S. Kalawati vs Durga Prasad & Anr on 2 May, 1975

Equivalent citations: 1975 AIR 1272, AIR 1975 SUPREME COURT 1272, 1976 (1) SCC 696, 30 FACLR 383, 1975 (1) SCWR 657, 1975 ALL LR 319, ILR 1975 2 ALL 726

Author: A. Alagiriswami

Bench: A. Alagiriswami, P.N. Bhagwati, P.K. Goswami

PETITIONER:
S. KALAWATI

Vs.

RESPONDENT:
DURGA PRASAD & ANR.

DATE OF JUDGMENT02/05/1975

BENCH:
ALAGIRISWAMI, A.
BENCH:
ALAGIRISWAMI, A.
BHAGWATI, P.N.
GOSWAMI, P.K.

CITATION:
1975 AIR 1272

ACT:
Constitution of India, 1950--Art. 226--Petition dismissed in limine but a certificate granted under Art. 133(1)(a)--Validity of certificate.

HEADNOTE:
The appellant filed a writ petition before the High Court under Art. 226 of the Constitution impugning the order of the Deputy Director of Consolidation. The High Court dismissed he petition in limine but granted a certificate under Art. 133(1)(a) on the basis of valuation.
On appeal to this Court, the respondent raised a preliminary objection that the certificate granted was not valid because the judgment of the High Court was one affirming the judgment of the Deputy Director, Consolidation.
Setting aside the order of the High Court,
HELD :The certificate granted by the High Court is

competent. An order of a High Court under Art. 226 or 227 is an order in a civil proceeding of a High Court and so falls under Art. 133. But it cannot be said that such cases a party is exercising any right of appeal conferred on him by any statute nor is the High Court exercising any power of appeal. Whatever might be the position even in respect of petitions under Arts. 226 or 227 of the Constitution where the Court goes into the merits of the question, it cannot be doubted that where it dismisses such a petition in limine it simply refuse,,; to exercise its powers under Art. 226 or 227 and such an order cannot be said to be an order passed on appeal or as affirming the decision of the Court. immediately below. Therefore, the order of the High Court in the present case is not a judgment of affirmance. [427F, 427AB]

Abdul Majid v. Jawahar Lal, [1904] I.L.R. 36, All. 350, Karsondas Dharamsey v. Gangabhai. [1907] I.L.R. 32 Bom. 108, Sunder Koer v. Chandishwar Prasad Singh I.L.R. 30 Cal. 679 Promotho Nath Roy v. W. A. Lee, [1919] 33 C.L.J. 128, Ramaswmi Udayar v. Sevu Aru Ramanathan Chettiar A.I.R. 1942 Mad'. 357. Purnendu Nath Tagore v. Kanailal Ghoshal [1948] 2 Col. 202, Ganesh Prasad v. Mr. Makhna A.I.R. 1948 All. 375 and Gululabchand v. Kudilal A.I.R. 1952 M.B. 149, referred to.

(2) The order of the Deputy Director of Consolidation is not clear and since the High Court dismissed the appellants petition in limine the reasons which led the High Court to dismiss are not known. Hence it is necessary that the High Court should deal with the petition before it and dispose of it by a proper order. [427 GH]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1641 of 1969.

From the Judgment and decree dated 13-9-1967 of the High Court of Allahabad in Civil Writ Petition No. 2334 of 1963, R. H. Dhebur, D. V. Desai and P. C. Kapur for the appellant.

G. N. Dixit, Uma Mehta, S. Bagga and Raj Kumar Mehta, for the Respondent.

The Judgment of the Court was delivered by ALAGIRISWAMI, J.-The appellants is the widow of one Gover- dhandass. The 1st respondent is her husband's brother. Goverdhandass and the 1st respondent are the sons of one Bhojraj. The appellant claimed 11 plots in Khata No. 97 as land in which she was entitled to be a joint tenant along with the 1st respondent. She claimed certain other plots on the ground that they were acquired by Bhojraj and therefore it was joint Hindu family property and she was entitled to inherit those shares also as a co-tenant along with 1st respondent. She succeeded in respect of the 11 plots in Khata No. 97 but failed in respect of the either plots. The matter first came up before the Consolidation Officer and thereafter on appeal before the Settlement

Officer and finally before the Deputy Director, Consolidation in revision. Against the order of the Deputy Director, Consolidation she filed a petition before the High Court of Allahabad under Article 226. The High, Court dismissed it in liminine but granted a certificate under Article 133 (1)

(a) of the Constitution.

A preliminary objection was raised on behalf of the 1st respondent that the certificate granted was not valid because the judgment of the High Court was one affirming the judgment of the Deputy Director, Consolidation. One of the questions on which the decision of this question depends is whether the Deputy Director, Consolidation as well as the other two officers exercising power under the U.P. Consolidation of Holdings Act, 1953 are Courts. However, in the view we take of the decision of the High Court that it is not a judgment of affirmance this question does not arise. The High Court dismissed the writ petition in limine. It did not go into the merits of the case or decide it even within the limited scope of its powers under Article 226 or 227 of the Constitution even if not as a Court of Appeal exercising its powers under section 96 or 100 of the Code of Civil Procedure. It simply refused to exercise its powers under those Articles of the Constitution. Unless the Court had applied its mind to the case and after consideration affirmed it the order cannot be said to be one of affirmance.

It may be useful to consider earlier decisions in this connection. In Abdul Majid v. Jawahar Lal (1904 ILR 36 All.

