ALLAHABAD HIGH COURT

Ganesh Prasad

Vs

Makhna

(Bind Bansi Prasad, J.)

12.05.1948

JUDGMENT

Bind Basni Prasad, J.

1. These are two appliby one Ganesh Prasad,on of Purshottam, arising out of Execution First Appeals Nos. 69 and 190 of 1944 for a certificate that the cases fulfil to the requirements of Sections 109 and 110, Civil P.C., and are fit for appeal to His Majesty in Council.

2. The following pedigree will be helpful in appreciating the facts of the case:

RAMESHWAR SAHU |

_____ | | | |

| Ram Das Ram Narain Deo Narain= Purshottam Raghunandan =Mt. Annapurna | Mt. Makhna |

widow J.D. Widow Laxmi Narain= D.H. Ganesh Pd. J.A. Mt. Sunpatti.

Mt. Lilawati appellant

3. Suit No. 51 of 1923 was filed in the Court of the Subordinate Judge at Benares for the partition of the joint Hindu family property by Ram Das, Purshottam and the applicant against Ram Narain, his son Laxmi Narain and Deo Narain. They all appear in the above pedigree. A preliminary decree for partition was passed on 28-4-1924. Deo Narain was lunatic at the time of the suit and his wife Mt. Makhna was his guardian ad litem. In the written statements filed by Ram Narain and Deo Narain no demand for partition as between themselves was made. Shortly after the preliminary decree, Deo Narain's guardian ad litem presented a petition to the Court praying that his share, viz., one-fourth, should be separated by the Amin. His three brothers objected, but the Civil Judge on 27-5-1924, granted her application and in the final decree for partition dated 16-8-1924, one-fourth share was allotted in severalty to Deo Narain. Prom this decree, Ram Narain and his son appealed on 27-7-1925, to this Court mainly on the ground that it was not in conformity with the preliminary decree of 23-4-1924. Before the appeal was heard, Deo Narain died on 5-8-1927, leaving him surviving his widow and a daughter. The widow having been brought on the record of the appeal in his stead, this Court on 19-7-1928, allowed

the appeal holding that after the preliminary decree the Civil Judge was not competent to entertain an application that Deo Narain's share should be separated. This Court observed as follows in the course of the judgment:

We leave Ram Narain and Mt. Makhna to have their rights adjusted by means of a separate suit if they so choose. In the meantime we are of opinion that the portion of the property which had not been allotted to the plaintiffs should be considered for the purposes of the present suit to be property held in common. What the legal effect of the application of Mt. Makhna upon the status of the family property or the constitution of the family qua Ram Narain and Deo Narain is has got to be determined in a subsequent suit if the parties are not agreed as to it or if one or the other party choose to institute a suit.

4. As a result of the final decree for partition a sum of Rs. 98,000 and odd was allowed to the defendants as compensation. According to the decree, Ram Narain and Deo Narain were entitled to this amount.

5. On 10-12-1934, Mt. Makhna made an application for execution to recover Rs. 98,000 and odd. Ganesh applicant and Mt. Annapurna, widow of Ram Das, had made an application under Section 4, Encumbered Estates Act, and so Mt. Makhna's execution proceeding was stayed. She then filed a claim before the Special Judge in the proceedings under the Encumbered Estates Act. A creditor filed an objection to her claim alleging that the amount was not a "debt" as defined under that Act. On 8-3-1943, Mt. Makhna's claim was rejected and the creditor's objection was upheld. The Special Judge evidently relied upon a Full Bench decision of this Court Shiva Prasad Gupta v. Gokulchand 26 A.I.R. 1939 All. 97. About a month after this decision, Ram Narain, one of the defendants, certified the full satisfaction of the decree before the Court on 10-4-1943. On 5-5-1943, the Court recorded it behind Mt. Makhna's back. On 10-5-1943, Mt. Makhna applied for the revival of her application, dated 10-12-1(934. The judgment-debtors filed an objection contending (1) that the decree was not drawn up on the requisite stamp, (2) that Deo Narain being a lunatic was not entitled to a share at partition and hence Mt. Makhna had no right to execute the decree and (3) that in view of the proceedings before the Special Judge the decree could not be executed. On 24-11-1943, learned Additional Civil Judge rejected all the objections excepting one, viz., that the decree was not on the required stamp and that there was a deficiency of Rs. 945-10-0 in stamp. Mt. Makhna was given an opportunity to make good the deficiency. On 14-12-1943, she made good the deficiency.

