RAJASTHAN HIGH COURT

Purohit Swarupnarain

Vs.

Gopinath

Revn. Appln. 264 of 1950
(Wanchoo, C.J. Bapna, Ranawat, Sharma and Dave, JJ.)

15.04.1953

JUDGMENT

Wanchoo, C.J.

1. The following point has been referred to this Bench for decision: "Whether where it is open to a party to raise a ground of appeal under Section 105, Civil Procedure Code from, the final decree or order with respect to any order which has been passed during the pendency of the case, it should be held that an appeal from that order lies to the High Court in the meaning of the term "in which no appeal lies thereto" appearing in Section 115, Civil Procedure Code"

2. The facts, which have led to this reference, may be very briefly set out. There was a suit in the Court of the Additional Civil Judge, Jaipur City, in which the defendant, who is the applicant in revision, raised the plea that the custom of pre-emption being contrary to the provisions of Article 19(1)(f) of the Constitution of India, should not be given effect to by the Courts. The Additional Civil Judge heard arguments and decided the issue against the defendant and ordered the suit to proceed. Thereupon, the defendant came in revision to this Court. This revision came up for hearing on 7-10-1952 before a Bench at Jaipur. In the meantime, another Bench of this Court, to which I was a party, decided in - *'Pyarchand v. Dungarsingh',* [1] that before a revision is competent in this Court, it has to be shown

> "that no appeal lies from that order to the High Court whether directly or indirectly. If there is a direct appeal to the High Court, namely a first appeal, the revision will not be competent. Even if there is an indirect appeal, namely a second appeal or the order in question can be taken in either first or second

appeal to the High Court by taking a ground of appeal under Section 105, the High Court will not be competent to entertain a revision."

3. As the order, which was being called in question in revision could clearly be attacked by taking a ground of appeal under Section 105, Civil Procedure Code from the decree in the suit, it was urged before the Bench that the revision was incompetent and should be dismissed on that ground. Mr. Bhandari appearing for the applicant however urged that the view taken in 'Pyarchand's case' was not in line with the decisions of other High Courts in India, and should be reconsidered, as the point involved was of considerable importance. Thereupon, the Bench made a reference in terms which I have set out above.

4. Before I consider the terms of the section and the interpretation to be placed on them, I think it desirable to set out the history of Section 115, as that will help in determining the meaning to be given to the words now in dispute. The Civil Procedude Code of 1859 did not contain any provision for the exercise of revisional powers by the High Court. No order, therefore, which was not open to appeal directly or indirectly, and which could not be challenged under the provisions corresponding to the present Section 105, could be looked into by the High Court, either because it could not come before it at all or even if it did, it could not be so challenged. It was perhaps felt that the absence of such power precluded the High Court from looking into the correctness of a number of orders, which, though of importance, could not be challenged under the provisions corresponding to the present S.105. So by S.35 of Act 23 of 1861 the Sudder Courts were empowered to call for the records of any case decided in appeal by a Subordinate Court, and in which no further appeal lay, and revise the decision when the subordinate court appeared to have exercised a jurisdiction not vested in it. This power, however, did not also seem to be sufficient for it only enabled the High Courts to send for cases decided by the appellate courts. There remained however many orders passed by trial courts which could not be challenged directly or indirectly in appeal to the High Court, and no revision was possible by the High Court with respect to these orders. Consequently S.622 was introduced in the Civil Procedure Code of 1877, which was more or less in the same terms as the present S.115 except that Clause (c) did not appear therein. Later, a provision analogous to Clause (c), as it now exists was added in 1879. It was now open to the High Court to revise any order which would not come before it in appeal directly or indirectly provided the other terms of S.622 were complied with.

5. This history clearly shows that the intention of the legislature was to give power to the High Courts, which was in the nature of superintendence over the subordinate courts, even though the particular order passed by the subordinate court would not come before the High Courts directly or indirectly in appeal. It is with this back ground that we have to interpret the actual words used in Section 115, the relevant part of which is as follows:

> "The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto." I lay particular emphasis on the word "in" used in the phrase 'in which no appeal lies thereto'. Mr. Bhandari in substance contends that what S.115 provides is that if there is no appeal (whether first or second) to the High Court from the particular order in question the order would be revisable under Section 115. To put it otherwise, every order, which is not appealable up to the High Court under the provisions of the Code, would be revisable under Section 115) if the other conditions mentioned in that section are complied with. I must say that if that was the intention of the legislature, it would not have used the word "in", as the word generally used in the Code in connection with appeals is "from".

