(1881) 01 CAL CK 0011

Calcutta High Court

Case No: None

Kally Soondery Dabia		APPELLANT
	Vs	
Hurrish Chunder Chowdhry		RESPONDENT

Date of Decision: Jan. 13, 1881

Citation: (1881) ILR (Cal) 594

Hon'ble Judges: Richard Garth, C.J; White, J; Mitter, J

Bench: Full Bench

Judgement

Mitter, J.

(after stating the facts down to the decision of the Privy Council, continued),-Hurro Kinkurry Dabia, on the 4th January 1880, conveyed away to the respondent her right, title, and interest in the subject-matter of the suit, etc., and made over to him the certified copy of the decree made in appeal to the Judicial Committee. Previously, however, she had produced this certified copy in this Court, when she made an application in the matter of security for costs which she had given in the Privy Council appeal proceedings. A copy of this certified copy of the final decree of the Privy Council is on the record of this Court.

2. The appellant before us then made an application to this Court setting out all these facts, to be allowed to execute the decree of the Court of first ^instance as restored and affirmed by the Judicial Committee of the Privy Council. The respondent raised two objections,-first, that the application was not accompanied by a certified copy of the decree of Her Majesty in Council, as it should have been u/s 610 of the Civil Procedure Code; and secondly, that the appellant, under the peculiar circumstances of the case, ought not to be allowed to execute the decree, until she establishes her rights to a share in the property in dispute in a regular suit instituted for that purpose. The learned Judge of this Court, before whom this application was brought on for hearing, being of opinion that there was no force in the first objection, inasmuch as the defendant himself was in possession of the certified copy

in question, disallowed the application upon the second objection. u/s 15 of the Letters Patent, this appeal has been preferred against that decision. A preliminary objection has been taken to the hearing of the appeal, on the ground, that an order passed u/s 610 of the CPC is not a judgment within the meaning of Section 15 of the Letters Patent, and is therefore not appealable.

3. I am of opinion that this objection is not tenable. In the first place, whether the function of this Court u/s 610 be judicial or not, the learned Judge who has disposed of the appellant''s application under that section has passed a decision disposing of it judicially, considering that, under that section, this Court has no judicial discretion to exercise, but is bound to transmit the order of Her Majesty to the Court which made the first decree, yet that was not done in this case. The learned Judge who heard that application has exercised his judicial discretion u/s 231 of the Civil Procedure Code, and the order passed by him is therefore a judgment within the meaning of Section 15 of the Letters Patent, and is accordingly subject to appeal.

4. It has been said that this Court has no jurisdiction u/s 610 to decide any question between the parties, and that as the learned Judge who disposed of this application has assumed a jurisdiction not vested in him, his order is not open to appeal in the same way as any other order passed in strict conformity with that section. Assuming that the order which is the subject of this appeal is not in accordance with Section 610 (which is by no means clear to me), yet, it being a judgment by which the learned Judge, in the exercise of his judicial discretion, refused the prayer of the appellant, is, in my opinion, appealable u/s 15 of the Letters Patent; see Dyebukee Nundun Sen v. Mudhoo Mutty Goopta (I. L. R. Cal. 123; s.c. 24 W. R. 478).

5. The next question is whether, under the circumstances of this case, the appellant is entitled to an order from this Court u/s 610 transmitting the decree of Her Majesty to the lower Court to execute and enforce it. It is true that the certified copy of the decree which the appellants to Her Majesty''s Privy Council obtained is not in the record, and cannot, therefore, be transmitted; but a copy of that certified copy is on the record, and the copy itself is in the possession of the respondent. Under these circumstances, the learned Judge in this Court was of opinion, that the apellant had sufficiently complied with the provisions of Section 610. No appeal has been preferred against this ruling. We cannot, therefore, re-open this question. Besides, it seems to me that there may be cases in which great injustice would be done, if it were to be held that, under no circumstances, would this Court transmit a copy of a certified copy of the decree of the Privy Council u/s 610. Suppose the certified copy obtained by a party is lost for no fault, negligence, or laches on his part, and it is impossible for him to obtain another certified copy from England within the time allowed by law to execute the decrees, would the decree-holder be entirely without any remedy? It would be unjust to hold so. But be that as it may, in the absence of any cross-appeal on the part of the respondent, we are bound to accept upon this point the ruling of the learned Judge who disposed of the appellant''s petition u/s

610 in the first instance.