350) the question of the starting point of limitation for the execution of a decree had to be decided and that question depended upon the effect of an order of the Privy Council dismissing an appeal for want of prosecution. In that connection the Privy Council observed :

> "The order dismissing the appeal for-want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him and that therefore 'he was in the same position as if he had not appealed at all."

A, In Karsondas Dharanuey v. Gangabai (1907 ILR 32 Bom.

108) an order of the High Court refusing, to admit an appeal after the period of limitation had expired was held to be not a "decree passed on appeal by the High Court" under s. 595 of the Civil Procedure Code and it was held that there was therefore no jurisdiction to grant leave to appeal therefrom to the Privy Council under cl. (a) of that section. The meaning of the words "Passed on appeal" were specifically considered and it was observed :

> "The meaning of the expression "passed on appeal" has been settled by a line of authorities, which it is right that we should follow: see Sunder Koer v. Chandishwar Prosad Singh (ILR 30 Cal. 679) and the cases there cited. And applying that interpretation to the circumstances of the case, it cannot (in my opinion) be said that

there is here a decree passed on appeal by a High Court."

This Bombay decision was noticed in Promotho Nath Roy v. W. A. Lee (1919 (33) CLJ 128). But that decision differed from the Bombay decision because in that case the appeal had been admitted and dismissed whereas in the Bombay case- the appeal was not admitted at all. In Ramaswami Udayar v. Sevu Aru Ramanathan Chettiar (AIR 1942 Mad. 357) it was held by a Division Bench of the Madras High Court that where an application to excuse delay, by deducting The time taken in other proceedings in computing the time for the application for rehearing of an appeal, was dismissed and consequently no order was passed on the application for rehearing the appeal, these were not orders on appeal within the meaning of s. 109 (a) of the Code of Civil Procedure and hence no leave could be granted. These decisions were followed in Purnendu Nath Tagore v. Kanailal Ghoshal (1948 (2) Cal.

202).

In Ganesh Prasad v. Mt. Makhna (AIR 1948 All. 375) however an order dismissing appeal for default on account of non- prosecution was held to be a decision which affirmed the decision of the Court below.

In Gulabchand v. Kudilal (AIR 1952 M.B. 149) it was held that the order of the Court dismissing the Special Appeal on the ground that no appeal lay under s. 25 of the Act was not an order which affirmed the decision of the Court below and it was observed that expression "affirms the decision of the Court immediately below" implies that the Court had dealt judicially with the decision of the Court below and upheld it and Where the Court holds that it has no jurisdiction to entertain an appeal from the decision of the Court below and rejects the appeal, it cannot be held that the decision of the Court below is affirmed by the rejection of the incompetent appeal.

The principle behind the majority of the decision is thus to the effect that where an appeal is dismissed on the preliminary ground that it was not competent or for non- prosecution or for any other reason the appeal is not entertained, the decision cannot be said to be a "decision on appeal" nor of affirmance. It is only where the appeal is beard and the judgment delivered thereafter the judgment can be said to be a judgment of affirmance. Where a party applies to the Court to exercise its powers under Article 226 or 227 of the Constitution it cannot be said that the party is exercising any right of appeal conferred on him by any statute nor is the High Court exercising any power of appeal. Whatever might be the position even in respect of petitions under Article 226 or 227 of the Constitution where the Court goes into the merits of the question, it cannot be doubted that where it dismisses such a petition in limine It simply refuses 'to exercise its powers under Article 226 or 227 Such an order cannot be said to be an order passed on appeal or as affirming the decision of the Court immediately below.

In 'this connection it may be noticed that under s.109 of the Code of Civil Procedure appeals lie to the Supreme Court from any judgment, decree or final order of a High Court where it is passed on appeal. A proceeding under Article 226 or 227 of the Constitution is not an appeal. it is true that the-right conferred by Article 133 of the Constitution, cannot in any way be curtailed by the provisions of

the Code of Civil Procedure and Article 133 does not speak of judgment, decree or final order passed on appeal by the High Court. All the earlier decisions of the various Courts referred to above are based on the interpretation of ss. 109 and-110 of the Code of Civil Procedure. An order of a High Court in a petition tinder Article 226 or 227 would be an order in a civil proceeding of a High Court and so fall under Article 133. Where a High Court refuses to entertain such a proceeding the same considerations that were applied in the earlier cases where an appeal was not judicially considered should Tic held applicable also on principle.

We are therefore of opinion that an order in a petition under Article 226 or 227 dismissed in limine is not a final order in a proceeding for the purpose of Article 133 (1) (a) of the Constitution and is not therefore a judgment of affirmance under Article 133(1) (a), and therefore the certificate granted by the High Court is competent. As regards the appeal itself we must say that we have not been able to understand the order of the Deputy Director of Constitution which was sought to be quashed by means of the writ petition. We were invited by the respondent to look into the orders of the Consolidation Officer and the Settlement Officer in order to understand the order of the Deputy Director of Consolidation. As the order sought to be quashed was that of the Deputy Director Consolidation we do not feel called upon to do so. We are therefore in the dark as to the reasons which might have led the High Court to dismiss the appellant's petition in limine. We consider it necessary and proper therefore to set aside the order of the High Court and direct that the petition be dealt with by it and disposed of by a proper order. The High Court will bear the matter afresh and dispose it of by a reasoned order. There will be no order as to costs.

P.B.R. Case remanded.