1961

State of Bombay
v.
Fakir Umar Dhanse

Kapur. J.

S. 61. "The person unauthorisedly occupying any such land may be summarily evicted by the Collector, and any crop raised in the land shall be liable to forfeiture, and any building, or other construction erected thereon shall also, if not removed by him after such written notice as the Collector may deem reasonable, be liable to forfeiture or to summary removal."

From the addition of these words it was sought to be argued that these words were added to authorise the Collector to remove any building or other construction put up on that land by a person in unauthorised occupation and it was argued that those words were specifically added for the purpose. It is wholly unnecessary for us to go into the question as to why that particular power was given to the Collector. In this case we are concerned with the meaning of the word "eviction" as used in s. 66 and in our opinion the meaning of those words is that on eviction land has to be restored to the original position so as to be used for the purpose for which it was given to the occupant.

For the reasons given above this appeal is allowed and the decree of the High Court affirming that of the trial court is set aside. The appellant will have its costs throughout.

Appeal allowed.

1961

February 6.

M/S. JETHANAND AND SONS

v.

THE STATE OF UTTAR PRADESH.

(J. L. KAPUR and J. C. SHAH, JJ.)

Appeal to Supreme Court—Certificate of fitness by High Court —Remand order, if and when final order—Substantial question of law—Power of High Court—Constitution of India, Art. 133—Code of Civil Procedure, 1908 (V of 1908), s. 109.

Pursuant to an agreement between the parties a dispute relating to the supply of stone ballast was referred for adjudication to an arbitrator who was appointed under the agreement. The arbitrator's awards were contested by the appellants but the trial court held that the dispute was properly referred and the awards were validly made. The High Court set aside the orders

of the trial court and remanded the case for decision after framing all the issues and giving the parties an opportunity to produce evidence. The High Court then granted a certificate of fitness or appeal to this Court under Art. 133(1)(c) of the Constitution.

Held, that an order remanding a case without deciding any question relating to the rights of the parties is not a judgment, decree or *final order* within the meaning of Art. 133 of the Constitution. An order is final if it amounts to a final decision relating to the rights of the parties in dispute in the Civil proceeding.

The power under s. 109 of the Code of Civil Procedure having been expressly made subject to Ch. IV, Part V of the Constitution an appeal lay under that section to this Court only against judgments, decrees and final orders.

V. M. Abdul Rahman and Others v. *V. D. K. Cassim and Sons and Another* (1933) L.R. 60 I.A. 76, referred to.

As the orders passed by the High Court did not raise any question of great public or private importance and even the question of interpretation of Para. 3 of the first schedule of the Indian Arbitration Act was left open to be tried by the Civil Judge, no certificate of fitness to appeal to this Court could be granted under Art. 133 of the Constitution.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 421 to 423 of 1957.

Appeals from the judgment and order dated February 18, 1955, of the Allahabad High Court (Lucknow Bench), at Lucknow in F.A.F.O. Nos. 11 to 13 of 1953.

J. B. Dadachanji, for the appellant.

C. B. Agarwala and *C. P. Lal*, for the respondent.

1961. February 6. The Judgment of the Court was delivered by

Shah J.

SHAH, J.—These three appeals were filed by the appellants M/s. Jethanand & Sons with certificate of fitness granted under Art. 133(1)(c) of the Constitution by the High Court of Judicature at Allahabad.

The appellants entered into three separate contracts with the Government of the United Provinces (now called the State of Uttar Pradesh) on March 20, 1947, May 27, 1947, and June 28, 1947, for the supply of stone ballast at Shankar Garh, District Allahabad. The contracts which were in identical terms contained the following arbitration clause;

1961

M/s. Jethanand and Sons
v.
State of Uttar Pradesh

Shah J.

"All disputes between the parties hereto arising out of this contract whether during its continuance or after its rescission or in respect of the construction or meaning of any clause thereof or of the tender, specifications and conditions or any of them or any part thereof respectively or anything arising out of or incident thereto for the decision of which no express provision has hereinbefore been made, shall be referred to the Superintending Engineer of the Circle concerned and his decision shall in all cases and at all times be final, binding and conclusive between the parties."

Pursuant to the contracts, the appellants supplied stone ballast. Thereafter, purporting to act under cl. (16) of the agreements, the Executive Engineer, Provincial Division, referred certain disputes between the appellants and the State of Uttar Pradesh, alleged to arise out of the performance of the contracts, to arbitration of the Superintending Engineer of the Circle concerned. The Superintending Engineer required the appellants to appear before him at the time fixed in the notices. The appellants by their letter dated May 31, 1951, declined to submit to the jurisdiction of the Superintending Engineer, and informed him that if he hears and determines the cases ex parte, the "decisions will not be binding" on them. On February 7, 1953, the Superintending Engineer made and published three awards in respect of the disputes arising under the three contracts and filed the same in the court of the Civil Judge, Lucknow. The appellants applied for setting aside the awards alleging that the contracts were fully performed and that the dispute alleged by the State of Uttar Pradesh to have arisen out of the contracts could not arise after the contracts were fully performed and that the State could not refer those alleged disputes to arbitration. They also contended that the awards were not valid in law because on the arbitration agreements action was not taken under s. 20 of the Arbitration Act. The Civil Judge, Lucknow, held that the disputes between the parties were properly referred to the Superintending Engineer by the State of Uttar

Pradesh and that the awards were validly made. Against the orders passed by the Civil Judge, Lucknow, three appeals were preferred by the appellants to the High Court of Judicature at Allahabad.