6. Section 96, which provides for appeals from decrees, says that "an appeal shall lie from every decree passed by any court etc. etc." Section 100, which provides for second appeals, says that "an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court etc., etc." Section 104, which provides for appeals from orders, says that "an appeal shall lie from the following orders etc., etc." Section 109, which provides for appeals to the Supreme Court, says that "an appeal shall lie to the Supreme Court from any judgment, decree or final order passed by the High Court etc., etc." If, therefore, the intention of the legislature was that a revision should lie from every decree or order from which no appeal was provided up to the High Court under Civil Procedure Code, I should have found the same word "from" used in S.115 also. Instead however, the word used is "in", the actual phrase being "in which no appeal lies thereto", and not "from which no appeal lies thereto". The legislature, therefore, must have intended something different when it used the word 'in' and not the word 'from'.

7. Mr. Bhandari urges that even if the legislature intended something different by using: the word 'in', it could only have intended that the High Court should look at the record as it stood on the date on which the order in question was passed, and if any appeal lay to the High Court on the record as it stood on that date, revision would he incompetent. But if no appeal lay to the High Court directly or indirectly on the record as it stood on the date when the order in question was passed, revision would be competent. This argument in my opinion, puts in slightly different words the same thing, unless it means that if there is any prior order which could be taken in appeal upto the High Court the latter order would not be revisable. It would then mean that the revocability of an order would depend upon whether there was any appealable order from which a first or second appeal could lie to the High Court on the record on the date of the order in question. I do not think, however, that it could have been the intention of the legislature to make the later order depend upon the appeal ability or otherwise of some earlier order, for, it may be that the earlier order might have been already taken in first or second appeal to the High Court and there would then be no opportunity for the High Court to consider the later order. To my mind, therefore, the intention could only have been, by using the word "in" and not the word "from" in this phrase, that the order in question should not be one which would come for consideration before the High Court in any form in any appeal that may reach the High Court in the suit or proceeding in which the order was passed. It is easy to understand that the revisability of the order was made to depend upon whether the order would reach the High Court in a first or second appeal, and could be questioned there by means of a ground under Section 105. If it was so, the legislature could not have intended that the High Court should use its extraordinary power under Section 115 at an intermediate stage.

8. The words "in which" in the phrase 'in which no appeal lies thereto' qualify the word 'case'. The word 'case' has been interpreted in 'Pyarchand's case' as referring to the whole suit or proceeding, or to a part of a suit or proceeding. But whether the word 'case' refers to the whole suit or proceeding, or to a part of the suit or proceeding, the words 'in which' qualify the words 'suit or proceeding' which may be substituted for the word 'case'. Making the substitution, the section would read like this:

> "The High Court may call for the record of any suit or proceeding or part of a suit or proceeding which has been decided by any court subordinate to such High Court and in which (suit or proceeding) no appeal lies." Therefore, the

> revisability of the order depends on whether an appeal lies in the suit or proceeding. If an appeal lies in the suit or proceeding, and if the order in question can be challenged in the appeal, whether it be first or second appeal, no revision would be competent to the High Court. It is only when the order in question cannot be challenged at all, in first or second appeal, and even by way of a, ground under Section 105, that it can be said that no appeal lies to the High Court, and it should, therefore, exercise its extraordinary jurisdiction under section 115 to look into the corrects ness of the order, as required by clauses (a), (b) and (c) of the section.

9. It was urged before the Bench which made the reference, and before this Bench also that the decision in 'Pyarchand's case' was not in line with the decisions given by other High Courts in India. This aspect was considered by me in 'Pyarchand's case, and it may be admitted that there is no definite decision by the High Courts in India going to the same extent as the decision in 'Pyarchand's case'; but as I pointed out in that case, some High Courts had almost come to the same conclusion which was arrived at in 'Pyarchand's case, but did not actually take it. It is not necessary for me to repeat what I have already said in 'Pyarchand's case'. But the more I consider it the more I feel that that decision is correct on the interpretation of the phrase 'in which no appeal lies thereto' appearing in S.115.

