Ramrichpal Singh vs Dayanand Sarup Minor Through Bhagwat ... on 6 January, 1955

Equivalent citations: AIR1955ALL309, AIR 1955 ALLAHABAD 309

Author: V. Bhargava

Bench: V. Bhargava

JUDGMENT

Malik, C.J.

1. These two cases came up before a Bench for hearing in the year 1949 and on 10-5-1949, they were referred to a Pull Bench as there was a conflict of opinion between the Allahabad High Court and the Oudh Chief Court on the point Whether a revision under Section 115, Civil P. C. (Act 5 of 1908) was entertainable by the High Court in a case where a Judge had refused to grant an application under Section 10 of the Code. The Allahabad High Court had held that no revision lay to this Court against the order as it was not a case decided, while the Oudh Chief Court had taken a contrary view that it was a case decided and a revision was entertainable. After the amalgamation of the two Courts in 1948 it was considered proper that there should remain no conflict and the case was, therefore, referred to a Full Bench for decision. When, however, the case was put up before a Bench of three Judges on 22-10-1951, they referred it to a larger Bench and on 24-10-1951, when the case came up before a Bench of five Judges they referred it to a Bench of seven Judges. The Full Bench of three Judges or of five Judges did not give any reasort Why it was necessary to have the point decided by a Bench of seven Judges. It was, probably, due to the fact that there was a decision by a Bench of five Judges in -- 'Buddhu Lal v. Mewa Ram', AIR, 1921 All 1 (FB) (A) which the learn-

' ed Judges thought might have to be reconsidered.

2. The points referred to the Full Bench are:

> (1) Whether an order under Section 10, Civil P. C. is a case decided? And (2) Whether it would make any difference if the learned Judge had framed an issue on the point and decided the point as a point in the case?

3. The facts of the case briefly are that a suit was filed for recovery of arrears of rent of a house on the ground that the defendant was a tenant. The defendant filed a written statement in which among other pleas he took the plea that there was a previously instituted suit pending in which the matters in issue in this case were directly and substantially in issue and the suit should therefore remain stayed under Section 10, Civil P. C. (Act 5 of 1908). On the pleas raised in the case a number of

issues were framed, issue No. 6 being as follows :

> "Is suit liable to be stayed under Section 10, Civil P. C.?"

The Court held that the mere fact that appeals were pending against decrees in suits for rent for certain other periods prior to the period now in dispute did not justify the grant of stay under Section 10 of the Code and rejected the application. Against that order dated 10-7-1948, this revision was filed.

4. There were two suits filed in the trial Court for two different periods: Suit No. 1 of 1948 and Suit No. 65 of 1947. There were two separate orders in the two suits and there are two revisions before us.

5. In -- 'Sultanat Jahan Begam v. Sundar Lal', AIR 1920 All 197 (2) (B) in a revision against an order dismissing an application under Section 10 of the Code Banerji J. held that it was an interlocutory order and was. not a case decided. He purported to follow ,the decision of this Court in -- 'Muhammad Ayub v. Muhammad Mahmood', 32 All 623 (C) which was overruled by a Full Bench in -- 'Ramzan Ali v. Mt. Satul 'Bibi', AIR 1948 All 244-(D). The next case in which the question arose is -- 'Bal Krishna v. Bam Kishun', AIR 1929 All 957 (E). Both the learned Judges (Mukerji and Niamat-ullah JJ.). were of the opinion that an order rejecting an application to stay under Section 10 of the Code was not a case decided. Mr. Justice Mukerji was of the opinion that it was a matter merely of procedure which had nothing to do with the merits of the case and was therefore not a case decided. Mr. Justice Niamat-ullah contented himself by saying that in the circumstances of that case where the Court had not decided whether Section 10 of the Code applied or not but had merely directed the case to proceed it could not be said to be a case decided. In -- 'Madan Mohan v. Kamla Narain Dube', AIR 1934 All 520 (F) Sulaiman, and King JJ. dismissed a revision application where the facts were exactly similar to the facts of the case before us. The plea of Section 10 was raised in the written statement and an issue was framed and the issue was decided. The learned Chief Justice said:

> "The plea that the Court has no jurisdiction to entertain the suit is similar to a plea that it has at least temporarily no jurisdiction to entertain it because of the pendency of another suit. The decision of the Court below on the point that it has jurisdiction amounts to mere finding on a question of law which was the subject-matter of an issue and cannot be treated as being in itself a case decided within the meaning of Section 115, Civil P. C."

