Daulat Ram Singh vs Swami Dayal And Anr. on 2 April, 1954

Equivalent citations: AIR1955ALL252, AIR 1955 ALLAHABAD 252

JUDGMENT

Malik, C.J.

1. This is an application for leave to appeal to the Supreme Court under Article 133 of the Constitution against an order of remand passed by this Court on 4-2-1952.

2. The case had rather a chequered history as would appear from the following facts. On 13-3-1931, one Ganga Sahai filed a suit No. 7 of 1931, in the Court of the Subordinate Judge, Kanpur, for a declaration that Daulat Ram was not the son and heir of his brother Raj Kumar. During the pendency of that suit, Ganga Sahai died on 24-4-1932. Ganga Sahai had left two daughters. Amrawati and Indrawati, who, on 15-7-1932, applied that their names be substituted in place of the name of Ganga Sahai deceased. Another application was, however, filed on 11-7-1932, by Swami Dayal; son of Indrawati who claimed that Ganga Sahai had left a will and under that will he was the sole legatee and was thus entitled to inherit all the right, title and interest of Ganga Sahai in the property in suit. On 19-10-1932, the learned Subordinate Judge dismissed the application of Swami Dayal but granted the application of the daughters Amrawati and Indrawati. Swami Dayal thereupon filed a suit, No. 6 of 1934, and in that suit he impleaded Amrawati and Indrawati, as also the Collector of Kanpur as Manager, Court of Wards, Estate of Daulat Ram Singh minor. The relief claimed in the suit was as follows:

> "(a) That it be declared that by virtue of the will dated 24-4-1932, executed by Chaudhari Ganga Sahai, the plaintiff is the sole legatee and the sole legal representative of Chaudhari Ganga Sahai, as far as the properties comprised in suit No. 7 of 1931 in the Court of Second Subordinate Judge, Kanpur, are concerned.
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> (b) Costs of the suit be awarded to the plaintiff from defendant No. 1, or any other defendant who may contest this suit. (Defendant No. 1 was Amrawati who had contested Swami Dayal's case.)
>
> (c) Any other relief that may be necessary be given to the plaintiff."

3. The suit was valued at Rs. 5,73,998/6/10. It was contested by Amrawati who raised a plea that the order dated 19-10-1932, passed in suit No. 7 of 1931, had become final and operated as res judicata. This issue was tried as a preliminary issue, and the learned Subordinate Judge found in favour of the contesting defendant and dismissed the suit with costs on 21-5-1934. The other issues in the case were not gone into. A First Appeal, No. 423 of 1934, was filed in this Court in which the following order was passed by Chaudhri Niamatullah and Alsop JJ. on 1-10-1935:

> "We have heard counsel on both sides and are of opinion that this is a fit case in which the appellant should be required to furnish security for the costs of the respondents incurred in the lower Court and likely to be incurred in this Court. The estimated costs of the respondent's costs in the two Courts is Rs. 5800/-. We direct the appellant to furnish within three months security for Rs. 5,800/-."

On failure of the appellant to furnish the required security the appeal was dismissed on 1-5-1936 by Harries and Smith JJ.

On 9-4-1945, an application was filed by Dr. Narayan Prasad Asthana and Mr. Shambhu Prasad in this Court, Miscellaneous Case No. 167 of 1945, for setting aside the order of dismissal passed on 1-5-1936. On 27-8-1945, Mr. Shambhu Prasad filed an application for condonation of the delay. These two applications were heard by a Bench of this Court consisting of Mr. Justice . Sinha and Mr. Justice Dayal on 12-9-1946, and the application was granted and the previous order of 1-5-1936 was set aside. Then an application was filed on 10-1-1947, for review of this order, and that application failed on 3-3-1947.

Thereafter the appeal came up before a Bench of this Court and the Bench disagreed with the lower Court that the order of 19-10-1932 operated as res judicata. The finding on the point was set aside and the case remanded to the lower Court for decision according to law after" recording findings on the other issues.

4. The valuation of the suit is well above the required figure and the valuation of the proposed appeal to the Supreme Court is also well in excess of Rs. 20,000/-, and this Court has set aside the order of the lower Court, but on behalf of the respondent Dr. Asthana has raised an objection that the order of remand is not a final order within the meaning of Article 133 of the Constitution and leave cannot, therefore, be granted.

Learned counsel has relied on two decisions, one of the Privy Council, and the other of the Federal Court. In -- 'V. M. Abdul Rahman v. D. K. Cassini and Sons', AIR 1933 PC 58 (A) their Lordships of the Judicial Committee pointed out that though a decision on a question of jurisdiction of the Court may be a decision on a very important and even a vital question of law, yet, if it left the suit alive and provided for its trial in its ordinary way, it could not be said to be a final order and no appeal lay to the Privy Council. Their Lordships have pointed out in a number of cases that unless a remand order finally determines the rights of the parties and the case was sent back to the lower Court only to work out the details in accordance with the decision of the Court, it could not be said to be a final order. In this connection reference may be made to the observations of Fazal Ali J. in -- 'Moolji Jaitha & Co. v. Khandesh Spinning & Weaving Mills Co., Ltd.', AIR 1950 FC 83 at p. 93 (B). His Lordship pointed out that, "the expression 'final order' means an order which finally determines the points in dispute and brings the case to an end, the test of finality being whether the order finally disposes of the rights of the parties and not whether the order decides an important or even a vital issue in the case."

His Lordship quoted with approval the observations of Lord Esher, Master of Rolls, in -- 'Salaman v. Warner', (1891) 1 QB 734 (C), where he had observed:

> "If their decision, whichever way it is given will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules, it is final. On the other hand, if their decision, if given in one way will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final but interlocutory."

5. The order of remand in this case does not in that sense finally dispose of the rights of the parties and, in the circumstances, we cannot certify that the appellant has a right to appeal to the Supreme Court. We think that it is, however, a fit case in which the parties should bear their own costs.