6. The judgment-debtors then filed another objection contending that the execution application was barred by time and that the Additional Civil Judge could not receive the deficiency in stamp. This objection was also dismissed by the learned Additional Civil Judge on 16-21944. Execution First Appeal No. 69 of 1944 was filed against the order, dated 24-11-1943, and Execution First Appeal No. 190 of 1944 was filed against the order, dated 16-2-1944. The two appeals came up for hearing before this Court on 14-11-1945, but they were dismissed for want of prosecution.

Applications for the restoration were made, but they too were dismissed on 8-5-1946. These two applications for certificate for appeal to the Privy Council were then made on 22-7-1946, against the two orders of this Court, dated 14-11-1945 dismissing the two execution first appeals for default.

7. Learned Counsel for the respondent con-tends that for the following three reasons the certificate cannot be granted to the applicant:

(1) There has been no "final order" within the meaning of Section 109(a), Civil P.C.

(2) The orders in question passed by this Court do not "affirm" the decision of the trial Court.

(3) The orders in question do not involve any "substantial question of law" within the meaning of Section 110, Civil P.C.

8. In *Beni Rai v. Ram Lakhan Rai*[1] it was held that an order of the High Court dismissing an appeal for want of prosecution -the appellants not having supplied their counsel with materials upon which to argue the appeal when it was called on for hearing - was an order affirming the decision of the Court immediately below. A similar view was taken in *Ram Karan v. Madhukar Prasad*[2] Learned Counsel for the respondent relies upon *Jagdish Kumaar Singh v. Harikishan Das*[3] in which it was held that an order dismissing an appeal for non-prosecution is not a final order passed on appeal within the meaning of Section 109. In the face of the two decisions of this Court referred to above, I see no good reason to follow the Oudh view. I hold that the orders of this Court, dated 14th November 1945, dismissing the appeals for default are final orders passed on appeal within the meaning of Section 109(a), Civil P.C. Those orders had the effect of terminating the two appeals.

9. Coming to the second point, learned Counsel for the respondent contends that the word "affirm" connotes the idea of the application of mind by this Court in upholding the decision of the trial Court. It is argued that when the two appeals were dismissed for default this Court did not apply its mind in upholding the decision of the trial Court on merits. Further, it is urged that the intention of the law is that the Privy Council should have before it the views of this Court on the merits of the appeals and a method whereby the appellant seeks to take an appeal to the Privy Council as if directly from the decision of the trial Court should not be countenanced. There is force in these contentions, but we have *Mahadeo Sahai v. Secy. of State*[4] In that case on the application of the respondent under Order 41, Rule 10, Civil P.C., this Court ordered the appellant to furnish security for the costs of the respondent, and on his failure to do so, the appeal was dismissed. It was held that the order of the High Court dismissing the appeal was an order affirming the decision of the Court below within the meaning of the last paragraph of Section 110, Civil P.C. The words in Section 110 are "affirms the decision of the Court" and not "affirms the decision of the Court on the merits." In the face of this authority, there is no escape from the

conclusion that the orders in question do affirm the decision of the trial Court.

10. Coming to the last point whether or not a, "substantial question of law" is involved in the proposed appeal to the Privy Council. Learned Counsel for the applicant contends that the pleas of limitation and jurisdiction raised by him do involve such questions. So far as the question of jurisdiction is concerned, it is a simple one. It is urged that the learned Additional Civil Judge had no jurisdiction to receive the stamp duty on the final decree for the partition so as to make it executable. No law in support of this contention has been cited. The decree was already there. Its executability depended upon the supply of the requisite stamp and it was certainly competent for the execution Court to receive the requisite stamp.

