

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rai Radha Kishen v. The Collector of Jaunpore, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered 8th December 1900.

Present at the Hearing :

LORD HOBHOUSE.

LORD DAVEY.

LORD ROBERTSON.

SIR RICHARD COUCH.

[*Delivered by Lord Robertson.*]

To this Appeal from the High Court of Judicature for the North-Western Provinces, Allahabad, it is objected by the Respondent that no Appeal to Her Majesty in Council lies against the Order complained of. For the due understanding of the question thus raised it is necessary briefly to trace the procedure in the suit.

The suit was brought on 10th March 1892, before the Subordinate Judge of Benares, for the recovery of money alleged to be due under two bonds, executed by a person of whom the Defendant Shankar Dat Dube was the legal representative. That Defendant is now deceased and is represented by the Respondent. He appeared in the suit and on 17th May 1895 filed a written statement with a list of documents. Into the nature of the questions raised by the plaint and the written statement it is unnecessary to enter, as the questions before their Lordships arise solely out of the part taken by the Defendant at a certain stage

of the procedure. It is sufficient to note that the issues settled between the Appellant and Shankar Dat Dube were:—1. Has the plaint been amended according to law? 2. Is Defendant No. 1 (Shankar Dat Dube) the heir of Raja Harihar Dat? 3. Is the Deed of mortgage legally valid? Could Harihar Dat duly legally hypothecate the property? 4. Is the deed of mortgage genuine? A fifth issue was settled, but it did not affect Shankar Dat Dube but only certain other Defendants.

Prior to 19th March 1896 the case had repeatedly been before the Court but had from time to time been postponed; and on 31st January 1896 an order was passed that the case should come on for decision on 19th March 1896. On each of these occasions the Defendant Shankar Dat Dube was represented by a pleader. On 19th March 1896 it is recorded by the Presiding Judge that "Defendant No. 1 "is to-day absent. No one appears for him. "His pleader informs the Court that he has "no instructions to proceed with the case." The Court proceeded, as in absence, heard evidence for the Plaintiff and decided the issues, giving decree for the claim with costs.

On the 9th April 1896, Shankar Dat Dube applied to the Court under Section 108 of the Civil Procedure Code to set aside this decree on the ground that neither the Defendant Applicant nor his general attorney had notice of the date fixed and that for this reason he could not conduct the suit. The Appellant filed a reply denying that the 108th Section applied and asserting that the Defendant had notice. The application came before a different Judge from Nil Madhad Roy, who had presided on 19th March 1896. The new Judge, notwithstanding that his predecessor had recorded that the Defendant in question was absent, that no one

appeared for him and that his pleader informed the Court that he had no instruction to proceed with the case, forthwith disallowed the application with costs. No opportunity was given to the applicant to satisfy the Court in terms of Section 108 that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the theory of the decision being that the Applicant had in fact appeared and that the decree was therefore not *ex parte*.

Against this order an Appeal was taken to the High Court at Allahabad, who allowed the Appeal and pronounced the order now appealed against. The terms of the order are as follows :—
 “ It is ordered that this Appeal be allowed ; that
 “ the order of the Subordinate Judge of Benares
 “ be set aside ; and that the case be and it hereby
 “ is remanded under Section 562 of the Code of
 “ Civil Procedure to the Court of the said
 “ Subordinate Judge to be disposed of on the
 “ merits.”

The Appellant represents that by this Order the High Court have set aside the decree of 19th March 1896 and have remanded the original suit to be disposed of on the merits. The Respondents disclaim for the Order any such sweeping effect and hold that what is remanded is merely the application immediately before the Court, to wit the application to set aside the decree, and that it is this application which the Subordinate Judge will, under the remand proceed to dispose of, by allowing the Respondent to endeavour to satisfy him of the conditions specified in Section 108 and then if this be done by setting aside the decree.

Their Lordships are clearly of opinion that the Respondent's is the just construction of the Order of the High Court. The application by the Respondent to set aside the decree might be described as “ the case,” with at least as much

accuracy as the original suit in which there was a standing decree; and unless and until that decree had been set aside, there was no means of remanding that suit. The form of the Records is inconsistent with the Appellant's view. The judgment of the High Court (p. 20) is headed "Case 2 of 1897. First appeal from the order of the Subordinate Judge of Benares dated 8th October 1896" which is the dismissal of the petition under Sect. 108 (p. 18). And the decree (p. 22) is headed in similar fashion. That then was the "Case" with which the High Court was dealing. But further, if there be any ambiguity, it is to be presumed that that was done which the law required; and it is allowed by both parties and is clear to their Lordships that, assuming the 108th Section to apply at all, the proper course was to remand the application to the Subordinate Judge to dispose of that application with due regard to the conditions of the section. There is however a further consideration which is conclusive as to the true intendment of the Order, for the learned Judges in their written judgment point out as the error of the Subordinate Judge that he had disposed of the case without considering whether the Defendant was prevented by sufficient cause from appearing and maintaining his defence at the hearing on the 19th of March 1896. Their Lordships would require very clear language in the Order which was intended to effectuate this opinion to induce them to construe it in a sense which would stultify the Court pronouncing it.

Their Lordships having thus ascertained the true meaning of the Order appealed against, the question is whether an Appeal lies to Her Majesty in Council, and this depends on whether the Order is a final order in the sense of Section 595 (a) as modified by Section 594 of the Civil Procedure Code. The mere fact that

the High Court, apparently on the assumption that it was such an Order, have certified the sufficiency of the amount and value of the suit cannot make appealable an Order which does not fulfil the statutory conditions. Now it does not in their Lordships' judgment admit of doubt that assuming the Order to have the meaning which they ascribe to it, it is in no sense of the term a final order. It is a purely interlocutory order, directing procedure. Accordingly their duty is to advise Her Majesty to dismiss the Appeal. Precluded as they would therefore be from proceeding to examine the merits of the order, their Lordships do not regret that in the course of ascertaining its true construction they have necessarily had to consider the law applicable to the case and to pronounce that no other order would have been appropriate save that which they find to have been made. The Appellant must pay the costs of the Appeal.
