(1970) 04 CAL CK 0014

Calcutta High Court

Case No: None

Sm. Tarabai Mahata and Others		APPELLANT
	Vs	
Union of India		RESPONDENT

Date of Decision: April 30, 1970

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 109, 110, 47, 96
- Constitution of India, 1950 - Article 133, 133(1)

Citation: 74 CWN 789

Hon'ble Judges: S.K. Chakravarti, J; Anil Kumar Sen, J

Bench: Division Bench

Advocate: P.N. Mitter, U. Mallick and J.N. Chowdhury, for the Appellant;B.L. Pal and N.L. Pal, for the Respondent

Final Decision: Dismissed

Judgement

S.K. Chakravarti, J.

This is an application under Article 133 of the Constitution. The fundamental question that arises for determination in this application is as to whether this Court has the jurisdiction to find out if an appeal would lie to the Supreme Court, at the instance of the petitioners, provided the other requirements of the Article are fulfilled. Execution proceedings were instituted by the Union of India against the present petitioners for realisation of a sum of Rs. 1,67,012-8-0 alleged to be due from the petitioners on account of arrears of income tax. The petitioners filed an application u/s 47 of the CPC contending, inter alia, that the execution case was not maintainable. This objection was overruled by the learned Trial Court. On appeal by the petitioners, this Court held that the execution Case was not maintainable as there was no executable decree, and allowed the appeal, and dismissed the execution case. We also held inter alia, that the present certificate proceedings were still alive. Thereafter the petitioners, in whose favour our judgment was passed, have preferred this application.

2. Now, ours is a judgment of reversal. The property involved is about Rs. 1,67012-8-0. Mr. Pramatha Nath Mitter learned Counsel appearing on behalf of the petitioners therefore submits that the granting of the necessary certificate would be automatic.

3. Mr. Balailal Pal learned Counsel appearing for the Union of India raises a two-fold contention. His first contention is to the effect that our order in question is not a final order. Mr. Pal submits that in view of our findings that the basic proceedings are still alive, thee has not been a final determination of the rights and liabilities of the parties, which are still at large, and so ours is not a final order. We are not in a position to accept this contention of Mr. Pal. So far as the appeal before us and the execution case are concerned, our order is a final one, and whether actually the rights and liabilities have been determined for all time to come, is not a question which would arise in these proceedings. This contention, therefore, fails.

4. Mr. Pal has further contended that as our judgment has been in favour of the appellants on the whole, and as the execution case has been dismissed as not maintainable, no appeal would lie at the instance of the petitioners, and, as such, this application has to be dismissed. Mr. Mitter on the other hand submits that this Court has no jurisdiction, under Article 133 of the Constitution, to find out if an appeal would lie or not, and that the two tests in this case namely, the valuation test and the test of reversal, are satisfied, and if we find that it is actually final order, then we are bound to issue a certificate. Mr. Mitra has relied on the decision of the Supreme Court in (1) Tirumalachetti Rajaram Vs. Tirumalachetti Radhakrishnayya Chetty, .

5. Now, the decision relied on by Mr. Mitra actually is on a point as to whether a party whose suit has been partly decreed and partly dismissed has a right to appeal to the Supreme Court, or, in other words, whether the judgment of the High Court which had partly decreed his suit and partly dismissed it, would be a judgment of affirmance or reversal. The Supreme Court held that it would be a judgment of reversal. There are observations in this judgment to show that even in a case where the final order is in favour of a particular party he can still appeal. Mr. Mitra relies on these observations to show, that in this particular case, though the petitioners'' application u/s 47 of the CPC has been allowed and the execution case has been dismissed, as not maintainable, still the petitioners have got a right of appeal to the Supreme Court inasmuch as there have been certain findings against them as well.

6. The decision referred to above does not lay down categorically that in such a case, as the present one, an appeal would lie to the Supreme Court, or that this Court has no jurisdiction in such a case to find out if an appeal would lie or not. The instant case before us is not one of partial decree in favour of the petitioners but an absolute order in their favour. No doubt, in Article 133, it has not been stated categorically as to who has got the right to appeal. Section 96 of the CPC also does not lay down who has got the right of appeal; but still u/s 96, it has been held by the