6. That being so, it seems to me that there does not exist in the circumstances of this case any sufficient reason which would warrant us in refusing the appellant''s prayer. It is true that the decree was passed jointly in favour of the appellant as well as Chundra Moni, whose interest probably is now vested in the (defendant) respondent. Because the appellant''s co-plaintiffs chose to convey their interest to the defendant, it does not follow that she should be left to have her rights determined in a regular suit-Suppose out of 100 persons, jointly holding a decree, one of them, whose interest is very small, were to assign it over to the defendant, would it be just to drive the remaining 99 persons to a regular suit to have their shares determined? Besides, I do not see why the Court executing the decree should be held incompetent to determine the question of shares, under Clause (e) of Section 244 of Act X of 1877, with as much facility and finality as the same Court in a regular suit. The defendant says, that since the decree was passed, he has acquired the interest of one of the joint decree-holders. The question that then arises between him and the remaining decree-holder is one that seems to me to come both within the spirit and letter of Clause (e) of Section 244 of Act X of 1877-see Wine v. Moulvie Abdool Ali (7 W. R. 136). I would, therefore, grant the prayer of the appellant, and direct the Privy Council decree in question to be transmitted to the Court which made the first decree to be executed according to the provisions of Section 610 of the Code of Civil Procedure.
White, J.

7. This is an appeal against an order of the learned Judge in the Privy Council Department refusing the application of Kally Soondery Dabia, as guardian of her infant son, Shurut Chunder Lahiri, to transmit for execution by the Court of first instance a decree made by Her Majesty in Council.

8. Kally Soondery Dabia''s infant son is one of the plaintiff''s in the suit which terminated in that decree, Hurro Kinkurry Dabia being the other plaintiff, and the decree of Her Majesty in Council reversed the decree of the High Court and affirmed that of the Subordinate Judge of Mymensingh of the 10th of March 1874, which ran in these words-"that the plaintiffs do recover from the defendant possession of the disputed mouza."

9. The application was made by petition, but not accompanied by a certified copy of the decree of the Privy Council as required by Section 610 of the Code. The petition stated that the certified copy was in the possession of the defendant; and in explaining bow this came to be, disclosed that, since the decree of the Privy Council had been made, the co-plaintiff, Hurro Kinkurry Dabia, had sold to the defendant, by a deed of sale dated the 4th January, her right, title, and interest in the subject of the suit, and had handed to him the original order of her Majesty in Council.

10. The learned Judge held, that the production of the certified copy was excused under the circumstances, but refused the application on the ground that the decree of the Original Court, which was affirmed by the Privy Council, could only be executed as a whole, and not partly by one of the plaintiffs.

11. The first point to be considered is, whether an appeal lies against the order complained of. The order is made by a single Judge appointed to dispose of all matters relating to appeals to Her Majesty in Council. The delegation is made, under Rules of this Court, which are authorised by the Charter Act, 24 and 25 Vict., c. 104, Section 13.

12. Section 15 of the Charter of 1865 gives an appeal against the judgment of a single Judge appointed in pursuance of Section 13 of the Charter Act.

13. What constitutes a judgment within the meaning of this section was well considered in the Justices of the Peace for Calcutta v. The Oriental Gas Company (S. B. L. R. 433). Couch, C.J., giving the judgment of himself and Markby, J., says:-"We think that ''judgment'' in Clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, having other matters to be determined." In the same judgment the Chief Justice, in dealing with an argument based on the fact that an appeal is entertained in cases where a plaint is rejected, remarks, "there is an obvious difference between an order for the admission of a plaint and an order for its rejection. The former determines nothing, but is merely the first step towards putting the case in a shape for determination. The latter determines finally, so far as the Court which makes the order is concerned, that the suit as brought will not lie. The decision, therefore, is a judgment in the proper sense of the term."

14. The order now under appeal appears to me to have the characteristics which are noticed in the above judgment. It is an order for rejection. It decides that, for the reason stated in the order, the applicant is not entitled to have the decree of the Privy Council executed. It determines her right to have execution; and the determination, so far as the Court passing the order can make it, is final. That being so, I am of opinion that the order is "a judgment" within the meaning of Section 15 of the Charter, and is therefore appealable.

