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Court : Rajasthan

Decided On : Nov-11-1955

Reported in : AIR1957Raj173

Judge : Wanchoo, C.J. and; Dave, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 2(2) and 109; Constitution of India - Article 133

Appeal No. : Civil Misc. (Leave to appeal) No. 6 of 1955

Appellant : Amsingh

Respondent : Jethmal and anr.

Advocate for Def. : B.N. Chand, Adv.

Advocate for Pet/Ap. : Sohannath, Adv.

Disposition : Application dismissed

Judgement :

Dave, J.

1. This is an application by defendant Amsingh for leave to appeal to the Supreme Court of India under Article 133 of the Constitution of India read with Section 109 of the Civil Procedure Code.

2. The brief facts giving rise to this application are that the plaintiff, opposite party, filed a money suit on 23rd of January 1952 in the Court of the Disrtict Judge, Balotra against the petitioner's father for the recovery of Rs. 38,845/9/3 on the basis of two Khatas dated 15th of December 1947.

The petitioner's father having died during the pendency of the suit, the petitioner was impleaded as his legal representative. The petitioner traversed the entire claim and took a number of pleas, one of them being on the ground of limitation. The trial Court decided only the issue regarding the limitation and dismissed the claim.

The plaintiff came in appeal to this Court. That appeal was heard by a Full Bench and it was held that the plaintiffs' claim was within limitation. The decree of the trial Court was, therefore, set aside and the case was remanded for trial on the remaining issues. It is against that order dated the 26th of November 1954 that the defendant wants to go in appeal to the Supreme Court and requires a certificate for that purpose.

3. It is urged on behalf of the petitioner that the value of the subject-matter of the suit in the Court of first instance was more than Rs. 20,000/-and the value of the subject-matter in dispute on appeal to the Supreme Court would also be the same, that the question of limitation involved is a substantial question of law and, therefore, he is entitled to the certificate asked for.

The non-petitioner has, on the other hand, contended that this Court has not given any decree or final order and that Section 109 and 110 of the Civil Procedure Code are controlled by Article 133 of the Constitution and, therefore, the petitioner is not entitled to any certificate.

It is not disputed even by the petitioner's learned advocate that Section 109 of the Civil Procedure Code is controlled by Article 133 of the Indian Constitution because Section 109, C. P, C. itself says that its provisions are ''subject to the provisions in Chapter IV off Part V of the Constitution.'

Article 133 of the Indian Constitution lays down that an appeal shall He to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies that the case comes within Clause (a), (b) or (c) of that article. We have, therefore, first to see whether the order of this Court dated 26th of November 1954 comes within the purview of the terms 'judgment, decree or final order'.

It is obvious that it does not amount to a decree because it is not a formal expression of an adjudication conclusively determining the rights of the parties with regard to the matter in controversy to the suit. Learned counsel for the petitioner has urged that the said order amounts to a decree because it decides one of the matters namely the question of limitation which was in controversy in the suit between the parties, conclusively.

In support of his arguments, he has referred to Mahaklal v. Madanlal, 1955 Raj LW 150 (A). It may be pointed out that the facts of that case were very different. In that case, the plaintiff had brought a suit for redemption of a certain shop. It was dismissed by the trial Court holding that the plaintiff had no right to redeem the disputed property.

On appeal by the plaintiff, the first appellate Court gave a decision that the plaintiff had a right to redeem. It also framed a decree but remanded the case to the trial Court saying that the trial Court had held the suit time barred without framing any issue on that point, that the parties were unable to lead their evidence on the question of limitation and, therefore, the trial Court was directed to frame an issue on the question of limitation, record the evidence which might be adduced by the parties and then dispose of the suit according to law.

A second appeal was filed against the decree of the first appellate Court and therefore a preliminary objection was raised by the respondent to the effect that the appeal was not maintainable. It was held that the decision of the first appellate Court amounted to a decree inasmuch as there was a formal expression of an adjudication by that Court and it had also conclusively determined the rights of the parties with regard to some of the matters in controversy in the suit.

It is clear that in that case, the first appellate Court's decision was held tantamount to a decree because all the three ingredients which go to constitute a decree were present there. In the present case, the trial Court has not conclusively determined the rights of the parties in relation to the subject-matter of the suit.

The term 'determination of the rights of the parties' refers to the substantive rights of the parties with regard to the merits of the case and not to other disputes between the parties which are ancillary to the subject-matter of the suit. For instance, question relating to the jurisdiction of the Court or limitation and other preliminary points of the sort, if decided in favour of the plaintiff would not determine the rights of the parties in relation to the suit.

The said case does not help the petitioner. In the present case, what has been decided is a preliminary point about limitation. The decision of the trial Court was that it could not enter into the merits of the case because the suit was barred by limitation.

This Court has reversed that decision and only held that the suit is not barred and the trial Court is, therefore, free to enter into the merits of the case and determine the rights of the parties in accordance with law. Besides, there is no formal expression of adjudication of the Court inasmuch as no decree has been framed. The order of this -Court, therefore, does not amount to a decree and this objection is dismissed.

4. It is next contended by the petitioner's learned advocate that the said order comes within the ambit of the term 'final order' or at any rate, it is a 'judgment' of this Court. It may be pointed out that in the case of Ratanlal v. Bhairondan, AIR 1954 Raj 127 (B), we had occasion to consider in detail the meaning of the term 'judgment' used in Article 133 of the Constitution of India.

It was held in that case that the word 'judgment' used in Article 133 of the Constitution could not have the meaning given to it in the Civil Procedure Code and that it could not be taken

"in its widest possible sense so as to include every order which terminates a proceeding pending in a High Court. The judgment must partake of the nature of finality attributed to a decree and a final order, when it is used in conjunction with the words 'decree', or 'final order'; otherwise the words 'decree', arid 'final order' would become superfluous, as every decision in the High Court in any case or proceeding before it would be a judgment whether or not it finally, puts an end to the litigation between the parties.'

