(1866) 08 CAL CK 0010

Calcutta High Court

Case No: None

In Re: Subjan Ostagar — APPELLANT

Vs

RESPONDENT

Date of Decision: Aug. 31, 1866

Judgement

Sir Barnes Peacock, Kt., C.J., Loch and Macpherson, JJ.

The first question referred to us is (reads). It appears to me that, under the section referred to (which is not very clearly worded) this Court has power to interfere, either in a case in which the Judge exercises an appellate jurisdiction which he has no power to exercise, or in a case in which, in the exercise of a jurisdiction which he has, he exceeds his jurisdiction. The words of the first portion of s. 35 are:-- "The Sudder Court may call for the record of any case decided on appeal by any subordinate Court in which no further appeal shall lie to the Sudder Court, if such subordinate Court shall appear, in hearing the appeal, to have exercised a jurisdiction not vested in it by law." The first word that causes ambiguity is the word "further." It is considered by some that, by the words "in which no further appeal shall lie to the Sudder Court," the legislature intended cases in which an appeal would lie to the subordinate Court without a further appeal to the Sudder Court. It is contended, in support of this view, that the word "farther" is not applicable to a case in which no appeal lies, either to the subordinate Court which exercises it, or to the Sudder Court; but the first part of the section must be read in conjunction with the subsequent words, "if such Subordinate Court shall appear in hearing the appeal to have exercised a jurisdiction not vested in it by law." The words are not "if in deciding the appeal, the Court shall appear to have exceeded its jurisdiction," but "if in hearing the appeal it shall appear to have exercised a jurisdiction not vested in it by law." If a Judge should hear an appeal in a case in which he has no appellate jurisdiction, he would appear to have exercised a power not vested in him by law; and yet, if no appeal lay to the Sudder Court, no further appeal than that which the subordinate Court in fact heard would lie to the Sudder Court. The thing to be looked to for the purpose of seeing whether the case falls within the section, is

rather the hearing than the decision. If the hearing was an exercise of a jurisdiction not vested by law, the decision consequent upon such hearing may be set aside, without reference to the decision itself. The section provides for setting aside the whole decision, not merely of any part of it which may be found to be in excess of jurisdiction. Looking at the whole section, and reading the words "in which no further appeal shall lie to the Sudder Court" together with the words "if such subordinate Court shall appear in hearing the appeal to have exercised a jurisdiction not vested in it by law," and the subsequent words of the section, I think the true construction is that the Sudder Court may call for the record in a case in which a subordinate Court exercises an appellate jurisdiction where it has none, or in a casein which it exceeds its jurisdiction where it has. I think that the words "in which no further appeal shall lie to the Sudder Court" means any case in which there is no appeal to the Sudder Court, or, in other words, no appeal in which the decision in the appeal heard de facto can be set aside. Where there is an appeal to the Sudder Court, any part of a decision which is beyond jurisdiction can be set right on appeal. But if there be no appeal, then the Sudder Court is authorized to call for the record and set aside whatever the subordinate Court has done in excess of its jurisdiction. There are very few cases, beyond those in s. 27, in which an appeal is given to a subordinate Court without a special appeal to the Sudder. But there may be many cases in which appellate jurisdiction may, through error, be exercised without jurisdiction, in which there is no further appeal to the Sudder, because there is no appeal given by law either to the subordinate Court or to the Sudder Court. Such cases were, I think, clearly intended to be included.

2. As to the second question In the matter of the Petition of Docowri Kazi Ante, p. 517, which was referred to a Full Bench, and was decided at this sitting, the Court considered that it would not he right to pass an order interfering with a decision which the Legislature intended to be final. In this case the order of the Moonsiff was intended by the Legislature to be final; and therefore, so far from thinking that it would be right, I think it would be wrong for this Court, simply because the Judge did erroneously exercise a jurisdiction which did not belong to him, to enter into the question whether a decision intended by the Legislature to be final was right or wrong. The words of the Act here are again important. "The Sudder Court may set aside the decision passed on appeal in such case by the subordinate Court, or may pass such other order in the case as to such Sudder Court may seem right." It is not that the Sudder Court may set aside the decision of the subordinate Court, and pass such other order in the case as it may think right, but that the Sudder Court may set aside the decision, or pass such other order as to it may seem right. It appears to me that, where a Court exceeds its jurisdiction, this Court may set aside that part of the order which is in excess of jurisdiction, and that, where the decision of the subordinate Court is made on appeal in a case in which it has no appellate jurisdiction, the proper order is to set aside the decision altogether. If an appeal be heard by a subordinate Court which has no jurisdiction to hear it, when it ought to

be heard by another subordinate Court which has jurisdiction to hear it, the Court may set aside the decision of the Court which had no jurisdiction, and may, if it think it right, refer the case to the Court which had jurisdiction even if it be too late to prefer a fresh appeal to that Court,

Jackson, J.

3. I regret to be obliged to differ from the judgment of the majority of the Court in this matter. It appears to me that the wording of s. 35, Act XXIII of 1861, does not permit the Court to interfere in cases where the lower Appellate Court has heard an appeal which it had no jurisdiction to entertain. I admit that this construction is of very much less convenience than that which has been adopted by the Chief Justice and my learned brethren. At the same time, I feel bound by the express words of the section itself. If we look at s. 35 and the sections which it follows, and look to the nature of Act XXIII and refer to the Acts which it supersedes, I think the meaning is clear enough.