On the other hand, in -- 'Sital Singh v. Sitla . Bakhsh Singh', AIR 1919 Oudh 178 (G) Stuart and Daniels JJ. held that an order under Section 10 staying a suit amounted to a decision that the Court had under existing circumstances no jurisdiction to proceed with the trial of the suit. It was, if wrongly passed, a refusal to exercise a jurisdiction vested in the Court and was open to revision under Section 115. They do not seem to have discussed the question whether it was or was not a case decided. The same view was taken by a Full Bench of the Oudh Chief Court in -- 'Sahdeo Singh v. Chanun Kuer', AIR 1928 Oudh 355 (H).

The two questions that were referred to the Full Bench were as follows:

> " (1) Is an order by which proceedings are resumed in a suit which had been stayed under Section 10, Civil P. C., a 'case decided', within the meaning of Section 115 Civil P. C.?"
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> and "(2) Is an order the effect of which is to refuse to exercise a jurisdiction vested in the Court, under Section 10, Civil P. C., open to revision under Section 115, Civil P. C.?"

The learned Judges differed from the view expressed by the Allahabad High court and held that it was a decided case. Wazir Hasan J. said that:

> "I am content to consider the matter from the standpoint that the meaning to be given to the word "case" in Section 115 must depend on the particular nature of the proceedings."

Misra J. held that orders passed under Section 10, Civil P. C., stood on quite a different footing from those orders which were generally considered as interlocutory orders. The last case of the Chief Court is -- 'Raisuddin v. Basti Sugar Mills, Ltd.', AIR 1940 Oudh 441 (I), where it was held that an order under Section 10, Civil P. C., staying a suit was open to revision under Section 115 as it was a case decided. They followed the previous Full Bench and no further reasons were given.

6. The only case cited from Madras is --

'Ramchandram Pillai v. Neelambal Achi', AIR 1923 Mad 88 (1) (J). In that case an order refusing to stay proceedings under Section 10 of the Code was held to be an interlocutory order by Phillips J. and the Allahabad view was followe

7. Section 115 of the Code 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, and if such subordinate Court appears-

> (a) to have exercised a jurisdiction not vested in it by law, or
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> (b) to have failed to exercise a jurisdiction so vested, or
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> (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."

The High Court can, therefore, entertain a revision only if:

> (1) a case has been decided, (2) the decision is by a Court subordinate to the High Court, (3) no appeal against the decision lies to the High Court, and (4) the subordinate Court has
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> (a) exercised a jurisdiction not vested in it by law, or
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> (b) failed to exercise a jurisdiction so vested, or
>
> (c) acted in the exercise of its jurisdiction illegally or with material irregularity.

8. The power is, however, discretionary and will be exercised only in the interest of justice.

9. So far as the grounds (a) and (b) are concerned, there never was much difficulty. They provide that the subordinate Court should have either exercised the jurisdiction that it did not possess or it should have failed to exercise the jurisdiction that it did possess, i.e., failure to exercise jurisdiction or wrongful assumption of jurisdiction. Interpretation of cl, Cc), however, gave rise to considerable difference of opinion. The Privy Council in -- 'Amir Hassen Khan v. Sheo Baksh Singh', 11 Ind App 237 (PC) (K) and -- 'Balakrishna Udayar v. Vasudeva Aiyar', AIR 1917 PC 71 (L) pointed out that the words had "acted in the exercise of its jurisdiction Illegally or with material irregularity" related also to the question of Jurisdiction and if the Court had jurisdiction to decide the matter the decision could not be challenged under Section 115 merely on the . ground that the Court had made an error on a question of law or fact.

Th_e latest decision of the Supreme Court on the scope of Section 115 has now made matter's clearer. Their Lordships in -- 'Keshardeo v. Radha Kissen', AIR 1953 SC 23 (M) have held that the section can apply only to a case of wrong exercise of jurisdiction. Their Lordships have referred with approval to the referring order of Bose J. in -- 'Narayan Soriaji v. Sheshrao Vithoba', AIR 1948 Nag 258 CFB) (N) wherein the learned Judge had said that the words "illegally or with material irregularity" do not cover either errors of fact or law, that they do not refer to the decision arrived at but to the manner in which it is reached. That the errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes, have been com-plied with.

10. There has been a lot of controversy as to what is "a case decided". We may in this connection briefly refer to the history of the section. In the Code of Civil Procedure (Act 8 of 1859); there was no provision giving any revisional power to the High Court. Act 23 of 1861 amended that Code in certain respects and Section 35 of the Act provided that:

> "The Sudder Court may call for the record of any case decided on appeal by any Subordinate Court in which no further appeal shall lie to the Sudder Court, if such Subordinate Court shall appear in hearing the appeal to have exercised a jurisdiction not vested in it by law, and the Sudder Court may set aside the decision passed on

> appeal in such case by the Subordinate Court, or may pass such other order in the case as to such Sudder Court may seem right."