11. On the question of limitation, it is contended firstly that Mt. Makhna's application dated 10-12.1934, for the execution of the decree cannot endure to save limitation because the stamp duty on the decree had not been paid at that time. Reliance is placed upon *Gopimal v. Vidyawanti*[5] In that case Dalip Singh J. observed as follows:

There wag no lack of inherent jurisdiction in the executing Court to act upon the decree, but there was an illegality or error affecting its jurisdiction in proceeding to act upon a decree which the statutory bar provided by Section 35, Stamp Act, forbade it from doing. It is true, or might be true that once the proper stamp was supplied, the validity of the decree would date back to the date of the decree and therefore the execution application instead of being struck off might proceed as from that date. But this would not validate the proceedings that ha& taken place before the proper stamp was supplied. Those proceedings would still be without jurisdiction in the sense that the Court was barred by statute from proceeding in the way it did without a proper stamp and therefore the proceedings were without any legal justification. Din Mohammad J. did not subscribe to the underlined (here italicised) observations of Dalip Singh J. He observed as follows:
In the present case when execution proceedings were taken out, no decree was admitted in evidence-in fact none was produced-and consequently it cannot be urged in any manner that the Court while making an order in respect of certain payments or issuing a commission had admitted the decree in evidence. All that can be said is that it had in a way acted upon it, but inasmuch as Section 36 does not contain the words 'acted upon', a subsequent objection on the ground that the decree could not be acted upon is not barred. It is a fundamental rule of the interpretation of statutes that words which do not exist there cannot be read into them and especially words which bear a different meaning from the words used in the statute itself cannot at all be imported, under any canon of law." Sale J. did not add any note of his own but agreed with the answers proposed.

12. I am of opinion that when by the supply of the requisite stamp the validity of the decree dates back to the dale of the decree, the validity of the execution proceedings under that decree taken prior to the supply of the requisite stamp can hardly be questioned. The payment of the stamp

duty in the present case validated not only the decree, but also the proceedings taken thereunder. This view hardly admits of any argument.

13. There is another aspect of the matter. If the decree became executable only after the supply of the requisite stamp on 14-12-1943, there is hardly a question of limitation because limitation would then run from 14-12-1943. It is inconsistent for the applicant to contend on the one hand that for the purposes of limitation of the decree the decree should be deemed to bear the date of 16-8-1924, when the final decree for partition was passed, whereas for the purposes of limitation for execution application, 10-12-1934, when Mt. Makhna applied for the execution of the decree should be ignored.

14. Secondly, it is contended that the view of this Court in *Shiva Prasad Gupta v. [7]Gokulchand* was set aside by the Privy Council in *Jyoti Bhushan v. Shiva Prasad*[8] in which it was held that the amount awarded to a member of a Hindu family in a partition proceeding as compensation for equalising the values of the allotted shares is a "debt" within the meaning of the term as defined by Section 2, Encumbered Estates Act and so the stay of the execution in 1936 was wrong and the period spent by Mt. Makhna in her attempt to the recognition of her claim in the proceedings under the Encumbered Estates Act, should not be excluded. It is hardly open to Ganesh, the applicant, to raise this plea. It was at his instance that the execution proceedings initiated by Mt. Makhna in 1934 were stayed. The decision of the Special Judge rejecting Mt. Makhna's claim was based on a Full Bench authority of this Court : *Shiva Prasad Gupta v. Gokulchand 26 A.I.R. 1939 All. 97(SUPRA).* The decision is res judicata and cannot lose its force by reason of the subsequent ruling of the Privy Council in Jyoti Bhushan v. Shiva Prasad 30 A.I.R. 1943 P.C. 205(Supra). see no force in this contention also.

15. In my opinion no substantial question of law arises in these two cases. The litigation has been going on for about a quarter of a century and Mt. Makhna has not been able to recover any amount. Ram Narain has evidently gone over to the side of the applicant and despite the fact that the decree was in favour of Deo Narain and Ram Narain both, he alone certified the satisfaction of the entire sum of Rs. 98,000 and odd.

