Ajaibul Hassan vs S. Chiranji Lal And Anr. on 6 December, 1950

Equivalent citations: AIR1951ALL564, AIR 1951 ALLAHABAD 564

JUDGMENT

Mushtaq Ahmad, J.

1. Pending a suit on a mtge, under which the machinery, the furniture & other paraphernalia of a cinema house had been pledged, the opposite party 1 was appointed a sapurdar by the learned Munsif of Chandausi under an order dated 29-11-1949. The building in which these items of property had been installed was not a part of the security. In fact it could not be, as the defts in the mtge suit held the building only as lessees on behalf of the original owner or owners for the purpose of running a cinema show. All the same, those things had been permanently fixed & installed in the Hall &, as found by the learned Munsif, when the sapurdar (opposite party 1) was put in possession of the properties mortgaged, he had necessarily to be put in possession of the building also. He was in fact put in possession of the building under the order dated 29-11-1949 appointing him a sapurdar.

2. In the course of his functions as sapurdar the opposite party 1 was found to have misbehaved. The learned Munsif remarked:

> "He abused his position as sapurdar & acted in bad faith from the beginning to the end. I have discussed his conduct in detail in the course of my orders dated 9-1-1950 & 18-1-1950."

3. An appln was then made by the defts in the suit to remove opposite party 1 from the possession of the properties mortgaged, indeed from the possession of the building also, in which those properties were permanently installed. By an order dated 18-1-1950, to which I have referred in the above quotation, the learned Munsif removed the said opposite party from his position as sapurdar, directing him to vacate his possession over the articles that had been entrusted to him. No appeal or revision against that order was filed by the sapurdar, & we are informed that that order became final. Subsequently, on 15-3-1950, the learned Munsif, while dealing with a number of applns made by one or the other of the parties to the suit, & by the sapurdar seeking to retain control over the properties, passed an order directing the erstwhile sapurdar to surrender possession over the articles in his charge to the Ct Amin. This was obviously with a view to ensure the safety & security of those articles. Against this last order, the opposite party 1 filed an appeal in the Ct of the Dist J., Moradabad, so far as the order of the Munsif had directed the said opposite party to deliver possession to the Amin over the cinema building also. Pending that appeal an appln was made by him before the learned Judge for stay of the operation of the order of the learned Munsif dated 15-3-1950, so far as it related to that building. There appears to have been taken an objection then by the counsel appearing for the defts before the learned Dist J. that he had no jurisdiction to pass

any order on this appln for stay, as he had none to entertain the appeal itself, in which that appln had been made. The learned Judge allowed the appln after hearing both the parties & passed an order of stay. In the course of his order he observed :

> "Chiranji Lal (Opposite Party 1) was only a supardar for the machinery hypothecated to the pltf & in my opinion the rights of Chiranji Lal & the defts regarding the possession of the Hall cannot be determined in the suit as the decision of the same is not necessary to the (sic) relief to the pltf."

That is to say, according to him, there could be no question of Chiranji Lal being asked to vacate possession of the building, as he had never got that possession in his capacity as a sapurdar. This was contrary to what the learned Munsif had found, after a somewhat detailed discussion of the matter, that Chiranji Lal had in fact been put in possession of the building together with its permanent fixtures, that is, the properties mortgaged with the pltf, under the order dated 29-11-1949, appointing him a sapurdar. There was thus on a vital question a conflict of findings between the two Cts, although, so far as the learned Dist J. was concerned, he utilised his finding only as a basis for the order of stay which he actually passed on the appln made by Chiranji Lal for that purpose. It was against this order that the present revision was filed by the defts in this Ct.

4. A preliminary objection was taken on behalf of the opposite party 1 that no revision lay, as there had been no 'case decided' within the meaning of Section 115, C. P. C. This is one of those numerous questions, on which the number of rulings of this, as well as of the other Cts, is almost legion. There can be no doubt that the word 'case' in this section has to be given a wide meaning, broader than the word 'suit'. The question is whether the order now sought to be revised was in the light of this meaning a "case decided".