different courts in our country that it is only a person who is adversely affected by the decree, who can appeal, and that if the decree finally is in favour of the particular party, he has no right of appeal, even though there may be a finding against him on some particular issue. We see no reason why these principles would not apply to an appeal under Article 133 of the Constitution. That Article has to be read with sections 109 and 110 of the Code of Civil Procedure. It presupposes that there is a right of appeal available to the petitioners. If we accept the contention of Mr. Mitra that this Court has no jurisdiction to find out if an appeal to the Supreme Court would actually lie, then on the same reasonings, it can also be argued that a stranger to the litigation may also appeal to the Supreme Court if the other particulars required under Article 133 are complied with. It may be noted that under Article 133 it has not been stated that only a party to the decree can appeal. If we accept therefore, the interpretation of Mr. Mitter, we would be faced with an illogical and self-contradictory position. This Court cannot be treated as a post office, with regard to such certificates, so to say, and we accordingly held that this Court, in an application under Article 133, has got the right to determine actually whether an appeal would lie to the Supreme Court or not at the instance of the petitioners. In this particular case, we have pointed out, the final order has been in favour of the petitioners absolutely. It may be that all the contentions of Mr. Mitra have not been accepted, or that there is a finding against the present petitioners that the present certificate proceedings are still alive. But, as the final order has been in favour of the petitioners, they have got no right of appeal in respect of a finding against them, and as such we hold that this application does not lie and must be dismissed.

7. We are fortified in the conclusion aforesaid by a decision of the Orissa High Court in (2) Chintamoni v. State of Orissa reported in AIR 1958 Ori 18 and a decision of this Court in (3) Azamabad Tea Co. Private Ltd. and Another Vs. Suraj Ratan Thirani and Others, .

8. In the Orissa case the Court refused the necessary certificate holding that the impugned order was a consent order, and as such, no appeal lay. It proceeded on the view that the Court had the jurisdiction to determine on such an application whether an appeal would really lie to the Supreme Court or not. The Court held "The order is therefore, for all practical purposes, a consent order and to grant leave to appeal against such a consent order merely because Article 133 of the Constitution does not expressly refer to such an order, would, we think be merely wasting the time of the Supreme Court." We would respectfully agree with the above observations.

9. In the Calcutta case referred to above, though the Court held that the requisite application was barred under Article 170 of the Limitation Act, it also held that appeals contemplated in Article 133 of the Constitution are also governed by the Code of Civil Procedure. There are observations in it which would show that the Court has the jurisdiction to go into the question as to whether an appeal to the

Supreme Court would be competent or not.

10. This application is accordingly dismissed, and the certificate prayed for is refused. Each party will bear its own costs on this application.

Anil Kumar Sen, J.

11. I agree with My Lord that this application at the instance of the proposed appellant to the Supreme Court for a certificate under Article 133(1) of the Constitution of India should be dismissed. In my view, there is nothing more fundamental in disposing such an application than to see that there is an appeal to the Supreme Court on behalf of the proposed appellant. Here in the present case, the objection u/s 47 of the CPC at the instance of the present petitioners having been upheld by this Court, the execution case of the respondents was dismissed by this Court by the judgment and order, and as such no appeal lies to the Supreme Court on behalf of the petitioner who is not adversely affected by the order. Mr. Mitter appearing for the petitioners in support of this application has not contended that the petitioners have any right of appeal against any particular finding in the judgment under the proposed appeal, but he has contended that the said judgment being one of reversal and the value being more than Rs. 20,000/-, the petitioners are entitled to a certificate as of right and it is not open to this Court to go into the questions as to whether an appeal at the instance of the petitioners lies to the Supreme Court or not. Such a contention, in my view, does not stand to reason at all because, in my view, as pointed out just hereinbefore this Court issues certificate only in respect of an appeal and as such if there is no appeal there can be no certificate. It is now well settled by judicial decisions that in issuing a certificate under any of the three clauses of Article 133(1) of the Constitution, this Court goes into the question as to whether a particular decision is a judgment or decree or not or a particular order is a final order or not within the meaning of Article 133(1). This Court again in the case of (3) Azamabad Tea Co. Private Ltd. and Another Vs. Suraj Ratan Thirani and Others, refused to grant a certificate when the appeal itself was found barred by limitation. Similarly, relying on an earlier Privy Council decision, the Division Bench of the Orissa High Court overruled a contention similar as that raised by Mr. Mitter and refused to grant a certificate when it found that the appeal itself was not competent in law-the order being one having the effect of a consent order; that was the decision in the case of (2) Chintamoni v. State of Orissa AIR 1958 Ori 18 with which I am in respectful agreement. Reference may also be made to a decision of the Supreme Court in the case of (4) Sardar Syedna Taher Saifuddin Saheb Vs. The State of Bombay, where the Supreme Court had held that a certificate granted under Article 133(1) was improper when the appeal proposed to the Supreme Court really amounted to an appeal against an interlocutory finding. On the view as above I hold that the present application under Article 133(1) of the Constitution is misconceived and should be dismissed as proposed by my learned brother.