Section 35 applied only to cases where one appeal was provided but there was no right to file a second appeal. In cases where there was a second appeal to the High Court the section did not apply. But in a case where there was only one appeal to the Subordinate Court the decision on appeal by the Subordinate" Court was revisable by the High Court. Revisions, therefore, Jay to the High Court only against the decrees or orders passed on appeal by the lower appellate Court where there was no further right of appeal to the High Court.

11. Act 10 of 1877 replaced the Code of 1859 and Section 622 of the Code provided that:

> "The High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, and may pass such order in the case as the High Court thinks fit."

The same language was more or less repeated with the addition of the words "or to have acted in the exercise of its jurisdiction illegally or with material irregularity" in the Code of 1882 (Act 14 of 1882), Section 622 of which was as follows:

> "The High Court may call for the record of any ease in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity, and may pass such order in the case as the High Court thinks fit."

The section was, however, redrafted in the Code of 1908 and it now reads:

> "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 and if such subordinate Court appears
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> (a) to have exercised a jurisdiction not vested in it by law, or
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> (b) to have failed to exercise a jurisdiction so vested, or
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> (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."

The words 'record of any case which has been decided' have been interpreted in a very large number of decisions of the various High Courts and the words have been differently interpreted by different Judges. One interpretation which can no longer be accepted was that though the word 'case' is wider than a suit yet it can only mean a suit or a similar proceeding which is started by an application in

the nature of a plaint; for example, testamentary proceedings, matrimonial proceedings, guardianship proceedings, proceedings under the Company Law etc. It was held in some cases that in a suit it was the suit which was itself a 'case' and it was not possible to envisage any other proceeding arising in that suit which could be called a separate case. The other view was that whenever any order was passed by a Court deciding any matter in controversy between the parties it was a case decided. The third view was that an interlocutory order could not be a case decided and a 'case' when it is a proceeding during the pendency of a suit, must be a proceeding distinct and separable from the issues that properly arise for decision in the case, and must raise a substantial question affecting the rights of the parties. Besides the questions of varying degree of importance that arise for decision during the pendency of a suit there might be other questions before or after the decision of a suit of a controversial nature. Decision of such questions may amount to decision of a case.

12. There are a large number of decisions under Section 115 which cannot all be reconciled and it would serve no useful purpose to refer to them.

13. I am not inclined to accept the view that in a suit no final decision of any matter can ever amount to a case decided as the suit itself is a case and only the decision of the suit can amount to a case decided. Nor am I prepared to accept the view that every order passed deciding any matter in controversy must be held to be a case decided.

14. There may be certain proceedings previous to the institution of the suit or subsequent to the decision of the suit; for example, application for leave to sue in 'forma pauperis'; application for review; application for amendment of decree; application for restoration of a suit dismissed for default; application for setting aside of an ex parte decree, etc. All these proceedings are started by means of an application and have to be disposed of judicially by final orders passed by the Court. These must all be cases decided. These proceedings are all completely separable from the decision of the issues that arise for decision in a case. Though in a way they relate to the adjudication of a dispute between the parties to a suit they can be treated as separate proceedings and their decision can amount to a case decided and if the other requirements of Section 115 are satisfied the High Court can interfere in the exercise of its revisional jurisdiction.

15. Then there may be other matters which are not ancillary to the decision of the case and are distinct and separable from it. Proceedings which are distinct and separable, when they are disposed of by a final order, which substantially affects the rights of the parties, may amount to a case decided.

16. Then come matters of varying importance arising during the trial of a suit. These are, to my mind, clearly divisible into three main groups :

> 1. Orders which are appealable under Section 104 and Order 43, Rule 1, Civil P. C.--they can be treated as cases decided and revisions can be entertained provided the orders are not appealable to the High Court. These were the only orders that were revi-sable under the Civil Procedure Code after its amendment in the year 1861.

2. Orders which are not appealable, but objection to which can be entertained at the tune of the hearing of the appeal under Section 105 of the Code on the ground that they affect 'the decision of the case'. The question whether these are revisable orders or not will depend upon the nature of the order and the decision of the question whether Section 105 provides an adequate remedy. The test for determining whether they amount to cases decided must be the same as for the next group of orders.

3. Besides these there are innumerable other orders that the Court may have to pass during the progress of a suit pending before it. These may be sub-divided into two groups:

(i) orders which are entirely procedural or routine matters which are not disposed of by final orders; and

(ii) final orders which decide substantial questions and affect the rights of the parties.

17. Orders under 3(i) may be changed by the Court at its discretion. But orders under 3(ii) must be final decisions so far as the Court passing them is concerned.

18. What orders will fall under group 3(i) or group 3(ii) is a matter on which there will always be differing views as it is difficult to draw! the line and the decision of the Court in each case would depend upon the nature of the order and the rights affected thereby.

