CALCUTTA HIGH COURT

Taleb Ali

Vs

Abdul Aziz

(Rankin ,C.J.)

02.09.1929

JUDGMENT

Rankin, C.J.

1. The plaintiff brought a suit in the Court of the Munsif on the allegation that the defendant was in possession of certain land under a mortgage by conditional sale made to him by the plaintiff and claimed to redeem the mortgage and to recover possession of the land. The defendant contended that the mortgage was not genuine, and that the land was his own. A preliminary decree for redemption was made on 8th December 1924 and on 19th December a final decree for redemption was made, the defendant not appearing. The defendant, on 6th January, preferred an appeal to the lower appellate Court against the preliminary decree. When this appeal came on for hearing no objection was raised that the appeal was incompetent, and on 14th December 1925, the appeal was allowed and the plaintiff's suit was dismissed altogether. Two years afterwards the plaintiffs applied to the Court of the Munsif for execution of the final decree. The defendant objected to the execution on the ground that the preliminary decree upon the basis of which the final decree had been passed, having been set aside, the final decree was not a subsisting decree of which execution could be had. The Munsif, and, on appeal from him, the District Judge, have upheld this objection. On second appeal to the High Court by the plaintiff a Division Bench has expressed the opinion that the judgments of the lower Courts are correct, but, in view of certain previous decisions of this Court, has referred the case to a Full Bench for final decision and has formulated the following questions:

(1) Whether an appeal from a preliminary decree is incompetent if a final decree is made before the appeal is presented ?

(2) Whether it is necessary for a party aggrieved by a preliminary decree to appeal both from that decree and the final decree in order to maintain his appeal against the preliminary decree,

although the final decree apart from its being based on the preliminary decree may be otherwise correct ?

2. In the present case no question arises of the defendant having by his conduct subsequent to the passing of the preliminary decree precluded himself from exercising any right of appeal therefrom conferred upon him by the general law. It is not necessary, therefore, to discuss such cases as Baikuntha Dey v. Salimulla Bahadur [1907] 12 C.W.N. 590 or, Sheik Salim v. Hajira or to enquire what kind of conduct will debar a litigant from exercising a right of appeal given to him by Statute. The mere fact of a final decree is not evidence of such conduct or even of laches. Again, whether or not the defendant, after the passing of the preliminary decree, ought to have preferred an appeal from the final decree as well, it is by no means manifest that the lower appellate Court was without jurisdiction to hear the appeal from the preliminary decree. As it did, in fact, dismiss the plaintiff's suit, it may well be contended that this decision must govern the parties' rights even if it be supposed that the appeal ought not to have been decreed. Indeed the decision in Abdul Jalil v. Ameerchand [1913] 18 C.L.J. 223 is an authority to this effect.

3. I propose, however, to examine the two questions referred to us. In practice they have been found to give rise to much difficulty both in this Court and in the lower Courts.

4. The terms " preliminary " and "final" decree were probably in general use before 1908, but Section 2, Civil P.C., of that year introduced them as technical expressions and provided a definition:

A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

5. Under the present Code suits to redeem or to enforce a mortgage, suits for partition, partnership suits, suits for accounts and other classes of suits are now disposed of by means of two decrees, the preliminary decree which usually settled the rights of the parties, and in this sense is final, (cf. Rahimbhoy v. Turner [1890] 15 Bom. 155, but which looks forward to a further decree to be made after the rights of the parties, thus declared, have been worked out by subordinate enquiries and other means. Under the Code of 1882, different provisions were made for different classes of suits. Thus, as regards suits for possession of immovable property and for mesne profits, Section 212 provided that:

the Court may, however, determine the amount by the decree itself or may pass a decree for the property and direct an enquiry into the amount of mesne profits and dispose of the same on further orders.

6. As regards administration suits the provisions of Section 213 was that:

the Court before making the decree shall order such accounts and enquiries to be taken and made and give such other directions as it thinks fit.

7. As regards suits for dissolution of partnership Section 215 provided that:

the Court before making its decree may pass an order fixing a date on which the partnership shall stand dissolved and directing such accounts to be taken and other acts to be done as it thinks fit.

8. So too, under Section 215-A, in a suit for accounts between principal and agent:

the Court shall before making its decree pass an order directing such accounts to be 'taken as it thinks fit.