10. Before I deal with the cases cited by Mr. Bhandari and Mr. Chiranjilal, I should like to refer to some older decisions of various High Courts in India as to the meaning to be attached to this phrase. Learned Judges of those times were nearer the date when this particular section came into existence, and their opinion as to its meaning would be of great value.

11. In - *'Motilal Kashibhai v. Nana',* [2] Sargent C.J. considered the scope of S.622 and remarked as follows:

> "The expression "case" in S.622 of the Code of Civil Procedure may be, as stated by the Court in - *'Dhapi v. Ram Pershad',* [3] wide enough to include an interlocutory order. But a word of such general import must be controlled by due regard to the purpose with which S.622 was framed. This, it cannot be doubted, was to enable a party to a suit to get a decision or order of a lower court rectified by the High Court when there would otherwise be no remedy. In

the case of those interlocutory orders (such as the present one), against which no immediate appeal lies, a remedy is still supplied by Section 591 (which is equal to S.105 now), which provides that the order may be made ground of objection in the appeal against the final decree."

The learned Chief Justice thus made it clear that revision would only lie against those orders which could not be challenged under Section 105 in appeal which would finally lie from the decree passed in the suit. It may be added that the question whether the particular order in that case was open to challenge under Section 105 is a different matter altogether; but the principle, which was laid down in that case, is the same which was laid down in 'Pyarehand's case'.

12. In - *'Chattar Singh v. Lekhraj Singh',*[4] Justice Oldfleld considered the scope of S.622 in these words:

"We are of opinion that we have no power of revision under Section 622. The contention that the proceeding for arbitration is a decided case in which no appeal lies within the meaning of the section, and therefore open to revision under Section 622, is not tenable. The proceeding is of an interlocutory character only, made in the course of a suit; it is part of a case which is still undecided, and in which an appeal lies from the final decree. It was not the intention to allow of revision of interlocutory proceedings, in the course of a suit, which do not determine it. The order, which is the subject of this application, will be open to revision by appeal from the final decree in the suit, and even if S.622 allowed of it, it would be highly inexpedient for us to interfere at this stage of the case." The decision in this case rested on two grounds, namely

(i) that an interlocutory order was not a case decided, a view which the Allahabad High Court has consistently held, and with which, with all respect I have not agreed in my judgment in 'Pyarchand's case, and

(ii) that the order in question will be open to revision by appeal from, the final decree in the suit.

13. The next case is - 'In re Nizam of Hyderabad', 9 Mad 256. In this case, Muttusarni Ayyar J. considered the scope of S.622. The revision was directed against two interlocutory orders, and the learned Judge observed as follows:

"No appeal is allowed by S.588 from either of these orders whilst Section 591

(now equal to section 105) prescribes the course to be followed in regard to defective interlocutory orders. I do not consider that S.622 is applicable to them and it presupposes a decision or an order in the nature of a decree and that no other remedy is provided for specially by the Code."

Here again, the learned Judge clearly lays down that S.501 which is equivalent now to Section 105, prescribes the course to be followed in regard to defective interlocutory orders.

14. In - *'Farid Ahmed v. Dulari Bibi',*[5] Oldfield J. said with reference to a revision application against an order of transfer

"that this is not an order which we can revise under Section 622 of the Civil Procedure Code, as it is an order made in a suit and there is an appeal in the case from the final decree," The argument before him was that the matter could be taken up in first appeal under Section 591, and he accepted this argument. Here again, it is not necessary to consider whether an order of transfer can be challenged under Section 105 in the appeal from the decree passed finally in the suit. It is now well settled that such an order cannot be challenged in appeal by way of a ground under Section 105, but that has nothing to do with the soundness of the principle laid down in this case that where an order can be challenged under Section 591 (now equal to S.105), no revision lies.

