CALCUTTA HIGH COURT

Srimati Mathura Sundari Dassi

Vs

Haran Chandra Shaha

(Lancelot Sanderson,C.J Woodroffe and A Mookerjee, JJ.)

21.12.1915

JUDGMENT

Lancelot Sanderson, C.J.

1. With regard to the preliminary objection which was raised by Mr. Jackson, when that point was taken, the case was argued upon the assumption that the suit had been dismissed under Order IX, Rule 8, which deals with default of appearance, and, therefore, I propose, whatever may have been the real position, to deal with the argument which was presented to us by the learned Counsel upon the basis that the order by Mr. Justice Imam dismissing the suit was made under Order IX, Rule 8. That order was made on the 5th of February 1915. Then an application was made on the?5th of March of this year to set aside that order of dismissal. That was heard by the learned Judge and was refused, and the plaintiff appealed from that order of refusal to restore the case and set aside the dismissal, and a preliminary point has been taken by the learned Counsel for the defendant that no appeal lies from such an order.

2. It was argued by the learned Counsel for the defendant, Mr. Jackson, firs', that the order in question was not a 'judgment' within the meaning of Clause 15 of the Letters Patent; and, secondly, that if it is not within Clause 15 of the Letters Patent, the Civil Procedure Code has no application to an appeal from a Judge of the High Court to other Judges of that Court.

3. As to the-first point, namely, whether the order in question was a 'judgment' within the meaning of Clause 15, personally I should not have had much doubt or hesitation in holding that the order was a judgment' within the meaning of that clause, if it had not been for some cases which were cited to us. It is quite true that the learned Judge had no discretion upon the question of the dismissal of the suit under Order IX, Rule 8. In fact, the rule expressly says, "where the defendant appears and the plaintiff does pot appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed." The Judge has no option and under such circumstances he must dismiss the suit. But when the application to set aside that dismissal is made, in my opinion, the Judge has a discretion, and he must exercise his judgment on the materials before him. The question on which he has then to exercise his judgment and his judicial discretion may, as in this case, be a matter of great importance: It is no less than whether the plaintiff under the circumstances of the case shall be allowed to prosecute his suit or for all time be debarred from trying to enforce his claim. Clause 15 obviously refers to judgments' which in

common parlance may be called orders. In my opinion, the decision so arrived at on such a question as above stated would be a judgment' within the meaning of the word 'judgment' in the Letters Patent. The judgments, however, in some of the cases which Mr. Jackson has cited to us throw some doubt upon the correctness of the above view. I do not refer to them all, though I have considered them : the most important are *Hurrish Chunder Chowdhry v. Kali Sunderi Debi*[1] *and Gobinda Lal Das v. Shiba Das Chatterjee*[2]. I only pause to remark that the exact point which arises in this case has not been decided, as far as I know, in any reported case, and I am informed that many such appeals, as this, have been heard in the Court of Appeal here, but it is said that in one unreported case the decision of this Court was that an appeal would not lie. The decision in the present case on the application of the plaintiff does, in my opinion, decide a question which affects the rights of the plaintiff. He alleges that he should be allowed to prosecute his claim. A. refusal of the application debars him for all time. If he had put in a plaint which was ill-framed and that had been struck out by the learned Judge, according to the decision in one of the cases, he would have a right of appeal within the very terms of the judgment in that case-that was an illustration in the case in *Hurrish Chunder Chowdhry v. Kali Sunderi Debi*[3] yet when an order is made which debars his suit for all time, according to the argument of Mr. Jackson, he is not to have a right of appeal.

4. I should be very 10th to hold that this order is not a judgment' within the meaning of Clause 15 of the Letters Patent, but it is not necessary in my judgment to give a definite opinion upon it because I think, on the second point, the Code does give a right of appeal. By Clause 44 of the Letters Patent it is provided as follows: "And we do further ordain and declare that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations." By the terms of Section 117, the Code is made applicable to the High Court, and Order XLIII, Rule 1, gives a right of appeal in the very case under discussion. But it is said that this Code and the rules made under it do not apply to an appeal from a learned Judge of the High Court. I cannot follow that argument. It is part of the defendant's case that Order IX Rule 8, applies. That Order is in effect a part of the Civil Procedure Code. It seems to me strange that the plaintiff should be subjected to Order IX, Rule 8, and be liable to have his suit dismissed for want of appearance, yet when he has had his suit dismissed under one of the rules of the Code and wants to call in aid another of the rules which-when his application for re-instatement has been refused-gives him a right of appeal against that refusal he is met with the argument that he cannot call in aid that rule because there is no appeal from the learned Judge of the High Court under the Civil Procedure Code. I think this is not a true view or a reasonable construction to put upon the Code and the rules made under it. In my judgment, the Code and the rules do apply and the plaintiff has a right of appeal.

