

Madras High Court

B. Raja Rajeswara Sethupathi ... vs Tiruneelakantam Servai on 8 November, 1922

Equivalent citations: (1923) 44 MLJ 217

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JUDGMENT Walter Salis Schwabe, K.C., C.J.

1. These are two applications for leave to appeal to His Majesty in Council against the decisions of this Court constituted as at present. The actual pecuniary amounts involved in the two appeals are Rs. 400 and Rs. 600 respectively. Under SS.109 and no of the Code of Civil Procedure of 1908 leave to appeal has to be granted where the amount or the value of the subject matter of the suit is Rs. 10,000 or upwards and the amount or value of the subject matter in dispute on appeal to His Majesty in Council is the same sum or upwards or property of like amount or value is involved directly or indirectly, provided where the decree affirms the decision of the Court immediately below some substantial question of law is involved. In this case by reason of the value of the subject matter, the above provisions do not apply. There is, however, further a power under Section 109(c) of the Code of Civil Procedure in this Court to give leave to appeal by certifying that the case is a fit one for appeal to His Majesty in Council. What is contemplated is a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases or in which, while the right in dispute is not exactly measurable in money, it is of great public or private importance. See *Banarsi Parshad v. Kashi Krishna Narain* (1900) I.L.R. 23 AH. 227 at 231; L.R. 28 I.A. 11. *Hirjibhai v. Jamshedji* (1913) 15 Bom L, Rule 1021 and *In re Khan Chinna* (1921)E, W, Notes 353. We are informed that there are many other persons in the Zamindari in question holding under the Zamindar whose rights are governed by documents in the same or similar terms to those construed by the Courts in these cases. The result of these decisions is that the plaintiff Zamindar cannot recover the arrears for the last few years alleged to be due to him in respect of certain Swatantrams. According to our Judgment, there are other means open to the plaintiff to recover such payments or their equivalent for the future. The plaintiff contends that this is a case of great public or private importance because, if our decision is wrong, he would be entitled to recover from many persons for the past amounts aggregating to a large sum. It is obviously unjust that the defendants in these two cases should be put to the expense of fighting this matter in the Privy Council so that, if our judgment is wrong, the plaintiff may recover these small amounts from them, and thereafter in the aggregate a large amount from other persons. In a similar case on application for special leave to appeal made to their Lordships of the Privy Council a condition has been imposed upon the appellant that, whatever be the result of the appeal, he should pay the costs of the other party as between solicitor and client. See *Spooner v. Juddow* (1848-1850) 4 M.I.A. 353 at 360-361, *In re Sibnarain Ghose* (1853) 5 M.I.A. 322 at 325 and *Indian Irrigation Trust Board of Natal v. Govindaswami* (1909) 13 C.W.N. 1127. I think that this is a proper case for such an order if it is a matter upon which I am entitled to express an opinion. The question has been raised before us whether we have power to impose such a condition. In *Clarke v. Brajendra Kissore Rai Chowdhuri* (1901) L.R. 29 I.A. 40, Jenkins, C.J. and Casperz, J. held that no such power existed in the Indian Courts but was confined to the Privy Council. The result of such a finding is curious. According to the direction of the Privy Council in *Moti Chand v. Ganga Pershad*(1901) L.R. 29 I.A. 40 quoted in the judgment in *Clarke v. Brajendra Kissore Rai Chowdhuri* (1909) 13 C.W.N. 1127 in all cases where leave to appeal is desired although the subject matter is under Rs. 10,000 such applications must in

the first instance, be made to the Indian Court as that Court, if it thinks that it is a case fit for appeal to His Majesty in Council can certify to that effect under Section 109(c). What is the duty of the Court if it thinks that the case is a fit one for consideration by His Majesty in Council but that it would not be right to call upon one party whose financial interest in the matter is small to incur the risk of the costs of the appeal? Assuming the decision in *Clarke v. Brajendra Kishore* (1909) 13 C.W.N. 1127 is right and in my judgment in view of the fact that that case went before the Privy Council and (1853) 5 M.I.A. 322 at 325. (1901) L.R. 29 I.A. 40. 220 the Madras Law Journal reports, vol. xlv. special leave to appeal was granted and it was not then suggested that the Calcutta High Court could have itself imposed any condition, it is not possible for this Court to hold otherwise, the only course open to us is to refuse leave and to leave the appellant, if so advised to apply to the Privy Council for special leave.

2. During the hearing of these applications we asked the appellant whether he would be prepared to agree to a condition that he should be liable for the costs of the defendants as between solicitor and client in any event. This by his counsel he definitely refused. It is possible that it would not have been right for us to give leave with such a condition even if agreed to, as if the decision *Clarke v. Brajendra Kishore* (1909) 13 C.W.N. 1127 is correct it might be said that to hold so would be usurping a power reserved to the Privy Council. I venture to express the hope that some day this matter will be discussed in the Privy Council and that a definite pronouncement may be made on the subject. But meanwhile, I think in such cases the only safe course is to refuse leave stating, if it be the case, that the point in issue appears to be one of general importance but not of sufficient importance to the proposed respondent to warrant this Court in putting him to the expense of an appeal to the highest tribunal.