15. In - 'In the matter of Omrao Mirza', 12 Cal LR 148, the plaintiff was asked to make good the court-fee within a certain time. Before the time expired, he filed a revision in the High Court, and it was held that if the suit had been dismissed on the expiration of the time limited on the ground that the relief was not properly valued, there would have been an appeal. Field J., with whom McDonell J. concurred, observed as follows:

"I am therefore of opinion that this is not, with reference to the language of Section 622, 'a case in which no appeal lies', and I therefore think that the matter which is now in dispute ought to be determined upon appeal, and that we have no jurisdiction to grant the rule under Section 622."

16. In - *'Damodar Trimbak v. Raghunath Hari',* [6] the Bombay High Court agreed with

the decision of the Allahabad High Court in 'Chatter Singh's case, and said that the order before them was not subject to revision under Section 622 as "the order complained of is interlocutory and, if erroneous, may form a ground of appeal against any decree "that may be passed in the suit." This clearly means that if the order can be challenged under Section 105 in the appeal from the decree which may be finally passed, it cannot be the subject matter of revision. The words "in which no appeal lies thereto" have not been specifically mentioned in many of these cases, but they are the basis of the decisions arrived at.

17. Mr. Bhandari concedes that the High Courts have generally held that if another remedy is open, the High Court would not generally interfere with an order in revision. But his contention is that that is very different from what was laid down in 'Pyarchand's case, namely that the High Court would be incompetent to interfere if an appeal lies directly or indirectly to the High Court. There is no doubt that what has been laid in 'Pyarchand's case' goes farther than what has generally been accepted by the High Courts namely that they would not interfere when another remedy lieS.But if the words of S.115 have the meaning, which has been given to them in 'Pyarchand's case, and I have no doubt that they have, I do not think why we should shrink from coming to the decision which was arrived at in 'Pyarchand's case, simply because the High Courts in recent years have not come to that decision. That is why I have pointed out the older decisions to show that learned Judges, who were nearer the time when S.622 came to be enacted, took a different view which was in consonance with the view taken in 'Pyarchand's case'.

18. I shall now refer to some cases which have been cited by Mr. Bhandari. He concedes that if there is a second appeal to the High Court from the order or decree in question, it would not be revisable. What he submits is that the recent trend of decisions of various High Courts is in favor of the view which he wants us to accept. The most important case on which he relies is - *'Narayan Sonaji v. Sheshrao Vithoba',* [7] It is a decision of a Full Bench which came to be constituted on a reference by Bose J. '(now Judge of the Supreme Court). Certain observations of Bose J. in the order of reference may be quoted to indicate the view that he was taking. At page 264 he observes as follows:

> "If the law is that no appeal shall lie except where a statute expressly provides for one and if a statute permits an appeal only under circumscribed conditions it

seems obvious that if a Court entertains an appeal in circumstances which the law does not warrant it travels beyond its jurisdiction; and what applies to appeals appears to me to apply with even greater force to revisions."

Further at page 265 he observes as follows:

"Now, of course, it is perfectly obvious that no appeal lies from an interlocutory decision of the nature we have here but an appeal does lie regarding the subject-matter of the decision and express provision for this is made in S.105 of the Code. It states in substance that no appeal shall lie from interlocutory orders of the nature we are considering here but "where a decree is appealed from any error, defect or irregularity in any order affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal."

The Full Bench however, of which Bose J. was not a member, did not accept that view. Padhye J. at page 268 observes as follows: "It is thus clear that the jurisdiction to entertain a revision does not depend on the order sought to be revised being interlocutory or final. Nor does it depend upon the particular matter disposed of by that order. The High Court has jurisdiction to entertain revision against orders deciding a particular matter provided the three conditions mentioned in the first part of S.115 are satisfied, it may be noted that according to one of those conditions the order sought to be revised must not by itself be appealable to the High Court. It is immaterial that an appeal would lie to the High Court from the decree which may ultimately be passed in the suit."

With respect to the view expressed here, with which the other two Judges seem to have agreed, I must point out that the learned Judge neither met the argument of Bose J., nor analyzed the words used in the section. He says that one of the conditions is that the order sought to be revised must not by itself, be appealable to the High Court. The words "by itself" do not appear in S.115. It is not clear from these observations whether the learned Judge would allow revisions to the High Court in decrees by Munsifs which are open to second appeal, because those decrees also are not by themselves appealable to the High Court. That the learned Judge himself seems to have felt that he was going too far is clear from his observations at p.269 where he has said that

"It does not however follow that the High Court will interfere with every order against which a revision is entertain able. The interference will depend firstly

upon whether the requirements of Clauses (a), (b) and (c) of S.115 Civil Procedure Code, are satisfied and secondly on the Court's regarding it a proper case where the discretionary power of revision should be exercised..... ....The High Court would not exercise its revisional jurisdiction only because the subordinate court has gone wrong on facts or on law."

