CALCUTTA HIGH COURT

Secretary of State

Vs

British India Steam Navigation

(Mookerjee and Coxe, JJ.)

04.01.1911

JUDGMENT

Mookerjee, J.

1. This is an application, for leave to appeal to His Majesty in Council from the decision of this Court is the case of *British India Steam Navigation Company v. Secretary of State for India in Council*[1] In that case, an interlocutory order of the Land Acquisition Judge was challenged on behalf of both the claimants and the Secretary of State. On behalf of the claimants, it was contended, first, chat the Land Acquisition Judge had no jurisdiction to review, at the instance of the Secretary of State, the award of the Collector in so far as it was not challenged by the claimants, to re-examine items not controverted by them, and to set aside the award partially on the ground that it was illegal and void, and, secondly, that the Land Acquisition Judge had no jurisdiction to make an order for discovery, and, at any rate, if he had such jurisdiction, fie had exercised it improperly in the case before him. On behalf of the Secretary of State, it was contended, first, that the Land Acquisition Judge had jurisdiction, which he had improperly refused to exercise, to review the award of the Collector, to cancel or modify it, or to remit the proceedings to him for reconsideration and, secondly, that if the Land Acquisition Judge did not possess such jurisdiction, this Court had, at any rate, jurisdiction to take action of the same description, and that the circumstances of the case rendered the interference of this Court essential in the interest of justice. In so far as the objections urged by the claimants were concerned, they were sustained by this Court, while those taken on behalf of the Secretary of State were overruled. The result was that the Rule obtained by the Secretary of State was discharged, whilst that obtained by the claimants was made absolute. On behalf of the Secretary of State, the application now before us has been presented for leave to appeal against the order of this Court, only in so far as thereby the Rule obtained by the claimants was made absolute. In so far as the order discharged the Rule obtained by the Secretary of State himself, its propriety has not been assailed. The application, as amended before us, purports to have been made both under Section 110 read with Clause (a) of Section 109 of the Civil Procedure Code of 1908 and Section 39 of the Letters Patent of the 2§th December, 1865. The application has been opposed by the

claimants on the ground that the order in question is neither an order passed or made on appeal, nor a final order, within the meaning of Section 109 of the Code or Section 39 of the Letters Patent. Two questions, therefore, arise for consideration, namely first, whether an order, passed by this Court in the exercise of its revisional jurisdiction under Section 115 of the Code of 1908 or of its power of superintendence under Section 15 of the High Courts Act of 1361, may be deemed to be an order made or passed on appeal; and, secondly, whether the order in this case, in so far as it reversed the order of the Court below for discovery and decided that it was beyond the competency of the Land Acquisition Judge to review certain portion of the award of the Collector, is a final order within the meaning of Section 109 of the Code of 1908 and Section 39 of the Letters Patent.

