(1878) 05 CAL CK 0012

Calcutta High Court

Case No: None

In Re: In the Matter of the Appeal of Pertab Narain Singh — APPELLANT

Vs

RESPONDENT

Date of Decision: May 31, 1878

Citation: (1879) ILR (Cal) 184

Hon'ble Judges: R.P. Collier, J; M.E. Smith, J; J.W. Colvile, J; B. Peacock, J

Bench: Full Bench

Judgement

J.W. Colvile, J.
This application seems to involve two distinct questions:

1st.--Whether the petitioner, if assumed to have been properly made a party to the suit in the Courts below, and bound by the proceedings therein, is entitled to have a re-hearing of the appeal by reason of his not having entered an appearance as respondent to the appeal, or authorized any person to do so for him; and of the appellant having failed to take the usual steps against him in order either to compel his appearance, or to have the appeal regularly hoard ex parte against him.

2ndly.--Whether, under the circumstances stated in the petition, he ought not to he treated as a person not properly represented in the suit in the Courts below, and therefore not bound by the proceedings therein; and if so, whether he is entitled to have the order of Her Majesty in Council varied so as to prevent its being used against him as a bar to any proceedings which he might otherwise be entitled to take in the Courts of India.

2. The first question must, their Lordships think, be answered in the negative. The jealousy with which this tribunal regards any attempt to question the finality of one of its judgments, particularly after its confirmation by an order in Council; the very rare instances in which such an order has been allowed to be re-opened or varied;

and the peculiar grounds upon which, if at all, this can be permitted, are elaborately considered in Lord Brougham''s judgment in the case of Rajunder Narain Rae v. Bijai Govind Sing (1 Moores P.C.C. 117), and in the more recent case of Ex parte Kisonauth Roy (L.R. 2 P.C. 274). It results from these authorities that the thing cannot be done unless by some accident, without any blame and without any default on the part of the party himself, he has not been heard, and an order has been inadvertently made as if he had been heard.

3. Now, what are the facts in this case as regards the proceedings on the appeal here. The appellant, who has been successful here, brought his suit in the proper Court of Oudh for a declaration of his title as the successor to the talukdari estates of the late Maharajah Man Singh (not praying for a decree of possession) against the Maharanee and widow of Man Singh, the petitioner, then an infant, as represented by Luchmi Nath, his brother and guardian, and two other parties (one being Luchmi Nath in his own right), who, for the present purpose, may be left out of consideration. The Court of first instance dismissed the plaintiff''s claim, and the decree was affirmed by the Appellate Court, with only a variation as to the costs of the suit, which the Appellate Court directed to be paid to all parties out of the estate, instead of leaving each party to bear his own costs. In the heading of both decrees the petitioner is named as one of the defendants; in the lower Court as an infant, appearing by his guardian Luchmi Nath; in the Appellate Court as an ordinary defendant.

4. The crucial question in the cause was, whether an instrument in the nature of a will executed by the late Maharajah on the 22nd of April 1862, and under which his widow had executed an appointment in favour of the petitioner, had been revoked by the Maharajah in his lifetime?

5. This tribunal decided this question in favour of the plaintiff (appellant), reversing the decrees of both the Courts below, and substituting a declaration of the title of the appellant as heir to the Maharajah under Clause 4 of Section 22 of Act I of 1869. The report to Her Majesty was made, after a full hearing, on the assumption that the petitioner, as well as the Maharanee, was represented by the Counsel who appeared as for the respondents on the appeal; and the Order in Council made in pursuance of it is, on the face of it, a final adjudication against both in favour of the appellant''s title.

6. It is now said, however, that the petitioner never appeared to, and was not represented on, this appeal; and that the proper steps to have it heard against him ex parte were not taken. This case is supported by the affidavit of Mr. Wilson, the solicitor, who ostensibly conducted the appeal for the respondents, who swears that he was retained only for the Maharanee; that he entered an appearance for her alone; that he had no instructions to appear for the petitioner, and never entered an appearance on his behalf; and that although the case filed by him was instituted in the same manner as the appellant''s petition of appeal and was headed, "Case of the

above respondents", this was by a clerical error, which was not discovered by him until it was recently (that is presumably after the hearing of the appeal) brought to his notice.

