

Lal Chand
v.
Parma Nand
and others
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7. Act LXX of 1951 came into force in Delhi on 10th December, 1951 (i.e., on the midnight of 9th December, 1951) and according to the appellant himself the pronote was endorsed in his favour and the debt assigned to him on 10th December, 1951, admittedly after the commencement of the Act. So far as Lal Chand appellant is concerned the pecuniary liability became due to him after the coming into force of the Act. The pecuniary liability cannot, therefore, be regarded as 'debt' and Parma Nand cannot be regarded as 'displaced debtor' within the meaning of the Act. That takes away the application of section 10 of the Act to the present case. The decision of the learned Single Judge on the point has accordingly to be upheld, though on different grounds.

8. In the face of this finding regarding the maintainability of the application under section 10 of the Act, I deem it not only unnecessary but inexpedient to go into the other two points, because the appellant, may, if so advised, still institute a regular suit for the recovery of the debt and then the points, if raised, may have to be examined under different provisions of law and in the light of different set of circumstances.

9. I would dismiss the appeal, but leave the parties to bear their own costs.

G. D. Khosla,
C. J.

G. D. KHOSLA,—I agree.

B. R T.

LETTERS PATENT APPEAL

Before D. Falshaw and G. L. Chopra, JJ.

CHANDO DEVI,—Appellant

versus

MUNICIPAL COMMITTEE, DELHI,—Respondent.

L.P.A. No. 107-D of 1954

Letters Patent—Clause X—Order setting aside abatement under Order XXII, Rule 9, C. P. C. Whether a judgment—Appeal against such an order—Whether competent.

1960

Feb. 15th

Held, that an order setting aside an abatement does not decide a question 'materially in issue between the parties and directly affecting the subject-matter of the suit or appeal'. Such an order does not amount to 'judgement' as contemplated in clause X of the Letters Patent and no appeal against such an order is competent. An appeal against such an order is also not competent under the Code of Civil Procedure (Section 104 and Order XLIII, Rule 1).

Appeal under Clause 10 of the Letters Patent from the Judgment of Hon'ble the Chief Justice passed in Civil Misc. No. 520-D of 1954 on 30th November, 1954 in R. S. A. 803 of 1950.

P. C. KHANNA, Advocate for the Appellant.

BISHAMBER DAYAL and SHRI KESHAV DAYAL, Advocates for the Respondent.

JUDGMENT

CHOPRA, J.—This is an appeal under clause 10 of the Letters Patent against an order of my Lord, the Chief Justice setting aside the abatement of an appeal filed by the Municipal Committee of Delhi, the respondent.

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2. Briefly stated the facts are: on 6th July, 1946, Mst. Inder Devi brought a suit for an injunction restraining the Municipal Committee, Delhi, the defendant-respondent, from raising a certain construction and thereby obstructing the plaintiff's passage to and from a building which belonged to her. The suit was decreed by the trial Court and the appeal filed by the Municipal Committee was dismissed by the Senior Subordinate Judge, Delhi, on 16th June, 1950. When the second appeal preferred by the Municipal Committee came up for hearing in this Court on 15th December, 1953, it transpired that Mst. Inder Devi, the sole respondent in the appeal, had died

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on 31st December, 1951. The appeal was accordingly dismissed as having abated. The same day, viz., on 15th December, 1953, the Municipal Committee submitted an application for setting aside the abatement under order XXII, rule 9, Civil Procedure Code, and for impleading Mst. Chando Devi, daughter of the deceased, as her legal representative. The application was opposed by Chando Devi stating that the Municipal authorities were aware of the death of Mst. Inder Devi, as they had made a note of her death in the relevant registers on 3rd January, 1952, mutation of the building which belonged to Inder Devi was sanctioned in her name in February, 1952, and house-tax in respect of that building was being realised from her since then. The learned Chief Justice did not consider these factors sufficient to attribute knowledge of the death of Inder Devi to the particular Department of the Municipal Committee, which dealt with the prosecution of pending suits, appeals or revisions on behalf of or against the Municipal Committee. The application was accordingly accepted and the abatement set aside,—*vide* his order dated 30th November, 1954. It is against this order that the present appeal under the Letters Patent is preferred by Mst. Chando Devi on a certificate.

3. A preliminary objection that the appeal is not competent is being raised on behalf of the respondent, for the order under appeal, it is stated, does not amount to a 'Judgment' within the meaning of clause 10 of the Letters patent. *Maria Flaviana Almeida and others v. Ramchandra Santuran Asavle and others* (1), is a direct authority on the point. There, Beaumont, C.J. (who prepared the Judgment of the Division Bench with which B. J. Wadia, J., agreed), accepted the classical definition

(1) A.I.R. 1938 Bom. 408

of the word 'Judgment' given in *Justices of the Peace for Calcutta v. Oriental Gas Co.* (1), as meaning a decision which affects the merits of the question between the parties by determining some right or liability. The learned Judges further observed:—

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“An order setting aside an abatement does not affect the merits of the dispute between the parties, though it certainly determines a right, because in the absence of such order the plaintiff is debarred from suing the defendant for the amount claimed. The order is really one in procedure. The plaintiffs originally had a cause of action which through no fault of their own came to an end by the death of their opponent and the effect of setting aside the abatement is merely to excuse delay in restoring the suit to an actionable condition.”

