(1868) 07 CAL CK 0003

Calcutta High Court

Case No: Misc. Appeal No. 238 of 1868

Kalikrishna Chandra		APPELLANT
	Vs	
Harihar Chuckerbutty		RESPONDENT

Date of Decision: July 15, 1868

Final Decision: Dismissed

Judgement

Phear, J.

The first question which arises is whether an appeal lies or not. The vakeel for the appellant has argued, that an appeal does lie on the following grounds: first, he says that the application to the Judge for the restoration of the appeal was regular, because it was made in conformity with the provisions of Section 7, Act XXIII of 1861, and because this section was, by the operation of Section 37 of the same Act, made applicable to "cases of appeal," within which category, it is clear that the Judge''s order dismissing the appeal falls. Then he says, it has been decided that an appeal lies against an order passed under the provisions of Section 7 and Section 5 of Act XXIII of 1861, in the same manner that it does against an order refusing re-admission of an appeal, made u/s 347 of Act VIII of 1859; and in support of this, he refers to the case of Dinabandhu Chatterag v. Behari Lal Mookerjee (3 W.E., (M.E.), 23); therefore by parity of reasoning, it must be against an order of rejection passed under Sections 7, 6, and 5 of the Act. And, thirdly, as an authority for maintaining that an appeal lies against a decision refusing re-admission of an appeal, u/s 347 of Act VIII of 1859[5] he cites the case of Ramyad Jemadar v. Bisweswar Bhattacharji (2 W.R., (M.E.), 23); acquiesced in by the Judges in another case, Harachandra Das Chowdhry v. Ramkumar Chowdhry (2 W. R., 254). In this way, he very logically makes out that an appeal does lie to this Court in this case. I am of opinion, however, that each one of the three links in the chain of his reasoning, is faulty. In the first place, 1 do not think that Section 7 is made applicable to cases in which the Appellate Court has dismissed the appeal under the provisions of Section 6, Act XXIII of 1861. The words of Section 37 are: "Unless otherwise provided, the Appellate Court shall have the same powers in cases of appeals which are vested in

the Courts of original jurisdiction in respect of original suits." I have some difficulty in satisfying myself as to what the legislature precisely meant when they used the word "powers" in this section, but be the meaning of that word what it may, assuming only, as I believed I am justified in doing, that it is not synonymous with "jurisdiction," I think that the following words, "in cases of appeal," do not comprehend that stage of proceedings which succeeds upon an order being made under Sections 6 and 5. It appears to me that those words apply solely to cases where the actual subject of appeal is before the Court and being dealt with. Now, in the present case, the appeal itself was entirely at an end. The Judge had dismissed it. He had passed a final order between the parties under the extraordinary powers given him by Section 6 and Section 5 of Act XXIII of 1861. I say extraordinary powers, because, strictly speaking, at the time that he passed the order under those sections, there was no appeal before him. There was only a memorandum of appeal filed. No respondent had been brought before the Court, and had it not been for the express words of the sections to which I am now alluding, the utmost that the Court could have done would have been to dismiss the memorandum or petition of appeal. It could not have passed an order which would be of final effect between the parties. However, the words of the section empower the Court, as it seems to me, actually to pass a final order between the parties as if an appeal were regularly before the Court, and there were both an appellant and a respondent, who could be affected by the order of the Court. The section empowers him to dismiss the appeal, and, accordingly, the appeal was dismissed. The subsequent application for the re-admission or re-hearing of the appeal, whatever be the foundation of the jurisdiction of the Judge to entertain it, was not an application in the original appeal. It was an application subsequent to it. It was an application of the nature of an application for review, and we have already had a ruling of a Full Bench of this Court, pronouncing a decision of a Court which rejects an application for review to be no judgment in appeal. (Raja Syud Enaet Hossien v. Rani Roushan Jehan, 1 F. B. R., 1). I am of opinion then, that the petition of the appellant to have his appeal re-admitted, although it had been finally disposed of, and the decision of the Judge refusing to grant his application, constitute matter dehors the appeal, although it may well be that it was matter disposed of by the Court in the exercise of its appeal jurisdiction.