19. As was pointed out by me in AIR 1948 All 244 (D), sometimes even an order of a mere routine or procedural nature may seriously affect the rights of the parties. The fixing of a date may sometimes substantially affect the rights of one party or another. Refusing to summon a witness for a particular date might again cause substantial loss to a party if the witness cannot be available on any other date. It is, however, not merely a question of loss caused that has to be taken into consideration. Before the High Court can entertain a revision the order must amount to a decision of a case and an order which a Court can itself change at any time cannot be termed an order which decides a case.

20. In my view the decision of certain proceedings prior to the institution of a suit may amount to decision of a case. On that ground I held in AIR 1948 All 244 (D) that a revision would lie against an order granting or rejecting a pauper application.

21. An application under Section 10, Civil P. C. has nothing to do with the decision of the question in controversy between the parties in a case. In that sense it cannot be said to be ancillary to the proceedings. In 'Madan Mohan's case (F)' Sulaiman C. J., was of the opinion that it is analogous to a plea raised as regards the jurisdiction of the Court, in an application under Section 10 the jurisdiction being questioned for a limited period. I do not think that this analogy, with great respect, is sound. In an application under Section 10 the defendant admits that the Court has jurisdiction to entertain the suit. All that he prays for is that since the matters in issue are directly and substantially in issue in, a previously instituted suit the hearing of the suit should remain stayed. The Court continues to have seism of the case and ultimately it has to dispose it of according

to law. Viewed from this point of view, the decision of a question under Section 10, where the Court has to consider whether there is a previously instituted suit or not and whether the mat-ters in issue are directly and substantially in issue in that other suit or not, are both questions which have to be determined judicially and if the decision of the two questions is in favour of the defendant, the Court has to stay the suit as the provisions of Section 10 appear to be mandatory. It is, therefore, to my mind, a case decided.

22. Then remains the second question, whether the fact that a plea was taken in the written statement and an issue was framed and that issue was decided, makes any difference. To my mind, it would not. Order 7, Rule 1 of the Code sets out the particulars which a plaint should contain. Apart from the facts constituting the cause of action and when it arose, the plaintiff has to show that the Court has jurisdiction. Order 8 of the Code deals with the contents of a written statement. In the written statement the facts asserted have to be denied and other facts may be pleaded by way of defence, set off or counter-claim. Order 14 then deals with the framing and determination of issues. Under Order 14, Rule 1, issues arise when a material propo-

sition of fact or law is affirmed by one party and denied by the other. Material propositions are those propositions of law or fact which a plaintiff must allege in order to show his right to sue or a defendant must allege in order to constitute his defence.

To my mind a plea under Section 10, Civil P. C. does not constitute a defence to the suit and it should not, therefore, be a matter in issue between the parties, and the mere fact that the Court has wrongly framed an issue should make, no difference. On that point I agree with the observations of Mukerji J. in 'Balakrishna's case (L)' already cited.

23. Where an issue arises out of the pleadings properly drafted, that is, in accordance with the provisions of Order 7, Rule 1 and Order 8, Rule 2, even if it has been decided as a preliminary issue under Order 14, Rule 2 of the Code, it cannot, to my mind, amount to a case decided. When a case is before a court of law and a number of issues have arisen for decision on the basis of which the Court has to adjudicate upon the rights of the parties the Court cannot pass a number of decrees except that there may be a preliminary decree and a final decree and the reasons given by it for the decree is its judgment. If some of the issues have been determi-ed under Order 14, Rule 2 of the Code earlier than others then the judgment must be deemed to have been written in two parts and it cannot be said that the part of a judgment is a final order from which a revision can lie to this Court.

This matter has been recently dealt with by me in -- 'Malkhan v. Mahar Chand', AIR 1955 All 307 (O) where I said that "if a court decides to determine preliminary issues of law under Order 14, Rule 2 and as a result of that decision decides that it is not necessary to go into other questions, it has to pass a decree, but if as a result of the decision of those issues the other issues of fact have also to be determined, then the decision of the preliminary issues is only a part of the judgment and so long as the judgment has not been completed by the decision of the other issues of fact or of law that had been left undetermined, a decree cannot be passed. The Court on determination of the preliminary issues, if it comes to the conclusion that the ease has to proceed and the other issues have to be decided, has not got to pass any formal order incorporating the result of its decision. In the

circumstances, it cannot be said that it has decided a case or even a part of a case."

I also referred in that case to my decision" in --'Manmohan Lal v. Rajkumar Lal', AIR 1946 All 89 (PB) (P) that the words "conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit" in Sub-section (2) of Section 2 of the Code "do not mean that there can be separate decrees for each matter in controversy in the suit, nor can the decision of each issue be said to amount to decision of a case which has to be embodied in a separate decree or order."

The decision of the Full Bench in AIR 1921 All 1 (A) no doubt proceeded on another ground but the decision can be supported on the ground Suggested by me.