9. In suits to enforce a mortgage the provisions of the Transfer of Property Act did not require that a mortgage decree under Section 88 should be followed by any supplemental decree, but only, if necessary, by an application for an order absolute for sale under Section 89. This was clearly brought out by Sir Lawrence Jenkins in Amlok Chand v. Sarat Chandra [1911] 38 Cal. 913 (920). The order absolute for sale was regarded as an order for the realization of the decree or as an order giving the plaintiff execution for the . amount of the decree. Under the Code of 1882, however, the general definition . of decree was wide enough to cover orders, if these were formal expressions of adjudication upon any right, claim or defence set up in a civil Court when such adjudication, so far as regards the Court passing it, decided the suit or appeal so that many orders were appealable as being decrees. Other orders were made appealable by Section 588 and by Section 591 it was provided as regards all orders that:

if any decree be appealed against, any error, defect or irregularity in any such order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal.

10. The Code of 1908, by providing for preliminary and final decrees introduced a uniform practice for many different classes of suits, and by Section 97 provided that:

where any party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

11. This last provision is also applied, by Section 105, Clause (2), to orders of remand from which an appeal lies. The difficulties which have been referred to us for solution arise from these provisions. A litigant, aggrieved by a preliminary decree, cannot seek remedy for his grievance

in an appeal from the final decree ; a litigant aggrieved by an order of remand from which an appeal lies, must appeal there from directly or be precluded from disputing its correctness.

12. The decisions from which the Division Bench has in this case dissented are decisions which purport, in the altered circumstances, to apply or adopt principles which the Court had applied under the Code of 1882. Under the old Code the first decision to be noticed is that of Jatinga Valley Tea Co. v. Chera Tea Co. [1885] 12 Cal. 45. The suit was for possession of land. The first Court had given the plaintiff a decree and the lower appellate Court had remanded the case for a local investigation. Thereupon, it would seem that the 'plaintiff appealed to the High Court against the order of remand and that subsequent thereto, the trial Court had proceeded with the case and passed a decree dismissing the plaintiff's suit. Whether this decree was made before or after the presentation of the appeal to the High Court is not quite clear from the report and the 'original record of the appeal throws no light on the question. It may be taken, however, that the presentation of the appeal preceded the dismissal of the suit. In the High Court it was contended that the existence of the final decree was a bar to the hearing of the appeal. This contention was rejected on the ground that Section 588 of the Code gave an appeal in such a case. Field, J. said:

that provision is not in any way qualified. The Code does not say that there shall be an appeal only if the case has not been finally decided in the Court of first instance before that appeal is preferred or comes on for hearing.

13. The Court not only set aside the order of remand but set aside the decree which had been made upon it and which was held to be based upon it.

14. Twenty years afterwards, in Madhusudan Sen v. Kamini Kanta Sen [1905] 32 Cal. 1023 the question again arose in a suit for ejectment. The Munsiff had dismissed the suit ; the Subordinate Judge had ordered a remand for the trial of certain issue : before the defendant appealed to the High Court from the order of remand, the Munsiff had tried the suit for the second time and 'had made a decree in favour of the plaintiff ex parte. Maclean, C.J. and Mitra, J., held the appeal to be incompetent and the decision in this case lies at the root of the present difficulty. The Court distinguished the Jatinga Valley case [1885] 12 Cal 45 on the ground that the appeal from the order of remand had been presented before the suit had been dismissed. Maclean, C.J., reasons that the orders specified in Section 588 comprise first of all some whose force lasts only as long as the suit is pending and that the right of appeal from such orders should cease with the disposal of the suit. He admits, however, that other orders do affect the decision on the merits and that an order of remand is of this nature. He observes that Section 588 makes no distinction between these two classes and that:

a party failing to appeal from an order of remand is not without a remedy. He may appeal from the final decision and on that appeal take exception to the validity of the order of remand.

15. He concludes therefore:

If a party desired to avail himself of the privilege conferred by Section 588 in relation to an order of remand, he ought to do so before the final disposal of the suit. He cannot be permitted to wait until after the final disposal of the suit and then appeal from the interlocutory order without appealing from the decree in the suit.

