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Court : Kolkata

Decided On : Aug-31-1909

Reported in : 4Ind.Cas.452

Judge : Mookerjee and ;Vincent, JJ.

Appellant : Tega Singh

Respondent : Bichitru Singh

Judgement :

1. We are invited by the appellant in this case to appoint a Receiver in respect of the properties which are the subject-matter in dispute on appeal to His Majesty in Council.

2. The decree of this Court affirmed the decree of the Court below, and an application for leave to appeal to His Majesty in Council was refused. Subsequently the plaintiff applied to the Judicial Committee and obtained special leave to appeal. The order of His Majesty in Council is in these terms:

It is hereby ordered that leave be and the same is hereby granted to the petitioner to enter and prosecute his appeal against the said decree of the High Court of Judicature at Fort William in Bengal dated the 20th day of December 1905 upon depositing in the Registry of the Privy Council the sum of 200 sterling as security for costs and that liberty be and it is hereby reserved to the respondent to move their Lordships for an order increasing the amount of the said security so to be

deposited as aforesaid by the petitioner. And the Registrar of the said High Court is hereby directed to transmit to the Registrar of the Privy Council without delay the authenticated copies, under the seal of the said High Court, of the record, pleadings, proceedings and evidence proper to be laid before His Majesty on the hearing of this appeal upon payment by the petitioner of the usual fees for the same.

3. The petitioner now applies under Order XLV, Rule 13 of the Code of 1908 for the appointment of a Receiver in respect of the subject-matter of the appeal to His Majesty in Council. Objection is taken by the respondent that the rule in question has no application, because the appeal in this case was not certified by this Court, but was admitted by special leave granted by His Majesty in Council. In support of this contention, reliance is placed upon the observations of the Judicial Committee in the case of *Moheshchandra Dhal v. Satrugan Dhal* 27 C.I.; 26 I.A. 281. In that case, special leave to appeal against the decree of the High Court was granted by the Judicial Committee. An application was then made to this Court that the manager of the estates in dispute should remain in possession during the pendency of the appeal. The application was refused on the ground that the Code did not give this Court jurisdiction over the subject-matter pending an appeal not certified by themselves. The petitioner then moved the Privy Council and obtained an order for stay of proceedings. Lord Hobhouse in delivering judgment observed as follows: Their Lordships cannot direct the High Court to act where they have no jurisdiction, and they are not prepared to differ from the High Court on the question whether or not they have jurisdiction without hearing full argument on the point. They are at present disposed to agree that the jurisdiction does not exist; and though it may be very anomalous that property should be left without the possibility of interim protection, pending an appeal granted by special leave, the case is one of great rarity, and not unlikely to have escaped the notice of the framers of the Code.'

4. On behalf of the petitioner, however, it is contended that although this may have been the position under the Code of 1882, the matter has been set at rest by the Code of 1908 in favour of the view put forward by him. Our attention is invited to two points of difference between Section 608 of the Code of 1882 and Rule 13 of

Order XLV of the Code of 1908.

5. In the first place, Section 608 of the Code of 1882 provided that 'not withstanding the admission of any appeal under this Chapter, the decree appealed against shall be unconditionally enforced, unless the Court admitting the appeal otherwise directs.'

6. In the new Code the words 'the grant of a certificate for' have been inserted before the words 'the admission of any appeal.' This is obviously of no assistance to the appellant. The effect of the alteration is merely to enable the Court, in a case in which Rule 13 applies, to make an order after the grant of a certificate and before the appeal has been finally admitted.

7. The second alteration to which our attention is invited is the addition of the words by the appointment of a Receiver or otherwise' in Clause (d). This change also is of no assistance to the appellant. The object was to make it quite clear that, in a case in which Rule 13 applies, the Court may afford relief by way of appointment of a Receiver. We are not prepared, therefore, to say that Rule 13 differs, so far as the present question is concerned, in any material respect from Section 608 of the Code of 1882. On the other hand, if we examine the frame of the Code, it becomes fairly clear that Rule 13 could not have been intended to apply to cases in which the appeal had been admitted by special leave of the Judicial Committee.

8. Sections 109--111 of the Code deal with appeals to His Majesty in Council, and define the circumstances under which an appeal may be allowed. Section 112 then lays down that nothing in the Code shall be deemed to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council or otherwise howsoever.' This section, it cannot be suggested, confers a right upon the subject to prefer an appeal to His Majesty in Council. It merely declares that nothing in the Code will affect the exercise of the appellate jurisdiction which the Sovereign in Council undoubtedly possesses by virtue of the Royal Prerogative. When we next turn to Order XLV, we find that Rule 2 lays down that 'whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is complained of.' The subsequent orders

deal with the mode in which such application is to be dealt with. No reference is made, as might have been expected, to any application to His Majesty in Council for special leave, and no provision is made for what is to happen if such application is granted or refused. It is stated on behalf of the petitioner that when an order for grant of special leave is received in this Court, it is registered and numbered as if leave had been granted by this Court. That may be so as a matter of Office procedure; but this circumstance cannot confer on the Court a jurisdiction which it does not possess. It is clear, therefore, that Order XLV applies only to cases in which the appeal to His Majesty in Council has been initiated by an application to the Court against whose decree the appeal has been preferred, which application is subsequently granted by that Court. In this view, Rule 13 would not have any application to a case in which special leave to appeal has been granted by the Judicial Committee. This we think is also clear from an examination of the other Rules in Order XLV. For instance, so far as the furnishing of security is concerned, the security is to be furnished, not in accordance with the Code (Rule 7) or under the rules framed by this Court in accordance therewith, but under the directions contained in the order of His Majesty by which the appeal is admitted *Spooner v. Juddow* 4. M.I.A. 353 at p. 361. Again, if any question arises as to the increase of security during the pendency of the appeal, the matter is to be determined, not by this Court under Rule 14, but by His Majesty in Council, as expressly directed in the order by which leave to appeal was granted. On these grounds, we are of opinion that the application which has been presented to us for the appointment of a Receiver cannot be entertained under Rule 13, Order XLV of the Code, although, it is quite conceivable that if an application were made to the Judicial Committee for the appointment of a Receiver, their Lordships might, if satisfied that ad interim protection was needed, direct this Court to deal with the matter.

9. We desire to add that even if it were conceded that We had jurisdiction to appoint a Receiver, we should be reluctant to do so at the present stage. The respondent is the Manager of a Religious Endowment appointed under Act XX of 1863, and it has not been disputed that he is under the control of the District Judge. Before an application for the appointment of a Receiver is made, on the ground of waste or mismanagement, the petitioner ought, in ordinary course, to

exhaust his remedies before the District Judge.

10. The application is refused with costs, five gold mohurs.

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