16. I would, therefore, dismiss both the applications with costs. It may be noted that by virtue of the passing of the Federal Court (Enlargement of Jurisdiction) Act, 1947, if the certificate were granted, it would be for appeal to the Federal Court and not to the Privy Council now.

Wali Ullah, J.

17. I agree with the conclusions arrived at by my learned brother, Bind Basni Prasad J. The facts of these cases have been set out in the judgment of my learned brother and it is unnecessary to detail them here. From the arguments addressed to us by learned Counsel three questions emerge for our decision:

(1) Whether the orders sought to be challenged in the appeals were "final orders passed on appeal" within the meaning of that expression in Section 109(a), Civil P.C.

(2) Whether the orders in question "affirmed" the decision of the Court below, and (3) Whether the orders in question involved a substantial question of law within the meaning of that expression in Section 110 of the Code.

18. As regards point No. 1, it is well settled that every decree or final order passed by a High Court in the exercise of its appellate jurisdiction is not necessarily "a decree or final order passed on appeal" e.g. an order passed by a High Court rejecting an application to amend a decree is not an order "passed on appeal" and is consequently not appelable under Section 109, Civil P.C. Similarly, an order of a High Court refusing to admit an appeal after the period of limitation prescribed therefor is not "an order passed on appeal." Reference may be made to the cases in *Sundar Koer v. Chandiswar Prosad*[8] *Karsondas Dharamsey v. Gangabai*[9] *and Jai Pratap Narain Singh v. Rabi Pratap Narain Singh*[10] In the last mentioned case the High Court dismissed a first appeal for default as the counsel stated that he had no instructions. An application was made for restoration of the appeal, but it was dismissed. Thereafter an application for leave to appeal to Privy Council against the order dismissing the application for restoration was made. It was held by two learned Judges of this Court that the order dismissing the application-for restoration was no doubt passed by the High Court in its appellate jurisdiction but it was not a "final order passed on appeal" within the meaning of Section 109(a), Civil P.C. At page 256 the learned Judges explained the meaning of the expression thus: By the expression 'final order passed on appeal' we understand an order which was made as the result of an appeal filed before the High Court. (The italics are mine). "Final order" within the meaning of Section 109, Civil P.C., as explained by their Lordships of the Privy Council in *Ramchand Manjimul v. Goverdhandas Vishindas*[11] means an order which finally disposes of the rights of the parties. That was a case in which a stay order under Section 19, Arbitration Act (9 [IX.] of 1899) passed by the trial Court was reversed on appeal with the result that the suits went back for trial in the ordinary way. The appellate Court being of opinion that this order was a final order within the meaning of Section 109(a), Civil P.C. gave a certificate under Section 110 of the Code. At the hearing before the Board, on a preliminary objection raised by the respondent that the order under appeal was not in fact final, it was held by the Privy Council that the order under appeal did not finally dispose of the rights of the parties, but left them to be determined by the Courts in the ordinary way. It was, therefore, not a final order within the meaning of Section 109, Civil P.C. Again in Abdul Rahman v. D.K. Cassim and Sons 20 A.I.R. 1933 P.C. 58, their Lordships of the Privy Council, with reference to Section 109(a), Civil P.C. affirmed the view expressed by the Board in *Ramchand Manjimul v. Goverdhandas Vishindas 7 A.I.R. 1920 P.C. 86(Supra)* and held: The test of finality is whether the order finally disposes of the rights of the parties. Where the 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.... 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. (The italics are mine).
In this case it was urged that the judgment by the Board in *Ramchand Manjimul v. Goverdhandas Vishindas 7 A.I.R. 1920 P.C. 86(Supra)* was based on some English cases decided by the Court of Appeal and that there was some divergence in the views expressed in those cases. Their Lordships, however, pointed out that the rule deduced in that case for guidance under the Indian Act was clear and unambiguous and must be decisive in all cases where the question 8 whether an order is appealable to His Majesty is Council under the provisions of the section in question.