5. So far as this Ct is concerned, it is well-settled that an order of an interlocutory nature cannot be said to amount to a "case decided", although it is conceivable that there may be exceptions to the rule, as for instance, in the case of 'Purshottam Lal v. W. T. Henlay's Telegraph Works Ltd.', AIR (20) 1933 All 523: (55 All 719), where an appln made by a member of the deft firm to cross-examine the witnesses examined by the pltf had been refused, & this Ct held that it was a "case decided", although the order of refusal was passed in interlocutory proceedings.

6. There is, however, no doubt that, where an order has been passed in a proceeding which is separate & independent of the suit or the appeal, as the case may be, it would be a "case decided". The words "separate & independent" indicate that the proceeding is not part of the main process which leads to the termination of the suit or the appeal, but it is something detached from the same, in the sense that the suit or the appeal can be disposed of even without there having been such a proceeding. An appln for injunction pending a suit or an appln for stay of the order of the trial Ct pending an appeal would certainly be a separate & independent proceeding in the sense that it is not a part of the proceeding leading to the termination of the suit or the appeal.

7. Fortunately the essential ingredients of S. 115 of the Code have been again & again considered by this Ct to indicate the limits within which revisional jurisdiction can be properly exercised. A F. B. of

this Ct in 'Gupta & Co. v. Kripa Ram Bros.', AIR (21) 1934 All 620 at p. 622: (57 All 17 FB) observed:

> "But where the case is a proceeding which can be considered separate & distinct & is finally disposed of by an order which terminates it, it may well be considered to be a case decided, although the suit has not in one sense been completely disposed of."

8. This is with regard to the meaning of the words "case decided". A later F. B. in the case of 'Ramzan All v. Mt. Satul Bibi', 1948 ALJ 43: (AIR (35) 1948 All 244 FB), in which the leading judgment was delivered by the present Chief Justice, laid down the necessary ingredients of the said section in the following words :

> "The questions that the Cts should consider when deciding a revision under Section 115, C. P. C. are whether the order complained against decides a point in controversy which substantially affects the rights of the parties, whether that order has been passed without jurisdiction or in the irregular exercise thereof, & whether, if the H. C. does not exercise its revisional jurisdiction, substantial injustice would be done to a party."

9. Every case, where such features as mentioned in the above passage are present, would, therefore, be a "case decided" within the meaning of Section 115 of the Code. We cannot lay down any hard & fast rule that an order of a particular class, say one of stay or injunction, can never be a "case decided". If the elements just mentioned are present, such an order would certainly be such a case. I have already pointed out that, in the context of events in which the learned Munsif had passed his order of 18-1-1950, removing the opposite party 1 as a sapurdar, of the facts mentioned by him in the later order of 15-3-1950 & of the fact that the sapurdar had never challenged the legality of the earlier of these two orders, an important question of the right of immediate possession over the building had been decided by the learned Munsif. An equally clear, though contrary, finding had been given by the learned Dist J., when disposing of the appln for stay. The element of a decision of an important question of right, though for the time being, is, therefore, present here. Prom the point of view of the deft for whose benefit as a protective measure, the learned Munsif had passed his orders of the 18th January, & the 15-3-1950, the order of the Dist J. certainly amounted to a grave injustice, inasmuch as it had the effect of sanctioning or legalising the misconduct, of which the sapurdar had been found guilty by the original Ct. A decision on an important question, though only for the time being, which also involves an element of injustice for one of the parties requires only the third ingredient of lack of jurisdiction in the Ct to make it revisable by the H.C. The question of absence of jurisdiction would depend on whether the learned Dist J. had jurisdiction to entertain the appeal itself, with which I shall deal after I have finished the point with regard to the preliminary objection.

10. A. F. B. of the Lahore H. C. in 'Bibi Gurdevi v. Mohammad Baksh', AIR (30) 1943 Lah 65 at p. 68: (ILR (1943) Lah 257 PB) quoted with approval a passage from Maxwell on Interpretation of Statutes, 8th Edn., p. 61. This was :

> "Even if there be some room for doubt, such construction should be placed on a statute as shall supress the mischief & advance the remedy."

