Lakshmi Vs. Mani Devi and ors.

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Court : Chennai

Decided On : Sep-20-1911

Reported in : (1911)21MLJ1063

Appellant : Lakshmi

Respondent : Mani Devi and ors.

Judgement :

1. This is an appeal against the order of the District Judge of South Canara in an application for execution of the decree in O.S. 43 of 1906. The decree was the result of a compromise between the parties. The material portion of it was in these terms : 'The court doth order and decree that plaintiffs do pay the assessment on the entire property as per plaint karar dated 16-11-05; that 1st defendant shall enjoy land yielding 126 muras of rice, and house, out of the land referred to in the karar; that 1st defendant shall not alienate the said land of 126 muras of rice; that if alienated, the alienation shall be null and void; that after the death of the 1st defendant the said land and house shall be enjoyed by the 2nd defendant paying thereon 63 muras of rice to plaintiff annually by the end of June of each year through this court, etc., etc.' In 1909 the plaintiff applied for execution and asked for the order 'directing that from out of the lands mentioned in the decree, land yielding 126 muras of rice, which is already in the possession of the 1st defendant and which is to be retained with her as per compromise decree, be caused to be separated towards the said 1st defendant and that the remaining properties be given in possession to the plaintiff by a commission.' The 1st defendant objected

on the ground that the decree was declaratory in its terms and that therefore no execution could issue. The District Judge held that 'the decree can be executed by setting aside lands that yield 126 muras of rice income' and directed that this should be done, and ordered the appointment of a commissioner to prepare lists of the lands. The 1st defendant has presented the appeal to this Court on the ground that the Judge was wrong in construing the decree as one that was not purely declaratory.

2. On the merits there can be no doubt that the order of the Judge cannot be upheld. The decree did not direct possession of any lands to be given to the plaintiffs but merely declared the right of the 1st defendant to remain in possession of laud yielding 126 muras of rice of which she already had possession. It does not even declare the plaintiff's title to any lands but merely decrees that the plaintiffs do pay the assessment on the entire property of the family. We are unable to see how on the terms of the decree an order directing that the plaintiffs be put in possession of all the lands except that yielding 126 muras of rice, could be justified.

3. Mr. Narayana Rao, the learned vakil for the respondent, has, however, raised a preliminary objection which we are bound to deal with. The objection is that before the appeal was presented on the 18th July 1910 the Judge has passed another order on 18th March 1910 directing delivery to the plaintiffs in accordance with his former order after hearing the objections to the lists prepared by the commissioner; that the defendant did not appeal against the final order of the 18th March which has in consequence become final; and that he was not entitled, after the passing of the second or final order, to appeal against the first order of the 29th January.

4. To this objection Mr. Narayana Row, in the course of his argument, added another - that no appeal could be preferred at all against the order of the 29th January as it really did not decide any question of right between the parties.

5. We may dispose of the second objection in a few words. According to Section 2 of the Civil Procedure Code 'the determination of any question within Section 47' is a decree. The question whether a decree is executable or not is certainly one that

comes within this definition. No doubt the determination of a mere issue by the execution court made prior to the passing of the final order would not be regarded as an adjudication between the parties against which an appeal would lie. See Venkatagiri Aiyar v. Sadagopachariar (1903) 14 M.L.J. 359, But in this case the Judge did not merely record a finding on an issue. He held that execution should issue in favour of th plaintiff and ordered the appointment of a commissioner as required by the decree. In Narayana Pattar v. Gopalakrishna Pattar I.L.R. (1904) M. 355 the learned Chief Justice and Subrahmanya Aiyar J. held that when the executing court finally decided, the decree-holder was entitled to institute an appeal against such an order. The learned Judges there point out the distinction between that case and one where the court merely records a finding on an issue, as in Venkatagiri Aiyar v. Sadagopachariar (1903) 14 M.L.J. 359. It has also been decided that where the executing court decides that the plaintiff is entitled to mesne profits an appeal will lie against that order though the amount of the profits may not have been ascertained by it. See Ramkripal v. Rup Kuari I.L.R. (1883) A. 269; Bhup Indar Bahadur Singh v. Bajai Bahadur Bahadur I.L.R. (1900) A. 152. Our judgment is also in accordance with Deokhi Nanda Singh v. Bansi Singh (1910) 14 C.L.J. 35, which lays down the test for deciding whether an appeal would lie against any particular order in execution or not. We overrule this contention.