16. Now the judgment of Field, J., in the Jatinga Valley case [1886] 12 Cal. 45 had pointed out that Section 588 contains no such qualification of the right of appeal. In subsequent cases the reasoning of Sir Francis Maclean has on this ground been condemned as a matter of construction : see Laxmi v. Maru Debi [1914] 37 Mad. 29, Kanahaya, Lal v. Tirbeni Sahai [1914] 36 All. 532 per Chamier, J., at 537. Again, to say that Section 588 of the Code deals with two classes of. orders: those which do not affect the decision of the case and those which-do, is to give no very strong reason for laying down a -rule for both which is appropriate to the former only. There is no doubt a distinct convenience to be gained by requiring a litigant when he brings his appeal, to attack the final decree if such a decree has been passed This, however, depends entirely upon-the right of the appellant to challenge the previous decree in his appeal from, the later one, and it has to be remembered that in a case where the appeal has been brought before the final decrees had been passed, the advantage aimed at by this decision is unattainable. It may here be observed that the language of Maclean, C.J. though clear enough with reference to the Code of 1882, has given rise to some confusion. When it was said that the appellant cannot be permitted to wait until after the final disposal of the suit and then to appeal against an interlocutory order without appealing from the decree in the suit, it was not meant that one appeal would be competent or incompetent according as another had been brought or not brought. What was meant; was ' that after a final decree had been passed, an appeal from an interlocutory order was incompetent as such, but that in an appeal from the decree an interlocutory order could be reversed or varied if it affected the decision of the suit. Maclean, C.J., was not arguing for two appeals but for one appeal in which the whole case would be disposed of.

17. The next case was that of Mackenzie v. Narsingh Sahai [1909] 36 Cal. 762. This was a partition suit and the appeal from the preliminary decree (so to call it though it was made in 1907), was not preferred until the final decree had been passed. A Division Bench held that a preliminary decree was subject to the rule laid down in Madhusudan's case [1905] 32 Cal. 1023 for interlocutory orders. This was said to be obvious and to follow from the application of a simple test. The test was as follows:

If the appeal is heard on the merits and the preliminary judgment of the Subordinate Judge set aside, what would be the position of the parties ? The final decree which up to present moment, has not been questioned by way of appeal, would still stand and that decree would entitle the plaintiff to eject the appellant If the appeal is heard and decided in favour of the appellant, in order to give him any relief, the final decree, against which no appeal has been preferred, would have to be indirectly set aside. It is difficult to appreciate how such a state of things could possibly have been contemplated by the legislature.

18. This case, though decided in 1909 was decided under the Code of 1882 and it appears to be the first case to treat a preliminary decree as on the same footing as an interlocutory order made immediately appealable by Section 588 of the old Code. The basis of the reasoning is that the final decree, unless directly and formally attacked, will remain unaffected though the preliminary decree be set aside. The case does not explain the principles upon which the presentation of an appeal from the preliminary decree before the final decree is passed enables a final decree to be set aside indirectly without formal and direct attack.

19. Janki Nath v. Promotha Nath [1911] 15 C.W.N. 830 was the first case under the new Code in which these doctrines were applied. They were applied to an appeal against an order of remand the appeal being filed after the disposal of the suit upon remand. They were applied notwithstanding the new provision in Section 105 upon which the only observation made was that this clause: " does not meet the present case but applies rather to the converse case."

20. The learned Judges failed to observe that this clause had made any difference at all to the reasoning of Maclean, C.J. in Madhusuclan's case [1905] 32 Cal. 1023 or even that it had affected the doctrine as to " election of alternative remedies " laid down by Mookerjee, J. In the case of Baikantha v. Salimullah [1907] 12 C.W.N. 590 under the Code of 1882 leaving aside cases in which the presentation of the appeal from the preliminary decree preceded the passing of the final decree. I come next to the case Khirodamoyi Dasi v. Adhar Chandra [1912] 18 C.L.J. 321 This case was governed entirely by the Code of 1908 but the principles of Mackenzie's case [1909] 36 Cal. 762 were applied to it. It was laid down that whether or not an appeal has been preferred against the prelminary decree before the final decree has been passed, it is the duty of the party aggrieved by the final decree to prefer an appeal against the final decree if he desires a remedy, and it was further held that in either case an appeal against the preliminary decree alone would be useless. In this respect, it will be seen, this decision goes beyond Mackenzie's case [1909] 36 Cal. 762 and beyond Madhusudan's case [1905] 32 Cal. 1023 Of Section 97 of the new Code it was observed:

That section does not, however, relieve the person who appeals from the preliminary decree from

the necessity of appealing against the final decree; nor does it provide how,' if the preliminary decree is contrary to the terms of the final decree, the final decree is to be interfered with if it has been allowed to stand without any appeal being preferred against it.