7. On the other hand, it seems to their Lordships to be established by the affidavits of Mr. Lattey and of his clerk Mr. Hewett, by the record itself, and by the bill of costs hereafter mentioned all taken together; that although Mr. Wilson sent to Messrs. Watkins and Lattey, the solicitors for appellant, a note to this effect'', "Maharajah Pertab Narain Singh v. Maharanee, Subhao Koer--I have this day entered appearance for the respondent in the above appeal". Messrs. Watkins and Lattey, on the 26th May following, when they sent the manuscript record to Mr. Wilson in the usual course of business, distinctly asked him by letter whether he appeared for all the respondents, and received no answer to that inquiry; that afterwards, and in the month of November 1876, when a clerk of Mr. Wilson''s and Mr. Hewett, on behalf of Messrs. Watkins and Lattey, met at the Council Office for the examination of the printed record, the former indorsed his own and allowed the appellant''s proof of the record to be endorsed", T.L. Wilson, for the respondents"; that the record as finally printed bears that endorsement; that Mr. Wilson, in May and June 1877, was served with orders calling upon him to bring in the printed cases of all the respondents; that he made no objection to the form of such orders, but ultimately brought in the printed case, headed as the case of "the abovenamed respondents"; that he thus induced his opponents and this Committee, on the hearing of the appeal, to believe that he was acting for all the respondents; and that, after their Lordships had pronounced their decision, which, amongst other things, directed the costs of all parties to the appeal to be taxed, with a view to the payment of them out of the estate, he brought in before the Registrar a bill of costs, which was not only headed as the bill of costs of all the respondents, but contained items of charge relating to the correspondence between himself and the petitioner in India with reference to the appeal.

8. Their Lordships must remark that, if the case stood here, they would, upon these facts, have serious ground of complaint against Mr. Wilson, whose conduct of the case of his admitted client, if he really had no authority to represent the petitioner, was such as to mislead not only his opponents, but their Lordships. They cannot admit his explanation that the heading of the case was a mere clerical error, and that in fact he was acting, and purporting to act, for the Maharanee alone. Whatever may have been his personal knowledge of these proceedings, he must be held to be responsible for the acts of his clerks, and cannot be acquitted of, to say the least, gross carelessness in allowing the appeal to be conducted as he says it was.

9. The case, however, does not rest on Mr. Wilson''s conduct of the appeal. The petitioner has himself filed an affidavit, from which it appears that in May 1875, after the decree of the Appellate Court in India, but whilst the appeal to Her Majesty was pending, the Maharanee executed a further appointment in his favour, by which she

relinquished the life interest which she had reserved by the former instrument; that he, being then of full age, though a minor when the suit was commenced, was put into possession of the property; and in 1877 corresponded directly with Mr. Wilson touching the appeal, in which, in fact, he had become the sole person interested, and furnished the funds for defending it, at all events in the name of the Maharanee. He had, therefore, full knowledge of the pendency of the appeal; and unless he was content, as he might well be, since their title was almost identical, to defend it in the name of the Maharanee, he might have taken, and ought to have taken, the necessary steps to appear by separate Counsel in order to defend his interests. It seems, then, to their Lordships that this is not a case in which, according to the principles laid down in the cases above referred to, the order of Her Majesty can be re-opened or varied, on the mere ground that he was not properly represented upon the appeal, or cited to appear to it. It cannot be said there has been no default on the part of the petitioner.

10. He asserts, however, that he was never properly made a party to the suit in the Courts below, and that the proceedings in India, so far as he is concerned, were coram non judice. He alleges that his brother Luchmi Nath was not his guardian; that the objection was taken in an early stage of the suit; that Luchmi Nath was then dismissed from the suit, not only as a defendant in his own capacity, but also as the supposed guardian of his infant brother; that no guardian at litem was ever appointed in his place; that whatever part Luchmi Nath after-wards took in the management of the suit, he took as agent on behalf of the Maharanee alone; that he, the petitioner, was never properly represented in the suit, was never duly served with process therein, and that if his name was retained in the title of the cause, it was so retained irregularly and improperly. If these facts can be established, it may be that the final decree in the suit, i.e., the declaration of the plaintiff''s title, considered independently of the order in Council, and merely as a decree of the Indian Courts, would not be res judicata against the petitioner. But it is clear that that issue can only be properly tried in a new suit in India. And there is the more reason for trying the question in India, since what the petitioner desires is not a mere rehearing of the cause on the evidence as it stands, which would probably be of little advantage to him, but a retrial of it on fresh evidence.

11. It is, however, said that in such a suit in India the order in Council might be opposed to him as a fatal bar. It would, however, be open to the petitioner to contend that it was not such a bar, if he should succeed in showing that he was not bound by the decree against which the appeal was preferred. Their Lordships do not wish to prejudge that question, as they would prejudge it, if upon this application they were to recommend Her Majesty to vary the order in Council. Should a new suit ever be brought, the determination of the Indian Courts upon that, as upon any other question raised in such suit, will be subject to appeal. Their Lordships, therefore, will humbly recommend Her Majesty to dismiss this petition with costs.