5. This case has given me a considerable amount of anxiety, and I think the safest thing for me to do in giving judgment, having regard to the course which we intend to adopt, is to say as little as possible about the case itself, on the merits or demerits of the case, because if I do say anything, it may be taken to prejudice either the one side or the other. I have come to the conclusion that the safest course for this Court will be to order this suit to be re-entered- i am not grounding my judgment upon what happened before January or February this year, but I take a few facts, namely, that this case was fixed to be tried by Mr. Justice Imam on the 4th of February; that, apparently, according to the evidence which was before the Court on the 3rd, the plaintiff, the lady, who had been suffering to some extent from colic for sometime was taken worse; that on the 4th that matter was mentioned to the learned Judge, and that an application would be made

for adjournment. When the case was called on the 5th what happened is shown by the entry in the learned Judge's note and is as follows: "Mr. Das withdraws from the case, that he has only instructions to apply for adjournment and he does not appear any more in the case." I do not know exactly what the position was as regards Mr. Das -unfortunately, he is not here to-day; he is out of Calcutta as I understand-but having regard to the admission which has been made by the learned Counsel for the appellant, Mr. S.R. Das, to the effect that the learned Counsel who appeared in the Court below took a wrong course, it seems to me that we must conclude that he ought to have gone on with the case, when the learned Judge gave him an opportunity of calling his other witnesses, and if necessary asking for an adjournment in order that the plaintiff might be examined at a subsequent time. It is, therefore, admitted that the learned Counsel made a mistake, in the course which he and his junior adopted. The only question is, whether the plaintiff in consequence of that mistake is to be debarred for all time from prosecuting her suit. It is a suit for a large sum of money: there are serious issues in it, and I think that if I had been in the position of Mr. Justice Imam, I would have allowed the case to be re-entered upon terms: and, inasmuch as there is an appeal (we have decided already that there is an appeal in a matter of this kind), I had to apply my mind and try to ascertain what I should have done had I been in the position of Mr. Justice Imam, In my judgment, this case should be re-entered and the conditions of re-instatement are these: The plaintiff must pay the taxed costs of the defendants, viz., such costs as were thrown away by the case not proceeding on the day when it should have, and she must also pay the taxed costs of the defendants upon the application before Mr, Justice Imam for restoration, and also the taxed costs of the respondents in this appeal, except for the first day which I think was occupied by the argument on the preliminary objection that there was no appeal, upon which question we have decided against the respondent. The plaintiff must pay such costs as I have intimated as a condition precedent to the case being re-entered: And, upon the point mentioned by Mr. Das, although at one stage of the proceedings there were only two sets of costs, still it seems to me that the defendants were entitled to appear here by separate Counsel and as regards this appeal there will be separate sets of costs as regards each defendant, who appeared.

6. Further, inasmuch as the taxation of costs may take sometime, we think that the plaintiff ought to bring into Court within three weeks from this date the sum of rupees two thousand, and it is to be clearly understood that the case will not be re-entered until the costs have been taxed and paid: they must be paid within one month from the certificate of costs. The appellant will have the costs of the first day of the appeal which was taken up in the preliminary point, and these costs will be set off, on taxation, against the costs which she will have to pay.

7. We direct that the taxation be expedited.

8. If the sum of Rs. 2,000 be not paid into Court and if the taxed costs payable by the appellant as aforesaid, after the taxation and the set-off, be not paid by her within the time fixed, the case will not be restored, and in that event the appellant will be liable to pay the taxed costs of this appeal after the set-off which has been allowed.

Woodroffe, J.

9. I need not in this case consider the question whether Section 104 of the Civil Procedure Code touches the right of appeal given by the Letters Patent, for, if the order appealed from is a

judgment within the meaning of the Letters Patent, the question does not arise. It has doubtless been held that an order dismissing an appeal for default is not a judgment [see *Mansab Ali v. Nihal Chand*[4]]. But we are not concerned here with an order under Order IX, Rule 8, only but with an application for restoration under Order IX, Rule 9. Whether or not as a question of jurisdiction an appeal lies under Clause 15 of the Letters Patent in a case in which an appeal is allowed under the Code, I think it may be said that there are prima facie grounds for holding that an appeal should be held to lie under the Letters Patent where it is allowed under the Code; for the fact that the Legislature has in the Code allowed an appeal in a particular case, affords to my mind prima facie ground for supposing that that case is of a class which this Court considers appealable under its Letters Patent. This Court has further held that we should not adopt a narrow construction [see Musammat Brij Coomaree v. Ramrick Dass 5 C.W.N. 781]. Looking at the nature of the order appealed from, I think I should hold that it is appealable as a 'judgment' under the Letters Patent. I do not consider that the case reported as Gobinda Lal Das v. 8Mb Das Chatterjee 33 C. 1323 : 10 C.W.N. 986 : 3 C.L.J. 545, which was on another section, is any bar to my so holding.

