Privy Council Appeal No. 19 *of* 1918.

Sabitri Thakurain - - - - - - - - *Appellant*

v.

Savi and another - - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JANUARY, 1921.

Present at the Hearing:

VISCOUNT CAVE.
LORD MOULTON.
LORD SUMNER.
SIR JOHN EDGE.

[*Delivered by* LORD SUMNER.]

The appellant in the present case presented a petition to the High Court at Calcutta on its original civil side in the exercise of its Testamentary and Intestate Jurisdiction under the Probate and Administration Act, 1881, praying for administration, with a copy of his last will annexed, to the property of her late husband. The grant was opposed by the present respondent, the manager of the deceased's property, who had applied to the Court of the District Judge of Bhagulpore for a grant of probate under an earlier will and entered a caveat to the widow's petition. Under the will which she propounded she would be entitled to a life interest in all the property of the deceased; under the earlier will her interest was limited to a mere pittance.

The late husband of the appellant was a Brahman by caste and a man of considerable means. He is described as having been a man of progressive ideas but intemperate habits. For the first he was excommunicated by the members of his caste, and owing to the second he died an untimely death at his house at

Garganibas, after a bout of conviviality which lasted about a week, leaving, as his widow alleges, the will which she relied upon, bearing date about a fortnight before he died. On account of the excommunication of the deceased from his community serious questions arose as to his cremation and sradh ceremonies and, during the widow's absence at Gaya for this purpose, the respondent, as she alleges, broke open the boxes belonging to the deceased and made away with this will. Fortunately a fair copy of it was forthcoming ,and she put it forward, relying upon the evidence of the attesting witnesses, two members of the Bhagulpore Bar.

The petition was heard by Choudhuri, J., who, after taking the evidence of the attesting witnesses and of the witnesses for the present respondent (two of whom are said to have been her late husband's boon companions and "inimically disposed to her because she stood in the way of her husband's leading a bad life and giving such pleasure parties"), rejected the evidence of the attesting witnesses and dismissed the petition.

From this decision Srimati Sabitri Thakurain appealed to the High Court in its appellate jurisdiction under Section 15 of the Letters Patent of 1865. It was evident that, on the one hand, her own interest in the matter was very considerable and that, on the other, further litigation might involve the respondent in great expense with small prospect of being recouped if he won. The respondent accordingly petitioned the High Court on its appellate side for an order that the appellant should give security for costs under Order 41 Rule 10 (1) of the Code of Civil Procedure, 1908, and on the 18th December, 1914, an order was made, that the plaintiff-appellant should within two months from that date furnish security to the extent of Rs. 5,000 to the satisfaction of the Registrar.

On the 17th February, 1915, counsel for the appellant appeared before the Registrar and offered that his client should furnish the security by executing a bond charging two properties, but as it was objected that the properties belonged not to her but to the estate, and there was no time left under the order to enquire whether she could charge them or not, the Registrar refused the offer and certified that the order had not been complied with.

On the same day the appellant filed a petition asking for three months' further time, which came on before the Court on the 18th February and was refused. Order 41 Rule 10 (2) of the Code of Civil Procedure, 1908, prescribes that if an order for security for costs is made and is not complied with during the period fixed by the Court, the Court "shall reject the appeal" and accordingly on the 22nd February the respondent filed a petition, alleging that his taxed costs amounted to Rs. 58,832 12a. 6p. as between solicitor and client, and Rs. 25,469 8a. 0p. as between party and party, and praying that the appeal might be dismissed with costs. Upon this the appellant for the first time sought to proceed *in formâ pauperis*, and telegraphed to the Chief Justice begging for an opportunity of making an application for that purpose. She was given a week's time and filed a petition on the 23rd March,

1915. On the same day an order was made refusing her application, and this is the order now under appeal. By a separate order the appeal against the decree of Choudhuri, J., was dismissed for failure to comply with the order for security. Leave to appeal against the refusal to allow the appellant to continue her appeal *in formâ pauperis* was granted to the appellant by His Majesty in Council on the 29th December, 1916.

