(1924) 11 CAL CK 0050

Calcutta High Court

Case No: None

Sayma Bibi		APPELLANT
	Vs	
Madhusudan Mohanta		RESPONDENT

Date of Decision: Nov. 12, 1924

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 105

Citation: AIR 1925 Cal 766

Judgement

1. This appeal raises an interesting question which requires some consideration. In a mortgage suit, the plaintiff (predecessor of the present respondent) died on the 28th January, 1916, and the defendant died on the 8th July, 1916, after the preliminary decree was passed by the High Court on the 13th July, 1915. No application for substitution of the deceased parties seems to have been made till the 15th July, 1918 when an application was made by the heirs of the deceased plaintiff for substitution of their names in place of the deceased plaintiff and for substitution of the heirs of the deceased defendant after setting aside the abatement and for a final decree. That application was dismissed for default on the 4th September, 1918. But during the interval between the filing of the application and its dismissal the heirs of the plaintiff bad parted with their interest in the mortgage in favour of the present respondent. The respondent thereupon filed an application on the 3rd September, 1918, for setting aside the abatement and for substitution of himself in place of the deceased plaintiff and of the heirs of the defendant in place of the deceased defendant and for final decree. The prayer for substitution as well as the prayer for final decree were considered together and the learned Munsif by his judgment, dated the 21st November, 1919, set aside the abatement and passed the final decree in favour of the respondent. The substituted defendant appealed to the District Judge who dismissed the appeal on the merits. With regard to the question that the application for setting aside the abatement and the substitution of the heirs of the deceased parties was made after the period of limitation, the learned Judge

observes that the CPC does not allow an appeal from an order setting aside an abatement and allowing substitution and therefore such an order cannot be challenged in an appeal from the final decree.

2. The defendant has appealed and the only point urged on her behalf is that the view of the learned Judge that the order setting aside abatement and directing substitution of the heirs of the deceased parties cannot be challenged in an appeal from the final decree is wrong. Reliance has been placed in support of this contention upon Section 105, C.P.C. That section says that where a decree is appealed from any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal. The whole question, therefore, turns upon the interpretation of the words ''affecting decisions of the case.'' The learned vakil who has ably argued the case for the appellants urges that the expression ''decision of the case'' means any question which will influence that ultimate decree to be passed by the Court. This contention is supported by the view taken by the Madras High Court in the case of Gopala Chetti v. Subbier (1903) 26 Mad. 604 and by the observations of Mr. Justice Karamat Hossain in the case of Nundram v. Bhopal Singh (1912) 34 All. 592. We are, however, confronted with other decisions of this Court which assign to the expression ''affecting the decision of the case'' the meaning ''affecting the merits of the case or affecting the decision of the case with reference to its merits''. Reference may be made in support of this view to the cases of Baroda Charan Ghose v. Gobind Pershad Tewary (1895) 22 Cal. 984 and Krishna Chandra Goldar v. Mohesh Chandra Saha 9 C.W.N. 584. The Allahabad High Court has also taken the same view as this Court: see the oases of Gulab Kunwar v. Thakur Das (1902) 24 All. 464 and Tasadeq Hossein v. Hayatunnessa (1903) 25 All. 280. If we were untrammelled by authorities we might have felt disposed to reconsider the meaning of the expression but as they stand we feel ourselves bound to follow them. The point which really arises in the case and which has been forcibly pressed upon our attention by the learned vakil for the appellants is that where the order setting aside the abatement is passed in the same judgment as the decree in the suit, such order can be attacked in an appeal from the decree. In support of this contention our attention has been drawn to the decision of the Allahabad High Court in the case of Hem Kunwar v. Amba Prasad (1900) 22 All. 430. In that case it has been held that where the matters relating to setting aside of abatement and the merits are dealt with in the same judgment and the findings of the Court as to both are em-bodied in the decree, the decree may be impugned in appeal on the ground that the order setting aside the abatement was bad in law. The case is no doubt in favour of the appellants; but it is the judgment of a single Judge and is not in consonance with the view consistently taken by that Court. There is no other case directly on the point which decides the question that has arisen in this case, namely, where the order setting aside an abatement and the final decree are passed by the same judgment, the order setting aside the abatement can or cannot be attacked in an appeal from the decree except

the case to which reference has been made. But the principle on which the Courts have barred the plaintiff''s right to challenge the order setting aside the abatement or an order restoring a suit in an appeal from the decree in the suit is that such an order is not one which affects the decision of the case with reference to its merits. The mere fact that the order setting aside the abatement and the order disposing of the case were passed in the same judgment does not by parity of reasoning affect the consideration which led the Courts to hold that such an order cannot be attacked in an appeal from the decree. The character of such order as being one not affecting the merits of the case remains the same whether it is passed before the decree or is passed along with the decree. Our attention has been drawn to another decision of the Allahabad High Court Niddhalal v. Collector of Balandsahar (1916) 14 A.L.J. 610. Similar circumstances happened there with the difference that the order setting aside the abatement was passed some time before the final decree in the case was passed.

3. By denying the right of appeal against an order restoring a suit or setting aside an abatement while granting it in the case of refusal to pass such order the Legislature may be taken to have intended that it is desirable in the interest of justice, that a case should be tried on the merits where the trial Court is of opinion that it should be so tried; and so such opinion should not be subject to revision by another Court. To allow such a decision of the trial Court to be challenged in appeal after the termination of the trial, may be after enormous expense of time and money occasioned by the act of the Court, is to defeat the intention of the Legislature and put the party winning on the merits to unnecessary loss for which he is not responsible. In our judgment the order setting aside the abatement cannot be questioned in appeal from the decree in the suit whether such order is passed before or simultaneously with the decree.

4. In this view of the law we think that the decree of the lower Court should be upheld and this appeal dismissed with costs.