

Devi Dayal Vs. Sita Ram

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Court : Delhi

Decided On : Apr-19-1968

Reported in : AIR1968Delhi240; 4(1968)DLT429; ILR1968Delhi335

Judge : I.D. Dua, C.J. and;T.V.R. Tatachari. J.

Acts : [Constitution of India](#) - Articles 132 and 133; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 109

Appeal No. : S.C.A. No. 28 of 1968, for leave to appeal to Supreme Court against judgment of I.D. Dua, C.J. and T

Appellant : Devi Dayal

Respondent : Sita Ram

Advocate for Def. : Vijay Kishan, Adv.

Advocate for Pet/Ap. : Uma Mehta, Adv

Judgement :

ORDER

(1) By this application under Article 133(1)(a)(b) and (c) of the [Constitution of India](#) and Sections 109 and 110 of the Code of Civil Procedure. Certificate for leave to appeal to the Supreme Court is sought against our order date 5-2-1968 by means of which Execution First Appeal No 75-D of 1962 (Sita Ram v. Devi Daval) was

allowed and the case remitted to the executing Court for selling the property in question. The value of the subject-matter in dispute, both in the Court below and on appeal in the Supreme Court, appears to us to be more than Rs 20,000.

(2) The question principally canvassed before us is whether the order from which the appeal is now sought to be preferred is a final order because if it is not a final order, then it is not open to this Court to grant the requisite certificate for appeal to the Supreme Court. On behalf of the petitioner-appellant, our attention has been drawn by Miss Uma Mehta, his learned Advocate, to the following decisions:-

(3) *Rahimbhoy Hibibhoy v. Turner*, (1890) 18 Ind App 6, in which the plaintiff had instituted a suit against the defendant alleging that the latter was accountable to the former upon several claims. The defendant denied his accountability. The Court held the legal defenses put forward in regard to some claims to be valid and in regard to others invalid, and in the final result directed the defendant to account. The certificate for appealing to the Privy Council having been declined by the Court on the ground that the decree made by it was not final, the Privy Council expressed its opinion on this question thus:-

'It is true that the decree that was made does not declare in terms the liability of the defendant, but it directs accounts to be taken which he was contending ought not to be taken at all, and it must be held that the decree contains within itself an assertion that, if a balance is found against the defendant on those accounts, the defendant is bound to pay it. Therefore, the form of the decree is exactly as if it affirmed the liability of the defendant to pay something on each one of these claims. If only the arithmetical result of the account should be worked out against him. Now that question of liability was the sole question in dispute at the hearing of the cause, and it is the cardinal point of the suit. The arithmetical result is only a consequence of the liability. The real question in issue was the liability and that has been determined by this decree against the defendant in such a way that in this suit it is final. The Court can never go back again upon this decree so as to say that though the result of the account may be against the defendant, still the defendant is not liable to pay anything. That is finally determined against him and, therefore, in their within the meaning of section 595 of the Code. They therefore,

think the case is one in which they should advise. Her Majesty that the leave to appeal should be allowed on the usual terms as to security.'

Syed Muzhar Husein v. Bodha Bibi, (1894) 22 Ind App. 1. In this case an order of remand under section 562 of the Code of Civil Procedure, which was then in force, was held not to be a final order but it was added that where a decree decides a cardinal point in issue in the suit. E.g., the validity of a will. It is final, notwithstanding that by order purporting to be under section 562 it remands the case for the decision of subordinate points. In taking this view, the earlier decision of the Board in the case *Rahimbhoy Hibibhoy*, (1890) 18 Ind App 6 was followed. *M. Venkayya v. Venkatarama Rao*, Air 1956 AP 126, in which was observed that an order can be held to be a final order only if it finally disposes of the rights of the parties in the suit or proceeding, and it was added, to quote the exact words, 'what matters is not the form but the substance. If in substance no rights of the parties are outstanding to be decided in the suit, it cannot be said that a mere pendency of a suit on the file of a Court deprives the otherwise final adjudication of the rights of the parties by the High Court of its finality.' This view was stated to get support from the decision of the Supreme Court in *Gurudwara Prabhandhak Committee v. Shiv Ratan Deo Singh*, : AIR 1955 SC576 . *Surendranath Sarkar v. Sree Iswar Lakshmi Durga*. : AIR1942 Cal537 , head-note (c) of which is in the following terms.

