Kalimuddin Ahammad Vs Esahakuddin

Court: Calcutta High Court

Date of Decision: Feb. 14, 1924

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 9 Rule 13

Citation: (1924) ILR (Cal) 715

Hon'ble Judges: Walmsley, J; Mukerji, J

Bench: Division Bench

Judgement

Walmsley, J.
The circumstances which have led up to the present appeal are as follows. A partition suit was instituted on December 20,

1918, against several defendants, among whom the present appellant was No. 4. Two of the defendants contested the suit, and on September 22,

1919, a preliminary decree for partition was made on contest against two of the defendants and ex parte against the others. The present appellant

did not appear at all in the first Court, and he is one of those against whom the decree was made ex parte. On December 17, 1919, the first

defendant alone preferred an appeal against the decree to this Court, and three days later, on December 20, the appellant presented an application

to the trial Court under Order IX, Rule 13 of the Civil Procedure Code. This application was kept pending until after the disposal of the appeal

preferred by the first defendant.

2. The fate of that appeal was this. One of the respondents died, and as the appellant did not take proper steps to bring her heirs on the record,

the appeal was dismissed as against them; and then as against the others it was held that in the absence of the heirs of the deceased respondent the

appeal could not proceed: it was accordingly dismissed. This was on January 5, 1922.

3. Then the record was returned to the lower Court, and the appellant''s application came on for hearing. On April 8, 1922, a petition of

compromise between the plaintiff and the appellant was presented, and in accordance therewith the Court ordered that the suit should be restored

to its original number as against defendant No. 4 in regard to three only of the plots mentioned in the plaint, those three plots together constituting

the basabati. In making this order the Court proceeded on the compromise alone without any enquiry as to the causes which prevented defendant

No. 4 from appearing at the trial. A few days later three defendants (not among the original defendants) were added; they are said to have taken a

conveyance from the first defendant before the institution of the suit.

4. In July, a different Judge was presiding over the Court, and on July 5, he expressed a doubt as to the legality of his predecessor''s order of April

8, and after hearing arguments he delivered the judgment, against which this appeal is directed, on July 7, 1922.

5. The view which he took was that the order passed on April 8 was made without jurisdiction, because there was no longer any ex parte decree

over which the Court had control; that the order was a nullity and utterly void so that no proceedings to set it aside were necessary; and that the

fact of the order being made on consent as against the plaintiff could not convert it into a valid order.

6. He also recalled the order adding three defendants and directed that their names should be struck out.

7. At the outset I must remark that the learned Judge seems hardly to have realised that it is a very grave thing for one Judge to say that an order

passed by another Judge, particularly by his own predecessor-in-office, is a ""nullity and utterly void"", however much he may doubt its correctness.

8. The arguments for the appellant are, shortly stated, that the order of restoration made on April 8 was a good order, and that, even if it was not

the fact that proper steps were not taken to have it set aside rendered it binding on the parties, so that it could not afterwards be treated as though

it had not been made.

9. As to the validity of the order it appears to me that the learned Judge has fallen into the error of confusing the jurisdiction to make an order in a

case with the legality of the order made. There can be no doubt that the appellant had a right to make his application under Order IX, Rule 13,

when he did make it, although an appeal had already been preferred by another defendant. It is also clear that the trial Court was competent to

entertain that application, and that had an order of restoration been made before the record was despatched to this Court, its validity would not

have been affected by the subsequent order on appeal. It appears to me therefore that the result of the appeal cannot have been to rob the Court

of its jurisdiction to make an order on the application of the appellant: at the most it cannot have done more than put limitations on the nature of the

order passed. If that is so, the order made on April 8 may have been illegal but cannot be treated as without jurisdiction. On this view, the

appellant''s second argument applies, namely, that the order must stand because no proper steps were taken to have it set aside.

10. As, however, the legality of the order has been discussed before us, I wish to, state my views briefly. I have already stated the nature of, the

order passed by this Court on the appeal. The appellant argues that such an order was not an adjudication on the merits: that in the words of their

Lordships of the Privy Council ""it merely recognised authoritatively that the appellant had not complied with the conditions under which the appear

was open to him and that therefore he was in the same position as if he had not appealed at all:"" Abdul Majid v. Jawahir Lal ILR (1904) All. 350.