3. These applications must accordingly be dismissed with costs.

Coutts Trotter, J.

4. These cases have given me very great difficulty; and I do not know now whether I have resolved that difficulty aright; but I desire to formulate it in my own words as it presents itself to my mind.

5. We can only grant leave to appeal if at all under Section 109(c) of the Code of Civil Procedure, because the amounts at stake in the cases are in themselves small. But the Zamindar who wishes to appeal, asserts that the cases will govern a very great number of other cases, in which he seeks to recover Swathanthrams from other ryots, and that therefore it is for him "a matter of great private importance," to quote the language of the leading case. The reply of the ryots is that to them individually it is a matter of a few hundred rupees, and 7. (1909) 13 C.W.N. 1127. that they could not possibly afford to contest such an appeal. Obviously, the most satisfactory order would be to allow the Zamindar to appeal and get his principle settled for him on terms of paying all the other side's costs in any event; but it is said that this Court has no power to make such an order. After a careful consideration of the section and the cases referred to I have come to the conclusion that this contention is well founded. We have in a sense a discretion as to granting leave to appeal; but it is strictly circumscribed by the section. I do not think that we can impose a condition as to costs unless it is to be found in so many words in the Code; it would be in my opinion an invasion and usurpation

of the powers of the Privy Council to do so, and an unwarranted attempt to fetter their Lordship's discretion as to costs.

6. This being the position, what is our duty? To grant leave because the matter is of great importance to the one party, or to refuse it because it is of trifling importance to the other? If we take the former view, the respondent will probably either pay at once or at any rate fail to appear to argue the case; and the ryots of this country have not for the most part reached the stage of realizing that they could advantageously combine to light a test case. I think on the whole that it is best to regard their Lordships of the Judicial Committee when they speak of "private importance" as meaning private importance to both parties to the litigation, and not only to one of them. I therefore concur in the order proposed that we should refuse leave. The Zamindar can apply to their Lordships for special leave to appeal, when if their Lordships see fit, they can impose the terms that we should have desired to impose, had we felt ourselves able to do so, or such other terms as may commend themselves.

Kumaraswami Sastri, J.

7. These are applications by the Rajah of Ramnad for leave to appeal to the Privy Council against the decision of the majority of the Full Bench. The question turns on the construction of two cowles executed by the respondent. The Rajah claimed that he was under the cowles entitled to recover from the respondent the Manibha Swatantrams paid by the ryots to the respondent: The appeals by the Rajah first came on before Wallis, C.J. and Sadasiva Aiyar, J. who differed. In consequence of this difference the above Letters Patent Appeals were filed. The Chief Justice and Coutts Trotter, J. were of opinion that the Zamindar was not entitled to the Swatantrams while I agreed with Sada-siva Aiyar, J. that he was entitled.

8. The present applications are for leave to appeal to the Privy Council against the decision of the majority of the Full Bench. It is alleged by the Rajah that though the value of the Manjbha Swatantrams in dispute is only Rs. 409-2-4 and Rs. 159-3-0 respectively in Letter Patent Appeals Nos. 21 and 22 of 1920, the judgment and decrees of the High Court will have far reaching consequences in the Ramnad Zemindary and that the judgment which will be binding authority on the question of law decided by the Courts will affect his right to collect the Manibha Swatantrams from other ryots and would entail on him a loss of Rs. 20,000 a year. It is contended that the judgment and decree of the High Court involve directly and indirectly a sum of over Rs. 10,000.

9. As regards the value of the appeal it is clear that so far as the petitioner and respondents are concerned it is far below Rs. 10,000. Even taking into account the amounts which will become payable on the unexpired term of the leases the amount will not be over Rs. 4,000 in both the Letters Patent Appeals. For the purposes of S. no of the Civil Procedure Code, the amount or value of the subject matter of the suit and in appeal in the Court of first instance and the appellate Court must be Rs. 10,000 or upwards in order to render an appeal under Clause (a) and (b) of Section 109 competent.

10. The question is therefore not what the indirect consequences of the decree may be to the petitioner but what the value of the subject matter is as between the parties when an application is made for leave on the ground that the pecuniary value is over the sum of Rs. 10,000 required by Clauses (a) and (b) of Section 110. I am of opinion that the subject matter of the suits and appeals is far below the sum of Rs. 10,000 even if we consolidate the appeals.

11. It is argued that even if Clauses (a) and (b) of Section 109 do not apply, leave should be granted under Clause (c) which enables the High Court to grant leave in cases not falling under Clauses (a) and (b) if the Judges consider that the case is a fit one for Appeal to His Majesty in Council. It is pointed out that special leave has been given in cases where though the amount in dispute in individual cases was small leave was granted when the question related to tenures or the construction of leases and grants which applied to tenants generally. It does not however appear that the questions raised affect other Zamindaries in this Presidency.

