**MYSORE HIGH COURT**

Kanakarathnammal

Vs

V.S. Lognatha Mudaliar

Civil Petn. No. 128 of 1957, Bangalore, in O.S. No. 39 of 1947-48

(N. Sreenivasa Rau and H. Hombe Gowda, JJ.)

03.11.1958

**JUDGMENT**

**N. Sreenivasa Rau, J.**

1. This is an application under Article 133 of the Constitution for leave to appeal to the Supreme Court against the decision of the Court in R.A. 171 of 1951-52. The suit from which the appeal arose was one filed by the present petitioner for the recovery from defendants 1 and 2 of certain items of property to which the plaintiff claimed to have succeeded as her mother's heir and of one jewel from defendant 3 on the ground that it belonged to her, i.e., the plaintiff and had been given to the 3rd defendant's custody by tier father. The trial court dismissed the suit against defendants 1 and 2 and granted a decree for the recovery of the jewel on payment of ₹ 109-7-9 claimed by defendant 3 on the footing that he had a lien for the amount. The plaintiff preferred an appeal against the dismissal of the suit as against defendants 1 and 2 as also in respect of the condition imposed that she should pay the amount mentioned above to defendant 3 before she could recover the jewel. As regards the appeal in so far as it related to defendants 1 and 2 the plaintiff confined it to a portion of the suit schedule property and gave up the rest. Respondents 1 and 2 preferred an appeal in so far as the jewel was concerned claiming that it belonged to the estate of the plaintiff's father, defendant 1 being the executor under the latter's will and defendant 2 the legatee. This Court dismissed the plaintiff's appeal except in regard to the portion of it which made' her liable to pay to defendant 3 the amount for which he claimed a lien. It was held that defendant 3 had no such lien. The appeal of defendants 1 and 2 in respect of the jewel was dismissed.

2. The learned advocate for the petitioner urged before us that the view taken by this Court regarding the main question, i.e., the plaintiff's claim to the suit schedule property' other than the jewel (in respect of which she had succeeded) was wrong as it resulted from an erroneous application of the law relating to benami transactions. The property in question undisputedly stood in the name of the plaintiff's mother. The contention put forward by defendants 1 and 2 was that the real owner was the father who admittedly had advanced monies for its purchase. The learned Judge upheld the plaintiffs contention and came to the conclusion that the plaintiff's

mother was the real owner of the property, but he dismissed that part of the suit on the ground that the plaintiff was not the sole heir and mat as she had not made the other heirs parties to the suit she had to fail. This Court took the view that the plaintiff's father was the real owner, that on his death the property vested in his executor under the will and that she had no claim to the property. Consequently it did not become necessary to go into the question whether the suit should fail on the ground of non-joinder of the other heirs of the plaintiff's mother.

3. It is true that some decisions laying down the criteria for judging whether a transaction is a benami transaction or not have been referred to in the judgment of this Court, but essentially it is a question of fact since what was really considered was whether those principles were applicable to the proved circumstances of the case. We therefore find that no substantial question of law as contemplated in the concluding part of Article 133(1) is involved in the proposed appeal, nor do we find any question or circumstance arising in the case which would make it a fit one to appeal to the Supreme Court under clause (c) of Article 133(1).

4. The learned advocate for the petitioner urges that as this Court has upheld the plaintiffs contention that she is not liable to pay the amount claimed by defendant 3 by way of a lien on the jewel, overruling the trial Court's decision on that point, the judgment and decree of this Court is not one that affirms the decision of the District Court and as the subject-matter of the suit and of the proposed appeal both exceed ₹ 20,000/-in value she is entitled to a certificate as of right.

5. The subject-matter of the appeal is the main part of the suit claim in respect of which she has failed in both the Courts. In regard to her right for the jewel both the Courts have held in her favour, Thus, in regard to these two matters the judgment and decree of this Court is one affirming the decision of the District Court. The only point of variation is in regard to the plaintiffs liability to pay the amount claimed by way of lien on the jewel by defendant 3, in respect of which the variation is in her favour. Thus she has no grievance in the matter of either the jewel or the amount claimed by way of lien. These matters do not and indeed cannot form the subject-matter of the proposed appeal.

6. There has been wide diversity of opinion amongst the various High Courts on what constitutes affirmation of the decision of the Court immediately below the High Court. The view generally prevailing prior to the decision of the Privy Council reported in *Anjiapurnabai v. Ruprao*[1], was that such affirmation had to be construed with reference to the subject-matter in dispute in appeal to the Privy Council the basis being that if the two Courts are at one upon the matter, which is to be debated before the Privy Council, then it is a case of a decree which affirms the decision of the Court immediately below. It may be mentioned this was the view with reference to Sections 109 and 110, C.P.C., which have been substantially reproduced in Article 133 of the Constitution and so far as the question at issue is concerned there is no difference. In fact those sections continue to be operative subject to the provision of the Constitution and such rules as may from time to time be made by the Supreme Court.