15. On the merits, I am of opinion, that the order cannot be sustained. The duties thrown upon the Court by Section 610 are in a large measure ministerial only. No doubt, the Court must ascertain in the first instance, whether the applicant is the party, or if the original party is dead, the legal representative of the party in whose favour the decree of the Privy Council is made; but when that is proved, the Court is bound to transmit the decree to the Court of first instance for execution, and has nothing further to do, unless one or other of the parties applies for special

directions respecting the enforcement or execution of the decree, when the Court is to give such directions as may he required.

16. In the judgment passed in the present case, the lower Court appears to me in the first place to have travelled outside Section 610 of the Code, and in the next place to have come to an erroneous conclusion that the decree could only be executed as a whole.

17. The application was, unquestionably, made on behalf of a party to the decree, though not the sole party, and by reason of the sale which had taken place subsequent to the decree, and so vested the interest of his co-plaintiff in the defendant, he was really the only party to the decree who could apply u/s 610 for its execution. Under these circumstances, I think the learned Judge ought to have transmitted the decree for execution to the Court of first instance, and left it to that Court to determine, in the course of execution, the questions which have arisen between the defendant and the applicant in consequence of the purchase by the former of the interests of the co-plaintiff. Clause 6 of Section 244 of the Code is, in my opinion, wide enough to permit of these questions being so determined. They are questions relating to the execution of the decree or to its satisfaction and discharge, and they have arisen in consequence of the defendant dealing with one of the plaintiffs since the decree. The effect of the purchase of that plaintiff''s interest is to satisfy the decree and discharge it to the extent of that interest.

18. I do not think that the applicant, who has retained his interest, ought, as suggested by the learned Judge, to be loft to bring a regular suit against the defendant in order to determine his share. To hold otherwise would be, in the case of all decrees which have passed in favour of several plaintiffs, to put it in the power of a defendant, by persuading one of the plaintiffs to sell to him his interest, however small, in the decree, to defeat the execution of the decree and compel the remaining decree-holders to encounter the expense, delay, and hazard of another suit, when they were on the eve of reaping the fruits of their success at the end of a protracted litigation.

19. It was decided by Loch and Macpherson, JJ., in Wise v. Moulvie Abdool Ali (7 W. R. 136), that where one of several plaintiffs had died after decree, the fact that by his death a share in the property, the subject of the suit, had devolved upon one of the defendants, did not prevent the execution of the decree by the surviving plaintiffs, and that the latter were from that circumstance alone not compelled to bring a separate regular suit. This case was decided in 1868. The present Code, as amended in 1879, has enlarged the questions arising between parties to a suit which may be determined in the course of executing a decree. In the case cited, the devolution was by operation of law in consequence of the death of one of the plaintiffs, but the sale by the co-plaintiff in the present case and the purchase by the defendant were unknown to the co-plaintiff, and were really as much beyond the control and without the. co-operation of the applicant, as the devolution by the operation of law

was beyond the control of the co-plaintiff in the case cited. The result too was the same, viz., that the decree could not be executed to the extent of the interest which had vested in the defendant.

20. As no appeal has been preferred by the defendant against that part of the order which dispensed with the production by the appellant of a certified copy of the Privy Council decree, it is unnecessary to consider the propriety of the order in this respect.

21. The result is that I would set aside the order appealed against, and order that the decree be transmitted to the Court of first instance for execution.

22. It is a peculiarity in this case that the applicant did not join in the appeal to the Privy Council which terminated in the restoration of the decree of the First Court, bat I think that that circumstance makes no difference, as the Privy Council, by restoring that decree, have in effect given a joint decree in favour of both the plaintiffs.

Richard Garth, C.J.

23. The point in this case upon which I am unable to agree with my learned brothers is as to whether we have jurisdiction to entertain this appeal.

24. It appears to me, that, having regard to the provisions of Section 610 of the Civil Procedure Code, the duties of the High Court in dealing with decrees of the Privy Council are purely ministerial; and that any order which the Judge of the Privy Council Department may make, when acting in a ministerial capacity, cannot properly be considered as "a judgment," and consequently cannot be made the subject of appeal to a Bench of this Court u/s 15 of the Charter.

25. It is said that the duties of the High Court u/s 610 are not altogether ministerial; and that it may become necessary for the Judge, acting under that section, to determine certain questions judicially; as for instance, if two persons presented themselves, each claiming to be entitled to the benefit of a Privy Council decree, it would be the duty of the Judge to decide which of those persons was really so entitled. But even in such a case, I consider that the High Court would have no power to decide between the contending parties. The question, who is entitled to the benefit of the decree, is one which, in my opinion, should either be decided by the Privy Council, or by the Court whose duty it is to execute the decree.