21. In the end, however, and inconsistently with their reasoning, the learned Judges appear to fall back upon the consideration that the appeal, was presented after the final decree has been pronounced. The logic of this case would appear to be that nothing which can happen upon an appeal against a preliminary decree can affect the final decree, and in keeping with this view no suggestion is offered as to any principle according to which the final decree can be held to stand or fall according as an appeal against the preliminary decree was preferred before or after the making of the final decree.

22. The next case is the Madras case already referred to, Laxmi v. Maru Debi [1914] 37 Mad. 29 The appeal in this case was against a preliminary order in execution and it was not filed until after the date of the final order. The decision contains a criticism of the Calcutta cases to which I have referred. It lays down that the final order merely carries out the former order and does not supersede it; that the final order could not affect or take away the right of appeal against the preliminary order; that the final order depends for its authority upon the preliminary order and that upon the quashing of the latter it would cease to have any force; that under Section 97 a party whose grievance is against the preliminary order is bound to appeal against it and cannot dispute its correctness in any appeal from the final order; that in these circumstances he may have no grievance which he can raise against the final order and an appeal therefrom would be an empty formality. In Bagaband Chandra v. Ishan Chandra [1918] 22 C.W.N. 831 the final decree was passed on 11th November though not drawn up or signed till 18th November. On 16th November an appeal was preferred against the preliminary decree. Fletcher, J., after pointing out that on 16th November the only decree against which the appellant could appeal was the preliminary decree, referred to a previous decision of his own in Atul Chandra v. Kunja Behari [1915] 22 C.L.J. 90 saying:

the right of appeal given by Section 57, Civil P.C., is one that is not taken away by the mere fact that the Judge has passed a final decree.

23. In Atul's case [1915] 22 C.L.J. 90 the presentation of the appeal had preceded the passing of the final decree and the Court held that if the appeal succeeded, the final decree ought to be amended in accordance with the result of the appeal.

24. In Kulada Prasad v. Bamananda A.I.R. 1921 Cal. 109, the preliminary decree in a suit to enforce a mortgage had been followed by the final decree before the defendants filed an appeal

against the preliminary decree. Mookerji, J. re-affirmed the principles upon which he had decided the case of Mackenzie v. Narsingh Sahay [1909] 36 Cal 762:

If we were now to reverse the preliminary decree at the instance of the appellant, the final decree would still remain unaffected as no appeal has been made to challenge the propriety of that decree.

25. Referring to Khirodamoyi's case [1912] 18 C.L.J. 321 he says, but not so far as I can see correctly, that it was ruled:

that the final decree must be deemed to have been made on the assumption that if the preliminary decree should be modified or set aside in the appeal, the final decree also would be similarly modified or set aside.

26. In this case, however, the Court allowed the appellant to amend his memorandum of appeal so as to turn it into an appeal against both decrees. Again in Nanibala v.

Ichhamoyee , the same learned Judge re-affirmed the principles that the right of appeal from interlocutory orders ceases after the disposal of the suit, and that this rule is applicable to cases in which there is a preliminary decree and a final decree distinguishing certain cases in which the appeal against the preliminary decree had been lodged before the final decree was made, he says:

It was ruled that the final decree must; be deemed a contingent decree or in the words of Turner L.J. in Shama Purshad v. Hurro Purshad [1865] 10 M.I.A. 203 a subordinate and dependent decree liable to be superseded by the-modification or reversal of the preliminary-decree which was the subject matter of appeal before a superior tribunal when the final' decree was made on the basis thereof in the primary Court.

27. In this case also recourse was had to the device of amending the memorandum-of appeal so as to enlarge its scope and convert it into a combined appeal against both the preliminary and the final decree.

28. Where an appeal has been brought; from the preliminary decree before the final decree has been passed, this Court has consistently held that such appeal is competent and that if the preliminary-decree be set aside the final decree falls to the ground along with it. In these cases attempt has been made to induce the Court to affirm that the passing of a final decree takes away from the appellate Court its jurisdiction over the appeal already lodged against the preliminary decree; or else to hold that the final decree is valid and subsisting until set aside formally and directly by am appeal therefrom.

29. Ugra Narain Singh v. Basanta [1913] 17 C.W.N. 868 like the case now before this Court, arose out of an application to enforce a. final decree in execution. The suit was for an account.