19. I must say that I respectfully agree with the observations of Bose J. in - *'Rajeshwar Vishwanath v. Dashrath Narayan'*[8] which he has quoted in his order of reference, and which are as follows: "I am not enamored of the view that the High Court has the right to interfere on questions of law but that it need not do so unless it thinks fit and that it will not think fit unless there has been substantial injustice and the like.....If the matter falls squarely within the ambit of its powers if cannot shirk a decision and it must act and decide according to the principles and laws which are administered in Courts of Justice. It cannot pick and choose." It seems to me that the High Courts which have opened the door of revision too wide, have then to use other methods to cut down the opening. It is to these methods that Bose J. is referring in the quotation given above. With all due respect to the view of Padhye J. I am not convinced that the view taken in - 'Pyarchand's case, is incorrect, particularly when I find very little reasoning in support of the view expressed by Padhye J.

20. Mr. Bhandari has further cited a number of cases of various High Courts where it had been held, when dealing with a question of court fees, that an order passed by a subordinate court demanding further court fees from the plaintiff is revisable even though if the plaintiff fails to pay the court fees a decree rejecting the plaint would follow. The High Courts have further held that no revision by the defendant would lie if the court holds that the court-fee paid is sufficient. Reference in this connection may be made to - *'Murthiraju v. Subbaraju',* [9] - *'Mahadeo Gopal v. Hari Waman',* [10] - *'Ramkhelawan Sahu v. Bir Surendra Sahi',* [11] In these it has been said that the mere fact that an appeal would lie later from the consequential order passed by the subordinate Judge if the stamp fee were not paid was no ground for refusing to entertain the petition. It may be mentioned that in these cases, the words "in which no appeal lies thereto" were not directly considered, and with all respect to the learned Judges who decided these cases I do not see why the High Court should interfere immediately, and should not wait till the plaintiff fails to deposit the court-fee and the plaint is rejected and an appeal comes to the High Court.

21. A reference was also made to certain observations of learned Judges in -*'Budhoo Lal v. Mewa Ram',* [11] (N). It may be mentioned that the case is a direct authority only for the meaning of the words "case decided", so far as Allahabad High Court is concerned; but Mr. Bhandari relies on certain observations of learned Judges in the course of the judgments delivered in that case. At page 2 Rafiq J. observed as follows:

> "In S.115 one of the conditions required is that no appeal lies from the order complained of. The section does not mean to say that no remedy at any time is open to the aggrieved party. Moreover it would be small consolation to the applicants to succeed on the plea of jurisdiction on appeal from the decree after undergoing a great deal of trouble and expense, and have the suit tried by the Cawnpore Courts over again."

At page 3 learned Rafiq J. further observed as follows:

> "The objection that another remedy is open to the applicants if a decree is passed against them is not sustainable upon the language of S.115 of the Civil Procedure Code, which requires that no appeal lies from the decision objected to."

With all respect to the learned Judge, he has assumed that the words in the section are "from which an appeal lies thereto", and has not considered the significance of the word "in" in place of the word "from". Piggot J. at page 4 referred to this point but did not decide it saying that this, however, was not the point which had been referred to the Full Bench.

Walsh J. at page 7 observes as follows:

> "No appeal lies from the order now before us. The fact that an appeal may hereafter be brought from the final decree and that under Section 105 of the Civil Procedure Code this order may be made the subject of an objection in such appeal so far as it affects the merits, does not in my opinion make the case one in which an appeal lies to the High Court now, when the application in revision is made."

If I may say so with respect Walsh J. also proceeded as if the words in S.115 were

"from which no appeal lies thereto". His attention was not apparently directed to the distinction which arises because the word "in" is used and not the word "from".