24. In the case before us, however, as I have already pointed out the lower Court erred in framing an issue on this point. It was not one of the pleas that could be raised under Order 8, Rule 2 and no issue, therefore, could be framed on the point. The mere fact that the learned Judge wrongly decided to frame an issue should make no difference in the result and his decision refusing to stay the suit will not cease to be a case decided merely because it has been wrongly made a part of the judgment. This portion was, to my . mind, clearly separable and amounted to a case decided. As I have already pointed out in the case of AIR, 1948 All 244 (D) even though an order may amount to the decision of a case it can be revisable by this Court only if it satisfies the provisions of Section 115 of the Code, that it is an order passed without jurisdiction, or that the Court has failed to exercise jurisdiction or that it has acted with material irregularity in the exercise of its jurisdiction.

25. I have not referred to the cases that were cited on the general scope of Section 115 as they do not help in determining the question as to what is a case decided. Two such cases cited at the Bar were -- 'Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madras', AIR 1949 PC 156 (Q), and -- 'Joy Chand Lal v. Kamlaksha Chaudhury', AIR 1949 PC 239 (R). These two cases also do not deal with the question what is a case decided.

26. In my opinion, therefore, an order under Section 10, Civil P. C. is a case decided and the fact that the learned Judge had framed an issue on the point and decided the point as an issue in the case would make no difference.

Agarwala, J.

27. The main point for decision in this case is whether an order refusing to stay the hearing of a suit, made under Section 10, Civil P. C., is a "case decided" or not within the meaning of Section 115, Civil P. C., The word 'case' has not been defined anywhere in the Civil Procedure Code. Its dictionary meanings are numerous. As used as a term of law the dictionary gives the meaning of the word 'case' as 'a suit or action at law; a cause'. A 'case stated or agreed on' is 'a statement in writing of facts agreed on and submitted to the Court for decision of the legal points arising in them' (vide Webster's International Dictionary). The word 'case' occurs in various provisions -of the Civil Procedure Code and does not necessarily convey the same meaning. For instance, in Section 13(b) the word 'case' obviously refers to the entire proceeding in which a judgment is delivered. In Section 33 the word

'case' has been used in the sense of a suit because on the judgment being pronounced in the case, a decree is to follow.

In Section 90, the word 'case' is used in the sense of a special case or a case stated for the opinion of the Court. In Section 99, again, the word 'case' refers to the entire proceeding pending in the court of appeal. The word 'case' in Section 113 obviously refers to a statement of facts concerning any point in dispute between the parties to a proceed-

ing on which the opinion of the High Court is sought. In Order 5, Rule 8, the word 'case' is used in a different sense. It is used in the sense of the parties' statement of facts and law of the matter in dispute. In Order 6, Rule 6, the word 'case' in the phrase, "for the case of the plaintiff or defendant" is again used in the same sense as in Order 5, Rule 8. In Order 7, Rule 18, again the word 'case', has been used in the same sense.

28. Apart from the use of the word 'case' in Order 5, Rule 8; Order 6, Rule 8, and Order 7, Rule 18, in which the expression is used as referring to a particular party's allegations, and apart from its use in

5. 113, in the sense of a 'case stated' for the opinion of a Court, the word 'case' is used in the sense of an entire proceeding initiated by one party in which that party claims a substantial right on certain facts and circumstances stated by him and seeks some reliefs as against another party. Thus, the essential features of a 'case' are: "

> 1. a proceeding in which a claim is made by one party that he is entitled to certain rights and the denial or admission of those rights by the other party,
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> 2. the rights claimed are substantial, the grant or refusal of which materially affects the interests of a party, and
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> 3. the proceeding is separate and complete by itself.
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> 29. A proceeding in which the rights of the parties are not to be conclusively decided, but is merely intended to be a step in the determination of those rights cannot by itself be a case or a cause or action at law. Thus if the proceeding is a suit in the sense in which that word is used in the Civil Procedure Code, the suit itself and the whole of it and not a part of it is normally a 'case'. A suit is initiated by a plaint which contains such allegations as are mentioned in Order 7 and there is a written statement by way of defence to the suit and such written statement contains matters which are mentioned in

6. .8 of the Civil P. C. The suit is disposed of by means of a decree or a final order dealing with the allegations made in the plaint and the defence raised in the written statement.