19. The question, therefore, is whether the orders of this Court dismissing the appeals for default of prosecution can be characterised as "final orders passed on appeal" within the meaning of Section 109(a), Civil P.C.

20. In *Mahadeo Sahai v. Secy. of State*[12] a Bench of two learned Judges of this Court held:

The words 'final order passed on appeal' in Section 109(a) should be construed broadly so as to include an order directing the dismissal of an appeal consequent upon the plaintiff's failure to furnish security for the costs of the respondent. This was a case where on the application of the respondent under Order 41, Rule 10, Civil P.C. the High Court ordered the appellant to furnish security for the costs of the respondent. On the appellant's failure to do so the appeal was dismissed. It was held that the order of the High Court dismissing the appeal was an order affirming the decision of the Court below within the meaning of the last paragraph of Section 110, Civil P.C. It was pointed out that the words in Section 110, Civil P.C., are "affirms the decision of the Court" and not "affirms the decision of the Court on merits." The learned Judges declined to follow the decision of the late Court of the Judicial Commissioners of Oudh in Radha Kishen v. Jamna Prasad ('10) 13 O.C. 59, where a contrary view was upheld. At p. 256 the learned Judges observed: This decision (of the Judicial Commissioner's Court), in our opinion, hinges upon a very narrow and technical construction of Sections 109 and 110. Where an order of this Court dismisses an appeal it has the effect of confirming the decision of the trial Court. It should be noticed that the words in Section 110 are 'affirms the decision of the Court' and not 'affirms the decision of the Court on the merits. Learned Counsel for the respondents has endeavoured to criticise the soundness of the decision of this Court in *Mahadeo Sahai v. Secy. of State 19 A.I.R. 1932 All. 312(Supra)* and has in this connection placed strong reliance upon the case in Jagdish Kumaar Singh v. Harikishan Das ('42) 29 A.I.R. Oudh 362(Suupra) decided by two learned Judges of the Oudh Chief Court, where it was held:

The words 'final order passed on appeal' are not equivalent to 'final order passed in the exercise of final appellate jurisdiction.' The words are confined to order disposing of an appeal at the hearing. Therefore an order dismissing an appeal for non-prosecution is not a final order passed on appeal within the meaning of Section 109(a). This view, however, was based principally on the view taken by Chamier J.C. and Evans A.J.C., in *Radha Kishen v. Jamna Prasad*[13] Other

cases referred to in that case are, in my judgment, clearly distinguishable. Furthermore, the cage in *Abdul Majid v. Jawahir Lal 1 A.I.R. 1914 P.C. 66(Supra),* has been reviewed by their Lordships of the Privy Council in *Abdullah Asghar Ali v. Ganesh Das*[14] where, in effect, it was held that an order dismissing an appeal on the ground that it had abated must be considered to be a final order of the appellate Court. Further, it did deal judicially with the matters before it. In *Radha Kishen v. Jamna Prasad ('10) 13 O.C. 59(Supra)* it was held that the order rejecting the appeal for failure on the part of the appellant to furnish security for costs under Order 41, Rule 10, Civil P.C., was not one affirming the decision of the Court below within the meaning of the last paragraph of Section 110, Civil P.C. It was further held that the order in question was not "a final order passed on appeal" within the meaning of Section 109, Civil P.C. It seems to me that the ratio decidendi of this case appears from what the Judicial Commissioners say at p. 61: The words 'final order passed on appeal' have always been confined to orders disposing of an appeal at the hearing. In the present case there was no hearing of the appeal. The Court declined to hear it because the appellant failed to furnish security for the costs of his opponents. An order rejecting an appeal under Rule 10 of Order 41 seems to stand on the same footing as an order rejecting an appeal under Rule 3 or declining to admit a time barred appeal. With respect, I dissent from this view. The expression "order passed on appeal" is not, in my judgment, confined to an order passed at the hearing of the appeal as is the view held in Oudh. Moreover there is the view taken by two learned Judges of this Court in Mahadeo Sahai v. Secy. of State 19 A.I.R. 1932 All. 312 which runs counter to the opinion which has prevailed in Oudh. The orders in question which are before us had undoubtedly the effect of terminating the appeals pending in this Court. They were, therefore, "final" in accordance with the test laid down by their Lordships of the Privy Council in Abdul Rahman v. D.K. Cassim and Sons 20 A.I.R. 1933 P.C. 58(Supra). I must, therefore, hold that the orders of this Court dated 14-11-1945, dismissing the appeals for default are "final orders passed on appeal" within the meaning of Section 109(a), Civil P.C.