2. Turning, now, with these views to the words of Section 37, I consider that the giving the Appellate Court the same powers in cases of appeal as are vested in Courts of original jurisdiction, in respect of original suits, does not apply to oases where the subject, which is being dealt with by the Court, is not the actual appeal itself; and cannot, therefore, be rightly treated as standing in an analogous position to that of the original suit itself.

3. As I am further disposed to think, on like grounds, that the power given by Section 11 of Act XXIII to Courts of original jurisdiction, upon the contingency in the section mentioned, "to order a fresh summons to issue upon the plaint already

filed," does not strictly come under the designation given in Section 37, namely a "power vested in a Court of original jurisdiction in respect of original suit."

4. Having arrived at the foregoing conclusions, I am of opinion that that section does not hare the effect of making Section 7 of the same Act applicable to cases where the Appellate Court has passed an order u/s 5 and Section 6, dismissing the appeal.

5. It would seem, therefore, that the application to the Judge seeking to have the appeal re-heard, against which the appeal to us is now made, was essentially an application for a review of judgment; and, as such, the decision of the Judge rejecting it, was final.

6. If this view be correct, I think it entirely disposes of this case. At any rate, it renders it unnecessary for me to go into the further argument of the appellant, which was directed to demonstrating that an appeal lay against an order made u/s 7 of Act XXIII of 1861. But, if it had been necessary to have gone. further, I should have felt myself at liberty to disregard, in this case, the decision to which the appellant referred us, Dinabandhu Chatterag v. Beharilal Mookerjee [3 W.R., (M. R.), 23], because the judgment there given, couched as it is in very concise terms, does not necessarily appear to have been pronounced upon a case similar to the present. So far as the learned Judges who decided that case judicially interpreted any of the sections of Act XXIII of 1861, and Act VIII of 1859, they seem, from the words used by them, to have confined their attention to Sections 5 and 6 of Act XXIII of 1861, and orders made under them. They appear not to have had in contemplation a further and subsequent order supposed to be passed u/s 7. No doubt, this limitation of their decision to these two sections only makes the reference to Section 347 of Act VIII somewhat obscure, and is, in some degree, inconsistent with what appears in the latter part of their judgment, where the Judges give their opinion upon the merits of the case. But I think it probable that the attention of those learned Judges was, in fact, directed more to the merits of the case, which, in truth, was made the foundation for their dismissing the appeal, than to the legal question which, is apparently so lightly passed over by them; and this is my chief reason for thinking that we ought not to feel ourselves bound to treat this decision as a binding authority with regard to the law point upon which it may seem to bear. But apart from any possible inference which may be drawn from this decision, I see no sort of reason, why orders rejecting an application for re-hearing in the cases contemplated by Sections 5, 6, and 7 of Act XXIII should, in the absence of express legislation on the point, be considered necessarily to be in the same position relative to appeal, as like orders u/s 347 of Act VIII of 1859. In the one set of oases there is no respondent before the Court, and in the other there is. And this distinction alone is sufficient to destroy the supposed analogy, or, at any rate, to prevent it being strong enough to give any appeal where the legislature has not said that there shall be an appeal.

7. And I may add that, whether or not there is an appeal against orders passed u/s 347, is a matter which at present rests solely on the second authority quoted by the special appellant, namely the decision of a Bench of this Court. in Harachandra Das Chowdhry v. Ramkumar Chowdhry [2 W.R.,(M. R.),23], and which lays down that an appeal lies from a decision given under the provisions of Section 347 of Act VIII of 1859; and this has, in effect, been overruled by the ruling of a Full Bench, which I have already quoted. For the Pull Bench, in express terms, decided that an order made as an order u/s 347 must necessarily be made after the appeal has been disposed of. is not an order made in appeal; and it was on the basis of an order u/s 347, being an order made in regular appeal, that the Judges who decided the case of Harachandra Das Chowdhry v. Ramkumar Chowdhry, placed their judgment.