2. In so far as the first of these questions is concerned, it has been contended on behalf of the claimants that an order passed by this Court in the exercise of its revisional jurisdiction, under Section 115 of the Code or of its powers of superintendence under Section 15 of the Charter Act, cannot rightly be regarded as passed on appeal. In support of this view, reliance has been placed upon the arrangement of the provisions of the Code of 1908 which distinguish between appellate and revisional jurisdiction; the principles, which regulate the former, are contained in Part VII, embracing Sections 96 to 112, whereas the principles which underlie the latter are enunciated in Section 115, contained in Part VIII. In answer to this argument, it has been contended on behalf of the Secretary of State that even if it be conceded that the arrangement of the Code lends some colour of apparent support to the contention of the claimants, the position becomes materially different when the provisions of Section 39 of the Letters Patent are examined. It has been argued, with considerable force, that the Letters Patent recognise an original (ordinary or extraordinary) jurisdiction and an appellate jurisdiction and that no basis for a suggestion as to the existence of a revisional jurisdiction as distinct from the appellate jurisdiction can be traced therein. After careful consideration of the arguments which have been addressed to us and of the judicial decisions to which we shall presently refer, we have arrived at the conclusion that the contention of the claimants, in so far as this particular point is concerned, cannot be sustained. Sections 11 to 18 of the Letters Patent treat of the Civil Jurisdiction of the High Court including ordinary original, extraordinary original, and appellate jurisdiction, as well from original jurisdiction as from Courts in the Provinces. No reference need be made for our present, purposes to Sections 32 to 35, which treat of special jurisdiction in admiralty, testamentary, and matrimonial matters. It is sufficient to point out that Section 16 makes this Court a Court of Appeal from all the Civil Courts of the Bengal Division of the Presidency of Fort William and from all other Courts subject to its superintendence, and authorises the Court to exercise appellate jurisdiction in such cases as are subject to appeal by virtue of any laws or regulations in force. It is reasonably plain, from an examination of these provisions, that a revisional jurisdiction is not contemplated apart from the appellate jurisdiction. Consequently, if we were to uphold the contention of the claimants that the expression an order made on appeal" in Section 39 does not include an order made in the exercise of revisional jurisdiction or of the powers of superintendence vested in the Court, we might be driven to the position that the Court cannot exercise any revisional jurisdiction at all as such jurisdiction is not expressly mentioned in the

Letters Patent. An interpretation, which might lead to an inference of this description, ought not, if possible, to be accepted as well-founded. The question, therefore, arises whether the revisional jurisdiction is essentially distinct from the appellate jurisdiction, or whether it was intended by the Letters Patent to be included in the appellate jurisdiction. Now the term appeal" is defined in the Oxford Dictionary, Volume I, page 398, as the transference of a case from an inferior to a higher Court or tribunal in the hope of reversing or modifying the decision of the former. In the Law Dictionary by Sweet, the term "appeal" is defined as a proceeding taken to rectify an erroneous decision of a Court by submitting the question to a higher Court or Court of appeal, and it is added that the term, therefore includes, in addition to the proceedings specifically so called, the cases stated for the opinion of the Queen's Bench Division and the Court of Crown Cases Reserved, and proceedings in error. In the Law Dictionary by Bouvier, an appeal is defined as the removal of a cause from a Court of inferior to one of superior jurisdiction for the purpose of obtaining a review and re-trial, and it is explained that in its technical: sense it differs from a writ of error in this, that it subjects both the law and the facts to a review and retrial, while the latter is a Common Law process which removes matter of law only for re-examination; it is added, however, that the term "appeal" is used in a comprehensive sense so as to include both what is described technically as an appeal as also the Common Law writ of error; in other words, as put by Lord Westbury in *Attorney-General v. Sillem*[2] the right of appeal is the right of entering a superior Court and invoking its aid and interposition to redress the error of the Court below; or as Mr. Justice Subramania Aiyar observes in Chappan v. Moidin 22 M. 68 at p. 80, the two things which are required to constitute appellate jurisdiction, are the existence of the relation of superior and inferior Court and the power, on the part of the former, to review decisions of the latter. Both these elements are obviously essential, for instance an application before a Judge to discharge or vary an order made by himself is not an appeal but a re-hearing, because the relationship of superior and inferior Court is absent; again, the order of the inferior Court may not be at all liable to be challenged before a superior tribunal; the exercise of the appellate jurisdiction in such a case is impossible. The matter is put lucidly and concisely in the Commentary on American Jurisprudence by Andrews, Volume II, page 1510, where it is pointed out that appellate procedure embraces two distinct modes of its exercise, namely, first, the record of the inferior tribunal may be brought to the superior tribunal and the decision reviewed, affirmed, reversed or modified; or, secondly, the superior tribunal may check the exercise or usurpation of power in inferior tribunals exercising judicial or quasi judicial power, or direct the mode in which they shall proceed without controlling the manner of doing that which is the result of judicial deliberation. Substantially to the same effect is the exposition given by Story in his work on the Constitution, (Volume II, Sections 1760 to 1776), where that learned Jurist points out the distinction between the original and the appellate jurisdiction of a Court, and observes that the characteristic of an appeal is the revision of a judicial proceeding of an inferior Court, so that the mode in which that power is] exercised is wholly immaterial. We are, therefore, unable to accept as well-founded the contention of the claimants that a narrow interpretation should be placed upon the expression made on appeal" in Section 39 of the Letters Patent, and its application excluded from all cases in which the order has been made in the exercise of