10. On the facts of this appeal I have myself doubts whether we should allow it. But as my learned colleagues are prepared to give an indulgence to the plaintiff and that indulgence is to be on the term that all costs should be paid as a condition precedent, I do not dissent from the order proposed.

Mookerjee, J.

11. This appeal is directed against an order under Rule 9 of Order IX of the Civil Procedure Code, whereby Mr! Justice Imam has refused to set aside an order of dismissal of a suit made by him under Rule 8.

12. As a preliminary objection has been taken to the competency of the appeal, it is incumbent upon the appellant to establish that she has a right of appeal Mindkshi Naidu v. Subravianya Sastri 14 I.A. 160 : 11 M. 20 : 5 Bur. P.C.J. 54 : 11 Ind. Jnr. 393], for as Lord Bramwell said in Sandbaek Charity Trustees v. North Staffordshire Railway Company (1877) 3 Q.B.D. 1: 47 L.J.Q.B. 10 : 37 L.T. 391 : 26 W.R. 229, an appeal does not exist in the nature of things; a right of appeal from any decision of any tribunal must be given by express enactment"-words quoted with approval by Lord Macnaghten in Rangoon Botatoung Company Ltd, v. Col-lector of Rangoon 16 Ind. Cas. 188 : 39 I.A. 197 : 40 C. 21 : 16 C.W.N. 961 : 16 C.L.J. 245 : (1912) M.W.N. 781 : 12 M.L.T. 195 : 23 M.L.J. 276 : 14 Bom. L.R. 833 : 10 A.L.J. 271 : 5 Bur. L.T. 205 : 6 L.B.R. 150. She relies upon Order XLIII, Rule 1, Clause (c), Civil Procedure Code, as also upon Clause 15 of the Letters Patent. Order XLIII, Rule 1, Clause (c), provides that "an appeal shall lie from an order under Order IX, Rule 9, rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit." The question, consequently, arises, whether Order XLIII, Rule 1, Clause (c), is applicable to an order under Order IX, Rule 9, made by a Judge on the Original Side of this Court.

13. On behalf of the appellant, reliance has been placed upon Section 117 of the Code, which lays down that Save as provided in this part or in part X or in rules, the provisions of this Code shall apply to High Courts established under the Indian High Courts Act, 1861." The only provision in part IX, which may have any possible bearing, is that contained in Section 120,

which obviously does not touch the present question. The provision in part X, which deals with this matter, is contained in Section 129; this also does not militate against the contention of the appellant. The term "Rule," which finds a place in Section 117, is defined in Clause 18 of Section 2 of the Code to mean "a rule contained in the First Schedule or made under Section 122 or Section 125." Our attention has not been drawn to any such rule which makes Order XLIII, Rule 1, Clause (c), inapplicable. On the other hand, Order XLIX, Rule 3, which excludes the operation of other rules, lends support to the contention of the appellant that Order XLIII, Rule 1, Clause (c), is applicable to the present appeal.

14. But it has been argued on behalf of the respondents, on the authority of the decision of the Judicial Committee in Hurrish Chunder Chowdhry v. Kali Sunderi Debi 10 I.A. 4 : 9 C. 482 : 12 C.L.R. 511 : 7 Ind. Jur. 161 : 4 Sar. P.C.J. 406, that the Civil Procedure Code, in so far as it provides for appeals, does not apply to an appeal preferred from a decision of one Judge of a High Court to the Full Court. The true effect of the decision of the Judicial Committee was considered by this Court in Toolsee Money Dassee v. Sudevi Dassee 26 C. 361 : 3 C.W.N. 347, but it is not necessary for my present purpose to determine its bearing in all its implications, because, in my opinion, the law has been substantially altered since that decision was pronounced. Section 104 of the Code of 1908 is materially different from Section 588 of the Code of 1882. It provides that "an appeal shall lie from the orders mentioned in the first clause of that section and, save as otherwise expressly provided in the body of the Code or by any law for the time being in force, from no other orders." The effect of Section 104 is thus, not to take away a right of appeal given by Clause 15 of the Letters Patent, but to create a right of appeal in cases even where Clause 15 of the Letters Patent is not applicable. I may here observe parenthetically that in the case of Toolsee Money Dassee v. Sudevi Dassee 26 C. 361 : 3 C.W.N. 347, Prinsep, J., felt pressed by the argument that if an appeal was deemed to have been allowed by the Code of Civil Procedure, there was no provision for the constitution of a Court to which such an appeal might be preferred. Section 106 of the Code, however, lays down that where an appeal from any order is allowed, it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made." Consequently, where a right of appeal has been so given, it would be the duty of this Court to constitute a Court of Appeal under Section 13 of the Indian High Courts Act. I hold accordingly that this appeal is competent under Clause (c), rule I, Order XLIII of the Civil Procedure Code.

