V.M. Abdul Rahman and others Vs D.K. Cassim and Sons and another

Court: Privy Council

Date of Decision: Dec. 19, 1932

Citation: (1933) AIR(PC) 58

Hon'ble Judges: Dinshah Mulla, George Lowndes, Wright, Thankerton, Lords Tomlin, JJ.

Advocate: A.P. Rennell, W.H. Upjohn, R. Leach, A.M. Dunne, for the Appearing Parties.

Judgement

Sir George Lowndes, J.

The suit out of which this appeal arises was instituted in the name of respondent 1 firm (hereinafter referred to as respondent 1) on the original side

of the Rangoon High Court, alleging, in effect, a conspiracy between the two named defendants to ruin the business of respondents 1, and claiming

Rs.5,00,000 by way of damages. The first of the two defendants was the appellant, V. M. Abdul Rahman, now deceased, and represented by his

heirs. The other was respondent 2, who does not appear before the Board. After the hearing of the suit had commenced in the trial Court

respondents 1 wereapparently upon their own application adjudicated insolvents. On this being brought to the notice of the Judge, he on 13th

February 1929 adjourned the trial, and gave a month''s time to the Official Assignee to consider whether he would proceed with the suit on behalf

of the creditors. On 11th March 1929 the Judge being then engaged in the Criminal Sessions, the matter seems to have come before the Deputy

Registrar, who enlarged the time till 2nd April. On this date the Deputy Registrar gave a further extension to 24th April and directed that the

Official Assignee should Ã¯Â¿Â½be brought on the record as plaintiff in the place of the insolvent plaintiffs,Ã¯Â¿Â½ and the heading of the plaint was

amended accordingly by the Assistant Registrar.

On 24th April the matter was again mentioned to the Deputy Registrar, when counsel for the Official Assignee stated that Ã¯Â¿Â½he had asked the

insolvents to furnish him with security, but they had failed to do so.Ã¯Â¿Â½ Whereupon counsel for the appellant asked that the matter be placed before

the Judge for the dismissal of the suit.Ã¯Â¿Â½ This was done, and on 29th April the suit was, by a decree of that date, dismissed. The decree was

headed as in a suit between, the Official Assignee, as assignee of the estate of respondents 1, and the defendants, but despite this fact and the

amendment of the plaint Ã¯Â¿Â½above referred to respondents 1 seem to have been treated as still parties to the proceedings, the Official Assignee

disappearing from the stage altogether. They were given leave to appeal against the decree as paupers : their appeal was heard; the decree was set

aside, and the suit was remanded to the original Court for trial on the merits. Against this order the present appeal has been brought to His Majesty

in Council, upon a certificate of the High Court that the case fulfils the requirements of S. 110, Civil PC 1908. Before their Lordships a preliminary

objection has been taken by respondent 1''s counsel that the appeal is incompetent and that the certificate was wrongly granted. The ground of the

objection is that the order of the appellate Court was neither a decree nor a "final order'' within S. 109 (a) and therefore not appealable under S.

110.

The grounds of respondent 1 ''s appeal in India, were, in effect, that their claim for damages was not property which vested under the Insolvency

Act in the Official Assignee, that they were therefore entitled to continue the suit in their own names without his intervention; and that it had been

wrongly dismissed. It will be seen that this was in reality an objection that the Official Assignee ought not to have been brought on the record in

their place, but there is nothing to show that any such contention was raised on their behalf before the dismissal of the suit. Indeed the point seems

to have been first suggested on behalf of a creditor, who was in fact the father-in-law of one of the insolvents, when the trial Judge was actually

delivering his judgment. It does not appear however to have been objected before the appellate Court that the question was not open to

respondents 1, or that they had ceased to be parties to the suit before the decree of the trial Judge was made, and their Lordships are not

prepared now to take any account of the very apparent irregularities in the trial Court.

The judgment of the appellate Court was delivered on 23rd June 1930. The learned Judges accepted the contention of respondent 1, holding that

the claim to damages did not vest in the Official Assignee. They accordingly, as already stated, set aside the dismissal of the suit, and remanded it

for trial on the merits by the original Court. It is, in their Lordships'' opinion, clear that this was, under the Civil Procedure Code, an order and not

a decree. It must be taken, they think, to have been made under O. 41, R. 23, the material part of which runs as follows :

Ã¯Â¿Â½Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in

appeal, the appellate Court may, if it thinks fit by order remand the case.....Ã¯Â¿Â½