The case in connection with which this dictum was cited was one of stay of the hearing of a suit.

11. In a number of cases it has been held in this Ct that an order of stay on an appln under Section 7, U. P. Encumbered Estates Act is a 'case decided' within the meaning of Section 115, C. P. C., for instance, 'Jwala Prasad v. Har Prasad', AIR (24) 1937 All 658 : (172 IC 285); 'Babu Ram v. Manohar Lal', AIR (25) 1938 All 6: (ILR 1938 All 22); & 'Mohammad Maqsud Ali v. Roop Chand', AIR (27) 1940 All 387 : (ILR 1940 All 499). The first was a case in which the Ct had refused to stay execution on an appln by a person who was not a party to the execution proceedings. The Bench held that the order passed on the appln, having terminated the proceedings initiated on the appln, amounted to a 'case decided'.

12. I may aptly conclude the discussion of this matter by referring to a decision of their Lordships of the P. C. in Balakrishna v. Vasudeva', AIR (4) 1917 P C 71 : (40 Mad 793). At p. 74 of the report it was remarked:

> "No definition is to be found in the Code of the word "case". It cannot in their Lordships' view, be confined to a litigation in which there is a pltf who seeks to obtain particular relief in damages or otherwise against the deft who is before the Ct. It must, they think, include an ex parte explanation, such as that made in this case, praying that persons in the position of trustees or officials should perform their trust or discharge their official duties."

13. I would find it difficult to distinguish the rule contained in the above passage from the facts of the present case. Here the trial Ct had ordered that the sapurdar should cease to function. The lower appellate Ct directed in effect by its order on the appln for stay that he should continue to function. If an order on an appln that a certain trustee should be asked to continue his duties as a trustee was a 'case decided', I see no reason why an order directing that a sapurdar, in spite of a prohibited order of the trial Ct, should continue to function, should not be so. In view of all these considerations, I would hold that the order of the Ct below was a 'case decided' within the meaning of Section 115 of the Code, & if it was passed without jurisdiction, surely it is revisable by this Ct under that section.

14. Coming to the merits of the revision, the preliminary objection to the order taken by the learned counsel for the appct is that it was passed in an appeal which the Ct passing it had no jurisdiction to entertain the appeal. The appeal, as we know, was against the order of the learned Munsif of the 15th March, ordering him to surrender possession of the articles in his custody. That order - had been passed expressly under Section 151 of the Code. Now an order under Section 151 of the Code cannot be conceived to be an appealable order. One may file a revision against it, but that is another matter. This, in my opinion, is the first indication of the absence of jurisdiction to entertain the appeal. Secondly, the Code mentions only a limited number of appealable orders, the nature of which is specified in Section 102 (104?) of the same, & a list of which is given in Order 43 thereof. It is conceded that the order in the present case does not come either within that nature or within that

list. Now Section 104(1) expressly lays down that an appeal shall not lie against any other order, & Section 105(1) is also to the same effect. But it was suggested that the order passed by the learned Munsif was a decree & as such appealable. It is very difficult to appreciate this suggestion. That order merely was that a certain person appointed to discharge certain functions should cease to do so. There was no adjudication of any question of 'right' within the meaning of Section 2(2) of the Code. No one on the mere pretension of a so-called 'right' can claim a right to discharge certain functions under an order of the Ct. It is a matter resting entirely with the discretion of the Ct to retain him in his position or to remove him from it. It all depends on the manner he had conducted himself & whether the Ct is satisfied with the same.