22. In - *'Ram Lal v. Mt. Bibi Sahra',* [13] Fazl Ali J., though he did not consider the words "in which no appeal lies thereto", observed as follows at page 91:

> "If the ultimate decision of the Munsif goes against the petitioner, he will in due course be entitled to prefer an appeal and he may ask the appellate Court to deal with the "issue as to jurisdiction" also. I would however like to make it clear that this. Court will not hesitate to interfere with an interlocutory order in a proper case where it is manifest that if the order is not promptly interfered with the party affected by the order may suffer an irremediable harm. The present case however does not appear to me to be a case of that description." If I may say so with respect, the observations of Bose J. in - 'AIR 1943 Nagpur 117', which I have quoted above, and with which I respectfully agree, apply to the view taken in this case.

23. Mr. Bhandari also referred to the following observations of Malik J., as he then was, in - *'Manmohan Lal v. Raj Kumar Lal',* [14]

> "There seems to be no justification for interpreting the words "in which no appeal lies" as equivalent to the expression "in which no appeal lies or may in. future lie"

I see no reason or justification for restricting the jurisdiction of the High Court by interpreting the word "appeal" as including a problematic second appeal, as the exercise of the revisional jurisdiction of the High Court is always discretionary, and where a party may have convenient remedy by way of appeal to the lower appellate Court this Court can always refuse to entertain or interfere in revision." Malik J. seems to imply by these observations that there must be a direct appeal, i.e., first appeal, to the High Court from the order in question; but this view has not been accepted by the Allahabad High Court, and other High Courts have also held the view that where a second appeal lies from the decree of a court, no revision would be entertain able. I shall consider this more in detail a little later.

24. A review, therefore, of the authorities cited by Mr. Bhandari does not, in my opinion, show that the view taken by this Court in - 'Pyarchand's ease, is incorrect.

25. I now turn to the argument addressed by Mr. Chiranjilal who contended that a revision would lie in every case in which there was no direct appeal to the High Court from) the order or decree of the subordinate court, and that even if there was a second appeal, that would not make the revision incompetent. I have already said that this seems to be the view of Malik J., as he then was, in - ' AIR 1946 Allahabad 89'. This view was also taken in - *'Daw Min Baw v. A.V.P.I.N. Chettyar* [15] and Baguley J. repelled the contention that the word "appeal" used in S.115 also included a second appeal. Mr. Chiranjilal contends that this Court should also adopt this view, and in that case there would obviously be no difficulty. He further urges that the view that second appeal is included in the word 'appeal' was wrongly adopted by a number of High Courts because of Sulaiman J.'s view in - *'Bani Madho Ram v. Mahadeo Pandey',* [16] . In that case, Sulaiman J. observed as follows:

> "In our opinion there is no ground for restricting the scope of the words "in which no appeal lies thereto" to cases where no appeal lies from the order sought to be revised. So long as the party has a right to come up to the High Court by way of an appeal and has failed to avail himself of that opportunity by first going up to the District Judge and then coming up to the High Court, he cannot ask the High Court to interfere in revision."

If I may say so with all respect, this view is in consonance with the intention of the legislature also, as is clear from the history of this section, and has been adopted by other High Courts.

26. The words "appeal lies thereto" came to be examined in - *'Nafar Chandar v. Kali Pada Das',* [17] (S). Nasim Ali J. agreed with the decision of the Allahabad High Court in - ' AIR 1930 Allahabad 604(2)(R)'. The other learned Judge Narsing Rau J. was hesitant in placing that construction and agreed with the order on other groundS.In - *'Pattammal v. Krishnaswami Iyer',* [18] it was held following an earlier decision of that Court in - *'Tirupati Raju v. Vissam Razu',* [19] that the word 'appeal' includes a 'second appeal'. In *Mt. Barko v. Mt. Habiba Khanam',* [20] **,** Kidwai J. held that it was only in cases in which no appeal at all first or second lay to the Chief Court that a revision application would be entertained.

