

APPELLATE CIVIL.

Before Suhrwardy and Jack JJ.

TAHER SHEIKH CHOWKIDAR.

v.

OTARUDDI HOWLADAR.*

1928

June 20.

Court, whether can decree appeal if appellant is absent on the date of hearing—Civil Procedure Code (Act V of 1908), Order XLI, rule 17.

Order XLI, rule 17 of the Civil Procedure Code does not authorise a court to consider an appeal in the absence of the appellant and decide it on merits. The law contemplates that the appellate court must hear both parties to the appeal and then decide it according to its judgment.

SECOND APPEAL by the defendant.

The plaintiffs brought a suit for *khas* possession of a plot of land of which they were the joint owners against the defendant Taher Sheikh Chowkidar who purchased the holding from the *raiyyats* who were also made *pro forma* defendants. The plaintiffs based their suit on the ground that it was a non-transferable occupancy holding and its transfer by the *raiyyat* amounted to abandonment and repudiation of the tenancy.

The Munsif decreed the suit in favour of the plaintiff No. 1, but dismissed it against the plaintiff No. 2 who he held had recognised the transfer. The defendant then appealed and the plaintiff No. 2 filed a cross-objection, the memorandum of which was insufficiently stamped. On the 26th August, 1925, the Subordinate Judge postponed the hearing of the appeal to the 9th September next, and asked the pleaders on both sides to get ready to argue their cases. The respondent's pleader did not appear on the date

* Appeal from Appellate Decree, No. 696 of 1926, against the decree of Pasupati Bose, Subordinate Judge of Khulna, dated Sept. 11, 1925, modifying the decree of Romesh Chandra Sen, Munsif of Bagerhat, dated Nov. 25, 1924.

fixed, but the appellant's pleader appeared and his argument was heard and the case was adjourned to the following day for judgment. The judgment was again postponed till the day after, when the defendant's appeal was dismissed and the respondent plaintiff No. 2's cross-objection allowed and the entire suit decreed, although no one appeared on behalf of the respondent to argue the cross-objection.

The defendant thereupon appealed to the High Court.

Mr. Amin Ahmad (with him *Moulvi Abul Quasem*), for the appellants.

Dr. Jadunath Kanjilal (with him *Babu Bhudhar Haldar*), for the respondents.

SUHRAWARDY AND JACK JJ. There are two plaintiffs in this suit, which is for *khas* possession of land on the ground of abandonment and transfer of a non-transferable occupancy holding by the original tenant. The trial court found that so far as plaintiff No. 1's interest was concerned there was an abandonment and unauthorised transfer. As to plaintiff No. 2, it found that he had recognised the transferee as a tenant and accordingly it passed a decree in favour of plaintiff No. 1 for joint possession with the defendant and dismissed plaintiff No. 2's suit. The defendant appealed and plaintiff No. 2 cross-appealed or to be more precise filed a cross-objection. On the 26th August, 1925, the appellate court passed an order that the pleaders must get ready on the date fixed, namely the 9th September, 1925. On the 9th, the following order was passed. "The respondent's pleader does not appear, though he was assured that the appeal would be heard to-day. The appellant heard. Judgment to-morrow." On the 10th, judgment was postponed till the next day, and on the 11th, the learned Subordinate Judge passed the judgment appealed against. He dismissed the defendant's appeal and then proceeded to consider plaintiff

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No. 2's cross-objection on the merits, although no one was present on his behalf and found that the view of the Munsif that the plaintiff No. 2 recognised the defendant as a tenant was wrong : and, in the result, he dismissed the defendant's appeal, allowed the cross-objection and decreed the entire suit. This appeal is on behalf of the defendant and the only point that is taken before us is that the Subordinate Judge was not justified in deciding the cross-objection of plaintiff No. 2 when no one appeared on his behalf. This contention has a good deal of substance in it. Under Order XLI, rule 17, if the appellant does not appear and the appeal is called on for hearing, the court may make an order that the appeal be dismissed. The previous Code contained the words "the appeal shall be dismissed." This portion of the rule has been altered in the new Code in order to give jurisdiction to the appellate court to pass such order as it thinks proper in the circumstances of the case other than dismissing the appeal and further to make the order of dismissal for default not open to appeal. By the words 'the court may make an order that the appeal be dismissed' it meant that the court may dismiss the appeal or may adjourn it to some other date or pass other order but it certainly does not authorise the court to consider an appeal in the absence of the appellant and decide it on merits. It was not contemplated by the alteration in the rule to invest the court with power to decide an appeal on the merits in the absence of the appellant and the reason is this. This appeal was not argued by the appellant plaintiff No. 2 and therefore there was no reply to the appellant's argument by the respondent, that is to say the defendant No. 1. The law contemplates that the appellate court must hear both parties to the appeal and then decide it according to its judgment. That is the procedure laid down in Order XLI, rule 30, C. P. C. The procedure followed by the court is wrong and the decree passed by it in favour of plaintiff No. 2 must, accordingly, be set aside. There are some points in this case which show the impropriety of deciding an appeal in the