It cannot be said that an order cannot be regarded as 'final' if it does not completely dispose of the suit. It would not be considered as 'final' if the rights of the parties were left still to be determined. If the rights of the parties to the suit had been determined and the suit was not 'finally' disposed of in the sense of its being finally terminated in the Courts of India, because certain subordinate matters of detail have not been disposed of the order would still be regarded as final within section 109.'

It is on this head-note that reliance has been placed by Miss Uma Mehta she has next cited *Venkata Reddy v. Pethi Reddy*, : AIR 1963 SC992 . A decision, according to this judgment, is said to be final when, so far as the Court rendering it is concerned, it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal, modification or amendment. Similarly, a final

decision would mean a decision which would operate as res judicata between the parties if it is not ought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed whether in a mortgage suit or a partition suit, was, on this basis, held not to be tentative decree but conclusive so far as the matters dealt with by it are concerned. These observations, it must, however, be pointed out, were made while dealing with the scope and effect of section 28-A of the Provincial Insolvency Act of 1920 as amended in 1948.

(4) On behalf of the respondent reliance has been placed on *V. M. Abdul Rahman v. D. K. Cassim and Sons.*, in which the head-note reads as under:

'The test of finality is whether the order finally disposes of the rights of the parties. Where order does not finally dispose of those rights, but leaves them 'to be determined by the Courts in the ordinary way,' the order is not final. That the order 'went to the root of the suit namely, the jurisdiction of the Court to entertain it', is not sufficient. The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it under section 109(a).

A person brought a suit for damages out became insolvent during the pendency of the suit. The suit was dismissed for the Official Assignee's failure to furnish security. The appellate Court however held that the claim being one for damages did not vest in Official assignee and remanded the case for trial on merits.

Held: that the order of remand did no doubt decide an important and even a vital issue in the case but it left the suit alive. And provided for its trial in the ordinary way and hence no appeal lay against it under Section 109(a).'

For this view, reliance was placed on the Privy Council decision in *Ramchand Manjimal v. Goverdhandas Vishandas*. 2nd 47 Cal 918; AIR 1920 PC 86 and the two earlier decisions of the Privy Council in the cases of *Rahimbhoy Hibibhoy*, (1890) 18 Ind App 6 and *Muzhar Husein*, (1894) 22 Ind App 1 were distinguished. The two earlier cases, it was observed, had been decided with reference to the Civil Procedure Code of 1882 in which the wording of the relevant sections differed

materially from that of the code of 1908.

Barkat ram v. Bhagwan Singh, Air 1949 E. Pun 222 has next been relied upon. According to this decision, an order is final within Section 109, Civil P. C., if it finally disposes of the rights of the parties and the finality must be a finality in relation to the suit. If after the order the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it under Section 109(a). Same test was held to apply to orders in execution proceedings. If an execution application, still pending and is a live application, an interlocutory order passed during the pendency of that application cannot be said to be final order. The test to find out whether an order is a final one, according to this decision. Is not whether the point decided thereby is a cardinal one, but whether the rights of the parties in the suit are finally disposed of by it. The decision of the Privy Council in Abdul Rahman's case, Air 1943 Lah 140 was given by a Full Bench of three Judges, in which it was held to be incorrect to say that every order passed in execution proceedings was a decree within the meaning of S. 2(2) of the Civil P. C. And therefore, appealable. As to whether or not the order impugned there was a final order Tek Chand and Bhide JJ., held that it was not a final order, whereas Beckett J., dissented from this view and held that an order finally adjudicating on the rights of the decree-holder was a final order and the application for leave to appeal to the Privy Council ought to be granted.

Our attention has then been drawn to a decision of the Federal Court in Mohd. Amin Bros. V. Dominion of India. Air 1950 FC 77. It has been observed in that case that 'the expression 'final order' has been used in contradistinction to what is known as 'interlocutory order' and the essential test to distinguish the one from the other has been discussed and formulated in several cases decided by the Judicial Committee. All the relevant authorities bearing on the question have been reviewed by this Court in their recent pronouncement in s. Kuppuswami rao v. King. , and the law on point, so far as this Court is concerned, seems to be well settled. In full agreement with the decision of the Judicial Committee in 47 Ind App 124 :AIR 1920 PC 86 and , and the authorities of the English Courts upon which these pronouncements were based, it has been held by this Court that the test for determining the finality of an order is, whether the judgment or order finally

disposed of the rights of the parties. To quote the language of Sir George Lowndes in :

'the finality must be a finality in relation to the suit. If after the order the suit is still a live suit in which the rights of the parties have still to be determined no appeal lies against it.'

