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

Court: Bombay High Court

Date of Decision: Dec. 19, 1932

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 109(a), 110

Citation: (1933) 35 BOMLR 331

Hon'ble Judges: Wright, J; Tomlin, J; Thankerton, J; George Lowndes, J; Dinshah Mulla, J

Bench: Full Bench

Final Decision: Dismissed

Judgement

George Lowndes, J.
The suit out of which this appeal arises was instituted in the name of the first respondent firm (hereinafter referred to

as respondents No. 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 the respondents No. 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 No. 2, who does not appear before the Board.

2. After the hearing of the suit had commenced in the trial Court respondents No. 1 were-apparently upon their own application-adjudicated

insolvents. On this being brought to the notice of the Judge, he, on February 13, 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 March 11, 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 April 2. On this date the Deputy

Registrar gave a further extension to April 24, and directed that the official assignee should ""be brought on the record as plaintiff in the place of the

insolvent plaintiffs,"" and the heading of the plaint was amended accordingly by the Assistant Registrar.

3. On April 24, the matter was again mentioned to the Deputy Registrar, when counsel for the official assignee stated that ""he had asked the

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

the Judge for the dismissal of the suit."" This was done and on April 29 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 No. 1, and the defendants, but despite this fact and the amendment

of the plaint above referred to respondents No. 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 Section 110 of the Code of Civil Procedure, 1908. Before

their Lordships a preliminary objection has been taken by respondents No l''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 Section 109

(a), and therefore not appealable u/s 110.

4. The grounds of respondents No. l''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.

5. 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 No. 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.

6. The judgment of the appellate Court was delivered on June 23, 1930. The learned Judges accepted the contention of respondents No. 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.

7. It is, in their Lordships'' opinion, clear that this was, under the Code of Civil Procedure, an order and not a decree. It must be taken, they think,

to have been made under O. XLI, Rule 23. The material part of which runs as follows :-

Whore the Court from whoso 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...

8. The matter is put beyond question by O. XLIII, Rule 1 (u), which gives a right of appeal from an ""order"" so made.

9. It remains to consider whether the order in question was a ""final order"" within the meaning of Section 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 Ratanckand

(1920) L.R. 47 IndAp 124: 22 Bom. L.R. 606

10. 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.

11. Two other cases before this Board were relied on by the learned Judges, viz., (1890) L.R. 18 I.A. 6 (Privy Council) and (1894) L.R. 22 I.A.

1 (Privy Council) . But both of these cases were decided with reference to the CPC 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 cases on the ground that the suit had been fully tried in

the lower Court, and ""the cardinal point"" 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.

12. Turning to the judgment in Ramchand Manjimal''s case, it will be apparent that the conditions there approximated very nearly to those of the

present case. The quetion arose with reference to a series of suits upon cotton contracts, which had been stayed by the first court u/s 19 of the

Indian 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 ""final order"" within Section 109 (a) of the present Code gave a certificate u/s

110. At the hearing before the Board a preliminary objection was taken that the order in question was not a ""final order"" and that therefore the

certificate was wrongly given and the appeals incompetent. The objection was upheld and the appeals were dismissed.

13. 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 ""finally disposes of the rights of the parties,"" and. ho held that the order then under appeal did not finally

dispose of those rights, but left them ""to bo determined by the Courts in the ordinary way."" 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,"" 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 u/s 109 (a) of the Code.

14. 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 u/s 109 (c).

15. 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 founds, and that no doubt is so, bat the rule deduced 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.

16. 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.

17. 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 u/s 109(a), and they think that the decision in Ramnchand Manjimal"s case must have been

either overlooked or misunderstood.

18. 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.