21. On the second question viz., whether the orders in question "affirmed" the decision of the Court below, it is to be noted that in Beni Rai v. Ram Lakhan Rai ('98) 20 All. 367, decided by two learned Judges of this Court, Knox A.C.J. and Banerji J., it was held that:

An order of the High Court dismissing an appeal for want of prosecution the appellants not having supplied their counsel with materials upon which to argue the appeal when it was called on for hearing was an order against the decision of the Court immediately below, within the meaning of Section 110, Civil P.C. In this case the order of the High Court ran as follows: This appeal is not supported. It is, therefore, dismissed. In the petition for leave to appeal to His Majesty in Council, it was urged that the order appealed from did not affirm the decision of the Court immediately below. At p. 369 the learned Judges observed: As regards the case before us the result of the appeal to us is that the findings of the Court below and the reasons on which they are based stand affirmed. There was no further finding of any kind by this Court. Under these circumstances. we hold that the order of this Court did affirm the order of the Court immediately below. The result of holding otherwise would be that an appellant, who, with the object of saving

himself the expense of having the necessary papers translated for this Court, neglected to support his appeal before us, might claim leave to appeal direct to Her Majesty in Council by refraining from obtaining any determination by this Court upon the pleas raised. The appellants in fact want leave to ask Her Majesty in Council to do that which this Court might have done, but which the appellants by their own laches put it out of the power of the Court to do. In my judgment, the last words of this quotation contain very weighty observations.

22. I may next refer to the case in Tassaduq Rasul Khan v. Kashi Ram ('03) 25 All. 109, in which the Privy Council have held that the word 'decision in the last clause of Section 110 means merely the decision of the suit, and cannot, like the word 'judgment' be defined as meaning a statement of the grounds on which the Court proceeds to make the decree. It follows, therefore, that in order to affirm the decision of a Court all that is required is that the appellate Court should affirm the decree or order of the Court below. Where, therefore, the order of the appellate Court is 'the appeal is dismissed,' it must be held that the decision of the Court below is affirmed within the meaning of the last paragraph of Section 110, Civil P.C.

23. Reference may next be made to the case in *Ram Karan v. Madhukar Prasad 2 A.I.R. 1915 All. 2(supra),* where following the decision in *Beni Rai v. Ram Lakhan Rai ('98) 20 All. 367(Supra),* two learned Judges of this Court, Tudball and Rafiq JJ. held: An order dismissing an appeal for default of prosecution is an order affirming the decree of the Court below and the case cannot be certified to be a fit one for appeal to the Privy Council unless some substantial question of law is involved. Lastly, reference may be made to the case in *Mahadeo Sahai v. Secy. of State 19 A.I.R. 1932 All. 312(Supra),* which I have already referred to above. It was held in that case that the dismissal of an appeal by the High Court on the failure of the appellant to furnish security for the costs of the respondent was an order 'affirming the decision of the Count below' within the meaning of the last paragraph of Section 110, Civil P.C.

24. Again, I may refer to two cases decided by the Lahore High Court. In Mt. *Satto v. Amar Singh* [15]two learned Judges of the Lahore High Court, Scott-Smith and Wilberforce, JJ. held: A decree of the High Court dismissing an appeal on account of insufficiency of court-fee is one affirming the decree of the first Court within the meaning of Section 110, Civil P.C. In *Chunni Lal Tulsi Ram v. Amin Chand ('33) 20 A.I.R. 1933 Lah. 690(supra),* decided by Addison and Agha Haider, JJ. during the pendency of appeal in the High Court, one of the respondents died. An application to bring on record the legal representatives of the deceased respondent was objected to and disallowed. The whole appeal was dismissed as it was held that the decree was an indivisible one and the appeal had abated. In an application for leave to appeal to the Privy Council it was held that:
The order of the High Court was a final order 'passed on appeal within the meaning of Section 109(a) dealing judicially with the matter before the Court, and that it was a final order affirming the decision of the Court below.