15. I am further of opinion that the appeal is competent also under Clause 15 of the Letters Patent. That clause allows an appeal from a "judgment," and, the controversy has consequently centred round this expression. Reference has been made to the now classical definition [Musammat Brij Coomareey. Ramrick Dass 5 C.W.N. 781] first formulated by Couch, C.J.,in the case of Justices of the Peace for Calcutta v. Oriental Gas Co. 8 B.L.R. 433 : 17 W.R. 364: "judgment" in Clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability; it may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit and a preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined." Substantially the same view was adopted by Sargent, C.J., in Sonbai v. AhmelLhai Habibhai 9 Bom. H.C.R. 398 and was later on applied by Couch, C.J., himself in Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed 13 B.L.R. 91 : 21 W.R. 303, where he held that an appeal lies from an order refusing to set aside an order granting leave to a plaintiff to sue under Clause 12 of the Letters Patent. Reference may also be made to the decision of this Court in Rally Soondery Dabia v. Hurrish Chunier Chowdhry 6 C. 594 : 7 C.L.R. 543 subsequently affirmed by the Judicial Committee Hurrish Chunder Chowdhry v. Kali Sunderi

Debi 10 I.A. 4 : 9 C. 482 : 12 C.L.R. 511 : 7 Ind. Jur. 161 : 4 Sar. P.C.J. 406, where an appeal was entertained against an order refusing to transmit for execution an order of His Majesty in Council. It must be remembered in connection with these decisions that they do not professs to give an exhaustive definition of the term judgment," and other definitions of a very comprehensive scope have, from time to time, been attempted, for instance by Scott, C.J., in Ahmed v. Ayeshabai 2 Ind. Cas. 167 : 11 Bom. L.R. 248, by Bittleston, J., in De Souza v. Coles 3 M.H.C.R. 384, and by White, C.J., in Tuljaram Bow v. Alagappa Chettiar 8 Ind. Cas. 340 : 35 M. 1 : 8 M.L.T. 453 (1910) M.W.N. 696 : 21 M.L.J. 1. In the opinion of Bittleston, J., the term judgment' includes any decision or determination affecting the rights or the interest of any suitor or applicant," and that it is impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from." In the opinion of White, C.J., this is too wide, and the test is "not what is the form of the adjudication, but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court, before which the suit or proceeding is pending, is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment." But, whether we adopt the wider or the narrower view of the scope of the term "judgment"-although, I may add that I am not disposed, as Maclean, C.J., was not disposed [Musammat Brij Coomaree v. Ramrick Dass 5 C.W.N. 781] to favour an attempt to place a narrow construction on the term "judgment,"-it is plain that the order in this case is a "judgment" within the definition formulated by Couch, C.J., in Justices of the Peace for Calcutta v. Oriental Gas Co. 8 B.L.R. 433 : 17 W.R. 364. The order under appeal does affect the merits of the question in controversy between the parties by the determination of a right or liability. No doubt, it has been argued that the right or liability of the parties was determined by the dismissal of the suit and the position was not affected by the subsequent dismissal of the application to revive the suit. But this clearly overlooks the fundamental point that the primary order of dismissal of the suit was liable to be revoked, as it was subject to a possible order of restoration under Rule 9. The effect of the subsequent order is accordingly to give a character of finality to the primary order of dismissal, by a determination that the applicant had failed to establish grounds in support of his alleged right to an order under Rule 9 of Order IX. Such determination is, in ray opinion, a judgment" within the meaning of Clause 15 of the Letters Patent.