When the High Court heard the application for leave to continue the appeal *in formâ pauperis*, after some discussion of the question whether the appellant was really without means or not, objection was taken by the respondent that leave, if given at all, should have been given before the time for furnishing the security expired, to which the appellant's advocate replied that the Court had jurisdiction to protect his client, her want of means having arisen since the date of the order for security. In giving the Court's reasons for dismissing the application, the Chief Justice, Sir Lawrence Jenkins, used the following language :—

> "In our opinion this application for leave to continue the appeal as pauper comes too late. It should have been made before the order for security was passed. The result of that order for security is that which is prescribed in Order 41, Rule 10, that is to say, the appeal is rejected with the obligation imposed upon the Court by the Code."

The appellant has urged before their Lordships that the Court's sole reason for dismissing the application was the view, that it should have been made, under Order 44 Rule 1, when the appeal was first lodged against the decree of Choudhuri, J., no subsequent application to proceed as pauper being competent, and it is said that, having decided on a wrong construction of that Order, the Court should now have the matter remitted to it to consider whether or not leave should be given under the circumstances of this case.

In their Lordships' opinion it is clear that the appellant's argument completely misconceives the real meaning of the judgment in question. The High Court did not intend or purport to lay down the proposition that, under the Orders and Rules or otherwise, an application for leave to appeal *in formâ pauperis* must be made, when first the appeal is lodged or not at all, but to state what it conceived to be the effect of Order 41 Rule 10 (2) upon the facts of the present appeal. The learned judges' proposition was that under that Rule they were bound, by words mandatory and not permissive, to reject the appeal under the circumstances of this case, and could not therefore grant a permission to continue it, which would in effect contradict the terms of Rule 10 (2). Whether this view was right or wrong is the question now to be decided, and their Lordships do not propose to travel outside it.

The appellant argued strenuously that a Court of Appeal as such, unless restricted by the express language of the instrument which creates it, must possess inherent power over the terms as to costs, on which litigants are allowed to proceed before it, and this in order that complete justice may be

done. Whether this contention is sound and whether a rule limiting the exercise of such power to applications contemporaneous with the institution of the appeal would be a valid exercise of a power to make rules regulating procedure are questions eminently deserving consideration when they arise, but they lie outside the scope of the present appeal.

The appellant further contended broadly that the Orders and Rules made under the Code of Civil Procedure, 1908, have no application to appeals brought under the Letters Patent of 1865. This contention again is too wide. The real question is whether Order 41 Rule 10 applies to such appeals, as the High Court thought that it did, and to this question alone their Lordships will proceed to address themselves.

By Section 117 of the Code of Civil Procedure, 1908, the provisions of the Code apply to all High Courts established under the Indian High Courts Act, 1861, and therefore to the High Court at Calcutta, and although Section 129 saves the power of the High Court to make rules not inconsistent with the Letters Patent establishing it, for the purpose of regulating its own procedure in the exercise of its original civil jurisdiction and adds that " nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code," there has been no exercise of this power to affect the present appeal. From Section 120 it would further appear that the Act was intended to apply to the High Court in the exercise of its original civil jurisdiction generally, for that section makes specific provision for certain sections of the Code which do not so apply. Again Order 49 Rule 3 specifically enumerates certain Orders and Rules. which are not to apply to a chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, none of the Orders or Rules now material being there enumerated, although it is noteworthy that another Rule of Order 41, namely No. 35, is included in the enumeration. Order 50 also excludes from application to Courts constituted under the Provincial Small Causes Act, 1887, and other similar Courts, certain specified Orders and Rules, including Order 41.