12. There is no doubt that the questions raised in these Letters Patent Appeals are of great importance to the Zamindar of Ramnad and that he will lose a large sum should the matter stand where it is. This however is not the only consideration. We have to view the case from the standpoint of the respondents who are tenants without means at their disposal to incur the heavy costs and charges which the granting of leave will entail on them. The case is one which while of great importance to one party is so far as the other is concerned of small pecuniary interest. In fact the respondents state that if leave to appeal is granted it would be more profitable for them to pay the Manibha Swatantrams disallowed rather than incur the expenses involved in defending the appeals to the Privy Council.

13. The considerations which ought to weigh with Courts in such cases were stated by Lord Langdale while granting leave to appeal in *Spooner v. Juddow* (1848-50) 4 M.I.A. 353 where he observed as follows: "The question appears to be of very considerable importance; but you observe the sum at issue is only a sum of Rs. 250 and for the purposes of deciding that, you put the respondent to the expense of this appeal. The question is whether this prosecution being by the East India Company, and no doubt important to have decided, for the benefit of the whole country, the whole expenses of this appeal should not be borne by them. However important it may be to establish the law, upon a question of this kind it would be very wrong to put the party to so great an expense in cases when so small a sum is at issue ". Leave to appeal was granted on the appellant undertaking to pay all costs charges and expenses which might be incurred on behalf of the respondent as well as the appellants. In *Bern Ram v. Kundan Lal*. (1898) I.L.R. 21 All. 496 where the suit was between landlord and tenant and the question was whether it 4. (1848-50) 4 M, I.A. 353. 9. (1898) I.L.R. 21 All. 496- was a good ground of defence in a suit for ejectment that the predecessors in tenancies had erected permanent buildings on the land without the landlords having interfered to prevent the building which was within their knowledge. Special leave was granted by Their Lordships of the Privy Council on terms that the appellant should be liable to pay the respondents' costs in any event if directed to do so.

14. We asked the petitioner if he will undertake to pay all the costs charges and expenses likely to be incurred by the respondents in any event should leave be granted under Section 109(c) but he

declined to be liable and we do not think leave should be granted on any other terms.

15. We have however no power to impose any terms on the petitioner as a condition precedent to granting leave to appeal to His Majesty in Council. Sections 109 and 112 and Order 45 of the Civil Procedure Code which deal with appeals to the King in Council do not give us any such power. Costs of the appeal once leave is granted is a matter entirely within the discretion of their Lordships of the Privy Council and except by consent of the parties I do not see how we can make any order fettering the discretion of their Lordships when they ultimately deal with the appeal. I do not think Section 151 of the C.P.C. can be invoked for the purpose.

16. The provisions of the Civil Procedure Code as to costs are contained in Section 35 and so far as suits are concerned there is no power to direct a plaintiff to pay in advance the costs charges and expenses likely to be incurred. Order 41, Rule 10 provides for security of costs in certain cases. Section 107 Clause 2 dealing with appeals enacts that the Appellate Court shall subject to the provisions of Clause (1) have the same power and perform as nearly as may be the same duties as are conferred or imposed by the Code on Courts of Original Jurisdiction in respect of suits. Treating the High Court as a Court acting in its appellate jurisdiction when granting the certificate under Section 109 Clause (c), it cannot have any higher powers simply because it has to consider whether it should grant the certificate required by the section. It is no doubt true that Courts in India have power to direct the petitioner in Divorce cases to pay in advance costs charges and expenses likely to be incurred by the wife but this power is given by Section 7 of the Divorce Act which confers on Indian Courts the same power which Courts for Divorce and Matrimonial cases in England have. As regards security for costs Rule 7 of Order 45 requires the appellant to give security and all that the respondent in appeals is entitled to is to require that security be furnished. I can find no case in India where the High Court has imposed terms such as those imposed in *Spooner v. Juddow* (1848-50) 4 M.I.A. 353. The powers of their Lordships of the Privy Council to grant special leave are not fettered by any enactments and it is therefore open to them to impose such terms as they think just and equitable when special leave is granted. In cases when the High Court refused leave on the ground that it had no such power special leave was obtained before the Privy Council and their Lordships when granting leave have not suggested that the High Court had power. agree with the view taken by Jenkins C.J. and Casperz, J. in *Clarke v. Brajendra Kishore Rai Chowdhuri* (1848-50) 4 M.I.A. 353. The learned Chief Justice after referring to the remarks of Lord Langdale in *Spooner v. Juddow* (1848-50) 4 M.I.A. 353 observes "It is true that ultimately their Lordships admitted the appeal but that was upon terms, which we cannot impose, and, indeed it is part of the applicant's argument here before us, that we have no power to impose any condition upon the applicant or upon the Government at whose instance and costs the application is being preferred. Without giving any further ground, I think, this affords a sufficient reason for us to hold that we cannot, without limited powers, certify this to be a fit case for appeal to His Majesty in Council. "Special leave was afterwards obtained and the appeals were disposed of on the merits by their Lordships. See *Clarke v. Brojendra Kishore Roy* (1909) 13 C.W.N. 1127. It was nowhere suggested that the refusal by the High Court to grant leave was erroneous owing to the High Court having power to impose terms.

17. I would dismiss these applications for leave to appeal to the Privy Council with costs.