

1890 SEP. 24. the Criminal Procedure Code and not at any time previous thereto. The wording of the section is clear and unambiguous.

CRIMINAL

OPINION.

REFER-  
ENCE.

15 B. 152.

PER CURIAM.—In his order of the 9th June last, the Magistrate says : "Ouster by one person of another lawfully in possession of property confers no rights on the former which I can recognise. I must refer back to a time previous to the quarrel, when sole possession was peacefully enjoyed by one or other of the disputants. My enquiry must be directed to the question as to which party was in possession of the subject in dispute before any proceedings in the Courts had taken place in the matter." In so ruling, the Magistrate has followed the decision of the Calcutta High Court in *Re Mohesh Chunder Khan* (1). But that was a ruling under s. 530 of Act X of 1872, the provisions of which [155] have been modified in the corresponding section (s. 145) of the present Code of Criminal Procedure, under which the Magistrate is required to decide which of the parties between whom a dispute exists is in possession of the subject of the dispute at the time when the Magistrate decides the question of possession. As the Magistrate omitted to comply with the requirements of the law, we reverse his order, and we direct that, if he finds that a dispute likely to cause a breach of the peace still exists concerning the house to which his order relates, he should decide the question of possession according to law.

*Magistrate's order reversed and case remanded.*

15 B. 155 (P.C.) = 18 I.A. 6 = 15 Ind. Jur. 35 = 5 Sar. P.C.J. 639.

PRIVY COUNCIL.

PRESENT :

*Lord Hobhouse, Lord Macnaghten, Sir B. Peacock, Sir R. Couch  
and Lord Shand.*

*[Petition for Special leave to appeal from a decree of the High Court,  
Bombay.]*

RAHIMBHOY HABIBBHOY (*Petitioner*) v. C. A. TURNER,  
(OFFICIAL ASSIGNER AND ASSIGNEE OF THE ESTATE OF ALLADINBHOY,  
AN INSOLVENT) (*Respondent*). [15th November, 1890.]

*Privy Council, leave to appeal to—Prerogative right of Crown to admit appeal where leave to appeal refused by High Court—Final decree—Meaning of "final" in s. 595 of Civil Procedure Code (Act XIV of 1882)—S. 601 of Code—Practice—Procedure.*

Where a decree directing the taking of accounts which the defendant contends ought not to be taken at all, decides, in effect, that, if the result should be found to be against the defendant, he is liable to pay the amount, the decree is final within the meaning of s. 595 of the Civil Procedure Code (Act XIV of 1882) for the purpose of appeal.

On the ground that a decree for an account was not final within that section, the High Court refused, under s. 601, to grant the defendant a certificate.

On his application for special leave to appeal to Her Majesty in Council, not by way of an appeal from the local Court's refusal, but asking for the exercise of the prerogative right to admit an appeal :

(1) 4 C. 417.

*Held*, that, as leave could be granted on any other ground, should any appear, besides the ground that the Court had refused the certificate without good cause, while leave could also be granted on the latter ground, if established, to make this application was, perhaps, more convenient than to appeal from the order of refusal.

[156] *Held*, also, that the real question in this suit having been the liability of the defendant to account to the plaintiff upon several claims, the decree had decided this against the defendant in such a way that, although the account had not been taken, the decree was final within s. 595.

[F., 17 A. 112 (116)=22 I.A. 1=5 M.L.J. 20=6 Sar. P.C.J. 580; 36 C. 493 (499)=12 18 I.A. 6=18  
C.W.N. 1102=2 Ind. Cas. 553; 7 Ind. Cas. 622; *Rel.*, 14 C.L.J. 603=13 Ind. Ind. Jur.  
Cas. 374; *Appl.*, 35 C. 618=8 C.L.J. 168 (170)=12 C.W.N. 545; R., 22 C. 928 35=5  
(930); 35 M. 1=8 Ind. Cas. 340=8 M.L.T. 453; 4 Bom.L.R. 212 (213); 10 C. Sar. P.C.J.  
L.J. 336 (338); 19 Ind. Cas. 922=6 S.L.R. 287; 21 M.L.J. (14) 1; 109 P.L.R. 639.  
1903; D., 11 O.C. 169 (170).]

