

## NAGPUR HIGH COURT

Rarachandra Paiku

Vs

Ganpati Paiku

Misc. Civil Case No. 39 of 1952. decided on 3-11-1952, F.A. No.22 of 1945

(Deo and Choudhuri, JJ.)

03.11.1952

### ORDER

#### **Choudhuri, JJ.**

1. This is an application under section 110, Civil Procedure Code, for leave to appeal to the Supreme Court from the judgment and decree in 'First Appeal No.22 of 1945', decided on 22-1-1951.

2. The applicants were the defendants-appellants against whom a decree for partition and separate possession of all the property in suit was passed. The points for decision in the appeal were :

- (i) Whether there was a partition of the joint family in the year 1909 putting an end to the interest of the plaintiff in the properties in dispute?
- (ii) Whether the properties in dispute are the joint family properties of the parties or are they self-acquisitions of the defendants? (iii) What is the extent of the gold to which the plaintiff is entitled?

The decision of the trial Court was affirmed on the first two points and the contention of the defendants-appellants on the third point was wholly accepted. No grievance on this score is now left and none is raised in the proposed appeal to the Supreme Court. The applicants thus want to appeal only against the affirming part of the decree of this Court.

3. According to the applicants the value of the subject-matter of appeal to the Supreme Court is Rs. 38,900/- while according to the non-applicant it is only Rs. 10,350/-. The learned Counsel for the non-applicant contends that the applicants cannot invoke section 109(a), Civil Procedure Code, unless the value is Rs. 20,000/- or upwards as the decree of this Court was passed after the Constitution came into force. The applicants rely on - '*Nandlal v. Hiraialsao*'<sup>1</sup>, in support of their contention that the value must be Rs. 10,000/- or upwards. It is not necessary to send the case to the trial Court to determine the value or to examine the contentions as the application must fail

on another point.

<sup>1</sup> AIR 1950 Nag 222

4. This case does not involve any substantial question of law. The two points decided against the applicants are pure questions of fact and the law applicable is well settled and does not admit of any controversy. The learned Counsel, however, relied on - '*Dinkarrao v. Rattansey*<sup>2</sup>', There the question was about construction of a deed of compromise which formed the root of title. The learned Judges had not only to construe the terms of the document which was missing but had also to infer what those terms were from a consideration of the other documents and statements on record. That undoubtedly was a substantial question of law. Another substantial question for consideration was whether 'res judicata' and estoppel which the High Court had applied could be applied when neither had been pleaded. There are no such considerations in this case. The case is thus distinguishable.

5. For the purposes of this order it is assumed that the requirement of valuation is satisfied. As the decree of this Court affirms the decree of the trial Court so far as the subject-matter of the appeal to the Supreme Court is concerned, the non-applicant contends that the proposed appeal must involve some substantial question of law. According to the applicants the decree of this Court is not a decree of affirmance as it has modified the decree of the trial Court; consequently this condition is not necessary in this case

6. The question for consideration, therefore, is whether the decree of this Court is a decree of affirmance. There is no doubt that the decree of this Court deciding the first two points, which alone the applicants want to challenge in the Supreme Court, is the decree affirming the decision of the trial Court. No leave can, therefore, be granted as the proposed appeal does not involve a substantial question of law. - '*Brahma Nand v. Shri Sanatan Dharam Sabha*<sup>3</sup>', followed in - '*Wahid-ud-din v. Makhan Lal*<sup>4</sup>', - '*Lakshmanan v. Thangam*<sup>5</sup>', and - '*Govind Dhondo v. Vishnu Keshav*<sup>6</sup>', The question would have been otherwise if the applicants had not succeeded wholly on the third point and desired to appeal on all the three points.

7. The following decisions relied on by the applicants belong to the latter class and are therefore distinguishable. - '*Raiyat Ali v. Mir Mohammad Ali*<sup>7</sup>', - '*Attar Kaur v. Gopal Das*<sup>8</sup>', and - '*Brajasunder Deb v. Rajendra Narayan*<sup>9</sup>', '*Kedar Nath v. Kalimata of Kalighat*<sup>10</sup>', is not helpful for want of facts. - '*Ramanathan v. Subramanian*<sup>11</sup>', does not take a view different from that in - '*Lakshmanan v. Thangam (supra)*', (C). No doubt, - '*Jamna Kunwar v. Lal Bahadur*<sup>12</sup>', supports the applicants. But if the appellant is deprived of his right of appeal if his entire appeal has been dismissed, it appears strange that if the appeal is partly allowed in his favour to his complete satisfaction the applt. gets a right to appeal as regards the rest as a matter of course. We therefore prefer the view taken by the Bombay, Madras and Lahore High Courts. The same view has been taken in - '*Ghulam Abbas v. Govindrao*<sup>13</sup>', See also - '*G.C. Bardoloi v. Collector of Kamrup*<sup>14</sup>', The Privy Council decision in - '*Annapurnabai v. Ruprao*<sup>15</sup>', which is regarded as a basic decision on the question and which is referred to in nearly all the cases on

<sup>2</sup> AIR 1949 Nag 300 (A-1)

<sup>4</sup> AIR 1944 Lah 458 (FB)

<sup>6</sup> AIR 1949 Bom 164

<sup>3</sup> AIR 1944 Lah 329 (FB) (A-2)

<sup>5</sup> AIR 1947 Mad 227

<sup>7</sup> AIR 1947 Nag 93

<sup>8</sup> AIR 1948 Lah 1

<sup>10</sup> AIR 1950 Cal 341

<sup>12</sup> AIR 1946 All 262

<sup>9</sup> AIR 1941 Pat 269 (SB)

<sup>11</sup> AIR 1926 Mad 1024

<sup>13</sup> AIR 1926 Nag 245

<sup>14</sup> AIR 1952 Ass 134

<sup>15</sup> AIR 1925 PC 60

the point, does not support the view taken by the Allahabad High Court. There the appellate decree increased the allowance by way of maintenance but affirmed the decree of the Court

below in all other respects. The appellants desired a higher rate of allowance and consequently they were entitled to appeal. The special leave was therefore limited to the question of maintenance.

8. The application therefore fails and is dismissed with costs. Counsel's fee Rs. 100-0-0.

Application dismissed.