27. It seems to me that the view that the word 'appeal' used in S.115 includes 'a second

appeal' is well established and there is no reason why this Court should not accept that view. As a matter of fact, looking to the history of this section, it is obvious that the intention of the legislature was that if the decree or order in question could be brought to the High Court for consideration by means of an appeal whether at once or later, the High Court would not have revisional jurisdiction. There is, in my opinion, no serious objection to the adoption of this view considering the language used in S.115. It would indeed be strange if the legislature intended that a decree from which a second appeal would, in due course, lie to the High Court, should be immediately revisable. If, therefore, it is well established, as I hold that it is, that where a second appeal lies to the High Court, no revision would lie, the decision in - 'Pyarchand's case, is only an extension of this principle. Once it is conceded that no revision lies if it is possible to bring the matter to the notice of the High Court at a later stage by a second appeal, I do not see why the words used in S.115 should not be capable of the interpretation which has been put on them in - 'Pyarchand's case'. I have, therefore, no hesitation in coming to the conclusion that the interpretation of the words "in which no appeal lies thereto" given in - 'Pyarchand's case, is correct.

28. Lastly, reference is made to a decision of this Court in - *'Prem Das v. Govind Sahai',* [21] to which I was a party. It is urged that the view taken in that case goes against the view taken in - 'Pyarchand's case'. In the first place:, my attention was not directed to the words "in which no appeal lies thereto" in that case, and therefore that case is no authority for the interpretation of these words. In the, second place it appears that the order in question could not be assailed in the appeal from the final decree by a ground under Section 105. The suit was filed in the court of Munsif, and an issue was raised whether the civil court had jurisdiction or the revenue court. The Munsif decided that he had jurisdiction, and proceeded with the case. Thereupon, there was a revision to the High Court, which was allowed. This point could not be assailed by taking a ground under Section 105, as is clear from Sections 41 and 42 of the Rajasthan Revenue Courts (Procedure and Jurisdiction) Act (No.I) of 1951. Section 41 says that where a suit is instituted in a civil or revenue court, an appeal lies to a civil court, an objection that the suit was instituted in the wrong court shall not be entertained by the appellate court, unless such objection was taken in the court of first instance; and the appellate court shall dispose of the appeal as if the suit had been instituted in the right court. Further S.42 says that if objection is taken in such suit and if the appellate court has not before it all such materials and remands the case, or frames issues and refers them for trial or requires additional evidence to be taken, it may direct its order either to the court in which the suit was instituted, or to such

courts as it may declare to be competent to try the same. No objection shall be taken or raised in appeal or otherwise to any such order on the ground that it has been directed to a court not competent to try the suit.

29. It is clear from these provisions that no ground could be taken under Section 105 as to jurisdiction from the final decree which would be passed in such a suit. The suit in this case was instituted in the court of the Munsif, and an appeal obviously lay there from to the civil Court. Therefore, the suit could be disposed of by the lower appellate court under the terms of Section 42, and no ground as to jurisdiction could be taken under Section 105 even if the matter came to the High Court in second appeal. Under these circumstances, the decision in - 'Prem Das's case, is not even indirectly opposed to the view taken in - 'Pyarchand's case'.

30. I have not considered it necessary to review those cases which have been already considered by me or by my brother Bapna J. in - 'Pyarchand's case'. The judgments in that case may be considered supplementary to what I am saying now, and it is, therefore, unnecessary to repeat what was said in - 'Pyarchand's case'. Nor have I considered the argument of expediency, which has sometimes been pressed into service, as in my view expediency has nothing to do with the interpretation of the words with which I am concerned.

31. On a careful consideration, therefore, of all the authorities that have been cited, I come to the conclusion that the decision in - 'Pyarchand's case, is correct, and that the question put to the Full Bench should be answered as follows:

> "Where it is open to a party to raise a ground of appeal under Section 105 Civil Procedure Code from the final decree or order with respect to any order which has been passed during the pendency of the case, it should be held that an appeal in that case lies to the High Court within the meaning of the term "in which no appeal lies thereto" appearing in S.115 Civil Procedure Code"

The consequence of this decision would be that in such a case revision will not be competent. Let this answer be returned to the Bench concerned.

Bapna, J.

32. I entirely agree with my Lord the Chief Justice but would like to add a few words. One of the arguments by learned counsel for the petitioner was that having coma to the conclusion that the word 'case' decided had a wider import and that 'case' would include not only the suit itself but also a part of the suit, the word 'case' if substituted by the interpretation given to it would permit a revision where the matter decided would not by itself be open to an appeal or a second appeal to the High Court. This contention has no force. If we make a substitution the opening sentence of S.115 will read as under:

> "The High Court may call for the record of any case or part of the case which has been decided by any Court subordinate to such High Court and in which case or part of the case no appeal lies thereto."