At the time when he preferred the appeal no final decree had been passed. The appellate Court therefore certainly had jurisdiction to hear the appeal and that power was not taken away by the final decree.... The final decree in the case which merely determined the amount for which the defendant; was liable to the plaintiff was dependent upon the preliminary decree which held that the-defendant was liable to render accounts and the validity of the proceeding's which resulted in the final decree depended upon the preliminary decree itself : and that decree having been see aside on appeal, the final decree necessarily fell through. It has been contended that it was at any rate necessary to have the final decree formally set aside and that at all events the question could not be gone into in execution proceedings and that the executing Court has no power to deal with it. We think, however, that the final decree was superseded by the order of the appellate Court setting aside the preliminary decree upon which it depended. We are therefore of opinion that it is perfectly open to the executing Court to determine whether the decree which it is asked to execute is a subsisting and operative decree or not and if such decree has been superseded and is no longer operative, the executing Court is entitled to refuse execution on that ground.

30. It will be noticed that in this reasoning the subordinate and dependent character of the final decree is rested not upon the fact of an appeal having been presented in the interim but upon the essential character of that decree and the nature of its relation to the preliminary decree. In Nistarini v. Raimohun [1913] 18 C.L.J. 214 Mookerjee, J. rested it upon this:

The party who obtained the final decree in his favour took it while the preliminary decree was under appeal. The final decree therefore must be deemed subject to the result of that appeal.

31. In Kanhaya Lal v. Tribeni [1914] 36 All. 532 a decision of a Pull Bench of the Allahabad High Court, the fact that the appeal against the preliminary decree had been filed before the passing of the final decree was not made the basis of the decision. The basis of the decision was the necessary dependence of the final decree upon the preliminary decree on which it was based. The Calcutta decisions were said to proceed on the basis that the final decree continued after the preliminary decree had been set aside, a view which was held to be erroneous.

32. In Wahidunnessa v. Dip Narain [1916] 20 C.W.N. 1174, Chamier, C.J. adhered to the Allahabad decision and Sharfuddin, J. affirmed that:

a preliminary decree has existence independent of the final decree and the final decree instead of extinguishing the preliminary decree gives effect to it.

33. It will be seen, therefore, that in this Court the decisions have followed two distinct lines according as the appeal from the preliminary decree was lodged before or after the final decree was passed. No difficulty has been felt in the former case. In the latter case it was not possible to say under the Code of 1908 that the appeal from the preliminary decree was incompetent, but it was said that its competence depended upon the bringing of another appeal from the final decree itself. The first effective challenge to this doctrine was made in Kasinath v. Himmat Ali , B.B. Ghose, J. said:

In my opinion, therefore, where a preliminary decree has an independent existence and a person aggrieved by it is bound to appeal from it, that right cannot be taken away by a final decree being passed either before or after the person appeals from the preliminary decree.

34. The order of reference in the present case repeats and amplifies this reasoning.

35. In my judgment it is altogether unreasonable to treat a preliminary decree under the Code of 1908 as a mere interlocutory order whose force is spent when the suit is disposed of. The definition given by Section 2 of the Code makes any decree preliminary:

when further proceedings have to be taken before the suit can be completely disposed of.

36. This certainly is a lame definition and if it were taken strictly one might well ask how any decree could be partly preliminary and partly final. In mortgage or partition suits, in suits for partnership or other accounts, the preliminary decree is what in the Court of Chancery would have been described simply as the decree;" the final decree corresponds to the " order on further consideration." The " further proceedings " are proceedings under preliminary decree and consist mainly of what Lord Hobhouse in Syed Muzhar Hussain v. Bodha Bibi [1894] 17 All. 112 described as ' subordinate enquiries. Section 97 has expressly excepted preliminary decree from the position assigned to interlocutory orders, precluding an appellant from impeaching them in the course of an attack upon the final decree. If there be any general doctrine of law to the effect that interlocutory orders cease to have any effect after the final disposal of the suit and that therefore they lose their appealable character upon the passing of the final decree, and I do not here affirm such doctrine, it is in my judgment reasonably clear that preliminary decrees, under the Code of 1908,which determine such questions as liability to account, existence of a. mortgage, share in joint property, are altogether outside its scope. In the second place I think it wrong to hold that the presentation of an appeal from the final .decree is a circumstance which renders the final decree contingent upon the result of the appeal or creates in the final decree a character of dependence or subordination. In my judgment the final decree is, in its nature, dependent and subordinate because it is a decree which has been passed as a result of

proceedings directed and controlled by the preliminary decree and based thereon. A final decree when passed is capable of immediate execution and the presentation of an appeal from the preliminary decree does not operate as a stay of execution. The Court which passes a final decree need not necessarily have before it the circumstance that an appeal from the preliminary decree has been presented. Whether such an appeal has been presented and whether or not the attention of the Court has been brought to the fact these matters in no way qualify the final decree when made.