Those words were used in regard to an appeal dismissed for default, and with reference to the effect of an appeal on the starting point of limitation,

but they express very aptly the reasons that underlay the order of this Court. This is the view taken in the case of Kali Dayal Bhattacharjee v.

Nagendra Nath Pakrashi (1919) 24 C.W.N. 44, where in similar circumstances a Bench of this Court said ""the appeal is now not properly

constituted, and in the absence of necessary parties we cannot proceed to hear it on its merits"". The result of an order dismissing the appeal in such

circumstances is that the decree which remains capable of execution is the decree of the first Court.

11. It is urged, however, for the respondent that such a dismissal is different from a dismissal for default, which is specifically excluded from the

definition of ""decree"" as given in Section 2(2) of the Civil Procedure Code, and that it does amount to a decree.

12. That argument, however, does not go far enough. The order of this Court may be a decree without being such a decree as to supersede the

decree of the lower Court. All that this Court decided was that having regard to the nature of the appeal a certain defendant was a necessary

party, and that in the absence of that defendant or, on her death, his representatives, the appeal could not proceed. On the merits of the appeal in

other respects there was no adjudication, but on the contrary an express refusal to adjudicate. Consequently it is of no importance whether the

order did or did not amount to a decree. What is of importance is that it was not a decree in which that of the lower Court was merged.

13. My conclusion is that the order of April 8 was a good order: but as I have already said, I think that, good or bad, the Judge had jurisdiction to

make it, and it was not within the power of his successor to cancel it.

14. Incidentally it was said that no evidence was taken to prove that the appellant was prevented by sufficient cause from appearing in the trial

Court. If the plaintiff was prepared to accept the explanation offered and to refrain from opposition the arrangement seems free from objection.

15. In my opinion, the order of July 7. directing that the order of April 8 should be treated as a nullity, must be set aside, and the suit remanded to

the trial Court for that Court to proceed to hear it in respect of the items of property mentioned in the petition of compromise.

16. With regard to the added defendants (Nos. 15 to 17), they wish to remain in the suit, and they were added at the instance of the plaintiff. Their

presence cannot prejudice the appellant, and I think the order striking out their names should also be set aside.

17. As the suggestion that the order of April 8 should be revised came from the Judge and not from the plaintiff, the parties are directed to bear

their own costs.

18. These orders are passed under the provisions of Section 115, C.P.C., and the appeal is dismissed.

Mukerji, J.

19. The appellant is defendant No. 4 in a suit for partition in the Court of the Subordinate Judge of Bogra. On the 22nd September, 1919, a

preliminary decree was passed ex parte against the appellant and on contest against some of the other defendants. On the 20th December, 1919,

the appellant applied under Order IX, Rule 13 for setting aside the ex parte decree. On the 17th December, 1919, the defendant No. 1 preferred

an appeal from the said decree to this Court making the plaintiff and all the other defendants (including the appellant) respondents therein. When

the said appeal was pending, one of the respondents, viz., the defendant No. 6, died and his heirs were substituted in his place, but the costs of the

Deputy Registrar and the usual indemnity bond necessary for the proper representation of the minor heirs by the Deputy Registrar as their

guardian, not having been paid by the defendant No. 1, the said appeal as against the minor heirs was dismissed on the 8th August, 1921. On the

5th January, 1922, the said appeal came on for hearing, and it being held that the same could not proceed in the absence of the said minors, the

said appeal was dismissed. When the records went back to the Subordinate Judge, a compromise was arrived at between the plaintiff and the

appellant and a petition was put in by them to the effect that the decree would stand with reference to all the properties excepting one which, for

the sake of brevity, may be called the basabati at Thanarorh. The Subordinate Judge in accordance with the said compromise restored the suit

against the appellant in respect of the said property and ordered the partition of the other properties in accordance with the terms of the preliminary

decree to be proceeded with by an order passed on the 8th April, 1922.