A contrary view taken by the Calcutta High Court in *Sarat Chandra Sarkar v. Maihar Stone Lime Co., Ltd.* (2), was not accepted, particularly because a Bench of the same learned Judges in another case decided only a few months later *Maharaj Kishore Khanna v. Kiran Shashi Dasi* (3)¹ took the view that an order made under order IX, rule 9, Civil Procedure Code, restoring a suit dismissed for default could not be regarded as 'Judgment' under clause 15 of the Letters Patent of that Court and was, therefore, not appealable. There appears to be no distinction in principle between an order restoring a suit under order IX, rule 9, and an order setting aside an

(1) I.L.R. 49 Cal. 616

(2) (1872) 8 Beng. L.R. 433

(3) I.L.R. 49 Cal. 62

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abatement under order XXII, rule 9, Civil Procedure Code, which too has the effect of restoring the suit. If the one order is a 'Judgment' the other must also be.

4. A similar view was taken by a Division Bench of the Allahabad High Court, presided by Bennet, C.J. in *Lakshmi Narain v. Mirza Mohammad Akbar* (1), and it was held that an order of a Single Judge in second appeal refusing to set aside the abatement of appeal is an order made in second appellate jurisdiction and cannot be considered an order passed in original jurisdiction and also that such an order does not amount to a 'Judgment' within the meaning of clause 10, Letters Patent, and therefore, no appeal lies against that order.

5. Mr. P. C. Khanna, learned counsel for the appellant, has drawn our attention to certain decisions of the Lahore High Court from which it does appear that the Court was in favour of a somewhat liberal interpretation of the word 'Judgment' in clause 10 of the Letters Patent, inasmuch as an order on an application to stay execution pending appeal [*vide Gokal Chand v. Sanwal Das and others* (2)], and an order passed in an appeal from preliminary decree restraining the trial Court from executing the preliminary decree or passing a final decree during the pendency of the appeal [*vide Firm Badri Das Janaki Das v. Mathannel and others* (3) and *Shibba Mal and another v. Rup Narain* (4)] were regarded as falling within its ambit and appealable. Nevertheless, the generally accepted definition of the term 'Judgment' in these cases was that it includes 'any interlocutory judgment which decides so far

(1) A.I.R. 1930 All. 185
(2) A.I.R. 1920 Lah. 326
(3) A.I.R. 1922 Lah. 185
(4) A.I.R. 1928 Lah. 904

as the Court pronouncing such judgment is concerned, whether finally or temporarily, any question materially in issue between the parties and directly affecting the subject-matter of this suit'.

No direct authority on the point in question is being cited and I fail to see how the order setting aside the abatement can be regarded as deciding a question 'materially in issue between the parties and directly affecting the subject-matter of this suit'. In *Ajudhia Parshad and others v. Imam-ud-Din and three others* (1) again the facts were widely different. There, the trial Court decreed a suit for possession against the defendants. The defendants preferred an appeal in the lower appellate Court and the same was dismissed as having abated. However, the abatement was set aside and the appeal having been heard on merits was accepted and the suit dismissed. Against the decree of the lower appellate Court the plaintiff preferred a second appeal in the High Court. One of the points raised in the appeal was that the abatement of the first appeal was set aside on insufficient grounds. On behalf of the respondents it was contended that the order of the lower appellate court had become final and could not be questioned in second appeal. The contention was turned down because the order setting aside the abatement was held to be one 'affecting the decision of the case' and any 'error, defect or irregularity' therein could be set forth as a ground of objection in the appeal as provided by section 105 (1), Civil Procedure Code. An order which affects the decision of a case may not necessarily be an order 'directly affecting the subject-matter of the suit or an order which 'affects the merits of the controversy between the parties in the suit itself'.

6. There is yet another reason which supports the view that I take and it is this. Under Order

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(1) A.I.R. 1923 Lah, 230

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XLIII, rule 1, Civil Procedure Code, an appeal shall lie against an order under rule 9 of order XXII refusing to set aside the abatement or dismissal of a suit. Read with section 104, it means that no appeal shall lie against an order setting aside the abatement of a suit or an appeal. It would certainly be anomalous to hold that no appeal is competent if an order setting aside the abatement of a suit or an appeal is made by a subordinate Court, but if a similar order is made by a Single Judge of the High Court in exercise of its original or appellate jurisdiction the order is appealable under the Letters Patent.

7. In *Asrumati Devi v. Kumar Rupendra Deb Raikot and others* (1), the question canvassed was whether an order for transfer of a suit made under clause 13 of the Letters Patent of the Calcutta High Court was not a 'judgment' within the meaning of clause 15 and, therefore, was not appealable. It was held that since the order neither affected the merits of the controversy between the parties in the suit itself, nor did it terminate or dispose of the suit on any ground and the suit remained perfectly alive, the order could not be regarded as a 'judgment' and was, therefore, not appealable. Their Lordships did notice the wide divergence of judicial opinion as regards the true meaning and scope of the word 'judgment' as it occurs in the Letters Patent of the different High Courts in India, but they left the matter open, because in their view the order in context could, according to none of the accepted definitions, be regarded as a 'Judgment'.

8. I would, therefore, dismiss the appeal as incompetent and leave the parties to bear their own costs.

Falshaw, J.

FALSHAW, J.—I agree.

B. R. T.