6. The first contention is certainly better supported by authority but we are of opinion that it is not entitled to prevail. The defendant being entitled to appeal against the order of the 29th January we are unable to hold that he was not entitled to do so within the period allowed to him by law. The second order merely carried out the first order in this case; it did not in any way supersede that order as indeed it could not do. We cannot see how that order could affect the defendant's right of appeal. He might have had no objection to it provided the first order was right.

7. This indeed is the position taken up by the appellant before us. To use the language of the decision of the Full Bench of this Court in another case : 'Where a right and jurisdiction are conferred expressly by statute they Cannot be taken away or cut down except by express words or necessary implication.' It is argued

that the later order, not having been appealed against, would remain in force even if we reverse the earlier one, and that therefore it is not open to us to take the futile step of setting aside the first order. We cannot agree that the reversal of the earlier order will leave the later one intact. The second order depends for its validity upon the first one allowing execution in favour of the plaintiffs, and with the quashing of the first the second must cease to have any force. The appellant has not been able to draw our attention to easy decision of this Court in support of his position. But he relies on the decision of the Calcutta High Court in Mackenzie v. Narasinga Sahai I.L.R. (1909) C. 762 and upon Madhusudan v. Kaminikanta Sen I.L.R. (1905) C. 762 which was followed in that case. It is perhaps desirable to examine briefly the decisions of the Calcutta High Court bearing on this question. Madhusudan v. Kaminikanta Sen I.L.R. (1905) C. 762 was a case of an appeal against an order of remand. It was presented after the Munsif had passed his final judgment subsequent to the remand. Maclean C.J. and Mitra J. held that the appeal was incompetent. Tue reason given is that Section 588 of the old C.P.C., provides for appeals against various interlocutory orders, several of which do not affect the decision of a suit on the merits, though some do; that a party failing to appeal against any of the orders could object to it on an appeal against the final decree and that therefore if he desires to avail himself of the privilege conferred by Section 588 in relation to an order of remand, he ought to do so before the final disposal of the suit. With all respect for the learned Judges we must say the argument does not commend itself to us. When the law gives a person two remedies he is entitled to avail himself of either of them, unless they are inconsistent. See Mussammat Gulab Koer v. Badshah Bahadur (1909) 13 C.W.N. 1197. The learned Judges distinguished an earlier case, Jalinga Valley Tea Co. v. Chesa Tea Co. I.L.R. (1885) C. 45, on the ground that the appeal there had been presented before the final judgment was passed.

8. But the ratio of that decision is equally applicable, whether the appeal against the remand is presented before or after the second judgment in the case. Field J. observes : 'The Code does not say that there shall be an appeal only if the case has not been finally determined in the court of first instance before that appeal is preferred or comes on for hearing. We cannot, therefore, import into the Code a provision which does not there exist. The Munsif's jurisdiction to hear the case

upon remand depended upon the remand order. If the remand order was badly worded the decree and indeed all the proceedings taken under that remand order are null and void.' In Mackenzie v. Narasinga Sahai I.L.R. (1909) C. 762 there was a preliminary decree in a suit for partition and a subsequent final decree. The appeal was against the former only, and was presented after the final decree had been passed. The learned Judges who decided the case - Mookerjee and Carnduff JJ. - followed Madhusudan v. Kaminikanta Sen I.L.R. (1905) C. 1023. They say that the final decree would still stand even if the. preliminary decree were reversed. No reason is given for this proposition. The learned Judges differ from the judgment of the Allahabad High Court in Uman Kunwari v. Jarbandhan I.L.R. (1908) A. 479 and point out that the view taken in that case, that an appeal might be preferred against an order of remand even after the court of first instance had passed its final judgment after remand, was based on the opinion of the Allahabad High Court that the party aggrieved by an order of remand could not object to it on an appeal presented against the final decree; and that the Calcutta High Court had adopted a contrary view on the point. Now, the Legislature has laid down in the present Code of Civil Procedure, Section 105(2), that an order of remand cannot be impeached except by an appeal against that order. It is similarly provided in Section 97 that 'where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.' The result of the opinion of the Calcutta High Court in the case cited by the appellant would be that, if a party, without any fault of his own, is unable to appeal against a preliminary decree or an order of remand before the final decree on remand is passed, he would lose all opportunity of objecting to that order or decree, and be deprived of the right of appeal expressly conferred on him by the Legislature. The incorrectness of the position would be manifest from another inconvenience, which may be pointed out here-Suppose a District Court passed an order of remand and before it is appealed against the Munsif's Court passes a decision on the merits in pursuance of the remand order. Suppose the Munsif's decision on the merits is unimpeachable. If the defendant's appeal could be only against the final judgment, he would be bound to appeal to the District Court though necessarily he would not be entitled in that appeal to attack that