16. I am not unmindful that the contrary view may receive an apparent support from some dicta in reported decisions, for instance, Rughoo Bibee v. Noor Jehan Begum 12 W.R. 459 : 4 B.L.R.A.C.J. 10 and Gobinda Lal Das v. Shiba Das Chatterjee 33 C. 1323 : 10 C.W.N. 986 : 3 C.L.J. 545. As regards the former case, which ruled that an order dismissing an application for review is not a judgment," it is sufficient for our present purpose to observe that judicial opinion on this matter has not been uniform [Ram-hari Sahu v. Madan Mohan Mitter 23 C. 339. Aubhoy Churn Mohunt v. Shamont Lochan Mohunt 16 C. 788 and Mulji Virji v. Ban gabashi Saha 9 C.W.N. 502 As regards the latter case, stress is laid upon the following passage in the judgment of Ghose, C.J., an order, which terminates a proceeding, is a judgment within the meaning of Clause 15, but it must be a proceeding... in the course of a suit or in relation thereto, and in which some question or other as to the right or liability of any party is raised, and not a proceeding in respect of a matter, which had already come to termination by operation of law or otherwise." I feel bound to record my respectful dissent from this exposition of the law, for the qualification formulated plainly carries us beyond the definition of the term "judgment" as given by Couch, C.J. and if the question arises in another case precisely on all fours with the decision mentioned,

and if it comes before me, I shall not hesitate to refer the matter for consideration to a Full Bench. It is not necessary, however, to adopt that course on the present occasion, as admittedly there is no decision which precisely covers the case before us; and the class of cases which rule that an order refusing [Tara Chand Biswas v. Radha Jeebum Mustofee 24 W.R. 148, Manly v. Patterson 7 C. 339 : 9 C.L.R. 166, Luff Ali Khan v. Asgur Reza 17 C. 455 and Kishen Pershad Pandey v. Tilucjkdhari Lall 18 C. 182] or granting [Musani mat Amirrunnessa v. Baboo Behary Lall 25 W.R. 529 and Mowla Buksh v. Kishen Peftab Sahi 24 W.R. 150 : 1 C. 102 an application for leave to appeal to His Majesty in Council, or for stay of execution [Mohabir Prosad Singh v. Adhikari Kunwar 21 C. 473 and Chitto Sheik v. Muzzur Hossain 2 Hyde. 212] is not a "judgment," plainly stands on a different footing.

17. As regards the merits, I am clearly of opinion that the application under Rule 9 of Order IX should have been granted. We have not had the advantage of hearing from Mr. C.R. Das his version of what took place in Court when the suit was dismissed for default. But, on the materials before me, I see no escape from the conclusion that there was a grave error of judgment on his part and that he should have proceeded with the suit. The question then reduces to this: should his client be penalized for his error of judgment, if so, to what extent. The client will be penalized by the order which the Court of Appeal is about to make in so far as the payment of costs is concerned; but I am not prepared to hold that the client should be penalized to the extent of dismissal of her claim without investigation.. Judicial decisions of high authority favour the view, that even where suits have been dismissed for the mistake or laches of the legal advisers of parties, the Court will not hesitate, if proper grounds are made out, to restore the suit upon payment of costs [Southampton Steamboat Co. v. Rawlins (1865) 34 L.J.Ch. 287 : 11 Jur. (N.S.) 230 : 13 W.R. 612, Michell v. Wilson (1877) 25 W.R. 380, Birch v. Williams (1876) 24 W.R. 700, Hale v. Lewis (1838) 2 Keen 318 : 48 E.R 651 Muruga Chetty v. Rajasami 14 Ind. Cas. 823 : 22 M.L.J. 284 : (1912) M.W.N. 332 : 11 M.L.T. 280], but reference need be made specially to one case in this country, Oriental Finance Corporation Ltd. v. Mercantile Credit and Finance Corporation Ltd. 2 Bom. H.C.R. 267, and to another in England, Burgoine v. Taylor (1878) 9 Ch. D. 1 : 47 L.J.Ch. 542 : 38 L.T. 438 : 26 W.R. 568. In my opinion, this appeal should be allowed and the suit restored on the conditions mentioned in the judgment of the Chief Justice.

Cases Referred.

110 I.A. 4 : 9 C. 482 : 12 C.L.R. 511 : 7 Ind. Jur. 161 : 4 Sar. P.C.J. 406
233 C. 1323 : 10 C.W.N. 986 : 3 C.L.J. 545
310 I.A. 4 : 9 C. 482 : 12 C.L.R. 511 : 7 Ind. Jur. 161 : 4 Sar. P.C.J. 406
415 A. 359 : A.W.N. (1893) 113