15. There was some argument with reference to Section 145 of the Code, & it was contended that an appeal lay against the order of the Munsif under that section. It is true that in certain cases a decree may be passed against a surety, &, of course, once such a decree has been passed, it is appealable. But several conditions have to be present before a contingency may arise under this section of passing a decree against a surety. The surety must be a person who had undertaken a liability on behalf of a third party, either after a decree had been passed against the latter or even before it. But it must be in every case a liability undertaken on behalf of a third party. In case the undertaking has not been fulfilled, & the Ct proceeds against the surety, as if default has been committed by the party originally liable, it would pass a decree against the surety & that decree would be appealable. None of these ingredients are found in the present case. There was no undertaking, in the first place, given by the opposite party 1 to satisfy the liability of a third party. None was given after a decree had been passed against the third party or in anticipation of a decree to be passed against him. Indeed, the question involved in the appointment of the opposite party 1 as a sapurdar was altogether independent of the controversy in the original suit which was for sale under a mtge, much less had any decree been actually passed against the opposite party 1 by the Munsif. I, therefore, find it very difficult to accept the contention that the order of the Munsif amounted to a 'decree' against this opposite party & that the latter was entitled to appeal against it as such.

16. The position, therefore, is that no appeal lay against the order of the learned Munsif. Learned counsel for the opposite party conceded that, if really no appeal lay against that order, it could not be claimed with certainty that the Ct below had jurisdiction to pass the order now under revision. It is, therefore, necessary for me to express my opinion on this question also.

17. The appeal filed in the lower appellate Ct was numbered as App. No. 56 of 1950. The appln filed by the opposite party for stay was headed as in the same appeal. That is to say, & it is obvious, that the appln for stay was made in that appeal & the order on it also purported to have been passed in that appeal.

Of course anything to the contrary is not conceivable. When an appeal is filed in a Ct which in fact has no jurisdiction to entertain it, it cannot be denied that the Ct in the exercise of its appellate jurisdiction cannot pass any order affecting the order appealed against in the least degree. That order may be vacated either by its permanent reversal or by its temporary suspension. The Ct passing the order being the Ct in which the appeal itself was filed & that Ct having passed the order as a Ct entertaining the appeal against that order, it would of course have no jurisdiction to pass the

order.

How can it be said that a Ct, having no jurisdiction to entertain the appeal & therefore none to decide it, can still do everything else, as if it had jurisdiction to entertain the appeal, for instance, staying the execution or enforcement of the order under appeal? I may repeat that such a Ct cannot annul or modify the order, by reason of lack of jurisdiction. It can not also affect its operation for any space of time.

18. It was at one stage suggested that the lower appellate Ct, even if it had no jurisdiction to entertain the appeal, had jurisdiction when it passed the order of stay, in the sense that at least it assumed that it had such jurisdiction. It cannot be denied that so far as the Ct below itself was concerned, it did assume throughout that it had jurisdiction to entertain the appeal, & therefore, also to pass the order of stay, but that is not the test to be applied. If this Ct in revision is of the view that the Ct below had no jurisdiction to entertain the appeal, then, on a correct & legal view of the question of jurisdiction, the lower appellate Ct, on the day it passed the order of stay, had no jurisdiction to pass that order. That the said Ct might have assumed that it had jurisdiction is not, I believe, the proper approach. The real test is whether in fact it had no jurisdiction to entertain the appeal, &, if in the opinion of this Ct, it had none, 'a fortiori' it had none to entertain the appln for stay either. I would, therefore, hold that the lower appellate Ct, by reason of its having no jurisdiction to entertain the appeal, had no jurisdiction to pass any order of stay of proceedings in that appeal, & on this ground I would hold that the order now sought to be revised was passed without jurisdiction.

19. I would, therefore, allow this appln in revision with costs.

M.C. Desai, J.

20. I agree with my learned brother that when the learned Dist J. stayed the operation of the order of the learned Munsif it amounted to his deciding a case within the meaning of Section 115, C. P. C., & that we are competent to call for the record from the Ct of the learned Dist J. & revise the order. The grounds on which the order can be revised are laid down in Section 115 & the only ground which has been pressed before us is that the learned Dist. J. exercised a jurisdiction not vested in him by law. There is no question of his having acted in the exercise of his jurisdiction illegally or with material irregularity. The argument is that the appeal itself was incompetent & that consequently the learned Dist J. had no jurisdiction to pass the stay order. I agree with my learned brother that the order passed by the learned Munsif was not appealable & that the appeal filed in the Ct of the learned Dist J. was incompetent.