4. Act XXIII of 1861 was an Act for amending Act VIII of 1859 (for simplifying the procedure of the Courts of Civil Judicature not established by Royal Charter), and for consolidating the Acts previously passed for the amendment of the said Act. It appears to have gone over the whole ground which had previously been traversed by the amending Acts, to have thrown the whole of those Acts into one, and to introduce new matter which had been found necessary for the further amendment of the law of procedure. One of the Acts which were repealed by Act XXIII of 1861, was Act XLIII of 1860. This enactment, following Act XLII (which was the Small Cause Courts Act for the Mofussil), gave a certain finality to the decisions passed in regular appeal in cases of the Small Cause Court class tried, not in the Courts of Small Causes proper, but in the ordinary Civil Courts, and it provided the mode of stating a case and obtaining the opinion of the Sudder Court upon such case. Ss. 27 to 34 of Act XXIII of 1861 exactly replace ss. 1 to 8 of Act XLIII of 1860. Then, immediately following those sections, 27 to 34, comes s. 35. I think, from the location of s. 35 immediately after those sections of the Act, and before s. 36, which relates to a subject wholly different, it is quite clear that that section was connected with the subject treated of in ss. 27 to 34. These, like Act XLIII, first provided that no appeal shall lie in cases of the nature described. They next provided the means of reference to the Sudder Court where a case should be stated; and then, as if to provide against a failure of justice in cases where special appeal was taken away, and in which the lower Appellate Court did not think fit to submit a case to the High Court for opinion, it was provided that the Sudder Court may call for the record of any case decided on appeal by any subordinate Court in which no further appeal shall lie to the Sudder Court, if such subordinate Court shall appear in hearing the appeal to have exercised a jurisdiction not vested in it by law." That seems to me to provide for cases in which special appeal is barred, and in which a case might not have been stated by the lower Appellate Court. I cannot get over the words "in which no

further appeal shall lie to the Sudder Court." Those words indicate clearly to me the case of one appeal being allowed, and a second, or special, or further appeal not being allowed. Nothing has been suggested, as far as I have heard, to account for the use of those words otherwise than as I have suggested. Then the expression "in hearing the appeal" appears to me also to admit a construction quite consistent with the view I have taken. It seems to me that, if by these words a going beyond the proper jurisdiction of the Court in entertaining the appeal had been alluded to, the words "in hearing the appeal" would not have been used, but "in admitting the appeal." It appears to me that the word "hearing" is meant in the sense of "determining," and that the section means that when a subordinate Court bearing an appeal lawfully before it, in determining that appeal, grants some relief or makes some direction beyond its lawful competence to make, then the High Court may send for the proceedings, &c.

5. That appeal''s to me to be the meaning of the section, and then as to the concluding part of the section, "and the Sudder Court may set aside the decision passed on appeal in such case by the subordinate Court, or may pass such other order in the case as to such Sudder Court may seem right," that seems to me to mean that this Court may either wholly reverse the judgment, or pass such modified or other order as it may think fit, and as the lower Appellate Court might, have passed. If this section does include the case of appeals improperly heard by the lower Appellate Court, surely all that the High Court could properly do would be to affirm or leave undisturbed the decision of the Court of first instance which by law was final. It would then be out of place to use such words "pass such other order in the case as to such Sudder Court may seem right."

6. I am, therefore, compelled to disagree with the majority of the Court in this construction of s. 35. But if it be held that cases of this kind are included in the section, then I agree that all this Court can do under the section is either in one case to pass the judgment which the lower Appellate Court ought to have passed, or in the other case simply to restore the decision of the Court of first instance.

Campbell, J.

7. I am of the same opinion with the Chief Justice. The contention which has been urged on the part of one of the parties in this suit, and which is supported by Jackson, J., is entirely new to me. I always supposed that s. 35, Act XXIII of 1861, was a general provision introduced into the Code of Civil Procedures in order to rectify the injustice which might be done by the lower Appellate Courts by exercising a jurisdiction not vested in them by law in cases in which no special appeal lay. It appears that when various amendments were made in Act VIII of 1859, among others, in 1860, a special Act was passed with a view to provide for a certain class of cases--money cases under Rs. 500--which were made final, and in which a special appeal was barred. That was the sole object for which Act XLIII of 1860 was passed, and that Act, which was passed with that object, contains no provision whatever of

the character of s. 35, Act XXIII of 1861. I am, therefore, unable to see why s. 35 has any special connection with the sections which now stand as ss. 27 and 34, Act XXIII of 1861, and the origin of which has been traced by Jackson, J. S. 35 has an origin quite independent from ss. 27 to 34. S. 35 was an entirely new provision, introduced, I think, into Act XXIII for the purpose of providing for all cases in which jurisdiction had been improperly assumed where no special appeal lay. I see no special connection between s. 27 and s. 35, such as to induce us to put a construction upon s. 35 different from that which we should put on it if read by itself. Head by itself, it would properly bear, it seems to me, the more liberal construction which has been put upon it. The whole argument the other way seems to be based on the word "further." Now that word "farther," as it is placed, is, I think, not very material. It may be that it is used in a somewhat in exact sense, and also it may be said that a de facto appeal having been preferred and heard, no further appeal lies, and s. 35 will be brought into play. The rest of the section is plain enough. As respects the words "in hearing the appeal" it seems to me that these words could cover both cases in which there was no jurisdiction, and those in which jurisdiction was exceeded. If the words "in deciding" had been used, it would have limited the operation of the section to the case in which an existing jurisdiction was exceeded. If the words "in admitting" were used, the section would be limited to cases in which there was no jurisdiction whatever. But the words "in hearing" seem to me to apply to both classes of cases. On the other point, I am of the same opinion with the Chief Justice. I think that the latter part of s. 35 can only be properly applied to questions affecting the jurisdiction whether the order of the Court below be upheld, modified, or otherwise dealt with.

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[1] See 24 & 25 Vic., c. 104, s. 15.

[2] In the matter of the Petition of Docowri Kazi, ante, p. 517.

[3] In the matter of the Petition of Docowri Kazi, ante, p. 517.