APPELLATE CIVIL.

Before C. C. Ghose and Pearson JJ.

SAKTIPRASANNA BHATTACHARYA

v.

NALINIRANJAN BHATTACHARYA.*

1930

Nov. 26.

Appeal to High Court—Defendant against whom suit is dismissed not made respondent in appeal, if such defendant a party "interested in the result of the appeal"—Discretion of appellate court to add parties as respondents for passing decree against them—Principal and Agent—Moneys realised by agent for principal—Fact of such realisation kept back from principal who became aware of the same upon enquiry later on—Limitation from date of such knowledge of the principal—Code of Civil Procedure (Act V of 1908), O. XLI, rr. 20, 33—Indian Limitation Act (IX of 1908), Sch. I, Arts. 62, 90.

Where the trial court dismisses a suit against one defendant and decrees it against the other, and afterwards the latter defendant alone appeals against the decree passed against him without making the former defendant respondent, the former defendant is not a party "interested in the result of the appeal" within the meaning of Order XLI, rule 20 of the Civil Procedure Code.

The discretionary power of the court under Order XLI, rules 20 and 33 of the Code, however ample it may be, cannot be used to the detriment or prejudice of the person against whom the suit has been dismissed by the trial court and against whom no appeal had been preferred before the lower appellate court.

Mahomed Khaleel Shirazi and Sons v. *Les Tanneries Lyonnaises* (1) and *V. P. R. V. Chokalingam Chetty* v. *Seethai Acha* (2) followed.

Bhutnath Deb v. *Shashimukhi Brahmani* (3) distinguished.

Where a defendant realises plaintiff's moneys as his agent on certain occasions, but does not inform the plaintiff of such realisations, time begins to run against the plaintiff from the date of the plaintiff's knowledge of such realisations and a suit for recovery of the said moneys is governed by Article 90 of the Limitation Act.

SECOND APPEALS by the plaintiff in both the appeals.

The material facts have been set out in the judgments.

*Appeals from Appellate Decrees, Nos. 2276 and 2277 of 1928, against the decrees of Ashutosh Ray, Additional Subordinate Judge of Sylhet, dated May 5, 1928, modifying and reversing the decrees of Binodbihari Ray, Munsif of Habiganj, dated Sept. 22, 1926.

(1) (1926) I. L. R. 49 Mad. 435; L. R. 53 I. A. 84.
(2) (1927) I. L. R. 6 Ran. 29; L. R. 55 I. A. 7.
(3) (1926) 30 C. W. N. 885.

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Binayendranath Palit for the appellants.

Upendrakumar Ray (for *Birendrakumar De*) for the respondents.

C. C. GHOSE AND PEARSON JJ. There were two suits instituted in the trial court. One was suit No. 1376, which was a suit on a mortgage. The plaintiff's allegation was that the defendant No. 1 had failed to pay the mortgage moneys. The plaintiff, therefore, prayed for a decree on the mortgage as against the defendant No. 1. Her allegation against the defendant No. 2 was that she had come to know that certain moneys had been realised by defendant No. 2 from defendant No. 1 on account of the mortgage and the plaintiff prayed that should it turn out that defendant No. 2 realised any moneys or the whole of the mortgage moneys from defendant No. 1, then a decree for money on account of the mortgage might be made against defendant No. 2. The first court found that defendant No. 2 had realised a sum of Rs. 100 from defendant No. 1 and that defendant No. 1, by such payment, had been released by the defendant No. 2 from the debt in question. The first court, accordingly, dismissed the suit as against defendant No. 1, but decreed the suit against defendant No. 2 for Rs. 100 which had been realised by him from defendant No. 1, and also passed a decree for a sum of Rs. 100 on account of damages, inasmuch as, owing to the action of defendant No. 2, the defendant No. 1 had been released by him from the mortgage debt. The defendant No. 2 appealed to the lower appellate court, his appeal being numbered as appeal No. 32. To that appeal the only respondent was the plaintiff. The defendant No. 1 was not made a party respondent to the appeal. The plaintiff, however, preferred certain cross-objections. These cross-objections were lodged within one month from the date of service of notice of appeal on her. But in these cross-objections the case on behalf of the plaintiff was not only directed against defendant No. 2, who was the