revisional jurisdiction or the power of superintendence vested in the Court. The view we take, is supported by the decision of this Court in *Girdharee Singh v. Hurdoy Narain*[3] In that case, an application was made for leave to appeal to Her Majesty in Council against the decision of this Court in *Hurdeo Narain v. Girdharee Singh*[4] where an order for reversal of a sale was set aside by this Court in the exercise of its revisional jurisdiction and of its power of superintendence under the Charter Act. It was argued {that the order of this Court was not passed on appeal; hut this contention was overruled by Sir Richard Couch, C.J., and Jackson and Pontifex, JJ. The principle of that decision applies with peculiar force to the circumstances of the present case. Here the parties invited the Court below to decide a preliminary question as to the scope of the enquiry before it, as also the question of the right of the Secretary of State to obtain an order for discovery in aid of an investigation of the matters in controversy. In ordinary:course, the trial would have proceeded on the merits on the basis of the decision of the Land Acquisition Judge on these preliminary points, and the question of the legality of such decision would have formed the subject of consideration by this Court in the course of any appeal that might be preferred at the instance of either party against the final decree. Both the parties, however, chose a different course. They invited this Court to consider the propriety of the order in so far as it affected the interest of each. Consequently, if we look at the essence of the matter, we find that the parties have obtained a decision from this Court upon these, points in advance as it were of the appeal against the final decree. The position is identical whenever this Court in the exercise of its revisional jurisdiction or power of superintendence, affirms, reverses or modifies an interlocutory order of a subordinate Court, the propriety of which in ordinary course would come up for consideration in an appeal against the final decree under Section 105 of the Code of 1908. Under such circumstances, the language of Section 39 of the Letters Patent, in our opinion, does not require to be unduly stretched to enable us to hold that the order, now sought to be impeached by way of appeal to His Majesty in Council, was made by this Court on appeal. But it has been contended that the decision of this Court in *Girdharee Singh v. Hurdoy Narain 21 W.R. 263(Supra)* is open to criticism, and that its authority has been shaken by subsequent decisions, amongst which reference has been made to *Sunder Koer v. Chandiswar Prasad*[5] It is worthy of note, however, that when the case of *Girdhari Singh v. Hardeo Narain*[6] came to be heard by their Lordships of the Judicial Committee no suggestion appears to have been made that leave had been granted by the High Court improperly or erroneously. On the other hand the case of Sunder Koer v. Chandishwar Prasad 30 C. 679 is clearly distinguishable It was there ruled that an older made by the High Court rejecting an application to amend a decree passed on appeal, was not an order made on appeal within the meaning of Section 39 of the Letters Patent. This view is substantially in accord with the decision of a Full Bench of this Court in the cases of *Soudamonee v. Mohatap Chand*[7] *and Enayet Hussain v. Rowshan Jahan*[8] where it was held that an order rejecting an application to review a judgement passed on appeal was not an order made on appeal within the meaning of Section 39 of the Letters Patent. This view may be defended on the ground that the order refusing an application for review, is an order made by the identical Court which passed the order assailed; in other words, the first element essential to constitute appellate jurisdiction, namely, the existence of the relations of superior and inferior Court is