8. I desire further to say, that, had I not taken the view which I have taken of the meaning of the words "in cases of appeal," which appear in Section 37 of Act XXIII of 1861, I should still have had very great difficulty in coming to the conclusion that Section 37 had the effect of applying Section 7 to cases within the appellate jurisdiction of a Court, in addition to cases of original jurisdiction, to which it seems to be limited by its own words. For it is observable that Section 6, which comes between Sections 5 and 7, expressly makes the provisions of Section 5 applicable to appeals. The inference from this section, taking into consideration its relative position to the preceding and succeeding sections, in my mind, is this, that the legislature, when framing this section, did distinguish between" appeals" and "appellate jurisdiction," and did purposely abstain from enacting that Section 7 should be applicable to appeals, which, in my view, would have involved an absurdity. If; however, they had intended to use "appeals" in the sense of "appellate jurisdiction," and also to apply Section 7 to cases of the latter, I should have expected that the words of Section 6, instead of coming where they do, would have followed Section 7, instead of the applicability of Section 7 being left to depend upon the operation of the latter Section 37, while that of Section 5 was cared for by Section 6. And, moreover, it is obvious that if Section 37 operates to apply the provisions of Section 7, in the way contended for, it must also apply Section 5 to appeals; and, consequently, there was no need of having Section 6 at all, because all that is done by Section 6 is done equally well by Section 37. I cannot, therefore, think that the legislature really intended Section 7 to have the effect which is attributed to it, and I should farther be rather disposed, if it was necessary to say, that the powers vested in Courts of original jurisdiction, spoken of in Section 37, mean powers vested otherwise than by the words of the Act. No doubt, even with this limitation, an opening is afforded to the special appellant in this case, for argument, leading to a result which would apparently be favourable to him, namely, that even supposing Section 37 of Act XXIII of 1861 does not render Section 7 applicable, it still will, by the interpretation which I have just mentioned, make Section 119 of Act VIII of 1859 applicable; and that latter section, after giving the opportunity to the plaintiff, against whom a decree by default was passed, to apply to the Court, within thirty

days from the date of the judgment, for an order to set it aside, says, that, "in all appealable cases in which the Court shall reject his application, an appeal should lie from the order of rejection to the tribunal to which the final decision in the suit would be appealable." And the appellant in this case might say that, as he has the benefit, by virtue of the interpretation of Section 37, which I have just mentioned, he thereby gets the benefit of Section 119 of Act VIII of 1859, in its entirety; and, consequently, if the Judge, upon his application made under this section, rejects it, he has a right under the same section to appeal to this Court.

9. However, it seems to me that the use of the word "powers" in Section" 37, has the effect of rendering this argument nugatory. The utmost that Section 37 by the use of that word can mean, is to give powers of action to the Appeal Court such as the Court of original jurisdiction enjoys, under the first portion of Section 119 of Act VIII of 1859; for it seems to me that it can have no applicability to the latter portion of that section. The latter portion of Section 119 does not give powers to the Court of First Instance trying and dealing with an original suit. It gives powers, if at all, to an Appellate Court, and Section 87 only purports to give powers to an Appellate Court, such as are vested in a Court of First Instance. It does not give powers to an Appellate Court in one class of cases, which are vested in an Appellate Court in another class of cases. And so even giving the appellant the advantage of the interpretation of Section 37, which I have last mentioned, and which I by no means think, is the proper interpretation of the section, he does not in my opinion, obtain thereby the right to say that the latter part of Section 119 of Act VIII of 1859 is applicable to his case.

10. On the whole, then, it seems to me for every reason that the decision of the Judge in this case is one which we cannot touch upon appeal. I think that no appeal from it lies to the Court. It is not necessary for me now to say, whether the Judge had any jurisdiction to entertain the appellant''s application, or if he had, whether he has properly entertained it, and exercised due judicial discretion with regard to it. I think that this appeal should be dismissed with costs, on the ground that we have no jurisdiction to entertain it.

Hobhouse, J.