appellant in the lower appellate court, but against the defendant No. 1, against whom the suit had been dismissed by the trial court and who was not made a party respondent to the appeal. The lower appellate court came to the conclusion that, inasmuch as the plaintiff had not preferred any appeal against the defendant No. 1, her cross-objections, though in part directed against defendant No. 1, could not be entertained, as they were out of time and also because no such cross-objections can be allowed against an absent respondent. It may be noted in this connection that notice of the cross-objections was served upon the absent defendant No. 1. The lower appellate court came to the conclusion, however, on the merits that the decree against defendant No. 2 for Rs. 200 should not be allowed to stand. The lower appellate court modified the decree against defendant No. 2 by reducing it from Rs. 200 to Rs. 100 (the last mentioned amount being the amount which had been realised by defendant No. 2 from defendant No. 1), holding that there was no case for the award of damages against defendant No. 2.

Mr. Palit has now, on behalf of the plaintiff, preferred an appeal to this Court and this appeal has been numbered S. A. 2276 of 1928. He has in his memorandum of appeal on behalf of the plaintiff made the two defendants respondents to this appeal and his argument is twofold. In the first place, he argues that the lower appellate court was wholly in error in not awarding damages against defendant No. 2. In the second place, he argues that the lower appellate court should not have thrown out the case that his client sought to make in the cross-objections as against defendant No. 1, although defendant No. 1 was not a party respondent in the appeal before the lower appellate court. He formulates his case against defendant No. 1 in the following manner. He says that, for all practical purposes, the defendant No. 1 was a party respondent to the appeal before the lower appellate court, inasmuch as the cross-objection on behalf of the plaintiff had been served on the

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defendant No. 1. In the second place, he argues that, by virtue of the combined operation of Order XLI, rule 33 and rule 20, the lower appellate court had clear jurisdiction in the matter and should have determined the plaintiff's claim as against defendant No. 1, although defendant No. 2, in his appeal to the lower appellate court, had not made defendant No. 1 a party respondent thereto. In support of his last contention Mr. Palit has invited our attention to the case of *Bejoy Kumar Sen* v. *Kusum Kumari Debi* (1), being a decision of our learned brothers Mr. Justice Suhrawardy and Mr. Justice Garlick. But, in our opinion, so far as this last contention is concerned, the case is covered by the authority of their Lordships of the Judicial Committee in the two cases to which reference has been made during the course of the argument at the bar, the case of *V. P. R. V. Chokalingam Chetty* v. *Seethai Acha* (2) and the case of *Mahomed Khaleel Shirazi and Sons* v. *Les Tanneries Lyonnaises* (3).

The whole point resolves itself into a consideration of the precise meaning to be attached to the words "a party interested in the result of the appeal" appearing in Order XLI, rule 20 of the Code of Civil Procedure and the words "the appellate court "shall have power to pass any decree and make any "order which ought to have been passed or made and "to pass or make such further or other decree or "order as the case may require, and this power may "be exercised by the court notwithstanding that the "appeal is as to part only of the decree and may be "exercised in favour of all or any of the respondents "or parties, although such respondents or parties "may not have filed any appeal or objection." As their Lordships point out in the circumstances such as have happened in this case, is it possible to say that the defendant, against whom the suit had been dismissed by the trial court and who has not been

(1) (1928) 33 C. W. N. 221.
(2) (1927) I. L. R. 6 Ran. 29; L. R. 55 I. A. 7.
(3) (1926) I. L. R. 49 Mad. 435; L. R. 53 I. A. 84.