20. Thereafter the appellant filed a written statement and the plaintiff amended the plaint and certain other proceedings took place in connection

with the suit so restored, of which it is only necessary to mention that at the instance of the plaintiff certain persons, of whom the defendant No. 15

was one, were added as parties to the suit and tiled written statements.

21. In the meantime the learned Subordinate Judge, who was proceeding with the suit, was succeeded by another officer; and he on the 5th July,

1922, while rejecting a further application of the plaintiff for amendment of the plaint, passed suo motu an order which ran as follows: ""I doubt very

much if the order of this Court of the 8th April, 1922, was not without jurisdiction. The defendant''s pleader for a day''s time argued this point.

After hearing the parties the learned Subordinate Judge on the 7th July, 1922, declared the order passed by his predecessor on the 8th April,

1922, a nullity, upon the ground that after the decree of this Court there was no longer any ex parts decree in existence over which the learned

Subordinate Judge could have any control and therefore the order vacating the same was one passed without jurisdiction, and he also ordered the

names of the added defendants (including that of defendant No. 15) to be struck out and directed the partition to-be effected in accordance with

the terms of the preliminary decree.

22. The present appeal and Rule are directed against this order of the learned Subordinate Judge, dated the 7th July, 1922; and of the parties

thereto, besides the defendant No. 4 who is the appellant, only the plaintiff and the defendant No. 15 have appeared before us.

23. At the outset it may be convenient to deal with the position of the defendant No. 15 in these proceedings. The learned vakil appearing on his

behalf has not been able to tell us what his client''s exact position is in this appeal, but it would seem rather strange that having come in in the

proceedings by virtue of this order, he should seek to challenge its validity--an order to which he owes his existence as a party to the suit.

24. On behalf of the appellant it is contended mainly that the learned Subordinate Judge had no jurisdiction to deal with the order of his

predecessor in the way that he did, that even if he had jurisdiction he was not competent to review the said order without an application from any

of the parties, and that he was in error in holding that the ex parte decree has ceased to exist and had merged in the decree of this Court and in

holding that his predecessor had therefore no jurisdiction to set aside the ex parte decree. It is also contended that the order of this Court

dismissing the appeal on the ground that it could not proceed and not disposing of it on the merits is not a decree into which the ex parte decree

could be said to have merged.

25. The plaintiff, on the other hand, contends that after the filing of the appeal in this Court, the application under Order IX, Rule 13, was no longer

entertain able; that in any case, after the disposal of the said appeal, the decree of the lower Court merged into that of this Court. It is further

contended that the order dismissing the appeal as against the minors was an order of dismissal for default, but that the later order dismissing the

appeal on the ground of its non-maintainability was one which amounted to a decree.

26. Now the consideration of the question as to whether the learned Subordinate Judge had jurisdiction to pass the order of the 8th April, 1922,

involves a consideration of the following questions: (a) Whether the order of this Court passed on the 5th January, 1922, amounted to a decree or

not, (6) if it was a decree, whether the ex parte decree can be held to have merged into it, (c) whether the learned Subordinate Judge had

jurisdiction to set aside the ex parte decree and restore the suit and (d) whether his successor could declare or was right in declaring the aforesaid

order a nullity.

27. As to (a).--The definition of the word ""decree"" in the Code of Civil Procedure, in so far as it purports to be a definition at all, lays down the

following essential and distinguishing elements, viz., that the decision must have been expressed in a suit, that the decision must have been passed

on the rights of the parties with regard to all or any of the matters in controversy in the suit, that the decision must be one which conclusively

determines those rights. Then certain orders which may not satisfy the above requirements are either expressly included in or excluded from the

definition. The whole object of defining a ""decree"" in the said Code appears to be to classify orders in order to determine whether an appeal or in

certain cases a second appeal lies therefrom. Apart from that object this definition is of no value. I am not prepared to accept the contention of the

respondent that because an order rejecting a plaint is a decree, an order dismissing an appeal on the ground that it was improperly constituted is by

mere analogy to be treated as a decree. I am unable to reconcile either in principle or in theory why an order rejecting a plaint should stand on a

different footing from orders of dismissal for default and yet one is a decree and the other is not. It is true that an order of rejection of a plaint has

been expressly included in the definition of ""decree"", but the Legislature has included it and no analogy can be drawn therefrom. The question

whether an adjudication is an order or decree is to be tested not by general principles, but by the expressions of the Code, and those words are to

be construed in their plain and obvious sense: Bhup Indar Bahadur Singh v. Bijai Bahadur Singh I.L.R(1900) All. 152, 1567; L.R. 27 IndAp 209,

