(1928) 10 BOM CK 0012

Bombay High Court

Case No: None

Shidramappa Revanshidappa Umbarje		APPELLANT
	Vs	
Gurushantappa Shankrappa and Others		RESPONDENT

Date of Decision: Oct. 29, 1928

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 47 Rule 7, 122

Citation: 116 Ind. Cas. 227

Hon'ble Judges: Patkar, J; Murphy, J

Bench: Division Bench

Judgement

Patkar, J.

Plaintiffs Nos. 1 and 2 are father and son who represent one branch of the family. Defendants Nos. 1 and 2 represent another branch of the family and defendant No. 3 represents the third branch of the family. The three branches agreed, on June 22, 1918, that they should be separate from November 14, 1917. On August 14, 1918, they referred their dispute for arbitration to the spiritual head the Belur Swami, who was appointed as an arbitrator. In the rajinama they agreed to divide the joint family properties and asked the arbitrator to effect a fair and equitable partition of the properties and to settle the disputes between the parties. On November 6, 1919, certain yadis were prepared and the finding of the lower Court is that the arbitrator divided the properties between the three branches. Nothing was done from November 6, 1919, till September 3, 1923, on which date the arbitrator sent a wire to the parties None appeared before him. The Swami, therefore, on September 5, passed an award Ex. 158 and delivered it to plaintiff No. 1. The plaintiffs then applied to the Court to have the award dated September 5, 1923, filed and prayed for a decree awarding the plaintiffs their separate shares on partition according to the said award. The learned First Class Subordinate Judge on December 14, 1925,

accepted the award in part and rejected it with regard to certain paragraphs which he held to be outside the scope of the reference, and passed a decree that the portion of the award after deleting the whole of paras. 17 to 21, whole of para. 22 except Clauses (i) and (ii), the whole of para. 23 except Clauses (i) and (ii), the whole of paras. 24 to 28, and the clause relating to sums declared as payable by parties to each in para 29 and Clauses (f), (g), (h) and (k) of Para. 32 and with the sums specified in para. 14 to 16 being added to the Clauses (a), (b) and (c), appertaining to them, be filed in Court and a decree in terms be drawn. On March 6, 1926, defendant No. 3 applied for a review of the decree of the First Class Subordinate Judge dated December 14, 1925. On April 6, 1926, defendant No. 2 filed an appeal to this Court, No. 35 of 1926. On July 15, 1926, the learned First Class Subordinate Judge allowed the review application so far as it related to the omission to take into account two items of Rs. 5,000 and Rs. 10,000 and made substantial alterations in the decree in respect of the two items though certain verbal alterations were made with respect to the sum of Rs. 348-14 0 and the sum specified in para. 14 of the award being added to the Clauses (a), (6) and (c), in para. 32. As against the order granting review Appeal No. 65 of 1925 was filed by defendants Nos. 1 and 2.

2. Defendant No. 3 has raised preliminary objections to the maintainability of both these appeals. With regard to Appeal No. 65 of 1926. it is urged on behalf of defendant No. 3 that the appeal of defendants Nos. 1 and 2 was against the order granting a review of a decree already made, and an appeal could only lie under Order XLVII, Rule 7 of the Civil Procedure Code. Clause (w) of Rule 1 of O XLIII, has been deleted by a rule of this Court u/s 122 of the Civil Procedure Code. According to the ruling in Kunversi Ratansi v. Pitamberd Ramdas 1927 Bom. 599 appeal from an order granting a review is governed by the provision of Order XLVII, Rule 7, of the Civil Procedure Code, as Clause (w) of Rule 1 of Order XLIII, is deleted by a rule made by the High Court in exercise of the powers conferred by Section 122 of the Civil Procedure Code. We have, therefore, to fall back on Order XLVII; Rule 7. Rule 7 of the order lays down three cases in which an appeal is allowed. The first deals with contravention of the provisions of Rule 2 which lays down to whom applications for review are to be made. The present case does not fall under Rule 2 of Order XLVII. The second case is where there has been contravention of Rule 4 which requires previous notice to the opposite party and also requires strict proof that the new or important matter which was discovered was not or could not be within the power or knowledge of the parties who sought to rely upon it. Rule 4, therefore, has no application to the present case. The third case is where the application for review is granted after the expiry of the period of limitation. The present review application was filed within time. In the present case, the review was granted on the ground of a clear error on the face of the record within Rule 1 of Order XLVII. We think, therefore, that the preliminary objection succeeds and Appeal No. 65 of 1926 must be dismissed with costs.