made a party to an appeal preferred against that decree before the lower appellate court, is still interested in the result of the appeal? If he cannot be considered to be a person who is still interested in the result of the appeal or if he cannot be considered to be a person who may be affected by the result of the appeal, within which expression is included the determination of the appeal itself as also the determination of any cross-objection which may be preferred by the respondent who is a party to the appeal, then it must follow that the powers of the court, however ample they may be within the ambit of Order XLI, rule 20 and rule 33, cannot be used to the detriment or prejudice of the person against whom the suit has been dismissed in the trial court and against whom no appeal had been preferred before the lower appellate court. It is true that the case of *Mahomed Khaleel Shirazi* (1) has been noticed in the judgment of Mr. Justice Suhrawardy and Mr. Justice Garlick in the case of *Bejoy Kumar Sen* v. *Kusum Kumari Debi* (2), but it does seem to us that the matter has been put beyond all doubt by the decision of the Privy Council in the case of *V. P. R. V. Chokalingam Chetty* v. *Seethai Acha* (3). The powers under Order XLI, rule 33, may no doubt be exercised in favour of an absent respondent. That is illustrated by the case of *Bhutnath Deb* v. *Shashimukhi Brahmani* (4). But we are not aware of any authority which has gone so far as to lay down in definite terms that such powers may be exercised, as stated above, to the detriment or prejudice of an absent respondent, against whom in the lower court the suit had been dismissed. For these reasons, we are of opinion that there is no substance in the second contention of Mr. Palit. We are of opinion that it is impossible for us to interfere with the judgment and decree of the lower appellate court as against the defendant No. 1.

(1) (1926) I. L. R. 49 Mad. 435; L. R. 53 I. A. 84.
(2) (1928) 33 C. W. N. 221.
(3) (1927) I. L. R. 6 Ran. 29; L. R. 55 I. A. 7.
(4) (1926) 30 C. W. N. 885.

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With reference to Mr. Palit's first contention that the lower appellate court should not have interfered with the decree which awarded damages as against defendant No. 2, it is sufficient to point out that, on the facts found, there is really no case of damages as against defendant No. 2.

The result, therefore, is that on both the points the judgment of the lower appellate court must be affirmed and this appeal No. 2276 of 1928 must be dismissed with costs.

S. A. 2277 of 1928.

The second suit between the parties is a suit for accounts. This was numbered in the first court as suit No. 1337. The appeal arising thereout is appeal No. 31 in the lower appellate court. The Second Appeal to this Court is appeal No. 2277 of 1928. The short facts, so far as this appeal is concerned, are these. The defendant No. 1 acted as agent of the plaintiff in the matter of the realisation of certain debts due to the plaintiff. The plaintiff's allegation is that, on three several dates, namely on the 9th September, 1920, 26th June, 1920, and 20th January, 1921, the defendant No. 1 had realised considerable sums of money from her debtors, but he withheld payments of these moneys from her. In the plaint she states that, after her husband's death, she made enquiries that these moneys had been realised and that the defendant No. 1 had not paid to her the same. Demand is said to have been made on her behalf on some date in 1331 B.S., which would correspond with some date in 1925. The plaintiff's suit has been dismissed on the ground that it is barred by limitation under Article 62 of the Limitation Act. As far as we can judge from the materials before us, namely, the judgment of the trial court and the very short judgment of the lower appellate court on this point, it is by no means clear that the plaintiff's case does not come within the purview of Article 90 of the Limitation Act. In our opinion, there is ample foundation for the contention that the case does come

with the purview of Article 90. But before any definite pronouncement can be made, the facts have got to be investigated and elicited. It does not appear from the materials on the record, so we are informed by the learned advocate for the plaintiff, that the date or time when the fact of the defendant No. 1 having withheld these moneys from the plaintiff became known to the plaintiff can be ascertained. That date must be ascertained before Article 90 of the Limitation Act can be invoked.

We, therefore, set aside the judgment and decree of the lower appellate court and remit the matter to that court for ascertainment of the date or dates bearing on the question referred to above and after such ascertainment to determine the case and dispose of the appeal according to law.

The costs of this appeal will abide the result of the decision of the lower appellate court.

Case remanded.

A. K. D.