SUPREME COURT OF INDIA

S. Kalawati

Vs.

Durga Prasad

C.A.No.1641 of 1969

(A. Alagiriswami, P. N. Bhagwati and P. K. Goswami, JJ.)

02.05.1975

JUDGEMENT

A. ALAGIRISWAMI, J:-

1. The appellant is the widow of one Goverdhandass. The l st respondent is her husband's brother. Goverdhandass and the l st respondent are the sons of one Bhojraj. The appellant claimed 11 plots in Khata No. 97 as land in which she was entitled to be joint tenant along with the 1st respondent. She also claimed certain other plots on the ground that they were acquired by Bhojraj and therefore it was joint Hindu family property and she was entitled to inherit those shared also as co-tenant along with 1st respondent. She succeeded in respect of the 11 plots in Khata No. 97 but failed in respect of the other plots.

2. The matter first came up before the Consolidation Officer and thereafter on appeal before the Settlement Officer and finally before the Deputy Director, Consolidation in revision. Against the order of the Deputy Director, Consolidation, she filed a petition before the High Court of Allahabad under Article 226. The High Court dismissed it in limine but granted a certificate under Article 133

(1) (a) of the Constitution.

3. A preliminary objection was raised on behalf of the 1st respondent that the certificate granted was not valid because the judgment of the High Court was one affirming the judgment of the Deputy Director, Consolidation. One of the questions on which the decision of this question depends is whether the Deputy Director Consolidation as well as the other two officers exercising power under the U. P. Consolidation of Holdings Act, l953 are Courts. However, in the view we take of the decision of the High Court that it is not a judgment of affirmance this question does not arise. The High Court dismissed the writ petition in limine. It did not go into the merits of the case or decide it even within the limited scope of its powers under Article 226 or 227 of the Constitution even if not as Court of Appeal exercising its powers under Section 96 or 100 of the Code of Civil Procedure. It simply refused to exercise its powers under those Articles of the Constitution. Unless the Court had applied its mind to the case and after consideration affirmed it the order cannot be said to be one of affirmance.

4. It may be useful to consider earlier decision in this connection. In Abdul Majid v. Jawahir Lal ((1904) ILR 36 All 350) (FB) the question of the staring point of limitation for the execution of a decree had to be decided and that question dependend upon the effect of an order of the Privy Council dismissing an appeal for want of prosecution. In that connection the Privy Council observed:

"The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him and that therefore he was in the same position as if he had not appealed at all."

In Karsondas Dharamsey v. Gangabai ((1907) ILR 32 Bom 108) an order of the High Court refusing to admit an appeal after the period of limitation had expired was held to be not a "decree passed on appeal by the High Court" under Section 595 of the Civil Procedure Code and it was held that there was therefore no jurisdiction to grant leave to appeal therefrom to the Privy Council under cl. (a) of that section. The meaning of the words. "Passed on appeal" were specifically considered and it was observed :

"The meaning of the expression "passed on appeal" has been settled by a line of authorities, which it is right that we should follow : see Sunder Koer v. Chandishwar Prosad Singh ((1903) ILR 30 Cal 679) and the cases there cited. And applying that interpretation to the circumstances of the case, it cannot (in my opinion) be said that there is here a decree passed on appeal by a High Court."

This Bombay decision was noticed in Promotho Nath Roy v. W. A. Lee (1919) is 33 Cal LJ 128 = (AIR 1921 Cal 415). But that decision differed from the Bombay decision because in that case the appeal had been admitted and dismissed whereas in the Bombay case the appeal was not admitted at all. In Ramaswami Udayar v. Sevu Aru Ramanathan Chettiar (AIR 1942 Mad 357 (1)) it was held by the Division Bench of the Madras High Court that where an application to excuse delay, by deducting the time taken in other proceedings in computing the time its for the application for rehearing of an appeal, was dismissed and consequently no order was passed on the application for rehearing the appeal, these were not orders on appeal within the meaning of Section 109 (a) of the Code of Civil Procedure and hence no leave could be granted. These decisions were followed in Purnendu Nath Tagore v. Kanailal Ghoshal (ILR (1948) 2 Cal 202).

5. In Ganesh Prasad v. Mt. Makhna (AIR 1948 All 375) however an order dismissing appeal for default on account of non-prosecution was held to be a decision which affirmed the decision of the Court below.

6. In Gulabchand v. Kudilal (AIR 1952 M B 149) (FB) it was held that the order of the Court dismissing the Special Appeal on the ground that no appeal lay under section 25 of the Act was not an order which affirmed the decision of the Court below and it was observed that expression "affirms the decision of the Court immediately below" implies that the Court had dealt judicially with the decision of the Court below and upheld it and where the Court holds that it has no jurisdiction to entertain an appeal from the decision of the Court below and rejects the appeal, it cannot be held that the decision of the Court below is affirmed by the rejection of the incompetent appeal.

7. The principle behind the majority of the decisions is thus to the effect that where an appeal is dismissed on the preliminary ground that it was not competent or for non-prosecution or for any other reason the appeal is not entertained, the decision cannot be said to be a "decision on appeal" nor of affirmance. It is only where the appeal is heard and the judgment delivered thereafter the judgement can be said to be a judgment of affirmance. Where a party applies to the Court to exercise its powers under Article 226 or 227 of the Constitution it cannot be said that the party is exercising any right of appeal conferred on him by any statute nor is the High Court exercising any power of appeal. Whatever might be the position even in respect of petitions under Article 226 or 227 of the Constitution where the Court goes , into the merits of the question, it cannot be doubted that where it dismisses such a petition in limine it simply refuses to exercise its powers under Article 226 or 227. Such an order cannot be said to be an order passed on appeal or as affirming the decision of the Court immediately below.

8. In this connection it may be noticed that under Section 109 of the Code of Civil Procedure appeals lie to the Supreme Court from any judgment, decree or final order of a High Court where it is passed on appeal. A proceeding under Article 226 or 227 of the Constitution is not an appeal. It is true that the right conferred by Article 133 of the Constitution cannot in any way be curtailed by the

provisions of the Code of Civil Procedure and Article 133 does not speak of a judgment, decree or final order passed on appeal by the High Court. All the earlier decisions of the various Courts referred to above are based on the interpretation of Sections 109 and 110 of the Code of Civil Procedure. An order of a High Court in a petition under Article 226 or 227 would be an order in a civil proceeding of a High Court and so fall under Article 133. Where a High Court refuses to entertain such a proceeding the same considerations were applied in the earlier cases where an appeal was not judicially considered should be held applicable also on principle.

9. We are therefore of opinion that an order in a petition under Article 226 or 227 dismissed in limine is not a final order in a civil proceeding for the purpose of Article 133 (1) (a) of the Constitution and is not therefore a judgment of affirmance under Article 133 (1) (a), and therefore the certificate granted by the High Court is competent.

10. As regards the appeal itself we must say that we have not been able to understand the order of the Deputy Director of Consolidation which was sought to be quashed by means of the writ petition. We were invited by the respondent to look into the orders of the Consolidation Officer and the Settlement Officer in order to understand the order of the Deputy Director of Consolidation. As the order sought to be quashed was that of the Deputy Director of Consolidation we do not feel called upon to do so. We are therefore in the dark as to the reasons which might have led the High Court to dismiss the appellant's petition in limine. We consider it necessary and proper therefore to set aside the order of the High Court and direct that the petition be dealt with by it and disposed of by a proper order. The High Court will hear the matter afresh and dispose it of by a reasoned order. There will no order as to costs.

Order accordingly.