213. In my opinion, the order of the High Court, dated the 8th August, 1921, is clearly an order of dismissal for default and is not a decree as

defined in the Code; but the order dated the 5th January, 1922, professes to decide one of the matters in controversy in the suit, viz., who are the

necessary parties thereto or whether the suit or appeal can be proceeded with in the absence of certain parties and therefore, in my opinion,

satisfies the definition of a decree as given in the Code. I am further of opinion that only such orders of dismissal for default as are treated as such

by the Code itself are excluded from the definition.

28. As to (6).--The question as to whether the order amounts to a decree or not is not, however, one of real importance. The question whether the

ex parte decree merged into it or not is a question which cannot be answered by a reference to any provision of the Code and it is not because the

appellate order amounts to a decree that such a merger takes place, but it is rather based upon the principle that where the Appellate Court has

determined the rights of the parties or the matters in controversy the orders passed by the original Court, whether they amount to decrees or not,

can no longer be said to be in existence but mast be deemed to have merged in those of the Appellate Court. Whether the decree of the Court of

first instance has merged into that of the Court of appeal will largely depend upon the facts of each particular case.

29. On an examination of the authorities bearing upon the question as to when the ex parte decree can be said to have merged in the decree of the

Appellate Court the following propositions seem to be well settled:

i. Where a defendant against whom an ex parte decree is passed applies, under Order IX, Rule 13, to set it aside and at the same time prefers an

appeal from it, it has been held by the High Court of Madras that the original Court ceases to have any power to hear the application. Sankara

Bhatta v. Subraya Bhatta I.L.R.(1907) Mad. 535. This Court, however, has held that notwithstanding the pendency of the appeal the original

Court may proceed with the application: Damodar Manna v. Sarat Chandra Dhal (1919) 13 C.W.N. 846; Kumud Nath Roy Chowdhury v.

Jotindra Nath Chowdhury ILR (1911) Cal 391. The Allahabad High Court too has taken the same view: Mathura Prasad v. Ram Charan Lal ILR

(1915) All. 208; Gajraj Mali Tiwarin v. Swami Nath Rai (1916) T.L.R. 39 All. 13,25; Hummi v. Azizud-din I.L.R (1916) All. 143 --the reason

for taking the latter view being that the matter for investigation in the two proceedings are wholly different,--in the one whether there was sufficient

cause for non-appearance, and in the other the determination of the merits of the controversy between the parties. The extreme position adopted

by the Madras High Court cannot, as explained in the case of Kumud Nath Roy Chowdhury v. Jotindra Nath Chowdahury ILR (1911) Cal 391,

be maintained either on principle or on the authorities: Brijalall Singh v. Chowdhury Mahadeo Prosad (1911) 17 C.W.N. 133.

ii. When the ex parte decree has been confirmed or otherwise disposed of on appeal, the Court which passed the ex parte decree has no longer

any power to entertain an application to set aside, even though the application was made before the appeal was filed: Mathura Prasad v. Ram

Charan Lal I.L.R (1915) All. 208.

iii. The same principle will hold good, even if the appeal has been preferred by a party other than the defendant against whom the decree was

passed ex parte, provided the decree was one and indivisible: Dhonai Sardar v. Tarak Nath Chowdhury (1910) 12 C.L.J. 53.

30. Now, the test to be applied to determine whether the Subordinate Judge had jurisdiction to vacate the ex parte decree is whether in spite of

the appeal presented to this Court, there was still a subsisting ex parte decree over which the Subordinate Judge had control. The answer to the

question would depend upon the scope of the appeal, by which expression is meant not merely the value of it, but a variety of other things, as well,

viz., the subject-matter involved, the parties concerned therein and the manner of its disposal. The learned Subordinate Judge has held that the

value of the appeal was the same as that of the suit, and the parties to the suit were all parties to this appeal. These, however, do not afford the

only materials for determining the scope of the appeal. The substance, and not merely the form, has got to be looked at.