The Orders and Rules made under the Code are, by Section 121, given the same effect as if they had been enacted in the Code, and therefore Order 41, Rule 10, is one of the provisions of the Code. It applies to appeals in the High Court, including the present appeal, unless any particular section of the Act can be found to exclude it. Section 104 (1) is the section relied on for this purpose. It prescribes what orders shall be appealable and enumerates them, and among the orders enumerated there is not included such an order as that made by Choudhuri, J. Out of the operation of Section 104 there are, however, expressly excepted matters, which are otherwise expressly provided for in the body of the Code. In order to appreciate the full effect of Section 104 it should be compared with the corresponding section of the Act of 1882, Section 588. The earlier section enacted that appeals should lie in certain cases, which it enumerated,

" and from no other such orders." This raised the question neatly, whether an appeal, expressly given by Section 15 of the Letters Patent and not expressly referred to in Section 588 of the Code of 1882, could be taken away by the general words of Section 588 " and from no other such orders." The change in the wording of Section 104 of the Act of 1908 is significant, for it runs, " and, save as otherwise expressly provided . . . . . by any law for the time being in force, from no other orders." Section 15 of the Letters Patent is such a law, and what it expressly provides, namely, an appeal to the High Court's appellate jurisdiction from a decree of the High Court in its original ordinary jurisdiction, is thereby saved. Thus regulations duly made by Orders and Rules under the Code of Civil Procedure, 1908, are applicable to the jurisdiction exercisable under the Letters Patent, except that they do not restrict the express Letters Patent appeal. There is a fallacy involved in the appellant's argument that the Letters Patent right of appeal is limited and to a certain extent taken away by Orders and Rules, which prevent the High Court from permitting the continuance of such an appeal *in formâ pauperis* at any stage, for there is of course a marked difference between a right to appeal on ordinary terms and without special indulgence, and a power to relieve the appellant in the exercise of that right from the burden of the ordinary terms. The High Court Order as to security for costs is not a limit on the right to appeal, nor does it take the right to appeal away, but it is a rule of procedure now applicable to the appeal under the Letters Patent under the words " any law for the time being in force," which are contained in Section 104.

The appellant puts the point in another way and says that under the Act of 1882 some Indian Courts, notably the Courts in Madras, had held the Procedure Code of 1882 inapplicable *in toto* to Letters Patent appeals ; that the Legislature had these decisions before it when the Code was re-enacted in 1908 ; that the changes of form and language between the Act of 1908 and that of 1882 are not substantial, and that accordingly the Legislature must be deemed to have adopted the judicial interpretation of the language used in 1882, when it repeated that language in substance in 1908. Their Lordships have already pointed out that the re-enactment is made not in identical language but with material differences, and it may be doubted how far this mode of construing a re-enacting statute is in point, where all that has been decided is the effect of the older statute upon the provisions of another legal instrument, and not the actual meaning of the statute re-enacted itself. There is, however, a prior question, namely, whether the Indian Courts have really laid down the proposition contended for ?

It is true that in *Sesha Ayyar* v. *Nagaratha Lala*, 1903 (27 Madr. at page 123), Ayyangar, J., said that in a Letters Patent appeal from a single Judge a respondent could not apply for security for costs, because Section 549 of the Civil Procedure Code, which corresponded to Order 41 Rule 10 of the Code of 1908, applied only

to appeals to the High Court from subordinate Courts, and that in *Sabhapathi Chetti* v. *Narayanasami Chetti* (1901, 25 Madr. 555) the Court said that the provision made by Section 15 of the Letters Patent was entirely foreign to the provisions of the Civil Procedure Code relating to appeals from one Court to another, but both these cases followed and purported only to apply *Chappan* v. *Moidin Kutti*, a Full Bench decision of 1898 (22 Madr. 68), and *Toolsee* v. *Sudevi*, 1899 (26 Calc., 361). These are cases in which the point actually decided was that the appeal expressly given by Section 15 of the Letters Patent is not interfered with by Section 588 of the Code of 1882, on the principle *generalia specialibus non derogant*, following *Hurrish Chunder* v. *Kalisunderi* (L.R. 10 I.A. p. 17), in 1882. From a consideration of these older cases, which were very fully argued and considered, it appears that the decisions in 25 and 27 Madras laid down their effect much more widely than was necessary and overlooked the distinction between rules which took away existing rights of appeal and rules which recognise these rights but regulate the procedure of the Court in which such appeals are pending. It is also plain that the words in Section 104 of the Act of 1908 are inserted for the purpose of giving effect to the decisions of the Full Bench at Madras and of the High Court at Calcutta, for the excepting words "save as otherwise expressly provided by any law," cut down the general words, and thus carry out the very reasoning of those two judgments.