absent. Consequently, we need not express any opinion upon the question raised by Sir Richard Couch, C.J. in Girdharee Singh v. Hardoy Narain 21 W.R. 263 as to the correctness of the earlier Fall Bench decisions, and this is the only point upon which Sir Francis Maclean, C.J., in *Sunder Koer v. Chandishwar Prasad*[9], expressed is dissent from the view indicate d by Sir Richard Couch. The case of *Karsan Das v. Ganga Bai*[10] which followed Sunder Koer v. Chandishwar Prasad 30 C. 679(Supra) is an authority merely for the proposition that an order refusing to admit an appeal after the period of limitation prescribed therefor, is not an order made on appeal; whether this view is defensible on principle and may be reconciled with the decision of the Judicial Committee in *Ram Narain v. Parmeswar Narain*[11] it is unnecessary to consider for our present purposes; possibly the actual decision in the case before the learned judges of the Bombay High Court may be supported on the ground that such an order is not a judgment at all as ruled in *Gobinda Lal Das v. Shiba Das Chatterjee*[12] We may also add that the case of Jabu Sakan Singh v. Gopal Chandra Neog 8 C.W.N. 296(Supra) is not inconsistent with the view we 'take, as the point in controversy there apparently was whether an order by this Court in the exercise of its revisional jurisdiction allowing a party to sue in forma pauperis was a final judgment within the meaning of Section 39 of the Letters Patent. So far as we are able togather from the judgment of Sir Francis Maclean, C.J., the essence of the objection was rather that the order was not a final judgment, than that it was made otherwise than an appeal. Upon a review then of the principles we have explained as also of the authorities to which reference has been made, we are not prepared to give effect to the contention of the claimants in the case before us that the order, against which leave is sought to appeal to His Majesty in Council, is not an order "made on appeal" within the meaning of Section 39 of the Letters Patent. The first objection 'taken by them must consequently be overruled.

3. In so far as the second question raised by the claimants is concerned, it has been argued on their behalf that the order passed by this Court is not a final order within the meaning of Section 109 of the Code of 1908 or Section 39 of the Letters Patent. In answer to this contention, it has been argued on behalf of the Secretary of State that the order is a final order, inasmuch as, so far as this Court is concerned, the decision of the points in controversy has become final, and cannot be re-opened when an appeal is preferred against the ultimate decree of the Land Acquisition Judge. In support of this view, reliance has been placed upon the case of *Sarat Moni Debi v. Bata Krishna Banerji* [13]Now it is obvious that whether a particular order is a final order for the purpose of the grant of leave to appeal to His Majesty in Council, must depend upon its nature and contents and its relation to the proceedings in which it lies been made. The order in the case before us, as has already been explained, deals with two questions raised in the Court below, namely, first, whether the Land Acquisition Judge had jurisdiction upon the reference obtained by the claimants to consider the validity of the award of the Collector in so far as it is not challenged on their behalf; and, secondly, whether the Land Acquisition Judge had made a proper order for discovery against the claimants. It is, in our opinion, clear beyond the possibility of dispute that in so far as the order sought to be impeached deals with the question of the propriety of the order for discovery it is, in no sense, a final order within the meaning of Section