A decision on any one of the issues raised in the suit arising out of the defence in respect of matters mentioned in Order 8, unless it disposes of a severable part of the plaintiff's claim cannot in my judgment amount to a 'case'. Therefore normally a separate decision on one of the issues in the suit is not to be treated as a case decided. These issues may relate to the merits of the claim itself or may arise out of the various defences open to the defendant which render the claim not maintainable. Thus, in my opinion, the decision on a question of jurisdiction of the Court to hear and determine a suit or that the suit is barred by limitation or res judicata is not to be treated as a case decided, unless the suit itself is disposed of by the decision. I may point out that I am not here dealing with the question whether a decision on any of these points raises a question of jurisdiction which was the point considered in the two Privy Council decisions: AIR 1949 PC 156 (Q) and AIR 1949 PC 239 (R). In my judgment the decision of the Full Bench in AIR 1921 All 1 (A) was, with respect, perfectly correct.

30. There may, however, be proceedings connected with a suit, though not directly bearing upon the trial of the issues arising in the case. These proceedings may be classified as follows:

(a) Antecedent to the suit,

(b) Subsequent to the decision of the suit, and

(c) During the pendency of the suit.

An application for leave to sue in 'forma pauperis' is a proceeding antecedent to the suit, because the suit comes into existence when the application is granted and is treated as a plaint and the court-fee is paid thereon. An application for leave to sue a defendant falls under the same category. The decision on such an application will be a case decided. An application for the restoration of a case dismissed for default of appearance of plaintiff, or an application for setting aside an ex parte decree, and application for- review are proceedings taken after the suit has terminated. A decision of any one of such applications will amount to a case decided. So also an execution proceeding taken after the decision of the suit is by itself a separate 'case'.

An application for appointment of a receiver or the issue of an injunction or the attachment of property before judgment are matters that do not touch upon the trial of the issues in a suit. These are, therefore, to be treated as separate cases. An interlocutory order passed during the pendency of a suit on an application which has a bearing upon the trial of the issues of the case cannot be treated as the decision of a 'case' by itself, because such a proceeding is part of a 'case' and not' a complete case by itself, unless it can be treated as such on the ground that the Civil Procedure Code makes special provision for it being so treated, inasmuch as an appeal is provided from it, under Section 104 read with Order 42, Civil P. C., or unless a severable part of the plaintiff's claim is thereby disposed of. But orders on applications for adjournment of a case or for summoning of witnesses or settling issues etc., are not orders which dispose of a part of the case or any of the rights of the parties in the suit, but are mere orders connected with the progress of the trial of the suit and are matters of routine. These cannot be treated as 'cases' by themselves.

31. An application under Section 10, Civil P. C., that the hearing of the suit may be stayed is not one of those matters which are mentioned in Order 8. The words "all matters which show the suit not to be maintainable" in Order 8 clearly mean matters which show that the suit is not maintainable at all and should be dismissed. An application under Section 10 is not a matter which shows that the suit is not maintainable at all. By means of this application a proceeding is initiated in which a claim is made by the defendant that he is entitled to have the hearing of the suit stayed till the decision of a previously instituted suit which is pending and to have the suit decided in accordance with the decision of the previously instituted suit. The right which the defendant claims by means of the application is very material to him in that he will not be called upon to answer the plaintiff's claim afresh, because that will be done in the previously instituted suit and he will be in a position to say to the Court that the decision of the suit must be in accordance with the previously instituted suit. The proceeding is separate from the trial of the matters which are in controversy in the suit and is complete by itself. Therefore it fulfils all the reauirements of a "case".

32. If the plea under Section 10, Civil P. C., is contained in the written statement, the Court very often frames an issue upon it. There is nothing improper in the Court adopting this course. But as already observed an issue raised for a plea under Section 10, Civil P. C., is not really a defence to the suit itself, and therefore, it is a matter which is separate from the trial of the suit and hence a case by itself, even though an issue has been framed by the Court relating to it.

33. I am in agreement with the opinion of Mukerji J. in AIR 1929 All 957 (E) that a matter under Section 10, Civil P. C., has nothing to do with the merits of the case, but I do not agree with him when he says that it is not a "case" by itself.

34. I, therefore, agree with my Lord the Chief Justice in the answers that should be given to the questions referred to this Full Bench.

V. Bhakgava, J.

35. I have had the benefit of reading the judgment proposed to be delivered by my Lord the Chief Justice. While agreeing with him, I would like to add a few words as I consider that the questions, which aris.e in this revision, are very easily answered if attention is paid to the language used by the Legislature in various provisions of law which determine the jurisdiction of Courts and in respect of which it may be necessary to find out whether the result of the order of the Court is that a case has been decided. In a number of statutes, the provision made is in the form of a direction to the Court to proceed or to refrain from proceeding in a certain manner or to pass an order that would terminate the proceedings before it. In this class of cases, I may cite a few instances:

36. Section 242 of the U. P. Tenancy Act lays down:

> "242. Subject to the provisions of Section 286 all suits and applications of the nature specified in the Fourth Schedule shall be heard and deter-

> mined by a revenue Court, and no Court other than a revenue Court, shall, except by way of appeal or revision as provided in this Act, take cognizance of any such suit or application or of any suit or application based on a cause of action in respect of which any relief could be obtained by means of any such suit or application."