3. With regard to Appeal No. 35 of 1926 also a preliminary objection is taken on behalf of the respondent-defendant No. 3, that the appeal was filed against the decree dated December 14, 1925. The decree was subsequently amended by the order in review on July 15, 1926. The decree dated December 14, 1925, was modified in respect of two items of Rs. 5,000 and Rs. 10,000. The original decree, therefore, does not stand, and the appeal as filed against that decree cannot be allowed to proceed. Reliance is placed on the decisions in Kanhaiya Lal v. Baldeo Prasad A.W.N. (1905) 265 Brijbasi Lal v. Saligram 9 A.L.J. 183 and Pyari Mohan Kundu v. Kalu Khan 44 C. 1011.

4. In Kanhaiya Lal v. Baldeo Prasad A.W.N. (1905) 265 it was held that, where an application for review of judgment is granted, the result is a new decree superseding the original decree, and not merely some amendment thereof. In that case the appeal was filed pending an application for review of judgment in the Court below, the review was granted, and an order passed which purported to amend the decree under appeal. It was held that the order for review superseded the original decree, and the original decree under appeal had ceased to exist and the appeal could not be heard. It is urged on behalf of the appellant that the order passed by the First Class Subordinate Judge on July 15, 1926, was not an order on an application for review but was an order on an application u/s 152 of the CPC to correct a clerical error. We do not agree with the contention of the appellant on this point. There is a substantial variation of the decree in respect of the two items of Rs. 5,000 and Rs. 10,000, and defendants Nos. 1 and 2 are directly concerned with the modification of the decree in respect of those amounts. Though the appeal is not filed by defendant No. 1 but by defendant No. 2, he is equally interested in the variation of the decree with respect to the two items of Rs. 5,000 and Rs. 10,000. In Brijbasi Lal v. Salig Ram 9 A.L.J. 183 the decision in the case of Kanhaiya Lal v. Baldeo Prasad A.W.N. (1905) 265 was followed and it was held that the effect of granting an application for review was to supersede the decree which was the subject of such an application, and no appeal, therefore, could be maintained under the decree anterior to the review but an appeal lay only against the subsequent decree. The appeal in that case was filed after the application for review was finally decided, but that, in our opinion, makes no difference. In Pyari Mohan Kundu v. Kalu Khan 44 C. 1011 where an application for review of judgment was filed, and later during the pendency of the same, an appeal was preferred, it was held that the Court had power and in fact was bound to proceed with the application for review of judgment notwithstanding the fact that an appeal had been subsequently filed. The point under discussion did not really arise in Pyari Mohan Kundu v. Kalu Khan 41 Ind. Cas. 497 but the judgment expresses its approval of the decision in Kanhaiya Lal v. Baldeo Prasad : A.W.N. (1905) 265 that if an application for review is successful, the appeal cannot proceed. In Vadilal v. Fulchand 7 Bom. L.R. 664 Sir Lawrence Jenkins has defined the three stages of an application for review. When the application is successful, there is a fresh decree which is binding between the parties. The grant of

a rule for review holds the judgment in suspense until the case has been re-heard: see Achyut Vishnu v. Tapibai Krishnaji 48 B. 210 AIR 1924 Bom. 310. The moment a review is granted the case is re-opened for consideration and the decree passed by the Court modifying the previous decree is a fresh and final decree binding between the parties. The present case resembles the case decided by the Punjab Chief Court in Basheshar Nath v. Ram Kishen Das 1 Lah. L.J. 191 which accepted the view of the Allahabad High Court in the case referred to above. The same view was adopted by the Calcutta High Court in Gour Krishna Sircar v. Nilmadhab Saha AIR 1923 Cal. 113 . We think, therefore, that in this case defendant No. 2''s appeal filed against the order of the First Class Subordinate Judge dated December 14, 1925, cannot proceed. The remedy of defendant No. 2 was to withdraw the appeal and file a fresh appeal against the final decree.

