

P. C.
1871
July, 15.

MUNSHI AMIR ALI (PLAINTIFF) v. MAHARANI
INDERJIT KOER AND OTHERS (DEFENDANTS); AND
RAN BAHADUR SING AND OTHERS (PLAINTIFFS).

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

*Appeal—Agreement not to appeal—Counsel—Costs—Sum given Nomine
Expensarum.*

Where the Counsel for the appellant had agreed, at the hearing of the case on appeal before the High Court, that, if the High Court would restrict its judgment to a finding on one of several issues, his client would not appeal to England: *Held* that that agreement was binding and that the appeal could not be heard.

Where an appeal is preferred contrary to an agreement not to appeal, application to stay the proceedings should be made before the case is prepared for hearing.

A fixed sum was given to each respondent *nomine expensarum*, in lieu of costs.

THIS was an appeal from a decision of the High Court (Peacock, C.J., Bayley and E. Jackson, JJ.), dated 12th June 1866 (1).

The suit was instituted in the name of Baboo Bisram Sing, Lal Narayan Sing, Deopati Narayan Sing, and the appellant, against the lady respondents, for the purpose of obtaining possession of a portion, and a declaration of right to another portion, of the estates belonging to the Ticaree raj. The three first plaintiffs claimed as heirs of Maharaja Mitterjit Sing; the appellant claimed a two-anna share as purchaser from the other plaintiffs.

The plaint, so far as baboo Bisram Sing was concerned, purported to be filed by his son Ran Bahadur Sing, and the authority so to file it depended upon the genuineness of a mooktearnama alleged to have been executed by Baboo Bisram Sing, on the 2nd December 1862, in favor of his two sons, Ran Bahadur and Murlidhur Sing. The title of the appellant depended upon a conveyance executed by these two sons under the

* *Present*:—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, SIR R. PHILLIMORE, SIR JOSEPH NAPIER, LORD JUSTICE JAMES, LORD JUSTICE MELLISH, AND SIR LAWRENCE PELL.

mooktearnama. The defendants impeached the mooktearnama as a forgery. Independently of the question as to the validity of the mooktearnama, many other points arise in the case, but the High Court having decided against the mooktearnama, the claim of the present appellant of course fell to the ground.

He thereupon obtained the ordinary leave to appeal to England; but as this was in breach of what had been agreed upon by his Counsel at the hearing of the appeal, the attention of the High Court was drawn to it, and the following certificate was accordingly sent by the High Court to the Privy Council Office :—

“ We hereby certify that, after deciding the point as to the validity of the mooktearnama. Mr. Paul, the Counsel for Munshi Amir Ali, one of the appellants, stated that, if the Court would confine its judgment to that point only, it was the intention of his client not to appeal to Her Majesty in Council. The Court, therefore, with the consent of both parties, abstained from pronouncing any judgment upon the other points in the case.

Finding that, notwithstanding what took place at the hearing before this Court, as above stated, Munshi Amir Ali had appealed to Her Majesty in Council, the Court called for an explanation. Mr. Paul now says that at the time when he made the statement he believed that he had the full authority of his client to make it, and that Munshi Amir Ali's son, who was managing the appeal on behalf of his father, was present in Court when that statement was made and consented to it.

We think it due to this Court and to the respondent that a certificate, as to the circumstances under which judgment was not pronounced upon all the points in the case, should be forwarded to Her Majesty in Council. We have therefore ordered the above certificate to be forwarded with the appeal to Her Majesty in Council.

(Sd.) B. PEACOCK.
 „ H. V. BAYLEY.
 „ E. JACKSON.”

The case came on for hearing in the ordinary course.

Mr. Leith for the appellant.

Sir *R. Palmer*, Q. C., and Mr. *Doyme* for the two first respondents.

1871

MUNSHI AMIR
ALI
v.
MAHARANI
INDERJIT
KOER.

Mr. *J. D. Bell* for the third respondent.

Mr. *Doyne* for the fourth respondent.

The other respondents did not appear.

Mr. *Leith* was proceeding to contend that there had been a mis-carriage in not settling the issue as to the validity of the document, when the Counsel for the respondent took as a preliminary objection that this appeal was brought contrary to good faith, and could not be heard. Mr. *Leith* contended that there had been in fact no authority from the Munshi to abandon his right of appeal; and although Mr. Paul acted in good faith, he did so under a misapprehension as to the authority.

Their LORDSHIPS gave the following judgment :—

Their Lordships are of opinion that the preliminary objection taken to the hearing of this appeal ought to prevail. The certificate of the High Court of Fort William in Bengal is to the effect that, in consideration of the Court deciding the appeal before them upon one point only, that is, the validity of the mooktearnama, the Counsel for the appellant, in the presence and with the consent of the son and agent of the appellant, stated to the Court that he would not appeal from the decision as to the validity of the mooktearnama. Their Lordships upon consideration find that there was really very good and sufficient consideration for such an agreement on the part of Counsel, as part of the conduct of the case, because the result was this,—and a very important result to the parties,—that, by obtaining the decision upon the validity of the mooktearnama alone, the case became a case not decided against Bishen Sing, the party in whose right the appellant was suing. If the case had been heard by the High Court, and, upon appeal, the merits had been gone into, and the whole matter determined upon, as in a suit by Bishen Sing and others, Bishen Sing and the persons claiming under him would not have been precluded from appealing to this Court, but might, on the other hand, have had two successive decisions against them upon questions of fact going to the merits of the case. But confining it to the decision upon the mooktearnama, it was really substituting a nonsuit for an adverse verdict, leaving it

open to Bishen Sing and the appellant himself, if he can get a new and genuine document in his favor, to bring a fresh suit. That being so, it was clearly a valid agreement on the part of Counsel not to appeal; and there is no doubt that it was done with the actual consent of the son and representative of the appellant. The appeal is brought in violation of good faith, and their Lordships feel that they ought not to entertain an appeal so brought, where the real merits of the case have been withdrawn from the Court below.

But their Lordships have had some difficulty in determining what should be done with regard to costs. Now their Lordships feel that, where a certificate of this kind comes over with the record, and must, therefore, be known to both parties, it was the duty of each party to have made an application to the Registrar, who would at once have brought the matter to the attention of their Lordships, and taken their Lordships' directions as to what ought to be done with a record so situated before any expense had been incurred in preparing cases, or in delivering briefs for the hearing. It was wrong of both parties to proceed with an expensive litigation in the face of this certificate, without its being brought, either through the Registrar or by an application at their Lordships' bar, to their attention. Disposing of it upon this preliminary, but still very serious, objection, their Lordships feel that they ought not to give all the costs, as if the case had been fully heard upon the appeal, but still they think the appellant ought not to escape a very considerable portion of the costs which have been incurred. They think, therefore, that this is a case in which they may use the power with which they are invested, to give a sum of money *nomine expensarum*, and, therefore, they will humbly recommend Her Majesty to dismiss the appeal, allowing to each of the three respondents the sum of fifty guineas for the costs of the dismissal of the appeal.

Appeal dismissed.

Agent for appellant: Mr. *Wilson*.

Agents for the several respondents: Messrs *J. H. and H. R. Henderson*, Messrs. *Watkins and Lattey*, and Mr *Barrow*.

1871

MUNSHI AMIR

ALI

C.

MAHARANI

INDERJIT

KOEI.