

# PATNA HIGH COURT

Narayan Prasad Sukul

Vs

Raj Kishore Misra

Supreme Court Appeal No. 113 of 1951

(Ramaswami and Jamuar, JJ.)

05.03.1953

## ORDER

### **Ramaswami, J.**

1. This application is for leave to appeal to the Supreme Court on behalf of defendant No.1 against a judgment of the High Court in second appeal dated 13-4-1951. The dispute relates to a building in the Purulia town known as Pratap Natya Mandir.

2. According to the case of the plaintiffs, defendant No.2 had executed a lease dated 3-11-1941, in their favour, which was registered on 15-11-1941. The plaintiffs brought the suit on 30-8-1943, asking for a declaration and also for permanent injunction against defendant No.1 from executing the decree which the latter had obtained in Second Appeal No.66 of 1943. The case of the petitioner, was that, on 5-4-1940, defendant No.2 executed a registered lease in his favour, and, upon the basis of this transaction, defendant No.1 had brought a suit against defendants Nos. 2 and 3 for recovery of possession of the building in dispute. The suit was decreed, and the decree was affirmed in appeal by the District Judge, and, in second appeal, the High Court affirmed the decree on 6-5-1943, with certain modification. Upon a consideration of the rival contentions in the present case the Subordinate Judge decreed the suit of the plaintiffs which was affirmed by the District Judge in appeal. On 26-4-1943, defendant No.1 preferred a second appeal in the High Court which was valued at Rs.2,100/-. The Stamp Reporter objected that the valuation was Rs.9,000/- and a first appeal ought to have been preferred. On 9-2-1948, the second appeal was converted into a first appeal by the order of the High Court. On 4-8-1948, a Full Bench of the Court decided in - *'Ramdeo v Raj Narain Singh'*, that clauses (a) and (b) of sub-section (1) of Section 11 of the Suits Valuation Act, 1887, were disjunctive and not conjunctive, and that under Section 11 of the Act the disposal of the appeal by the lower appellate Court could not be questioned as being without jurisdiction on the ground of the valuation being beyond the pecuniary jurisdiction of that Court. It was further held by the Full Bench that simply because the lower appellate Court had no pecuniary jurisdiction over the appeal, which should have been heard as a first appeal in this Court, would not by itself amount to prejudice in the disposal of the case on merits. After the decision of the Full Bench, the Stamp Reporter said that the present suit should be treated as second appeal. Accordingly, on 11-3-1949

a Bench of this Court ordered that the first appeal would be reconverted into a second appeal. On 13-4-1951, the case was treated and heard as second appeal and was dismissed.

3. When this matter came up before the High Court in the first instance, we directed that the case should be remanded to the Subordinate Judge of Purulia for making an enquiry into the question of valuation. The Subordinate Judge has now made a report stating that the valuation of the subject-matter of the suit was Rs.11,915/- on 30-8-1943, and the valuation of the subject-matter at present in dispute is of the same extent. Mr. S.C. Ghosh who appears on behalf of the petitioner, contended that the petitioner had a right of appeal under Section 110, Civil Procedure Code, before the promulgation of the Constitution of India, and that right of appeal was a vested right, and would continue irrespective of the fact that Article 133(1) stipulates that the valuation of the subject matter in dispute should be not less than twenty thousand rupees. In support of his argument, learned Counsel relied on a decision of the Bombay High Court, - *'Dajisaheb v. Shankarrao'*<sup>2</sup>, We think that the contention of Mr. S.C. Ghosh on this point is well-founded. In the present case, the learned Subordinate Judge has valued the subject-matter in dispute at a sum of Rs.11,915/-. On behalf of the opposite party, Mr. Mazumdar raised several objections to the report of the Subordinate Judge. Learned Counsel said that the valuation has been made on a wrong principle. But no such objection was raised before the Subordinate Judge before whom the opposite party appeared and contested the valuation. Counsel also stated that the valuation has been made on the profit from the cinema business, and not on the rental paid. This objection also was not raised before the learned Subordinate Judge who said that there was no evidence produced by the parties to show what was the profit from the cinema business.

