25 Bom. L. R. 77.
[5] (1924) 49 Bom. 149.

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in *Mirza Abid Husain Khan* v. *Ahmad Husain*[1] explaining the case of *Radhakrishna Ayyar* v. *Sundaraswamier*.[2] It was held by their Lordships of the Privy Council that section 110 of the Civil Procedure Code applied to the value of the annuity which was sought to be recovered and not to the value of the property upon which the annuity was charged. The view of this Court in *De Silva* v. *De Silva*[3] is followed by the Patna High Court in *Gosain Bhaunath Gir* v. *Bihari Lal*.[4] Where the detriment to the party seeking relief is less than the prescribed value of Rs. 10,000, the value of the subject-matter in dispute on appeal to His Majesty in Council is neither of the prescribed value, nor does the decree itself involve any claim or question to or respecting property of that value. The same view was taken by the Madras High Court in *Appala Raja* v. *Rangappa Naicker*,[5] where it was held than in a suit framed as one for a declaration and injunction in respect of the right to take water from a pond and channel for the irrigation of lands, the real value of such a right could properly be ascertained only on the basis of the detriment or injury which the plaintiff would suffer if that right were negatived. It was held by Sadasiva Aiyar J. that the word " property " in the second paragraph which is an alternative to the first paragraph means rights to property inferior to full ownership where such inferior rights alone are the subject-matter in dispute, and the second paragraph extended the privilege given by the first paragraph only to cases where a claim regarding rights of Rs. 10,000 or upwards in value is involved indirectly though not directly. Spencer J. was of opinion that the claim must be one to or respecting property of Rs. 10,000 in value, and not a claim merely

(1) (1923) 26 Bom. L. R. 731.
(2) (1922) L. R. 49 I. A. 211.
(3) (1904) 6 Bom. L. R. 403.
(4) (1919) 4 Pat. L. J. 415.
(5) (1917) 33 Mad. L. J. 481.

affecting property of such value. In case a right of way or other easement is claimed by the owner of two adjacent houses one of the value of Rs. 10,000 and another of the value of Rs. 5,000 in two different suits over the land of a third person and is negatived by the decrees in the two suits, leave to appeal to the Privy Council will have to be granted in the one case and refused in the other if the contention of the applicant is accepted. I think, therefore, that the case does not fall under the 2nd clause of section 110.

If the contention on behalf of the appellant had been accepted, it would have been necessary to send down an issue to the lower Court under Order XLV, rule 5, but in the present case the affidavit filed on behalf of the applicant shows that the value of the building is Rs. 10,892, to which is added the value of the front portion of the land and the rear portion of the land to the extent of Rs. 2,075 and Rs. 1,866. Assuming, however, that the value of the building was Rs. 10,892, it is difficult to accept the value of the depreciation at Rs. 345 only. If proper deduction on account of depreciation is made from the value of the building as given in the estimate of the engineer on behalf of the applicant, the value of the building might come to less than Rs. 10,000. On the other hand the value of the property according to the affidavit of the engineer on behalf of the opponent is Rs. 5,994 only. Even if the extended construction sought to be put upon the 2nd clause of section 110 be accepted, I doubt whether the value of the property would be Rs. 10,000 or more. It is therefore unnecessary to consider whether there is any substantial question of law involved in this case. I would therefore discharge the rules in both the applications with costs.

Rule discharged.

J. G. R.