26. If, as in the present case, the person claiming the benefit of the decree was no party to the appeal to the Privy Council, and there were any question, whether, having regard to the true meaning of the decree, the claimant was entitled to take advantage of it, I consider that that the Privy Council, who made the decree, would best understand its meaning, and would be the proper Court to determine that question.

27. But if, on the other hand, the question did not depend upon the meaning of the decree itself, but upon something which had happened subsequently, as for instance, if the decree-holder had died, and the question was, who was his representative, or if the decree-holder had assigned his interest, and the question was between the assignee on the one hand and the heirs of the decree-holder on the other, this would be a question which, u/s 210 of the Code, would have to be determined, as in other cases, by the Court which executes the decree; and having been determined there, might be made the subject of appeal to the High Court.

28. But the High Court, in my opinion, is neither the proper Court to put a construction upon the decree, nor to determine questions which would, in the ordinary course, have to be decided in the execution-proceedings. The High Court has merely to transfer the decree for execution to the Court below; and I think that Section 610 has specially provided a means of notifying to the High Court the person or persons in whose favour, and upon whose application, the decree should be so transferred.

29. The person who applies must do so by petition, and this petition must be accompanied by a certified copy of the decree or order which is sought to be executed. That certified copy can, of course, only be obtained at the Privy Council Office; and if any one applies for it other than the decree-holder, 1 presume the question whether he is, or is not, entitled to a copy, would have to be determined by their Lordships of the Privy Council.

30. When, therefore, the petitioner produces to the High Court a certified copy of the decree, that Court has then, and not till then, as I conceive, the duty thrown upon it of transferring the decree to the lower Court for execution; and it has no discretion, in my opinion, to refuse to perform that duty. The production of the certified copy is a sufficient warrant to the High Court that the party producing it is entitled to ask to have the decree executed; and the language of the section is imperative, that, upon its production, the High Court shall transfer the decree for execution.

31. In this particular case the party applying did not produce a certified copy of the decree, and the learned Judge thought it right to dispense with the production of it, because a certified copy had been produced by one of the other parties to the proceeding. I confess, I doubt very much whether this was right. I think, for the reasons which I have just now explained, that the certified copy is not merely intended to satisfy the High Court that the decree exists, but that the person who applies for execution is entitled to the benefit of it. And this case affords a good illustration of the convenience and propriety of such a provision; because here the applicant was no party to the appeal to the Privy Council; he had paid no share of the costs; and if be had applied to the Privy Council for a certified copy of the decree, their Lordships might, with good reason, have refused to allow him to share in the benefit of the decree, until he had paid or given security to his co-plaintiff for his

share of the costs.

32. I would, however, decide this appeal solely upon the ground that we have no jurisdiction to hear it. I think that if this Court or any other Court has a mere ministerial duty to perform, and refuses to perform it (no matter for what reason) the order or act of refusal can no more be considered as "a judgment" than could the order of the Court made ministerially in compliance with that duty; and it is not because the learned Judge of the Privy Council Department has in this case acted ultra vires in determining the right of the parties, and has usurped, as I consider, a jurisdiction in that respect which he does not possess, that we have any right to usurp a jurisdiction also, and to treat his decision as "a judgment" which may be reviewed in appeal u/s 15 of the Charter. If any Court subordinate to the High Court were to usurp a jurisdiction in a similar way and to refuse to perform some ministerial act, the High Court, in my opinion, could not confer upon itself right to review the decision of the subordinate Court by way of appeal. Its proper course would be to set aside the decision and to order the subordinate Court to do its duty either u/s 15 of the High Courts Act or Section 622 of the Civil Procedure Code.

33. In such a case as this, it seems to me that the Privy Council is the only proper tribunal to rectify the order of Mr. Justice Pontifex. But I cannot regret that my learned brothers have come to a different conclusion, because it is no doubt more convenient that the mistake which we all agree has been made should be rectified here, instead of putting the parties to the trouble and expense of applying to the Privy Council. If it were merely a question of convenience, I should certainly have agreed with the other members of the Court; but as I consider it a question of principle, by the decision of which we must be guided in other cases, I feel compelled, for the reasons which I have given, to dissent from their judgment.