4. The objections of Mr. Mazumdar, must therefore, be overruled, and the report of the learned Subordinate Judge must be accepted as correct, and the valuation of the subject-matter in dispute must be taken to be a sum of Rs.11,915 at the time of the institution of the suit and at the present moment when leave to appeal to the Supreme Court is sought. If that is the position, it is clear that, under Section 110, Civil Procedure Code, the petitioner had a right of appeal either to the Federal Court or to the Judicial Committee of the Privy Council at the time when the suit was instituted. Article 133(1) of the Constitution provides that an appeal lies to the Supreme Court only in a case where the amount or value of the subject-matter in dispute is over twenty thousand rupees. The question that arises in this case is whether Article 133(1) has retrospective effect, and whether it takes away the right of appeal which the petitioner had. In our opinion there is nothing in Article 133(1) to suggest that the right of appeal which had already vested in the petitioner is adversely affected. It is well settled that a right of appeal is not a mere matter of procedure, but it is a substantive right which cannot be taken away retrospectively unless the legislation clearly states, either expressly or by necessary implication, that the vested right has been taken away (see - *'Colonial Sugar Refining Co. Ltd. v. Irving'*<sup>3</sup>, (C). But, when did the right of appeal vest in the petitioner in this case? It was pointed out on behalf

of the opposite party that the second appeal before the High Court was dismissed on 30th April 1951. But that is not the date for the purpose of determining when the right of appeal arises. The reasoning of Lord Macnaghten in (1905) AC 369 is conclusive authority to show that the right of appeal is not a mere matter of procedure and that the right to enter the superior Court is deemed to arise to a litigant on the date of the institution of the suit even before any decision has been given by the inferior court. The reason is that a suit and all appeals from that decree made therein are regarded as one "Legal proceeding" and in - *'Sadar Ali v. Dolimuddin'*<sup>4</sup>, it was held by a Special Bench of the Calcutta High Court that the right of appeal is deemed to arise to the litigant

at the date of the institution of the suit and that the amendment of the Letters Patent which came into effect on 14-1-1923 could not be given retrospective effect (see also - 'In re Vasudeva Samiar', AIR 1929 Madras 381. Applying the principle to the present case it is clear the suit was brought by the plaintiff on 30-8-1943 and the right to appeal to the Federal Court and to His Majesty in Council arose on that date. There are important considerations in the present case which suggest that this right of appeal, which the petitioner had, has been clearly saved. In the first place, it is important to state that after the passing of the Indian Independence Act, and before the commencement of the Constitution, the jurisdiction of the Federal Court was enlarged and the appellate jurisdiction of the Privy Council in civil cases was transferred to the Federal Court by the Federal Court (Enlargement of Jurisdiction) Act (Act 1 of 1948). Under this Act, appeals, in all civil cases from which a direct appeal could have been taken to His Majesty in Council either with or without special leave could lie to the Federal Court under the provisions of Civil Procedure Code, 1908. After the Constitution of India was promulgated, the appellate jurisdiction of the Federal Court was transferred to the Supreme Court. Article 135 of the Constitution states :

"Until Parliament by law otherwise provides, the Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions of Article 133 or Article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law."

In this connection Article 374(2) is also important. Article 374(2) states:

"All suits, appeals and proceedings, civil or criminal, pending in the Federal Court at the commencement of this Constitution shall stand removed to the Supreme Court, and the Supreme Court shall have jurisdiction to hear and determine the same, and the judgments and orders of the Federal Court delivered to or made before the commencement of this Constitution shall have the same force and effect as if they had been delivered or made by the Supreme Court."

Upon an examination of Articles 374(2) and 135 it is clear that though the Supreme Court may have no jurisdiction under Articles 133 and 134 still if in respect of that matter the Federal Court had jurisdiction, the Supreme Court also would by reason of Article 135 have the same jurisdiction in respect of that matter. There is a further consideration. By the Adaptation of Laws Order, 1950, Section 110, Civil Procedure Code, was adapted to bring it into conformity with Article 133(1) and the sum of Rs.20,000 was substituted for the sum of Rs.10,000 in Section 110 and other consequential amendments were made. Section 27 of the Adaptation of Laws Order, 1950, is very significant. Section 27 states that

"nothing in this Order shall affect the previous operation of or anything duly done or suffered under, any existing law, or any right, privilege, obligation or liability, already acquired ....."

For these reasons, we think that the petitioner has a right of appeal to the Supreme Court in this case under Section 110, Civil Procedure Code, provided he makes out that a substantial point of law is involved.

5. It was contended by Mr. S.C. Ghosh that the appeal ought to have been treated by the High Court as a first appeal, and not as a second appeal, and that the decision of the Full Bench in AIR 1949 Patna 278 requires reconsideration. After having heard Mr. Mazumdar, who appears on behalf of the opposite party, we are inclined to think that there is case, and that the requirements of Section 110, Civil Procedure Code, have been complied with.

6. We, accordingly, allow this application, and grant a certificate to the petitioner for leave to appeal to the Supreme Court under Section 110, Civil Procedure Code, read with Article 135 of the Constitution. The petitioner is entitled to his costs; hearing fee five gold mohars.

Application allowed.

Cases Referred.

<sup>1</sup> AIR 1949 Pat 278

<sup>2</sup> AIR 1952 Bom 303

<sup>3</sup>(1905) AC 369

<sup>4</sup> AIR 1928 Cal 640