(1866) 02 CAL CK 0010

Calcutta High Court

Case No: Application for Review No. 273 of 1865

In Re: Mirza Himmat Bahadur — APPELLANT

Vs

RESPONDENT

Date of Decision: Feb. 12, 1866

Judgement

Sir Barnes Peacock, Kt., C.J.

S. 363 of Act VIII of 1859 enacts as follows:-- "No appeal shall lie from any order passed in the course of a suit and relating thereto prior to the decree; but if the decree be appealed against, any error, defect or irregularity in any such order affecting the merits of the case or the jurisdiction of the Court may be set forth as a ground of objection in the memorandum of appeal." The decision reversing the decree of the Moonsiff on the issue of limitation was not a mere order prior to decree. It was itself a decree; as shown by s. 351 of the same Act. That section enacts:-- "If the lower Court shall Lave disposed of the case upon any preliminary point, so as to exclude any evidence of fact which shall appear to the Appellate Court essential to the rights of the parties, and the decree of the lower Court upon such preliminary point shall be reversed by the decree in appeal, the Appellate Court may, if it think right, remand the case, together with a copy of the decree in appeal, to the lower Court, with directions to restore the suit to its original number in the register, and proceed to investigate the merits of the case and pass a decree therein." It is clear that the decision reversing the first decree of the lower Court was a decree of the Principal Sudder Ameen in appeal, and not a mere order prior to decree. It appears to us that the defendant might have appealed against the first decision of the Principal Sudder Ameen reversing the first decree of the Moonsiff on the issue of limitation. But he did not do so. The case went down to trial on the merits under the remand. When the defendant appealed against the decision of the Moonsiff on the merits, he could not ask the Principal Sudder Ameen to allow him to appeal to the Principal Sudder Ameen himself from the former decision of the Principal Sudder Ameen on the issue of limitation; and when the suit was dismissed by the Principal Sudder Ameen upon the merits, there was no occasion for the defendant to appeal to the High Court against his decision. If the

Principal Sudder Ameen had upheld the decision of the Moonsiff on the merits, the defendant might clearly have applied to the Court to enlarge the time for his appealing against the decision of the Principal Sudder Ameen upon the plea of limitation, and if he had done so, the Court might have granted his application, if he had shown sufficient cause, and in all probability, the remand would have been deemed a sufficient cause. But when the plaintiff appealed to the High Court against the decision of the Principal Sudder Ameen on the merits, the respondent had the right under s. 348 of Act VIII of 1859, to rely upon any objection as if he had preferred a separate appeal. The words of s. 348 are:-- "Upon the hearing of the appeal, the respondent may take any objection to the decision of the lower Court, which he might have taken if he had preferred a separate appeal from such decision." The word "decision" in this section must, in our opinion, mean a decision upon the whole case; and we are of opinion that the defendant (respondent) had the right, upon the hearing before the Division Court, to object to the first decree in the suit which was against him on the issue of limitation. I had some little doubt whether, upon the strict wording of ss. 332 and 333, which relate to regular appeals, and of ss. 372 and 373, which relate to special appeals, the defendant could, without leave of the Court, have appealed against the first decision of the Principal Sadder Ameen upon the plea of limitation, within ninety days after the last decision of the Principal Sudder Ameen upon the merits, and after the expiration of ninety days from the date of his decision upon the plea of limitation, if the last decision of the Principal Sudder Ameen had affirmed the last decision of the Moonsiff, and had consequently been adverse to the defendant. But I agree with the rest of the Court, who entertain no doubt on the subject, that he might have done so even without satisfying the Court that there was sufficient cause for not having presented it within ninety days from the time of the first decision of the Principal Sudder Ameen. It appears to us that the judgment and decree, from which the ninety days are intended to be reckoned, are the final judgment and decree in the suit between the parties.

2. The result is that, although the defendant might have appealed against the first decision of the Principal Sudder Ameen, on the question of limitation, within ninety days from that decision, he was also at liberty to appeal against it at any time within ninety days from the time of the final decree disposing of the whole case. The case will go back to the Division Court to be decided with reference to the opinion now expressed upon the point referred to us.

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(1) Act IX of 1859, s. 20.-- "Nothing in this Act shall be held to affect the rights of parties not charged with any offence for which, upon conviction, the property of the offender is forfeited, in respect of any property attached or seized as forfeited or liable to be forfeited to Government; provided that no suit brought by any party in respect of such property shall be entertained unless it be instituted within the period of one year from the date of the attachment or seizure of the property to which the suit relates."