7. It may be noticed that taking into consideration the relevant parts of Sections 109

[1] ILR 51 Cal 969 : AIR 1925 PC 60

and 110 they provide that an appeal shall be to the Privy Council from any judgment, decree or final order passed on appeal by a High Court provided that the amount or value of the subject-

matter of the suit in the Court of the first instance and the amount or value of the subject-matter of appeal to the Privy Council was ₹ 10,000/- or upwards or the judgment, decree or final order involved directly or indirectly some claim or question to or respecting property of like amount or value and that where the judgment, decree or final order appealed from affirms the decision of the Court immediately below the Court passing such judgment, decree or final order, the appeal must involve some substantial question of law. From this it would follow that no substantial question of law need be involved if in the proposed appeal the conditions regarding the amount or value of the subject-matter of the suit and of the dispute to the proposed appeal being satisfied, the judgment-decree or final order proposed to be appealed from did not affirm the decision of the Court immediately below. On the face of it, it would appear that, apart from the question of valuation, all that was necessary to give a right of appeal was that the judgment, decree or final order of the Court should be different from what was decided by the Court immediately below.
But, as mentioned above, the interpretation generally placed on the provision was that non-concurrence should relate to that part of the judgment, decree or final order which was appealed against. Similarly the decision of the Court immediately below was interpreted to be that part of its judgment, decree or final order which constituted the subject-matter of the proposed appeal. In the Privy Council decision above referred to ILR 51 Cal 969 : AIR 1925 PC 60 the matter came up for consideration on a petition for special leave to appeal against the; decision of the Judicial Commissioner of the Central Provinces affirming the District Court's decision upholding the plaintiff's claim to the property and negativing defendant 2's competing claim but enhancing the plaintiff's liability to provide maintenance for defendant 1 from ₹ 800/- to ₹ 1,200/- per annum. Leave to appeal had been refused by the Judicial Commissioner and it was contended for the petitioner that he had a right of appeal as the subject-matter of the suit exceeded ₹ 10,000/- as also the subject-matter of the proposed appeal, even if the maintenance alone was regarded as in dispute and as the appellate Court did not affirm the decree of the first court but varied it and that therefore it was not material under Section 110 whether any substantial question of law was involved. At the same time the learned counsel, submitted that having regard to the concurrent findings the petitioner desired to appeal only with regard to the amount of the maintenance. The judgment of the Privy Council was very brief and as reported in ILR 51 Cal 969 : AIR 1925 PC 60 reads as follows :

> "In the opinion of their Lordships the contention of the petitioners' counsel as to the effect of Section 110 of the Code is correct. They had therefore a right of appeal. Special leave to appeal should be granted, but should be limited to the question of maintenance. The petitioners' chance of success is not material to their application.

Their Lordships will humbly advise His Majesty that special leave to appeal be granted, but that it should be limited as already stated." This decision clearly indicated that, even though the variation or non-affirmation was in favour of the applicant, he was entitled for leave to appeal as of right at least in regard to that part of the subject-matter in respect of which there had been affirmation. There can be no question of such right where the variation was prejudicial to the applicant. But the High Courts in India have differed in regard to the interpretation of this decision on the point whether the subject-matter in that case in respect of which there was a right of appeal was only the claim for maintenance or the whole suit including the question of title. One view is that in the light of the contention urged by the appellant's counsel the right to appeal

extended to the whole subject-matter of the suit and that the leave was confined to the question of maintenance, not because it could not be agitated in appeal, but because the appellant's counsel himself voluntarily agreed to the restriction of the scope of appeal as there were concurrent findings on the question of title and it was the practice of the Privy Council not to interfere with, such findings.

The other view is that the decision lays down that when the suit comprised more subject-matters than one, the right to appeal is confined only to that subject-matter in respect of which there had been variation whether such variation was to the advantage or to the detriment of the applicant. These contending views have persisted till to-day there being minor modifications and refinements in between the two positions. In fact some High Courts have altogether changed or modified their views in the matter. The present position, broadly speaking, appears to be that while the Madras, Allahabad, Madhya Pradesh, Bombay and Hyderabad High Courts are in favour of the more restricted interpretation, vide *Subba Rao v. Chelamayya*[1], *Fateh Run war v. Durbijai Singh*[2], *Markandalal v. State*[3], *Govind Dhondo v. Vishnu Keshav*[4] and *Frnmnw v. Veerpanna*[5] the Oudh Chief Court and the Patna and Punjab High Courts have taken the view that when more subject-matters than one are comprised in a suit the applicant is entitled to appeal against the whole extent of his failure even though the variation is in respect of one of those subject-matters, whether that variation is to his advantage or to his detriment, vide *Abdul Samad v. Mt Aisha Bibi*[6], *Kanak Sunder Bibi v. Ram Lakhan Pandey*[7], and *Union of India v. Kanhaya Lal Sham Lal*[8], It may be mentioned that most of these are Special Bench or Full Bench decisions.

