

Shankar Bharati Vs. Narasinha Bharati

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Court : Mumbai

Decided On : Jul-10-1922

Reported in : (1922)24BOMLR925

Judge : Lallubhai Shah, Kt., Acting C.J. and Crump, J.

Appeal No. : Civil Application No. 861 of 1921

Appellant : Shankar Bharati

Respondent : Narasinha Bharati

Disposition : Application Dismissed

Judgement :

Lallubhai Shah, Acting C.J.

1. This is an application for leave to appeal to His Majesty in Council. It is urged that as this Court set aside the decree of the lower Court and sent back the case to the trial Court for disposal according to law, it is a final order within the meaning of Section 109(a), Civil Procedure Code, and that as the subject-matter of the suit and of the appeal is over Rs. 10,000 in value, the applicant is entitled as of right to a certificate under Section 110. The trial Court in this case passed a decree upon a certain compromise which was arrived at between the plaintiff and defendant No. 2.
2. There was an appeal from the order directing a decree to be passed in terms of the compromise under Order XLIII, Rule 1, Clause (m), Civil Procedure Code, to

this Court. This Court in the first instance sent down certain issues to the trial Court for findings; and after the findings were returned to this Court, the order under appeal was set aside and the lower Court was directed to proceed with the suit in the ordinary course as if there had been no compromise. The applicant now asks for a certificate for leave to appeal to His Majesty in Council from the order made by this Court on the appeal from order. It would appear from Section 104, Sub-section (2), that no appeal shall lie from any order passed in appeal under that section. So it is urged that the order passed by this Court is a final order within the meaning of Section 109. I am, however, unable to accept this contention. Having regard to the nature of the order it seems to me that it is an interlocutory order. It decides no point arising in the suit, and certainly no cardinal point in the suit. It only disposes of a point which arose during the pendency of the suit, extraneous to the suit. It does not finally dispose of any rights of the parties. The suit is still to be heard on the merits. After giving my best consideration to the question as to whether such an order could be treated as a final order within the meaning of Section 109, I have come to the conclusion that it is not a final order within the meaning of that section. The applicant is not, therefore, entitled as of right to a certificate. It is conceded that if he is not entitled as of right, there is no other valid ground for certifying the case as a fit one for leave to appeal to His Majesty in Council. I, therefore, discharge the rule with costs payable to defendant No. 1 only.

Crump, J.

2. I agree. It is not always easy to say what is or is not a final order for the purposes of Section 109, Civil Procedure Code. But in the present case I feel no doubt that this is not a final order. All that this order does is to decide that the manner in which the lower Court disposed of this suit was incorrect, and that the suit must be disposed of on the merits, and not upon a certain compromise. I cannot see myself that this is in any sense a final order. I take the word 'final' to be used in its ordinary sense and, therefore, to mean an order which puts an end to the litigation between the parties, or at all events disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision. There is nothing of the kind about this order which is for all practical

purposes interlocutory only, and, therefore, I agree that no appeal will lie.

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