5. This view was based on the observations of Sulaiman J. in Dr. Hori Ram Singh v. Emperor, AIR 1939 FC 43 (C), and the observations of Kania C. J. with which other learned Judges had also concurred & in the case of S. Kuppuswami Rao v. The King, AIR 1949 FC 1 (D). We have no reasons to change the view which we had taken in the said case.

We need not also repeat the reasons which have been given therein. It would suffice to say that we do not consider that our order dated 26th of November 1954 comes within the purview of the term 'judgment' because it is not a final decision of the matters in dispute in the case.

6. We have next to consider whether the said order can be covered by the term 'final order'. It is urged by the petitioner's learned advocate that if this Court had agreed with the view of the trial Court on the question of limitation, the suit would have stood dismissed and there could be no doubt that this Court's decision would have been final. It is contended that the order of this Court should not be considered anything less than a 'final order' simply because the case has been remanded to the trial Court. What the learned counsel means to urge is that the decision on the question of limitation has become final so far as this Court is concerned and it does not matter whether the Court has taken a view different from that of the trial Court.

We have given due consideration to this argument, but we think that it is not tenable. In the case of Salaman v. Warner, 1891-1 QB 734 (E), the term 'final order' came for consideration. It was observed by Lord Esher, M. R. that

'the question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally disposes of the matter, in dispute, I think that for the purposes of these rules it is final.

On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory.'

7. This observation was quoted with approval in the case of S. Kuppnswami Rao v. The King (D). In the case of Abdul Rahman v. D.K. Cassim & Sons, AIR 1933 PC 58 (F), it was observed that 'the test of finality is whether the order 'finally disposes of the rights of the parties'.

In that case, the High Court of Rangoon had set aside the decree of the lower Court and remanded the case for trial on the merits. A certificate for filing an appeal to the Privy Council was also given by the High Court. A preliminary objection was raised before their Lordships of the Privy Council whether the order of the High Court was a final order. In these circumstances, it was observed by their Lordships as follows :

'It should be noted that the appellate Court in India was of opinion that the order it had made 'went to the root of the suit, namely, the jurisdiction of the Court to entertain it', and it was for this reason that the order was thought to be final and the certificate granted. But this was 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) of the Code.'

8. If the decision of the High Court on the question of jurisdiction is not a final order, there is no reason to think that its decision on a question of limitation would be a final order when in both the cases the suit is remanded to the trial Court and it is kept alive.

The view expressed in Abdul Rehman v. D.K. Cassim & Sons (F), was followed in Mohammad Amin Brothers Ltd. v. Dominion of India, AIR 1950 FC 77 (G). Learned counsel for the appellant has urged that his argument is supported by the view of their Lordships of the Supreme Court in the case of Shiromani Gurdwara Parbandhak Committee, Amritsar v. Raja Shiv Ratan Deo Singh, (S) AIR 1955 SC 576 (H).

We think that this argument is not correct because the facts of the said case were very different. It is true that in that case the High Court had remanded the suit to the trial Court, but it was observed by their Lordships of the Supreme Court that though the order purported to be an order by way of remand, the High Court did, in fact, finally decide the matter. The High Court itself, while granting the certificate, had made the following remark :

'It was finally decided that the building in dispute was merely a private property and it was neither a Gurdwara nor a Sikh Gurdwara and that no claim could be made by the 56 worshippers merely because it was a Gurdwara and that the notification of 1929 was inconsistent with the notification under Section 3 of 1927. The decision on these three points finally determines the rights of the parties in regard to the ownership of the property.

If it is private property, as it has been held by this Court, then a declaration must be given as prayed for by the plaintiff and as a consequence the injunction will follow.'

9. On the basis of these remarks of the High Court, it was observed by their Lordships that, in fact, this was the very view of the effect of that order which has been taken by the trial Court after remand. In deference to this view, the trial Court did nothing except passing a decree in terms of this order, There is, therefore, no substance in the preliminary objection.

On the facts of this case, the judgment of the High Court appealed against does amount to a 'final order'.' It would appear that their Lordships treated the order of the High Court as a final order on account of the special facts of that case.

It is clear that although the High Court had passed an order of remand, it had, in fact, finally decided the matter and the trial Court had done nothing except passing a decree in terms of the order given by the High Court. It was, therefore, a special type of case.

10. In the case before us, we have simply decided the question of limitation. All other questions of dispute between the parties are still to be decided by the trial Court. The suit in the trial Court is alive and it cannot be said whether its decision will be in favour of the petitioner or the non-petitioner.

Suppose, for instance, that the decision of the trial Court goes in favour of the petitioner himself, can it be said, in that case that the order of this Court against which certificate is sought, would be final? We do not mean to say that such a thing is likely to happen but if it comes to this pass, then the order of this Court would not affect the petitioner.

The view, which we have taken, finds full support from the case of Habib-uu-nissa v. Munawar-un-uissa, ILR 25 All 629 (I). In that case also the plaintiffs' suit was dismissed as barred by limitation in the Court of first instance. The plaintiffs appealed to the High Court which set aside the decree of the trial Court on the question of limitation and remanded the case for retrial under Section 562 of the Code of Civil Procedure.

Against that order, one of the respondents applied for leave to appeal to His Majesty in Council, but the application was dismissed on the ground that the appellate order left the parties to contest their rights and claims on every other point and, therefore, it was not a final order.

11. The preliminary objection raised by the non-petitioner, therefore, prevails and the application is dismissed with costs.

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