Further, where Section 632 of the Act of 1882 enacted that "except as provided in this chapter, the provisions of this Order apply to such High Courts" (*i.e.*, such as the High Court at Calcutta), Section 117 of the Act of 1908 says: "save as provided in this part or in Part 10 or in Rules, the provisions of this Code shall apply to such High Courts." Now Part 10 of the Code of 1908 enacts (Sections 122 and 128) that Rules made under the authority of the Code may provide for any matters relating to the procedure of Civil Courts subject to their not being inconsistent with the provisions in the body of the Code, that is to say that, under the Act of 1908, rules relating to all procedure are competent, unless the body of the Code contains something inconsistent with them, while under the Act of 1882 the provisions of the Code merely (and subject to exceptions, which are now immaterial) "apply to such High Courts," which leaves in doubt the point, which the Code of 1908 puts beyond controversy.

A further point is taken, that Section 151 of the Code of Civil Procedure, 1908, preserves the inherent powers of the Court to make such orders as may be necessary for the ends of justice, and to this general saving section appeal is made to take the present case out of the operation of the Orders and Rules, if they are applicable to Letters Patent appeals. How far a mere general saving clause gives power in effect to refuse to apply an appropriate Rule, made in the exercise of other powers of the Court and having statutory force, is another question, but for present purposes it is enough to say that in the terms of the section the inherent powers

saved are such as are used to secure the ends of justice. Now the question is, whether or not the appellant should be assisted in prosecuting an appeal in a case which has been tried once and decided against her, where failure in her appeal will impose a heavy burden of costs on the beneficiaries under the earlier will, and as to this question their Lordships have not the materials even for forming a *primâ facie* view of the merits of the case or the probabilities of its issue. It is evidently one, which turns mainly on the facts proved, and these depend on the credibility of witnesses whose testimony has been rejected by the learned judge who saw and heard them. Their Lordships are not in a position to say that justice requires the prosecution of an appeal on terms so onerous to the party, whom that learned judge declared to be in the right.

In conclusion, there is no reason why there should be any general difference between the procedure of the High Court in matters coming under the Letters Patent and its procedure in other matters, and if this particular matter of security for costs is not dealt with in the Orders and Rules made under the powers of the Code, when it arises in connection with the jurisdiction created by the Letters Patent, Section 15, no rules of procedure have been formulated with regard to it, though the High Court's power to regulate procedure in Letters Patent appeals is independent and has been preserved. The Code is framed on the scheme of providing generally for the mode in which the High Court is to exercise its jurisdiction, whatever it may be, while specifically excepting the powers relating to the exercise of original civil jurisdiction, to which the Code is not to apply. It confers a general rule-making power saving only what is excepted in the body of the Code.

Their Lordships are accordingly of opinion that the High Court at Calcutta rightly conceived itself precluded from entertaining the appellant's application to be allowed to continue her appeal *in formâ pauperis*, since to grant her application at that stage would in effect have been to keep alive an appeal which they were, by reason of her default in the matter of security, bound to reject. The consequence is that the appeal fails, and so their Lordships will humbly advise His Majesty.

In the Privy Council.

SABITRI THAKURAIN

v.

SAVI AND ANOTHER.

DELIVERED BY LORD SUMNER.

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