5. We think, therefore, that Appeal No. 35 of 1926 must also be dismissed with costs.

6. With regard to the cross-objections of defendant No. 3, he could not file cross-objections if he could not appeal. The logical result of the contention of defendant No. 3 in support of the preliminary objection to the main appeal would be that he could not have appealed against the decree dated December 14, 1925. It would, therefore, follow that he could not file cross-objections to the decree dated December 14, 1925. The cross-objections must, therefore, be dismissed with costs.

7. There will be separate sets of costs with regard to the appeals and the cross-objections. As regards the cross-objections, though they are valued at Rs. 130 for the purposes of Court-fees, the office should decide the valuation as to the Pleader''s fees, and if the parties do not agree the matter can be brought before the Court.

Murphy, J.

8. I also agree that the preliminary objections must be upheld, in the case of each of these appeals and that they are not now competent.

9. Appeal No. 65 of 1926 is made against an order granting a review of judgment on the ground of an error or defect on the face of the record. Order XLIII, Rule 1, Clause (w), of Civil Procedure Code, has been deleted by a rule made by this High Court u/s 122, and if an appeal lies against the order granting a review, it must do so under Rule 7 of Order XLVII. But it does not seem to me that the order now appealed against comes within the purview of that rule. I do not think, though it has been urged, that it is in contravention of the provisions of the Rule 2 of the Order, neither admittedly does it come within those of Rule 4; and there is no question of limitation. These are the only possible grounds of appeal now remaining against an order of this nature, and since this particular one does not come within them, it is clear that no appeal lies, and that it must be dismissed.

10. In the case of Appeal No. 35 of 1926, which has been filed by defendant No. 2 alone, the facts are slightly different. The Court''s original decree was made on December 14, 1925, and it is against this decree that the appeal has been made. As already stated in connection with the companion appeal, the decree was modified by the Court on (July 15, 1926, in consequence of the review application. The general principle applicable to such cases has been stated broadly by Sir Lawrence Jenkins, C. J., in the case Of Vadilal v. Fulchand 7 Bom. L.R. 664 and it is to the effect that when a review is granted, the original decree is modified, and actually what happens is that a fresh one is passed. It has been held in the case of Kanhaiya Lal v. Baldeo Prasad A.W.N. (1905) 265 that where there has been a modification of the decree on a review, no appeal against the original decree remains competent, and this view has been followed in the case of the same Court, Brijbasi Lal v. Salig Ram : 9 A.L.J. 183 and in that of Pyari Mohan Kundu v. Kalu Khan 44 C. 1011 where it has been held that if a review is successful the appeal against the original decree cannot proceed.

11. Mr. Jayakar, for the appellant, has urged that a distinction has been made in the case of Kanhaiya Lal v. Baldeo Prasad A.W.N. (1905) 265 where there is a sentence to the following effect (page 241 Page of 28 A.- Ed.):

It is admitted that the application for review and the order passed thereon could not be treated as having been made u/s 206, (that is of the old Code) inasmuch as it was not an application to bring the decree into conformity with the judgment or to amend a clerical error.

12. He has urged that we should make a distinction that, where the application for review is substantially one u/s 152, involving some minor modification or correction, and not going to the merits of the original decree, these cases have no application; but I agree with my learned brother Patkar, J., that on the facts of the present case, even if we held that the Allahabad High Court really meant to lay down a principle apart from the obvious extent of Section 152, we would not be warranted in making such a distinction. What happened in the lower Court was a substantial amendment of the original decree such as could only have been made on a review of the judgment. I think the cases quoted apply, and that on this ground this appeal also must be held to be incompetent and must be dismissed, and that for a similar reason the cross-objection must also fail.