absence of the pleader for the appellant without giving an opportunity to the other side to reply to such statements as might have been made on behalf of the appellant. The memorandum of cross-objection on behalf of plaintiff No. 2 was filed on insufficient stamp. That question was not decided by the court and it should not have been heard without its being properly stamped. Accordingly the order passed with regard to the court-fee that the plaintiff should get *khas* possession in the entire lands on his depositing the court-fee on the memorandum of cross-objection within three days is not the proper order to pass. There is another point with reference to mesne profits. The Munsif said that no evidence had been given as to what would be the amount of mesne profits. But he gave plaintiff No. 1 liberty to bring a fresh suit for mesne profits. Now the Subordinate Judge has decreed the plaintiffs' whole suit and ordered that mesne profits be ascertained by the lower court. There is no reason given for it. Besides, as there was no appeal by plaintiff No. 1, against the order dismissing the claim for mesne profits, the court was not justified in passing a decree in his favour with regard to mesne profits. All these irregularities are due to the Subordinate Judge taking upon himself to decide the case without having it argued before him by both sides. The decree in so far as it relates to the claim of plaintiff No. 2 must, accordingly, be set aside. Now the question is as to what order we should pass in this case. If the occurrence had taken place before us and if the appellant was informed of the date of hearing but was not before the court on that date the order which we would generally pass was to dismiss the cross-objection. That is the order which the lower appellate court should have passed. We have jurisdiction to pass such an order in Second Appeal, as we are responsible for the proper disposal of the case according to law. As regards the defendant's appeal before the lower appellate court it cannot be heard after the concurrent findings of the courts below and that portion of the present appeal which relates to the

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interest of plaintiff No. 1 must stand dismissed with costs.

The result is that this appeal is partially allowed, the decree of the lower appellate court set aside and that of the court of first instance restored with costs in all courts against plaintiff No. 2.

Appeal allowed.

A. A.

APPELLATE CIVIL.

Before Rankin C. J. and Mukerji J.

SHIBNATH SINGH RAY.

v.

SHEIKH SABERUDDIN AHMED.*

1928

June 22.

Attachment before Judgment—Attachment in execution—Reattachment in execution, if of itself a waiver of abandonment of attachment before judgment—Civil Procedure Code (Act V of 1908), O. XXI, r. 57 and O. XXXVIII, r. 11.

Reattachment in execution of a decree, notwithstanding the terms of O. XXXVIII, r. 11 of the Code, is not of itself a waiver or abandonment of the attachment before judgment. The case is different where there is express or manifest abandonment.

Ganesh Chandra Adak v. Banwari Lal Roy (1) and the judgment of the minority in *Meyyappa Chettiar v. Chidambaram Chettiar* (2) followed.

Arunachalam Chetty v. Periasami Servai (3) dissented from.

Bhugwan Chunder Kritiratna v. Chundra Mala Gupta (4), *Sewdut Roy v. Sree Canto Maity* (5) and *Protap Chandra Gope v. Sarat Chandra Gangopadhyaya* (6) distinguished.

Patringa Koer v. Madhava Nand Ram (7) and *Mahabharat Dutta v. Surja Kanta De* (8) referred to.

O. XXI, r. 57 of the Code was intended to provide a remedy for the grievance or inconvenience which is apt to arise, where, after an attachment in execution, the application for execution cannot

* Appeal from Appellate Decree, No. 158 of 1926, against the decree of M. Osman Ali, Subordinate Judge of Nadia, dated Sep. 5, 1925, affirming the decree of Srish Chandra De, Munsif of Ranaghat, dated Jul. 21. 1924.

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| (1) (1912) 16 C. W. N. 1097. | (5) (1906) I. L. R. 33 Calc. 639. |
| (2) (1923) I. L. R. 47 Mad. 483. | (6) (1920) 25 C. W. N. 544. |
| (3) (1921) I. L. R. 44 Mad. 902. | (7) (1911) 16 C. W. N. 332. |
| (4) (1902) I. L. R. 29 Calc. 773. | (8) (1918) 3 P. L. J. 310. |