PETITION for special leave to appeal from a decree (17th March, 1890) of the High Court, generally affirming, with a variation of detail, a decree (10th December, 1888) made in its original jurisdiction; also to appeal from an order (20th June, 1890) of the High Court (1) refusing a certificate under s. 601 of the Civil Procedure Code (XIV of 1882).

The question now raised was whether a decree directing that accounts should be taken between the parties was final within the meaning of s. 595 of the Civil Procedure Code.

The petitioner, who was a brother of Alladinbhoj Habibbhoj, an adjudged insolvent, was defendant in a suit, brought in 1887, by the Official Assignee as representing the insolvent's estate, on behalf of the creditors, to obtain a decree for assets alleged to belong to the insolvent, the property being in the possession of the defendant who was alleged by the plaintiff to be liable to account to him. The insolvent Alladinbhoj carried on business down to about the year 1866 as a merchant in Bombay; and there, as the plaintiff alleged, the defendant; who carried on a separate business with a third brother Ahmedbhoj, had, after Alladinbhoj's failure, assisted him in concealing his property, now retaining some of it.

In 1881, the present plaintiff sued Ahmedbhoj to obtain possession of some of the property held by him which, as the plaintiff alleged, belonged to the insolvent; and that suit, to which the present defendant was made a party (but only for purposes of discovery), had been referred to arbitration, with a result in the plaintiff's favour. Part of the claim now made to the amount of Rs. 1,12,500 was dismissed by the High Court (Scott, J.) in December, 1888 (2). But the judgment, as to cash balances, shares and outstandings, transferred just before the adjudication of insolvency, was that there had been a fraudulent transfer. The decree directed an account of what was due [157] the insolvent at the date of the vesting order. Interest on any balance that might be found due on the accounts was declared payable to the plaintiff. This judgment, and all the others in this suit, are reported in the fourteenth volume of the Indian Law Reports of the Bombay Series (see pp. 408 and 428).

The defendant appealed, and the plaintiff filed cross-objections to the decree. The High Court (Sargent, C.J., and Bayley, J.) confirmed the decree, with a variation as to the taking the accounts(3).

On the 20th June, 1890, the High Court refused the defendant's application for a certificate required to enable him to appeal to Her

(1) 14 B. 428.

(2) 14 B. 412.

(3) 14 B. 422.

- 1890  
NOV. 15. Majesty in Council, on the ground that the decree was not final within the meaning of s. 595, sub-section (c) of the Civil Procedure Code(1).
- PRIVY  
COUNCIL  
15 B. 155  
(P.C.)=
- 18 I.A. 6=15  
Ind. Jur. 35=5  
Sar. P.C.J. 639.
- The defendant now petitioned for 'special leave' to appeal, alleging that the refusal was not well grounded: that he had a defence raising questions of law which should be disposed of before the taking the account: the leave to appeal, applied for, was from the decrees of 10th December, 1888, and of 17th March, 1890, as well as from the order of 20th June, 1890.
- Mr. A. Cohen, Q. C., with whom was Mr. J. H. A. Branson, appeared for the petitioner.
- Mr. J. B. Finlay, Q. C., with whom was Mr. J. D. Mayne, for the respondent.

For the petitioner, it was argued that the decree that the accounts should be taken was in itself a final decree, on the merits involved in this suit, which was to enforce the liability to account on the part of the defendant. The *North British Bank v. Collins* (2) decided that an interlocutor ordering the taking of account was appealable under the Stat. 48 Geo. III, C. 151, s. 15, as the merits were clearly involved. And on s. 19 of the Judicature Act, 1873, giving a right of appeal from any judgment or order, an order, as in effect disposing of the merits, though only referring a case back to an arbitrator, was held appealable—*Shubrook v. Tufnell* (3). In [158] regard to the prerogative character of the special leave to appeal, reference was made to *Babu Gopal Thakur v. Teluk Chunder Rai* (4). Act X of 1877, s. 594, Act XIV of 1882, s. 595, and W. Macpherson's Practice of the Judicial Committee, Chap. II, were also referred to.