37. Again, the doctrine that subordinate and dependent decrees come to nothing when the decree on which they are dependent is set aside must now be viewed in the light of the decision of the Judicial Committee in Naganna Naidu v. Venkatappayya A.I.R. 1923 P.C. 167. Shama Prasad's case [1865] 10 M.I.A. 203 has for years been taken as extending this doctrine very widely but the decision of the majority of the Full Bench in Jogesh Chandra Dutt v. Kali Churn Dutt [1878] 3 Cal. 30 has now been overruled. In a case such as the present, however, I see no reason for holding that the final decree is not a subordinate and dependent decree. It is as much subordinate and as much dependent as an order for the execution of a decree is subordinate and dependent on the decree which is being executed. The function of the final decree is merely to re-state and apply with precision what the preliminary decree has ordained. The decrees are in the same suit. The appellate Court, if it has power over the preliminary decree at all, power to reverse it or vary it, has power to affect the final decree. In a redemption suit, such as we are now concerned with, it has power to see whether there has been any mortgage and, if so, upon what basis the plaintiff should be permitted to redeem. There is no intermediate position between the view that the mere existence of a final decree takes away all power from the appellate Court over the preliminary decree and the view that the appellate Court being competent to hear the appeal from the preliminary decree has necessarily the right to set aside the final decree and any other proceedings based upon the decree under appeal. With the solitary exception of Khirodamoyi's case [1972] 18 C.L.J. 321 opinion in this Court has been unanimous to the effect that the existence of a final decree does not deprive the appellate Court of its power to hear an appeal previously presented against the preliminary decree.

38. It appears to me that in this matter we should take our stand upon the express provisions of the Code and refuse to read into the Code qualifications and conditions of which it contains no sign. I respectfully adopt the language of Chamier, J., in Kanhaiya Lal's case [1914] 37 Mad. 29 at p. 536:

The Code gives a right of appeal against a preliminary decree and further provides that where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal

which may be preferred from the final decree. It seems to me that we are not at liberty to read into the Code any provision to the effect that the passing of the final decree shall be a bar either to the institution or the hearing of any appeal against the preliminary decree.

39. I would add that when a preliminary decree is set aside the final decree is superseded whether the appeal was brought before or after the passing of the final decree and that in my judgment an appellate Court when setting aside or varying a preliminary decree can, and indeed should, give direction for the setting aside or varying of the final decree if the existence of the final decree is brought to its notice as in all cases it ought to be. In the present case the preliminary decree affirming the existence of a mortgage has been set aside and the plaintiff's suit has been dismissed. But, be the question clear or difficult, I am of opinion that a Court of execution" is entitled to enquire whether the final decree originally passed is still subsisting or has ceased to have effect. It doe3 so when a decree has been reversed. It must do so when a decree has been superseded. No doubt had Shama Prasad s case [1865] 10 M.I.A. 203 stood unexplained there would have been some difficulty here and it is true that the present class of case was not considered by the Full Bench in Gorachand Haldar v. Prafulla Kumar But on this point the reasoning of Chatterjee and Walmsley, JJ., in Ugru Narain Singh v. Basantanarayan [1913] 17 C.W.N. 868 is in my opinion sound and should be followed.

40. I would answer in the negative both of the questions which have been referred to us. In my opinion the appeal should be dismissed with costs before the Division Bench and before us. Consolidated hearing fee before both Benches is fixed at ten gold mohurs.

C.C. Ghose, J.

41. I agree.

Buckland, J.

42. I agree.

B.B. Ghose, J.

43. I am entirely of the same opinion. As one of the referring Judges, I am glad that the cobwebs which disfigured the procedure of our Courts for a great many years have been swept away by the judgment of my Lord the Chief Justice just pronounced.

Mukerji, J.

44. I agree.