39 of the Letters Patent or of Section 109 of the Code of 1908 To use the language of their Lordships of the Judicial Committee in Radha Kishen v. Collector of Jaunpur 28 I.A. 28 : 23 A. 220(supra), the order merely directs procedure and is consequently not a final order. The only point, therefore, which deserves serious consideration, is whether the order, in so far as it decides that certain portions of the award of the Land Acquisition Collector are not embraced within the scope of the investigation by the Special Judge, is a final order for the purposes of appeal to His Majesty in Council Now, the expression "final order" is, not defined either in the Letters Patent or in the Code, and it may be conceded that the judicial interpretation of the phrase is, by no means, free from difficulty. But the effect of the decisions on the subject, some of which may not be easy to harmonise, is stated in the case of Sarat Moni Debi v. Bata Krishna Banerji 10 C.L.J. 336 : 4 Ind. Cas. 459(Supra) where the earlier authorities are fully reviewed. The term "final order" denotes an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. If the order decides in effect finally the cardinal point in the suit, if it decides an issue which goes to the foundation of the suit, and therefore is an order which can never, while the decision stands, be questioned again in the suit, it is final within the meaning of section, notwithstanding that there may be subordinate enquiries to be made. Questions of considerable nicety may arise in the attempt to apply this exposition to a concrete instance, but the case before us is, in our opinion reasonably free from difficulty. The Question which was raised before the Special Judge as a preliminary matter for decision and which at the invitation of the parties has been determined by this Court, related to the precise scope of the enquiry before, the Land Acquisition Judge. There is no controversy that the Judge is entitled to investigate the propriety of the award of the Collector in so far as it is impeached by the claimants. The point of difference is whether he can at the instance of the Secretary of State include in this investigation the question of the propriety of that portion of the award with which the claimants are satisfied and for the examination of which they have not obtained a reference to the Court. We are not prepared to hold that a decision of this question is a decision of the cardinal point in the suit or of an issue which goes to the foundation of the suit. It is manifest that whatever view may be taken of the question in controversy between the parties, the reference before the Judge cannot come to a termination without an investigation of the matters which admittedly form a legitimate subject of enquiry. The suggestion, which was made at one stage on behalf of the Secretary of State, that the order is final because in so far as this Court is concerned the question decided by it cannot be re-examined upon the appeal against the final decree, is obviously untenable; if this wore the sole test of finality of an order, all orders interlocutory or otherwise, made by this Court, would be final. Whether the character of finality can be rightly claimed in respect of an order, must be determined with reference to the precise relation in which it stands to the proceedings before the Court. It may be conceded generally that a final order is one which determines the rights of the parties in the suit or proceeding or a distinct and definite branch of it, and reserves no further question or direction for future determination, except such as may be necessary to carry it into effect; but an order may be final though it does not determine the rights of the parties, if even without such determination it terminates the particular suit or proceeding. An interlocutory order, on the other hand, is generally one which does not dispose of the suit or proceeding but reserves

some further question or direction for future determination. As a general rule, an order cannot be rightly considered final which settles part only of several issues of law or fact; in other words, if the order decides a question the solution of which cannot, whatever view may be taken of it, terminate the proceeding before the Court, it cannot be appropriately called a final order. To take a concrete illustration, assume that a Court under Rule II of Order XIV of the Code of 1908 tries an issue of law first, and subsequently proceeds to deal with the issues of fact, it cannot reasonably be contended that the decision of the issue of law is an adjudication which conclusively determines the right of the parties with regard to any of the matters in controversy within the meaning of Section 2, Clause 2 of the Code, so as to attract the operation of Section 97; in other words, such a decision of the issue of law in a pending suit is not a conclusive determination or final order see Behari Lal Pundit v. Kadar Nath Mullik 18 C. 469 which was accepted as good law in Chanda Sala v. Probodh Chandra 36 C. 422 at p. 430 9 C.L.J. 251 : 2 Ind. Cas. 338(Supra). This view is not opposed to that taken in the case of Dwarka Nath Sarkar v. Haji Mahomed Akbar 15 C.W.N. 60 : 7 Ind. Cas. 622 where an order of remand by this Court, setting aside the final decree in a suit for the winding up of a partnership business, and directing accounts to be taken on a new basis, was regarded as a final order. In that case, the judgment of this Court on appeal determined the respective liability of the parties, and consequently, involved the decision of the issue which went to the foundation of the suit. On the other hand, the view we take is supported by the case of *Baij Nath Das v. Sohin Bibi*[14] in which it was ruled that an order of remand, which determines only a part of the case and leaves other matters still to be "determined, is not a final order within the meaning of Section 109 of the Code. The learned Judges quoted with approval the observation of Brett, L.J. in *Standard Discount Co., v. La Orange*[15] that no order, judgment or other proceeding can be final which does not at once affect the status of the parties, for whichever side the decision may be given. Reference was also made, apparently with approval to the observation of Fry, L.J. in *Salaman v. Warner*[16] that "an order is final only where it is made upon an application or other proceedings which must, whether such an application or other proceedings fail or succeed, determine the action; and conversely, an order is interlocutory where it cannot be affirmed that in either event the action will be determined." It is worthy of note, however, that the decision in this latter case has been doubted if not dissented from by Halsbury, L.C. *in Bozson v. Altrincham Urban District Council*[17] where the decision of *Sir George Jessel, M.R. in Shubrook v. Tufnell*[18] was accepted as good law. The case nearest in point is that of *Collins v. Vestry of Paddington*[19] where an order was treated as not final because it decided only one point in the case, of such a description that in whatever way that point might be decided, the case would have to go back for the decision of other matters in the action. To put the matter in another way, the decision was treated as interlocutory, because it could not, in any event, necessitate the entering of final judgment for either party--a position which is materially strengthened by the decision in In re Crossdell (1906) 2 K.B. 569 : 75 L.J.K.B. 769 : 95 L.T. 441 : 54 W.R. 620 : 22 T.L.R. 759(supra). In the case before us, the decision of the preliminary question as to the precise scope of the enquiry by the Land Acquisition Judge could not possibly terminate the proceedings before him. Indeed the parties have subsequently obtained from this Court an order by consent, that whatever view we may take