Section 55 of the U. P. Panchayat Raj Act (U. P. Act No. 36 of 1947) is as follows :

> "55. No Court shall take cognizance of a case or suit which is cognizable under the Act by a Panchayati Adalat unless an order has been passed by a Sub-Divisional Magistrate or Mun-sif under Section 85."

In both these instances, the Legislature has given a direction to the Court not to take cognizance of the suit in certain circumstances. If a question arises before a Court and the Court Is called upon to decide in any suit already instituted before it whether it can or cannot take cognizance of the suit, the decision will be on a question which determines the power of the Court to proceed with the suit and the validity of the subsequent proceedings in the Court will depend on the correctness of the decision that the cognizance of the suit can be validly taken by the Court. In such circumstances, it must be held that the order of the Court, deciding the question of jurisdiction, amounts to a case decided.

37. Another example, that may be taken, is provided by Section 3 of the Limitation Act, which lays down :

> "3. Subject to the provisions contained in Sections 4 to 25 (inclusive) every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence."

By this provision of law, a mandatory direction is given to the Court to dismiss the suit, appeal or application if instituted, preferred or made after the period of limitation prescribed therefor unless it is saved by other provisions of the Act. Consequently, a decision by the Court on the question whether the suit, appeal or application is or is not barred by limitation determines what action is to be taken by the Court in the proceedings and regulates the further conduct of the Court and, in such a case also, therefore, the order of the Court will result in the decision of a case.

Similarly, Section 11, Civil P. C. directs that "no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Here again, the Court is directed not to try a suit or an issue under certain circumstances and any order by the court in this behalf determines the question whether further proceedings to be taken in the Court are or are not within its jurisdiction.

These two later instances cited by me explain why their Lordships of the Privy Council in AIR 1949 PC 239 (R) remarked:

> "There have been a very large number of decisions of Indian High Courts on Section 115, to many of which their Lordships have referred. Some of such decisions prompt the observation that High Courts have not always appreciated that although error in a decision of a Subordinate Court does not by itself involve that the Subordinate Court has acted illegally or with mate-rial irregularity so as to justify interference in revision under Sub-section (c), nevertheless, if the erroneous decision results in the Subordinate Court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under Sub-section (a) or Sub-section (b), and Sub-section (c) can be ignored. The cases of -- 'Babu Ram v. Munna Lal', AIR 1927 All 358 (S) and -- 'Hari Bhikaji v. Naro Vishvanath', 9 Bom 432 (T) may be mentioned as cases in which a Subordinate Court by its pwn. erroneous decision (erroneous that is in the view of the High Court), in the one case on a point of limitation and in the other on a question of 'res judicata', invested itself with a jurisdiction which in law it did not possess, and the High Court held, wrongly their Lordships think, that it had no power to interfere in revision to prevent such a result."

So far I have mentioned instances where the provision of law is so worded as to raise a question of jurisdiction at the very initial stage in a suit or proceeding; but there can also be cases where, though a court may be rightly seized of a suit or proceeding pending before it, the Legislature may have made a provision directing the manner in which the Court is to proceed further with the suit or proceeding and also laying down that, under certain circumstances, the Court shall stay its hands and refuse to continue further proceedings. An example of a case of this nature is provided by Section 7(1) (a) of the U. P. Encumbered Estates Act wnich, while giving the consequences of an order passed by the Collector under Section 6 of the Act, lays down :

> "7(1) (a). All proceedings pending at the date of the said order in any civil or revenue court in the United Provinces in respect of any public or private debt to which the landlord is subject, or with which his immovable, property is encumbered, except any appeal (review) or revision against a decree or order, shall be stayed ....."

Very similar is the provision of Section 10, Civil P. C. which has, come up for consideration in this case before us and which is as follows :

> "10. No Court shall proceed with the trial of any suit .....' In these cases again, the Court is directed to stay proceedings in the suit which may have been properly instituted before it and cognizance of which may have been taken by the court competently. In these cases, however, the determination of the question by the court whether the suit or proceeding should be stayed also determines the validity of further proceedings by the Court and, consequently, in my opinion, a decision by the Court on such a question must amount to decision of a case.

38. The other class of cases is whether the Legislature has so worded the provisions of the statute that limitations are not placed on the powers or functions of the Court, nor is any direction intended to be conveyed to a Court as to the manner in which it must exercise its powers but limitations are placed on the right of a party to invoke the jurisdiction of a Court. The simplest example is provided by Sections 15 to 20, Civil P. C. In all these sections, the language regulates the institution of the suit and not the power of the Court to take cognizance of the suit or to deal with it. Institution of a suit is an act of a party and these sections, therefore, regulate the act of that party. Section 15 requires every suit to be instituted in the court of the lowest grade competent to try it. Section 16 lays down, the Court in which the suit is to be instituted when the forum is to be determined by the situation of the property to which the suit relates. Section 17 permits, under certain circumstances, institution of a suit in different Courts. Section 19 makes special provision governing the institution of suits for compensation for wrongs done to a person or movable property and Section 20 is the general section indicating in which court suits should ordinarily be instituted.