31. Here the position was that the plaintiff had got a decree as against the defendants in respect of a certain share; one of the defendants, viz., the

defendant No. 1, had preferred the appeal; and excepting the question as to whether the appeal was maintainable in the absence of the minors, the

heirs of the defendant No. 6, no other question was gone into, and in fact none could be litigated, and what is more important is what the rights of

the defendant No. 4 were as against the plaintiff or whether the ex parte decree passed against him was a good or valid one, or whether it should

stand at all, could scarcely be determined in that appeal.

32. There is no authority for the proposition that under circumstances such as these, the ex parte decree can possibly be said to have merged in the

decree passed by the Appellate Court. In Brijalall Singh v. Chowdhury Mahadeo Prosad (1911) 17 C.W.N. 133, in which the earlier cases

having a bearing upon the point, were considered, at p. 135, considerable stress was laid upon the fact that the scope of the appeal was limited to

the question which arose between the plaintiff and only two of the defendants, the question in controversy between the plaintiff and the first five

defendants (who were parties to the appeal and against whom the suit had been decreed ex parte) was not raised in the appeal and never came

under the judicial consideration of the Court, and it was held that under these circumstances the view could not possibly be supported that the

effect of the decree of the Appellate Court was to supersede the decree of the Court of first instance in so far as it had been made ex parte against

these five defendants. In Gajraj Mati Tiwarin v. Swami Nath Rai ILR (1916) All. 13 Sundarlal J. at p. 27 observed that it was unnecessary for

him, having regard to the facts of the case before him, to go so far, but at p. 31 the learned Judge seems to have laid stress upon the fact that the

Appellate Court had not adjudicated upon the case of the applicants for setting aside the ex parte decree, as one of the factors for determining the

question. In Abdul Majid v. Jawahir Lal I.L.R (1904) . All. 350, the basis of the decision of the Judicial Committee on the question as to whether

the decree of the High Court was constructively turned into a decree of His Majesty in Council for the purpose of determining the starting point of

limitation was the consideration that the Judicial Committee had, in dismissing an appeal for want of prosecution, not dealt judicially with the matter

in suit and the order could in no sense be regarded as an order adopting or confirming the decision appealed from.

33. Applying these principles to the decree of this Court as made on the 5th January, 1922, it cannot for a moment be suggested that the ex parte

decree passed by the Subordinate Judge on the 22nd September, 1919, had ceased to exist so as to deprive the learned Judge of his jurisdiction

to set it aside and restore the suit in part as aforesaid.

34. It follows from the above that the order made by Subordinate Judge on the 8th April, 1922, in accordance with the petition of compromise

was an order which he had ample jurisdiction to pass and was an order to which neither the plaintiff nor the defendant No. 4, who were parties to

the compromise, can possibly take any exception. The other defendants have not challenged its validity either in the Court below or in this Court;

and it seems to me that, under the proviso to Order IX, Rule 13, the decree in so far as it related to this particular property could be set aside as

against all the defendants. In this view of the matter, it must be held that the learned Judge was also competent to make the orders that he did in the

matter of amendment of plaint, filing of written statements and addition of parties The only defect that I find in the order is that it is not explicit as to

whether it means to reopen the matter so far as all the defendants are concerned; but I take it that it does.

35. As to (d), it is unnecessary for me to say anything further than this, that the successor of the said learned Judge acted wholly without

jurisdiction in treating his predecessor''s older as a nullity, when no proper steps were taken by any of the parties to get it set aside, if that was

possible, in any of the modes recognized by law.

36. In my opinion the order complained of is not open to appeal, and, therefore, I would dismiss the appeal; and agreeing with my learned brother,

I would set the order aside in the exercise of our powers of revision and restore the orders which that order purported to treat as nullities, and

make the Rule absolute.