of the nature of the order, they should be at liberty to ask the Special Judge to take evidence upon the questions which are admittedly within the s cope of his investigation. In this view, it is impossible for us to hold that the order is final order within the meaning of Section 109 of the Code or of Section 39 of the Letters Patent, although it determines only a question of law which affects one part alone of the case, and leaves other matters still to be determined. We may add that this conclusion is by no means to be regretted, because it is clearly inexpedient that leave to appeal should be granted against an order of this description. The inevitable result would be that the proceedings would be prolonged for a series of years, whereas if they were brought to a termination in the Court below, the appeal against the final decree could be heard by this Court in ordinary course, and the litigation might then proceed to His Majesty in Council ready and ripe for hearing on every point, at no very distant date. The second objection, therefore, must be decided in favour of the claimants.

4. The result is that the application is refused with costs ten gold mohurs. It is conceded that this order will govern the application in the other case, which also will, therefore, stand dismissed with costs ten gold mohurs.

Cases Referred.

18 Ind. Cas. 107 : 15 C.W.N. 87 : 12 C.L.J. 505
210 H.L.C. 704 : 10 Jur. 446 : 10 L.T. 434
321 W.R. 263
419 W.R. 227
530 C. 679
63 I.A. 230 : 26 W.R. 44
76 W.R. Mis. 102 : B.L.R. Suppl. Vol. 585
810 W.R. 1 (F.B.) : 1 B.L.R. 1 (F.B.)
930 C. 679
1032 B. 108 : 9 Bom. L.R. 566
1130 C. 309 : 30 I.A. 20
1233 C. 1323 : 3 C.L.J. 545 : 10 C.W.N. 986
1310 C.L.J. 336 : 4 Ind. Cas. 459
1431 A. 545 : 6 A.L.J. 786 : 6 M.L.T. 94 : 3 Ind. Cas. 967
15(1877) 3 C.P.D. 67 : 47 L.J.C.P. 3 : 37 L.T. 732 : 26 W.R. 25
16(1891) 1 Q.B. 734 : 60 L.J.Q.B. 624 : 39 W.R. 547
17(1903) 1 K.B. 547 : 72 L.J.K.B. 271 : 51 W.R. 337 : 67 J.P. 397
189 Q.B.D. 621 : 46 L.T. 749 : 30 W.R. 740
195 Q.B.D. 368 : 49 L.J.Q.B. 264 : 42 L.T. 573 : 28 W.R. 588