21. But I have difficulty in accepting the view that the fact that no appeal lay rendered the learned Dist J.'s order of stay one without jurisdiction. He had jurisdiction to entertain the appeal if it lay. He was the first appellate Ct. When the appeal was presented before him it was pointed out to him by the office that it was doubtful whether the appeal was competent or not. The office also pointed out that under some authority a supurdar is a surety. The learned Dist J. thereupon passed the order, "Admit & issue notice". This means that he considered that the appeal was competent. Once

he assumed jurisdiction over the appeal, he could not very well say later on that he had no jurisdiction to dispose of the appln of Chiranji Lal for stay of the order of the learned Munsif. He could not direct Chiranji Lal to wait till the question of the competency of the appeal was decided by this Ct in appeal or revision. He had jurisdiction to dispose of the appln; & no one else had it. It cannot be said that the order of stay passed by him was both with & without jurisdiction. It could be either with or without jurisdiction. So it cannot be said that he had no jurisdiction. If the stay order passed by him had been disobeyed, I doubt if the party disobeying it could have excused himself on the ground that the learned Dist J. had no jurisdiction to pass it merely because he had no right to entertain the appeal. It is to be noted that the appct has not come to us to challenge the learned Dist J.'s order admitting the appeal (& issuing notice). When he challenges the validity of the subsequent stay order, there is much to be said for our deciding it on the basis that the previous order of admitting the appeal conferred jurisdiction upon the learned Dist J. to pass it. It may be said that he could not question the order admitting the appeal because that orders does not amount to deciding a case. A F. B. of this Ct has held in 'Buddhu Lal v. Mewa Ram', 43 All 564: (AIR (8) 1921 All 1 F B), that when a Ct decides a question of jurisdiction as a preliminary issue it does not decide a case within the meaning of Section 115. If the appct had come before us in revision against the learned Dist J.'s order admitting the appeal, we would have refused to send for the record from the learned Dist J.'s Ct.

22. But it is contended that when he comes before us questioning the validity of the subsequent order of stay, we are competent not only to revise that order but also the previous order of admitting the appeal. The only ground on which the stay order can be vacated is that it was passed in an appeal which was incompetent; consequently our vacating the stay order must necessarily mean that the appeal was incompetent & was wrongly admitted by the learned Dist J. I do not know how we can say so when the appeal is pending. If we are prohibited from directly revising the order admitting the appeal, it stands to reason that we are prohibited from doing it indirectly though revising the stay order simply on the ground that the order admitting the appeal was without jurisdiction. The appct cannot get by the back door what he cannot get by the front door. Section 105 in terms would not apply to the revision against the stay order & its analogy also would not apply. If there is an appeal from a decree or a final order, the applt may question the propriety or validity of an interlocutory order, but what was sought to be done here is quite the reverse. The principal order was that of admitting the appeal as competent & the stay order was only an incidental order; the Legislature could not have intended that a party applying in revision from the stay order would be able to question the validity of the order admitting the appeal. It has already been observed by my learned brother that a proceeding which is separable & distinct from the proceeding in the suit may be a case decided. This, in my opinion, does not fit in with the view that the incompetency of the appeal creates want of jurisdiction in the passing of the stay order. If the passing of the stay order is a case separable & distinct from the appeal, the illegality in the entertainment of the appeal should not amount to want of jurisdiction for the passing of the stay order. On account of these facts it would have been easier for me to agree with the view that the stay order passed by the learned Dist J. cannot be revised as an order passed without jurisdiction. But I do not feel quite strong in the view that I hold & as the stay order of the learned Dist J. deserves to be set aside, if not under Section 115 at least on the ground that it was passed in an appeal which itself was not maintainable, I would concur in the order proposed by my learned brother.

23. We allow this appln & set aside the order of the Ct below dated 1-4-1950 directing the stay of the execution of the order of the trial Ct dated 15-3-1950. The appct will get his costs of this appln from the opposite parties.