25. On this question also the learned Counsel for the respondents has placed reliance upon the case in *Radha Kishen v. Jamna Prasad ('10) 13 O.C. 59(Supra)* and the case in *Jagdish Kumaar Singh v. Harikishan Das ('42) 29 A.I.R. Oudh 362(Supra).* The ease in *Jagdish Kumaar Singh v. Harikishan Das ('42) 29 A.I.R. Oudh 362(Supra),* is really against the contention of the learned Counsel for the respondents on this point, for it was held at p. 365: Where an appeal is dismissed for non-prosecution the order of dismissal (assuming that it is an order passed on appeal) must be taken to be one affirming the decision of the Court below within the meaning of Section 110, Civil P.C. But, as already pointed out above, the view taken in these cases has not been accepted by this Court. In my judgment, therefore, it must I be held that the orders passed by this Court dismissing the appeals did 'affirm the decision' of the Court of first instance.

26. With regard to the third and last question, i.e., whether the orders passed by this Court involved a substantial question of law within the meaning of the last paragraph of Section 110, Civil P.C., learned Counsel for the applicant has contended that the pleas of limitation and jurisdiction raised by him in the appeals do involve substantial questions of law. It must be observed at once, as already stated, that the two appeals were dismissed by the High Court and it is thus the orders passed by the High Court which would be appealed against, if leave is granted and not the orders passed by the Court of first instance. The only question involved in the proposed appeals would, therefore, be whether or not this Court was justified, under the circumstances of the cases, in dismissing the appeals for want of prosecution. This view of mine finds support in the principle affirmed by two learned Judges of this Court in Mahomed Abdul Ghafur Khan v. Secy. of State 1 A.I.R. 1914 All. 54. In that case it was held that an order dismissing an appeal for failure to furnish security for costs under Order 41, Rule 10, Civil P.C., did not involve a substantial question of law inasmuch as the only relevant question was whether or not the Court was justified, under the circumstances of the case, in ordering the appellant to give security for costs.

27. Similarly, in Ram Karan v. Madhukar Prasad 2 A.I.R. 1915 All. 27, which has already been referred to, where also the appeal had been dismissed for default of prosecution, Tudball and Rafiq JJ. in effect, though not in so many words, upheld this principle.

28. Next I may refer to the case in *Mariam Begum v. Banku Behary ('21) 8 A.I.R. 1921 Cal. 94(Supra),* decided by Sanderson C.J. and Mookerjee J. The learned Judges held that where the High Court dismisses' an appeal on the ground of laches and certain irregularities in filing the appeal on the part of the appellant, the only question for the Judicial Committee would be whether the High Court was right in dismissing the appeal in the exercise of its discretion. There would thus be no substantial question of law involved in the appeal.

29. Similarly, in *Mt. Satto v. Amar Singh ('19) 6 A.I.R. 1919 Lah. 65(Supra)* already referred to above, it was held by two learned Judges of the Lahore High Court that in a ease where the High Court refuses to show any indulgence under Section 149, Civil P.C., and to allow the deficiency

in court-fee to be made good and dismisses the appeal on account of insufficiency of court-fee, no question of law within the meaning of Section 110, Civil P.C., is involved in the proposed appeal to their Lordships of the Privy Council.