11. I agree in the judgment delivered by Mr. Justice Phear in this case. It seems to me that the first question is to see whether the Judge who heard this case in appeal had jurisdiction to hear it; because, if he had jurisdiction, so have we; and if he had not jurisdiction, so have not we jurisdiction,--jurisdiction of course I mean within the provisions of Section 7 of Act XXIII of 1861. The case before him was simply this. He dismissed an appeal u/s 6 of Act XXIII of 1861, for default of the appellant to pay any money for service of process. Having done this, the appellant appeared before him within thirty days after the order of dismissal, and u/s 7 of that Act, asked him to entertain the question, whether he was satisfied that there was some sufficient cause for not having made the deposit required within the proper time. The Judge

did so, and held, that the appellant had not shown sufficient cause for his failure, and, therefore, he dismissed the application; and it is with reference to this order that the special appeal is made before us. It seems to me that, reading Section 7 and Section 37 of Act XXIII together, there was no jurisdiction in the Lower Court under these sections; neither is there jurisdiction in this Court to entertain the appeal. The question seems to me to turn entirely upon the use of word "powers", in Section 37. If the word "powers" comprehended the word "jurisdiction," then I think we should be in a position to entertain the special appeal. But it seems to me that the word "powers," especially with reference to the use of that word in other parts of the Act, and in Act VIII of 1859, does not comprehend "jurisdiction." The word "powers," as used in Section 358 of Act VIII of 1859[6] is, used in regard to powers for granting time, for adjournment of hearing, for examination of parties and pleaders, for awarding costs, &c., but the word is not used in the sense of jurisdiction. For instance, it seems to me, and that has been ruled by a decision of this Court, that the word "powers" in Section 37 would comprehend the power to grant an appellant the liberty to bring a fresh suit; but it does not, in my judgment, comprehend jurisdiction. I hold, then, upon the reading of Section 7 and Section 37 of Act XXIII of 1861 together, that we have no jurisdiction to entertain this appeal, and I agree in dismissing it with costs.

---

[1][Sec. 5:--If on the day fixed for the defendant to appear and answer to a suit, it shall be found that the summons to the defendant has not been served inconsequence of the failure of the plaintiff to deposit within the time allowed the sum required to defray the cost of issuing the summons, the Court may order that the suit be dismissed. Provided that no such order shall be passed, although the summons shall not have been served upon the defendant, if on the day fixed for the defendant to appear and answer he shall have entered an appearance by a pleader or by a duly authorized Agent, when he is allowed to appear by Agent, or shall be in attendance in person.]

Procedure on discovery, on the day fixed for defendant to appear and answer, that usual notice has not been served in Consequence of failure of plaintiff to deposit the cost of issuing the same.

[2][Sec. 6:--The provisions of the last preceding section shall apply to appeals also.]

Provision of last section to apply to appeals also.

[3][Sec. 7:--Whenever a suit is dismissed under the provisions of Section 5 of this Act, the plaintiff shall be at liberty, to institute a fresh suit, unless precluded by the rules for the limitation of actions, or if the plaintiff shall satisfy the Court within the period of thirty days from the date of the order dismissing the suit, that there was a sufficient cause for his not making the deposit required within the time allowed, the Court may order a fresh summons to issue upon the plaint already filed.]

Procedure in case of dismissal of suit u/s 6.

[4][Sec. 37:--Unless when otherwise provided, the Appellate Court shall have the same powers in cases of appeal which are vested in the Courts of original jurisdiction in respect of original suits.]

Appellate Court to have same powers as Courts of original jurisdiction.

[5][Sec. 347:--If an appeal be dismissed for default of prosecution the appellant, may, within thirty days from the date of the dismissal, apply to the Appellate Court for the re-admission of the appeal; and if it shall be proved to the satisfaction of the Court that the appellant was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the Court may re-admit the appeal.]

Re-admission of appeals dismissed for default of prosecution.

[6][Sec. 358:--The Appellate Court shall have all the like powers in regard to the granting of time, adjourning the hearing of the suit, examining the parties or their pleaders, and awarding costs, or otherwise as hereinbefore contained in regard to Courts of original jurisdiction. (Repealed by Act XXIII, 1861, s. 1).]

Powers of Appellate Court.