If a suit is instituted in a wrong Court the question whether the Court should proceed with the suit will be a question of jurisdiction but the determination by the court will be a determination of the right of a party to institute the suit and not a determination of the power of the court to continue proceedings in the suit. In such a case, therefore, the decision by the Court must be held to be a decision relating to the right of a party which is a matter intrinsic to the decision of the suit and not a collateral proceeding which will determine the power of the court and its' jurisdiction to continue the proceedings. In my opinion, in such a case, the decision by the Court must be held not to amount to a case decided but to be a decision on an issue in the suit arising between the parties relating to their rights.

Very similar is the provision of Section 80, Civil P. C. which prohibits institution of suits against the State or against a public officer until the expiration of two months next after notice in writing has been given. Sections 55 and 59 of the U. P. Court of Wards Act, 1912, may also be referred to in this connection. Under these sections, there is a bar on the right of a ward to sue or be sued except by and in the name of the Collector in charge of his property or such other person as has been appointed in this behalf, This is again a limitation on the right of a party in respect of seeking remedy in court by a suit and if a plea is taken that the suit is not maintainable as being barred by any of these two sections, the determination of that question will be a determination of rights of parties and will, therefore, not amount to a case decided.

39. Section 192 of the U. P. District Boards Act, 1922, and Section 326 of the U. P. Municipalities Act, 1916, also place limitation on institution of suits against a district board or a municipal board. Questions frequently arise whether a suit has or has not been properly instituted in accordance with these provisions of law. Decisions on such questions must also be held to be decisions relating to rights of parties to seek the remedy in the court and, consequently, orders passed in accordance with these sections or giving in effect to the provisions of these sections will not amount to cases decided.

40. This division of decisions on question of jurisdiction into these two classes also supports the view taken by My Lord the Chief Justice that it is Quite immaterial whether the decision is given after the court has framed an issue on the point or does so without framing any issue. The mere fact

that a question is made the subject-matter of an issue cannot affect the nature of the decision and cannot convert a matter which is extrinsic and collateral into a matter intrinsic and ancillary to the suit or proceeding. The decision of the Full Bench of this Court in AIR 1921 All 1 (A), in the view that I have taken above, is, if I may say so with respect perfectly correct. That was a suit in which the plaintiff claimed a sum of money as damages on account of an alleged breach of contract in the Court of the Munsif of Etawah. The defendants took the plea that the suit was cognizable by the civil court at Kanpur and the issue, that arose, was framed by the trial court in the following words:

"Is the suit cognizable by this or the Civil Courts of Cawnpore?"

The court then proceeded to try this issue separately from the rest of the case on the evidence, both oral and documentary, and came to the conclusion that it had jurisdiction and recorded a formal order to that effect. In the revision before the High Court under Section 115, Civil P. C., the question arose whether the order of the Munsif had decided a case so as to determine whether a revision did or did not lie to the High Court. It was held that the decision of the Munsif did not amount to the decision of a case and no revision lay. The question as to the Court, which had jurisdiction to try the suit, depended on the interpretation of Clause (c) of Section 20 Of the Code of Civil Procedure which, as I have mentioned above, regulates the right of a plaintiff to institute a suit and does not place any limitation on the power of a court to take cognizance of the suit. The decision, therefore, was a decision on the right of a plaintiff on a matter, which was in issue before the court, as an intrinsic part of the suit instituted before it, whether, rightly or wrongly. It could not, therefore, be held that a case had been decided and that a revision could be entertained by the High Court under Section 115, Civil P. C.

41. For the reasons mentioned by me above, I agree with My Lord the Chief Justice and concur in the answers proposed by him to the questions referred to the Full Bench.

Mukerji, J.

42. I agree with the judgment of my Lord the Chief Justice and have nothing further to add.
CHATURVEDI J. :

43. I agree with the Judgment of my Lord the Chief Justice and have nothing further to add.

Asthana, J.

44. I agree with the judgment of my Lord the Chief Justice and have nothing further to add.

Mehrotra, J.

45. I agree with the judgment of my Lord the Chief Justice and have nothing further to add.

BY THE COURT :

46. Our answer to the question, therefore, is that an order under Section 10, Civil P. C. is a case decided and the fact that the learned Judge had framed an issue on the point and decided the point as an issue in the case would make no difference.

47. The case may now be laid before the Bench, concerned.