court's order of remand And yet, according to the view of the Calcutta High Court, he would be bound to get the order of the Munsif confirmed in order to get a right of appealing to the High Court against the order of remand. Mookerjee J. has attempted in a later case to support Mackenzie v. Narasinga Sahai I.L.R. (1909) C. 762 on another ground. In Baikunthanath Dey v. Nawab Salimulla Bahadur (1908) 12 C.W.N. 590 the learned Judge says : 'When an order of remand is passed its validity may be challenged directly and immediately by an appeal under Section 588, Clause 28, or indirectly under Section 591, when an appeal is preferred against the final decree hi the suit. The party affected by the order of remand must make his election. He may, if be chooses to prefer an appeal against the order of remand, obtain a stay of proceedings during the pendency of the appeal. He may, on the other hand, carry out the order of remand, and take the chance of a successful termination of the suit in his favour; and in the event of defeat, prefer an appeal against the final decree in which the validity of the order of remand may be questioned. He cannot, however, if he has carried out the order of remand and taken the full benefit of it, turn round and prefer an appeal against the order of remand.' But surely a party appealing against an order of remand is not entitled, as of right, to a stay of proceedings in the court of first instance. Nor does it lie in the power of a defendant objecting to a remand to decide whether he should appear at the further proceedings before the court of first instance or not. He is bound to do so at the risk of those proceedings being completed in his absence, in case of default. This theory of alternative, reliefs is pointed out by Mr. Justice Mookerjee himself to be wrong in Mussammat Gulab Koer v. Badshah Bahadur (1909) 13 C.W.N. 1197 where the learned Judge observes that a litigant is entitled to take advantage of each and every one of the remedies open to him except when they are inconsistent with each other. The Allahabad High Court in Kurigal MaL v. Bishambar Das I.L.R. (1910) A. 225 followed Mackenzie v. Narasinga Sahai I.L.R. (1909) C. 762; distinguishing its own earlier case Uman Kunwari v. Jarban dhan I.L.R. (1908) A. 479 which had been dissented from in Mackenzie v. Narasinga Sahai I.L.R. (1909) C. 762 on the ground that 'a right of appeal from an order of remand was expressly given by Section 588 of the old code,' and the court proceeded upon the ground that 'such right of appeal could not be taken away in the absence of some direct provision to the contrary.' We may point out tint a right

of appeal against a preliminary decree or against an order in execution is also expressly granted by the statute. The learned Judges of the Allahabad High Court go on to observe : 'Moreover, in considering what the effect of the reversal of an order of remand cinder Section 562 aforesaid would be, this Court was careful to point out that anything done in pursuance of such an an order would become ipso facto of no effect on the reversal of the said order because the court concerned would have no jurisdiction to pass any further order in the case (except by way of review) unless empowered to do so by the order under Section 562 itself. No such consideration arises in the case now before us as it is clear that the learned Munsif after passing his preliminary decree had jurisdiction and indeed was bound to proceed in due course to pass a final decree in the case. It seems to us that a serious anomaly would be created by the modification of the preliminary decree of June 25th, 1908, while the final decree of June 30th, 1908, remained in force and had not been appealed against.' The whole argument, it will be noted, is based on the assumption that the final decree which is the result of the proceedings dependent for their validity on the preliminary decree would survive the reversal of the earlier decree. This assumption, we have already pointed out, is unsupportable. Kurigal Mal v. Bishambar Das I.L.R. (1910) A. 225 has been reaffirmed by the Allahabad High Court in Narain Das v. Balgobind (1911) 8 A.L.J. 604. The Madras High Court has held that an order of remand is appealable even after the passing of the final decree subsequent to the remand. See Subba Sastri v. Balachandra Sastri I.L.R. (1894) M. 421 and Mulikarjuna v. Pathaneni I.L.R. (1896) M. 479.

9. For the reasons above mentioned we overrule the first preliminary objection also.

10. In the result, the order of the lower court must, be reversed, and the application for execution dismissed with costs both here and in the lower court.