The decision in - 'AIR 1952 Rajasthan 90', would be supported even on the above substitution as the sentence would mean that the High Court may call for the record of any case or part of a case decided by any Court subordinate to such High Court where no appeal lies to the High Court either against the decision in the case or against the decision in that part of the case i.e. in either of the two cases a revision would not be competent. The words 'in which' in the case of substitution as above would emphasize that the record may only be called in cases where the particular matter decided may not come up for decision in appeal to the High Court.

33. Learned counsel for the intervener at one stage urged that the interpretation placed by this Court in - 'Pyarchand's case, on S.115 had not been accepted or urged so far and therefore it may be held that it was not correct. He relied on the observations of their Lordships of the Privy Council in - *'Brij Narain v. Mangla Prasad',* [22] where it was said that when a long series of cases, extending over a long period of time when parties are represented by eminent counsel, are decided in a way where if a plea which was evident had been taken and upheld, the decision would have been the other way, there arises an irresistible conclusion that the plea was not taken because it was felt to be bad.

34. The argument however was addressed without taking into notice the various cases which have been referred to in the judgment of my Lord the Chief Justice and it is apparent that in the earlier cases, the Bombay, Allahabad and Calcutta High Courts

took the same view as held by us in - 'Pyarchand's case'. In the later decisions a tendency for a narrow interpretation is noticeable but the forceful argument of Bose J. in the referring judgment in - 'AIR 1943 Nagpur 117', does not leave any room for the contention that eminent counsel or Judges did not direct their minds to this aspect of the question.

35. Learned counsel for the intervener argued at some length that the word "appeal" in clause "in which no appeal lies thereto" does not include a second appeal. This line of reasoning was however not adopted by learned counsel for the petitioner. Though the point was not free from controversy, the view taken by us that the word "appeal" includes a second appeal is supported by quite a number of cases which have been referred to by my Lord the Chief Justice. If we look to the principle behind the decisions in which the word "appeal" has been interpreted to include "a second appeal" it becomes obvious that the decisions laid down that the High Court had no power to entertain revisions in cases where the matter decided by the lower Court could be agitated before the High Court by way of appeal or second appeal. The decision in - 'Pyarchand's case, is only an extension of the principle underlying those decisions. Mr. Allen in his learned treatise "Law in the Making" has quoted from Lord Mansfield which was reaffirmed by Sir George Jessel.,

> "The only use of authorities or decided cases is the establishment of some principle which the Judge can follow out in deciding the case before him. Simple and self-evident though this dictum may sound, it is not always kept in view. The result is that the form tends to be confused with the substance. Precedents, as has been observed by a distinguished Judge of our own time should be 'stepping stones, and not halting places'." (page 252, 1951 Edition)

Ranawat, J.

36. I agree with the opinion expressed by my Lord the Chief Justice.

Sharma, J.

37. I also agree with the opinion of my Lord the Chief Justice and add that as the words "and in which no appeal has thereto" are not quite clear and unambiguous, assistance has legitimately been taken in interpreting them from the history of Legislation on the subject.

Dave, J

38. I also agree with my Lord the Chief Justice and have nothing to add.

Reference answered.

Cases Referred.

1. AIR 1952 Raj 90
2. 18 Bom 35
3. 14 Cal 768(C)
4. 5 All 293
5. 6 All 233
6. 26 Bom 551
7. AIR 1948 Nag 258
8. AIR 1943 Nag 117
9. AIR 1944 Mad 315
10. AIR 1945 Bom 336
11. AIR 1938 Pat 22
12. AIR 1921 All 1
13. AIR 1935 Pat 90
14. AIR 1946 All 89 at p.105(P)
15. AIR 1933 Ran 64
16. AIR 1930 All 604
17. AIR 1940 Cal 257
18. AIR 1928 Mad 794
19. 20 Mad 155
20. AIR 1947 Oudh 101
21. 1952 RLW 114
22. AIR 1924 PC 50