The High Court set aside the orders passed by the Civil Judge and remanded the cases to the Trial Judge with a direction that he do allow the appellants and if need be, the respondent to amend their pleadings, and frame all issues that arise out of the pleadings and allow the parties an opportunity to place such evidence as they desire and decide the case on such evidence. In the view of the High Court no proper notice of the filing of the awards was served upon the appellants and that they were "seriously handicapped in their reply by the course which had been adopted both by the court and the arbitrator in the conduct of the proceedings in court." On the applications filed by the appellants, the High Court granted leave to appeal to this court under Art. 133(1)(c) of the Constitution, certifying that the cases were fit for appeal to this court.

Counsel for the respondent has urged that the High Court was incompetent to grant certificate under Art. 133(1)(c) of the Constitution.

The order passed by the High Court was manifestly passed in exercise of the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Under Art. 133 of the Constitution, an appeal lies to this court from any judgment, decree or *final order* in a civil proceeding of a High Court if the High Court certifies that:

(a) .....

(b) ..... or

(c) "the case is a fit one for appeal to the Supreme Court."

In our view, the order remanding the cases under s. 151 of the Civil Procedure Code is not a judgment, decree or *final order* within the meaning of Art. 133 of the Constitution. By its order, the High Court did not decide any question relating to the rights of the parties to the dispute. The High Court merely

1961

M/s. Jethanand and Sons
v.
State of Uttar Pradesh

Shah J.

remanded the cases for retrial holding that there was no proper trial of the petitions filed by the appellants for setting aside the awards. Such an order remanding the cases for retrial is not a final order within the meaning of Art. 133(1)(c). An order is final if it amounts to a final decision relating to the rights of the parties in dispute in the civil proceeding. If after the order, the civil proceeding still remains to be tried and the rights in dispute between the parties have to be determined, the order is not a final order within the meaning of Art. 133. The High Court assumed that a certificate of fitness to appeal to this court may be issued under s. 109(1)(c) of the Code of Civil Procedure, even if the order is not final, and in support of that view, they relied upon the judgment of the Judicial Committee of the Privy Council in *V. M. Abdul Rahman* v. *D. K. Cassim & Sons* (1). But s. 109 of the Code is now made expressly subject to Ch. IV, Part V of the Constitution and Art. 133 (1) (c) which occurs in that chapter authorises the grant of a certificate by the High Court only if the order is a final order. The inconsistency between s. 109 Civil Procedure Code and Art. 133 of the Constitution has now been removed by the Code of Civil Procedure (Amendment) Act 66 of 1955. But even before the amending Act, the power under s. 109(1) (c) being expressly made subject to the Constitution, an appeal lay to this Court only against judgments, decrees and final orders.

Again, the orders passed by the High Court did not raise any question of great public or private importance. In the view of the High Court, the applications for setting aside the awards filed by the appellants were not properly tried and therefore the cases deserved to be remanded to the court of first instance for trial *de novo*. The High Court granted leave to the parties to amend their pleadings; they also directed the Civil Judge to frame "*all the issues* that arise and allow the parties an opportunity of adducing such evidence as they desired." It was an order for trial *de novo* on fresh pleadings and on *all issues* that may

(1) (1933) L.R. 60 I.A. 76.

arise on the pleadings. Evidently, any decision given by the High Court in the course of the order would not in that trial *de novo* be binding and the cases will have to be tried afresh by the Civil Judge. The High Court was of the view that the interpretation of para. 3 of the first schedule of the Indian Arbitration Act raised a substantial question of law. But by the direction of the High Court, this question was also left open to be tried before the Civil Judge. We fail to appreciate how an observation on a question which is directed to be retried can still be regarded as raising a question of law of great public or private importance justifying grant of a certificate under Art. 133 (1) (c) of the Constitution.

We accordingly vacate the certificate granted by the High Court and dismiss these appeals with costs. One hearing fee.

Appeals dismissed.

HAZRAT SYED SHAH MASTERSHID ALI AL QUADARI

v.

THE COMMISSIONER OF WAKFS, WEST BENGAL.

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Mutawalli—Temporary appointment—When can be made by the Commissioner—Delegation of powers—Duty interwoven with power—Distinction—Bengal Wakf Act, 1934 (Ben. XIII of 1934), ss. 29, 40.

During controversy between two brothers each of whom claimed to be appointed Mutawalli, the Commissioner of Wakfs appointed a third brother as a temporary Mutawalli under s. 40 of the Bengal Wakf Act, which appointment was challenged on the ground that the order of the Commissioner appointing a temporary Mutawalli was illegal because under the rules framed by the Government of West Bengal the Board constituted under Bengal Wakf Act could alone make the appointment and the Commissioner could only make a report and recommendation to the Board.

Held, that under the provisions of s. 40 read with s. 29 of the Bengal Wakf Act, a temporary Mutawalli can be appointed by the Commissioner to whom the powers and duties have been