8. If the latter view is accepted, there can bet no doubt that in the case on hand the applicant is entitled to a certificate, since there has been a variation by the High Court of the decision given by the District Court even though it be that it was to the applicant's advantage and related to a small and minor matter, namely, the plaintiff's liability to pay the sum of ₹ 109-7-9 for which defendant 3 claimed a lien on the jewel. It seems to us, however, that even accepting that view there is another factor to be taken into consideration which rules out the applicant's right to a certificate.

9. The proposed appeal is directed against defendants 1 and 2 and not against defendant 3. The variation above referred to was in respect of the matter in dispute between the plaintiff (applicant) and defendant 3. The latter does not figure as a party in the proposed appeal at all, nor can he, since the applicant has no surviving grievance against him. It is true that the fact of the subject-matter of the suit as between the plaintiff and defendant 3 being different from that between the plaintiff and the other defendants will not deprive the plaintiff of her right to appeal as long as

[1] AIR 1952 Mad 771 (FB)
[2] AIR 1952 All 942 (FB)
[3] AIR 1958 Mad Pra 235
[4] ILR (1948) Bom 881 : AIR 1919 Bom 104
[5] AIR 1957 Hyd 24
[6] AIR 1948 Oudh 76 (FB)
[7] AIR 1950 Pat 325
[8] 1 ILR (1957) Punj 255 : AIR 1957 Pun 117 (FB)

there is variation in the judgment or decree of the High Court, either in respect of that subject-matter or any other subject-matter, from the decision of the Courts below, if the second view, i.e., the more liberal view on the meaning of affirmation, is accepted. But the same considerations as may apply to the subject-matter will not necessarily apply to the parties to the suit. The proposed appeal must be against some person or persons though in relation to the subject-matter. As long

as the proposed appeal is not against a particular party, when more parties than One have been contesting the suit or appeal against the applicant, and when one or more of those parties are not to figure in the proposed appeal, the position is the same as when the decision dealt with by the High Court and the judgment and decree of the High Court pertained to a suit filed only against the parties who are proposed to be arrayed in the appeal to the Supreme Court. The test then is whether in regard to such a Suit the judgment or decree of the High Court is one of affirmation or not. It is against reason and principle to allow the applicant to point at some one outside the purview of the proposed appeal and seek leave against others when the decision as between the applicant and the latter has been affirmed by the High Court. There is nothing in the language of Article 133 of the Constitution to warrant the applicant having such a right. Nor is there anything inferable from the views expressed in ILR 58 Cal 969 : AIR 1925 PC 60 to support such a view. There is no explicit reference to parties at all in Article 133. It must therefore be understood as applying to the normally understood notions in regard to the array of parties. In this connection reference may be made to the observations of Venkatasubba Rao, J. in the case reported in *Veukitasami Chettiar v. Sakkutti Pillai*[9], While considering the language of Section 110 of the Code of Civil Procedure in the context of the decree appealed from affirming or varying to decision of the Court immediately below in relation to the subject-matter in dispute, or as it affects the party for or against whom leave to appeal is sought, the learned Judge gives the following illustrations :

> "Two further illustrations will serve to bring out clearly all that is involved in the argument. Where the trial Court passes a decree against a debtor and his surety, but the appellate Court exonerates the surety on the ground that there has been a variation of the contract without his consent, the debtor is on this contention enabled by reason of the part-reversal of the decree, to file an appeal and attack the concurrent finding.

Again, for money borrowed by A, the trial Court passes a decree against A and B on the ground that B was A's partner but rejects the claim against C and D, finding that the they were not his partners. If the appellate Court reverses the trial court's finding so far as C is concerned, it will he open to the plaintiff (on this contention) to attack the concurrent finding that D was not a partner; B will be likewise enabled to got rid of the finding as against himself though that finding also is a concurrent finding.
Not a single case decided previous to 51 Ind App 319 : ILR 51 Cal 969 : AIR 1925 PC 60 or which the applicant so strongly relies, lends the slightest support to this view." The illustrations show, as stated in the decision that the applicant's contention if accepted would lead to anomalies of the most serious kind. It is true that in that decision the learned Judges expressed themselves in favor of the stricter view in

[9]71 Mad LJ 580 : AIR 1936 Mad 881

relation to the question of subject-matter, but whether that view is acceptable or not, the above mentioned result of extending the right of appeal even to a case where the party as between whom and the applicant there has been a variation in the decision is not to figure in the proposed appeal would show that such extension is unwarranted, when there is nothing in the language of Article 133 of the Constitution to compel it.

10. In the light of what is stated above we dismiss the petition. There will be no order as to costs.

Petition dismissed.