(1938) 12 CAL CK 0026

Calcutta High Court

Case No: Application for leave to appeal in Privy Council, No. 17 of 1938

Khajeh Sayedulla and Others		APPELLANT
	Vs	
Nowab K. Habibulla and Others		RESPONDENT

Date of Decision: Dec. 13, 1938

Final Decision: Dismissed

Judgement

S.K. Ghose, J.

This is an application for leave to appeal to His Majesty in Council from a judgment of this Court, dated 23rd March, 1938. The relevant facts connected with this litigation are recited in the judgment of the learned Judges and need not be recapitulated. The Plaintiffs founded their claim to monthly allowances upon a wakf created in 1846 and upon two subsequent documents, namely, a memorandum of agreement, dated 26th August, 1881, and a deed of agreement, dated 17th September, 1881. The Plaintiffs are some of the heirs of one Hola Mia who, according to the terms of the agreement, were entitled to receive a sum of Rs. 187-8-0 as a monthly allowance and the share of the Plaintiffs out of it is Rs. 33-2-0 per month. The shares of Hola Mia and some other members of the family amounting to 17 gds. odd in the properties were the subject-matter of a mortgage in favour of Defendants Nos. 2 to 4. The latter sued upon the mortgage and fought the matter up to the Privy Council and ultimately got a decree in their favour. In the present suit, the Plaintiffs seek for a declaration inter alia that they are not bound by the decision in the suit upon the mortgage and that Defendants Nos. 2 to 4 have not acquired any title to the allowances claimed by the Plaintiffs. One of the defences taken by Defendants Nos. 2 to 4 was that the aforesaid allowances were a charge upon the property and as such were both heritable and transferable and as the result of the mortgage and the litigation thereon these Defendants had acquired by their purchase the right to the allowances. The Subordinate Judge dismissed the suit, holding that the allowances were a charge on the properties, that the interest in them was transferable, and that by virtue of the auction-purchase the Defendants Nos. 2 to 4 became entitled to the said allowances. Against that judgment, the

Petitioners filed First Appeal No. 98, of 1934. This appeal was dismissed by the judgment aforesaid which was delivered by R. C. Mitter and C. C. Biswas, JJ., and against that judgment the present application has been filed.

2. The first question is whether the value of the subject-matter is Rs. 10,000 or upwards as required by sec. 110 of the Code of Civil Procedure. It is conceded by the learned Advocate for the applicants that the value is not Rs. 10,000 under the first paragraph to sec. 110, but it is contended that they would be entitled to come under the second paragraph to sec. 110 and that the decree involves directly or indirectly a claim or question to or respecting property of the value of more than Rs. 10,000. The position is this. The claim in the suit was valued at Rs. 5,300 based upon the sum of Rs. 33-2-0 payable per month. That was also the value in the appeal. So far as this claim is concerned, it cannot come to Rs. 10,000 and so it is conceded that the applicants are not entitled to get the benefit of the first paragraph to sec. 110. The applicants however, rely upon the fact that the total monthly allowance payable to themselves and their co-sharers is Rs. 187-8-0. Upon this basis the yearly sum payable, if capitalised at 20 years, would come to a good deal more than Rs. 10,000. The short point, therefore, is whether the applicants are entitled to fall back upon the value of the entire monthly allowance which was at one time payable to Hola Mia. In support of this, it is pointed out that the other successors-in-interest of Hola Mia have been made parties to this appeal. On the other hand, there is this fact that these other co-sharers are making no contest or claim. Therefore, the actual claim which was involved in the suit and the appeal is nothing more than the interest of the present applicants which is the sum of Rs. 33-2-0 payable per month. No doubt, the language of the second paragraph of sec. 110 is very wide, but it has been held that the word "property" must be taken to be the property of the applicants and that it-is the extent to which the decree has operated to the prejudice of the applicants that determines the value of the property for the purpose of sec. 110. This is the view taken in the case of N. C. Galliara v. A. M. M. Murugappa Chetty I. L.R. 12 Rang. 855 (1934) which relies upon the three decisions of the Judicial Committee in the cases of Gudivada Mangamma v. Maddi Mahalakshmamma 34 C. W. N. 235 (P. O.) (1929), Mukh Lal Singh v. Kishuni Singh 35 C. W. N. 33 IP C.) (1930) and Jogesh Chandra Roy v. Emdad Meah L. R. 59 I. A- 29: s. c. 36 C. W. N. 221 (1931). There are also other decisions of the Judicial Committee in favour of the same view in the cases of Mirza Abid Husain Khan v. Ahmad Husain 28 C. W. N. 289 (P. C.) (1923) and Udoychand Pannalal v. P. E. Guzdar & Co. I. L. R. 52 Cal. 650: s. c. 30 C. W. N. 98 (P. C.) (1925). It seems to me in the circumstances of the present case that it cannot be said that the decision in the present suit will involve directly or indirectly the interests of others who have made no claim. That being so, the applicants are not entitled to fall back upon the value of anything beyond their own share of the monthly allowance, and so the value of the property cannot come upto the statutory limit required by sec. 110 of the Code of Civil Procedure.

3. But even conceding that the value is upto the statutory standard, the question is whether the appeal involves some substantial question of law. Now, so far as the appeal is concerned, it is confined to some points dependent upon the construction of the two agreements of 1881 and these were the subject-matters of two judgments delivered by the Judicial Committee in the cases of Khajeh Soleman Quadir v. Nawab Sir Salimulla Bahadur L. R. 49 I. A. 153: s.c. 27 C. W. N. 101 (1922) and Nawab Khajeh Habibullah Saheb v. Raja Janaki Nath Roy 34 C. W. N. 313: s. c. 51. C. L. J. 131 (P. C.) (1929). The judgments show that really two points were urged. The first was the question of the construction of the agreements and the second, which appears to have been taken for the first time in this Court, depended upon the Wakf Validating Act of 1930. As to this second point, the learned Judges said that it was really dependent upon the first, because if " it be held that the right to receive allowances was a heritable one, one that conferred on the original grantees so to say absolute estates which would be transmitted by them to their heirs and could be sold by them, the second point urged by the Appellants would be of no help to them, for in that case the Roys'' right to receive the allowance would be saved by the proviso to sec. 2 of the Wakf Validating Act of 1930, they having acquired the said right by their mortgage and purchase before that Act came into force." The substantial question, therefore, turns upon the construction of the agreements of 1881. It is contended that the allowances payable under the agreements of 1881 must be considered as maintenance payable to the members of the joint family and the right to receive them, coupled with the charge on the properties must be considered to be restricted to the enjoyment of the grantees personally under sec. 6, cl. (d) of the Transfer of Property Act. As to this argument, the learned Judges pointed out that the contention was no longer open to the Appellant in view of the decisions of the Judicial Committee in the aforesaid two cases. No doubt the present applicants were not parties to that litigation and the decisions are not res judicata. But so far as the question of law is concerned the matter has already been decided by the Judicial Committee and therefore no substantial question of law arises in this appeal.

4. In these circumstances, it cannot be said that the present appeal involves any substantial question of law. The result is that this application must be refused with costs--three gold mohurs, payable to Opposite Parties Nos. 2 to 4 represented by Dr. Basak.

Mukherjea, J.

I agree.