For the respondent, it was argued that the High Court had rightly refused the certificate on the ground that the decree was not final. This application, which was not only by way of appeal against the decision that the decree was not final, was based also on the allegation that there were points of law that in the Court below had not been rightly disposed of. However, the one ground only, that the decree was final, was the reason brought forward why the special leave should be granted. But it could hardly be said that the rights of the parties were determined before all the facts were disposed of. And upon such a decree as the one now in question it might appear that no accounts were forthcoming, or it might be found that nothing was due. Thus the decree was not final. *Aben Sha Sabit Ali v. Casirao Baba Saheb Holkar* (5) and *Mahant Ishvargar Budhgar v. Caudasama Amarsang* (6) were referred to.

Counsel for the petitioner was not called upon to reply.

#### JUDGMENT.

Their Lordships' judgment was delivered by

LORD HOBHOUSE.—In this case the defendant desires leave to appeal from the decree of the High Court, and the Court have refused him the necessary certificate, on the ground that the decree is not a final one within the meaning of s. 595 of the Civil Procedure Code. This petition is not by way of appeal from the decision of the Court, but it is presented for an exercise of the prerogative right of the Crown to admit an appeal. Although it is not an appeal, it is perhaps a more convenient proceeding:

(1) 14 B. 428.

(2) 1 Macq. H.L. Ca. 369.

(3) L.R. 9 Q.B.D. 621.

(4) 7 M.I.A. 548 (551).

(5) 6 B. 260.

(6) 8 B. 548.

than an appeal, because their Lordships can then grant leave on any other ground, if other ground appears for the indulgence that is sought, and if their Lordships find that, in a case in which the appeal is claimed as of right, the Court below has refused the certificate for a reason which appears to them to be an unsound reason, then they would advise Her Majesty to admit the appeal.

[159] Now in point of fact no other ground has been assigned for presenting this petition, and no other ground has been argued here excepting the one ground that the Court below did not take the right view of the word "final" in the Civil Procedure Code. Therefore, to test that point, their Lordships have to look at what was the real question before the Court when this decree was made. The plaintiff in the suit alleges that the defendant is accountable to him upon several claims. The defendant alleges that he has got legal defences to every one of those claims, and that he is not accountable at all. The Court held that the legal defences put forward were valid as to some of the claims, and as to others of the claims that they were invalid, and therefore that the defendant must account. It is true that the decree that was made does not declare in terms the liability of the defendant, but it directs accounts to be taken which he was contending ought not to be taken at all; and it must be held that the decree contains within itself an assertion that, if a balance is found against the defendant on those accounts, the defendant is bound to pay it. Therefore the form of the decree is exactly as if it affirmed the liability of the defendant to pay something on each one of these claims, if only the arithmetical result of the account should be worked out against him. Now that question of liability was the sole question in dispute at the hearing of the cause, and it is the cardinal point of the suit. The arithmetical result is only a consequence of the liability. The real question in issue was the liability, and that has been determined by this decree against the defendant, in such a way that in this suit it is final. The Court can never go back again upon this decree so as to say that, though the result of the account may be against the defendant, still the defendant is not liable to pay anything. That is finally determined against him, and therefore in their Lordships' view the decree is a final one within the meaning of s. 595 of the Code. They, therefore, think the case is one in which they should advise Her Majesty that the leave to appeal should be allowed on the usual terms as to security.

*Petition granted: special leave to appeal allowed.*

Solicitors for the petitioner:—Messrs. *Lattay and Hart.*

Solicitors for the decree-holder:—Messrs. *Payne and Lattay.*

1890  
NOV. 15.  
—  
PRIVY  
COUNCIL.  
—  
13 B. 155  
(P.C.)=  
18 I.A. 6=15  
Ind. Jur.  
35=5  
Sar. P.C.J.  
639.