The matter is put beyond question by O. 43, R. 1 (u) which gives a right of appeal from an Ã¯Â¿Â½order Ã¯Â¿Â½so made. It remains to consider whether

the order in question was a Ã¯Â¿Â½final order Ã¯Â¿Â½within the meaning of S. 109 (a), and this question is, their Lordships think, concluded by the

judgment of this Board delivered by Lord Cave in Ramchand Manjimal v. Goverdhandas Vishindas, AIR 1920 PC 86=47 IA 124=14 SLR

191=47 Cal 918=55 IC 302 (PC). Upon the application for the certificate the matter was gone into at considerable length by the Officiating Chief

Justice and Ellis Cunliffe, J., but by some mischance the authority just referred to was overlooked. Two other cases before this Board were relied

on by the learned Judges, viz., Rahimbhoy Habibhoy v. Turner, (1891) 15 Bom 155=18 IA 6 (PC) and Muzhar Husein v. Bodha Bibi, (1895) 17

All 112=22 IA 1 (PC). But both of these cases were decided with reference to the Civil Procedure Code of 1882, in which the wording of the

relevant sections differed materially from that of the Code of 1908. Special leave to appeal was given in each of these eases on the ground that the

suit had been fully tried in the lower Court, and Ã¯Â¿Â½the cardinal pointÃ¯Â¿Â½ decided leaving, in the one case, only a reference for accounts, and, in the

other, only subordinate points for decision which should have been dealt with by the appellate Court. In the first case it is clear that an appeal to

His Majesty in Council would have lain as of right under the provisions of the present Code, and in the second that if the effect of the appellate

Court"s decree had been (as in the present case) merely to remand the case for trial on the merits, different considerations would have applied.

Their Lordships think therefore that neither of these, authorities is applicable to the case now before them. Turning to the judgment in Ramchand

Hanjimal"s case, AIR 1920 PC 86=47 IA 124=14 SLR 191=47 Cal 918=55 IC 302 (PC) it will be apparent that the conditions there

approximated very nearly to those of the present case. The question arose with reference to a series of suits upon cotton contracts, which had

been stayed by the first Court under S. 19, Arbitration Act, but in which the order for stay had been reversed on appeal, with the result that the

suits went back for trial in the ordinary course. The appellate Court being of opinion that its order was a Ã¯Â¿Â½final order Ã¯Â¿Â½within S. 109 (a) of the

present Code gave a certificate under S. 110. At the hearing before the Board a preliminary objection was taken that the order in question was not

a Ã¯Â¿Â½final orderÃ¯Â¿Â½ and that therefore the certificate was wrongly given and the appeals incompetent.

The objection was upheld and the appeals were dismissed. Lord Cave in delivering the judgment of the Board laid down, as the result of an

examination of certain cases decided in the English Courts, that the test of finality is whether the order Ã¯Â¿Â½finally disposes of the rights of the

parties,Ã¯Â¿Â½ and he held that the order then under appeal did not finally dispose of those rights, but left them Ã¯Â¿Â½to be determined by the Courts in

the ordinary way.Ã¯Â¿Â½ It should be noted that the appellate Court in India was of opinion that the order it had made went to the root of the suit,

namely, the jurisdiction of the Court to entertain it,Ã¯Â¿Â½ and it was for this reason that the order was thought to be final and the certificate granted.

But this was not sufficient. The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the

parties have still to be determined, no appeal lies against it under S. 109 (a) of the Code. Their Lordships would only add that the enforcement of

this principle involves no practical hardship, inasmuch as, in a proper case, it is always open to the appellate Court to give a special certificate

under S. 109 (c). It was pointed out in argument that there is some divergence in the views expressed in the English cases upon which the judgment

in Ramchand Manjimal''s case AIR 1920 PC 86=47 IA 124=14 SLR 191=47 Cal 918=55 IC 302 (PC) founds and that no doubt is so, but the

rule deducted for guidance under the Indian Act is clear and unambiguous, and must; their Lordships think, be decisive in all cases where the

question is whether an order is appealable to His Majesty in Council under the provisions of the section in question.

In their Lordships'' opinion it is impossible to distinguish the present case from that upon which Lord Cave pronounced. The effect of the order

from which it is here sought to appeal was not to dispose finally of the rights of the parties. It no doubt decided an important and even a vital issue

in the case but it left the suit alive, and provided for its trial in the ordinary, way. Their Lordships have thought it right to deal with this matter at

some length, as there seems to have been a considerable divergence of opinion in some of the Indian Courts as to what is a final order under S.

109 (a), and they think that the decision in Ramchand Manjimal''s case must have been either overlooked or misunderstood. For these reasons

their Lordships think that the appeal is incompetent, and they will humbly advise His Majesty that it should be dismissed with costs.