30. Again, in Chunni Lal *Tulsi Ram v. Amin Chand ('33) 20 A.I.R. 1933 Lah. 690(Supra)* decided by two learned Judges of the Lahore High Court, it was held that there was no substantial question of law involved in the appeal and as such leave should not be granted. In this case the appeal was dismissed on account of the failure of the appellant to apply in time for bringing the legal representatives of a deceased respondent on the record. The whole appeal was held to be an indivisible one and thus abated. On the question whether the proposed appeal to the Privy Council involved a substantial question of law it was held at p. 691 by Addison J. (with whom Agha Haider J., agreed):

It seems to me impossible to hold that there is any substantial question of law involved in this case. The application to bring the legal representatives of the deceased...was obviously belated and there was no sufficient cause to allow them to be brought on the record.

31. Once again, I may refer to the case in *Sagar Chand v. Dewat Ram* [16]*(Lah.)* decided by Sir Shadi Lal C.J. and Moti Sagar J., where it was held: It is entirely discretionary with Court to grant or refuse time for making up a deficiency in court-fee, and the question whether the Court should have exercised its discretionary power under given circumstances cannot be treated as a substantial question of law.

32. Reference may also be made to the case in *Rajendra Kishore v. Rajkumar Kamakhya Narain Singh*[17] decided by two learned Judges of the Patna High Court, Dawson-Miller C.J. and Mullick J. In this case the High Court dismissed an appeal for default ill furnishing the list of papers to be printed in the paper book. Against the order of dismissal an application was made seeking leave to appeal to His Majesty in Council. At the hearing of the application it was urged that the questions of law which were determined in the Court of first instance should be considered to determine whether there was a substantial question of law involved in the appeal to the Privy Council. The learned Judges observed at p. 84: It is quite obvious that so far as the present appeal is concerned, no question of the merits of the case at all can arise until the Privy Council has set aside the order which was passed on 4-2-1920, and so far as this appeal is concerned the only question which can go for determination to the Privy Council is the question whether or not we were justified on that occasion in passing the order which we did dismissing the appeal for default. It is, therefore, in my opinion, idle for the appellant to contend that there is some question of law arising on the merits of the case. Those merits do not become the subject of appeal to His Majesty in Council as already said, what will have to be determined is the question whether or not our order was justified in the circumstances.

33. Lastly, I may refer to *Jagdish Kumaar Singh v. Harikishan Das ('42) 29 A.I.R. Oudh*

362(Supra), already discussed by me above. Following the decision of the Patna High Court in *Rajendra Kishore v. Rajkumar Kamakhya Narain Singh ('21) 8 A.I.R. Pat. 83(Supra),* it was held that for purposes of the application for leave to appeal the High Court could not consider the questions of law raised before the Court of first instance; that the only questions of law which the Court had to consider were those involved in the appeal before the Privy Council. Again, following the decisions in *Mariam Begum v. Banku Behary ('21) 8 A.I.R. 1921 Cal. 94*(Supra)and of the Lahore High Court in Sagar *Chand v. Dewat Ram ('21) 63 I.C. 222 (Lah.)(Supra),* the learned Judges observed at p. 366: Where the only question is whether the discretion vested in a Court has been properly exercised, there is no substantial question of law. Therefore, where the only question before their Lordships of the Privy Council if an appeal is preferred will be whether the High Court was right in dismissing an appeal for want of prosecution, no substantial question of law is involved.

34. From what has gone before it follows that no substantial question of law arises in these two cases. The result is that I would dismiss both the applications with costs.

Cases Referred.

1('98) 20 All. 367
22 A.I.R. 1915 All. 27
3('42) 29 A.I.R. Oudh 362
419 A.I.R. 1932 All. 312
5('42) 29 A.I.R. 1942 Lah. 260
626 A.I.R. 1939 All. 97
730 A.I.R. 1943 P.C. 205
8('03) 30 Cal. 679
9('08) 32 Bom. 108
1020 A.I.R. 1938 All. 453
117 A.I.R. 1920 P.C. 86
1219 A.I.R. 1932 All. 312
13('10) 13 O.C. 59
14(33) 20 A.I.R. 1933 P.C. 68
15('19) 6 A.I.R. 1919 Lah. 65
16('21) 63 I.C. 222 (Loh)
17('21) 8 A.I.R. Pat. 83