The fact that the order decides an important and even a vital issue is by itself not material. If the decision on an issue puts an end to the suit, the order will undoubtedly be a final one, but if the suit is still left alive and has got to be tried in the ordinary way, no finality could attach to the order.

The decision of the Supreme Court in *Prem Chand Satramdas v. State of Bihar*, : [1951]19ITR108(SC) . Dealt with the Bihar Sales Tax Act and held that an order of the High Court declining to call upon the Board of Revenue to state a case under section 21 of that Act was not a final order and, therefore, not appealable. Reliance has further been placed on *Nidhpal Sharma v. Union of India*. : AIR1966 All360 where it was observed that the term 'civil proceeding' for the purposes of Art. 133(1) of the Constitution would mean the execution proceeding based on the application of the decree-holder for execution of the decree and the test of finality within Article 133 was laid down as under;

'(1) The order is not an interlocutory order.

'(2) Even though it is an order disposing of the proceeding before the High Court finally, it does not leave the original proceeding in the Court below alive for determination of the rights and liabilities of the parties

(3) The order amounts to a final decision relating to the rights and liabilities of the parties in dispute in the civil proceeding, or the order, of its own force, binds or affects the rights and liabilities of the parties.'

In so far, as this decision is concerned, the petitioner's learned counsel has submitted that the order of this Court, of its own force, binds and affects the rights and liabilities of the parties in regard to the liability of the property to be sold in execution of the decree. The decision of the Rajasthan High Court in *Amsingh v.*

Jethmal , relied upon by the respondent lays down that while reversing the decision of the trial Court, the decision of the High Court on a question of limitation is not a final order when the suit is remanded to the trial Court and it is kept alive. The order of the High Court on a point of limitation only in execution proceedings and remanding the execution case to the Court below was held not to be a final order in *Ramaswami Chettiar v. Official Receiver*, : AIR1951 Mad1051 , it being observed that such an order did not put an end to all the points in dispute between the parties.

An order of the High Court upholding the subordinate Court's jurisdiction to execute the decree and directing its execution, was held not to be a final order by the Patna High Court in *Girwar Prasad Singh v. Rameshwar Lal Bhagat*, : AIR1919 Pat383 . In our opinion, the decision of the Privy Council in the case of *Abdul Rahman*. and of Punjab High Court in *Barkat Ram*, Air 1949 E. Pun 2221 lend support to the view that if the execution proceedings are still live proceedings in which the question relating to the execution of the decree is still to be determined, then the order may not be held to be final order so as to be appealable in the Supreme Court under Article 133 of the Constitution. That the expression 'final order'. As used in Article 133, is intended to have a somewhat narrower meaning, seems also to be evident from the Explanation added to Article 132, giving to this expression a relatively wider concept for the purposes of that Article. It is true that plausible arguments can be urged that, in the present case, the rights of the parties in regard to the saleability of the property have been determined, but we are inclined, as at present advised, to think that this would not be conclusive on the competency of the appeal from this order because like the suit in the case of *Abdul Rahman*. the execution proceeding is still a live proceeding. The order disposing of the objection to the saleability of the property in question on the plea of *res judicata*, may well be considered to be similar to an order disallowing a plea of limitation. The rights of the parties of the execution proceeding still remain to be adjudicated upon and all that has been determined is the objection questioning the liability of a property sought to be sold in execution of the decree. The contention that the petitioner would be remediless on the view we have taken, ignores that he can file a fit case seek special leave under Article 136 of the Constitution.

(5) For the reasons foregoing, we are inclined, as at present advised, to hold that in this case the petitioner is not entitled to the certificate under Article 133 of the Constitution, the impugned order not being a final order. The application, therefore, fails and is dismissed, but without any order as to costs.

(6) Petition dismissed.

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