

APPELLATE CIVIL.

Before Nasim Ali J.

KAMALAKANTA DEBNATH.

v.

TAMIJADDIN.*

1934

May 2.

Appeal—Appeal by one defendant—Remaining defendants not impleaded in appeal—Appellate court's powers to vary decree in favour of non-appealing defendants—Code of Civil Procedure (Act V of 1908), O. XLI, rr.4, 33.

Reading rules 4 and 33 of Order XLI of the Civil Procedure Code together, there can be no doubt that one of the defendants can file an appeal without impleading the other defendants as respondents, if the decree appealed from proceeds on a ground common to all of them and that the appellate court may thereupon exercise the power of varying the decree in favour of the non-appealing defendants, although they have not been made parties to the appeal.

Dasarath Patel v. Brojo Mohon Gaontia (1) followed.

Jogesh Chandra Banerjee v. Sarada Kumar Chakravorti (2) distinguished.

Bhut Nath Deb v. Sushimukhi Brahmani (3) and *Madan Lal v. Gajendrapal Singh* (4) referred to.

Order XLI, rule 33 authorises the appellate court to pass a decree in favour of a party who has not been heard: it does not authorize the court to pass a decree *against* a person who is not a party to the appeal; or, in other words, powers under rule 33 of Order XLI of the Code cannot be exercised to the *prejudice* of a person, who is not given a hearing.

SECOND APPEAL by the plaintiffs.

The facts of the case and the arguments in the appeal appear sufficiently in the judgment.

Nripendrachandra Das for the appellants.

Upendrakumar Ray for the respondents.

NASIM ALI J. This is an appeal by the plaintiffs in a suit for declaration of title and for *khâs* possession of certain lands. Plaintiffs' case is that the lands in suit appertained to the *jote* of Panchananda Debnath and that they purchased the

*Appeal from Appellate Decree, No. 1743 of 1931, against the decree of Jateendrakumar Basu, Second Additional Subordinate Judge of Tippera, dated Dec. 11, 1930, modifying the decree of Brajendrakumar Pal, First Munsif of Nabinagar, dated Nov. 20, 1929.

(1) (1913) 18 C. L. J. 621.

(3) (1926) 45 C. L. J. 119.

(2) (1918) 23 C. W. N. 223.

(4) (1929) I. L. R. 51 All. 575.

1934
 Kamalakanta
 Debnath
 v.
 Tamijaddin.
 Nasim Ali J.

same at an auction sale in execution of a decree against his heirs. Plaintiffs further alleged that they got symbolical possession through court on the 20th September, 1921, but were prevented from taking actual possession by the defendants. Defendants Nos. 1 to 5 filed a joint written statement contending *inter alia* that the land in suit was not the exclusive property of Panchananda Debnath but that he had only 8 annas share therein.

The trial court held that the land in suit was the exclusive property of Panchananda Debnath and, in that view, decreed the plaintiffs' suit in full.

On appeal by defendant No. 4, in which the other defendants were not made parties, the lower appellate court held that Panchananda Debnath had only 8 annas share in the land in suit and, in that view, declared the plaintiffs' title in respect of 8 annas share of the land in suit and ordered delivery of joint possession of the said 8 annas share with all the defendants. Plaintiffs have preferred the present appeal against this decision of the lower appellate court.

The first point urged in support of the appeal is that the lower appellate court erred in law in varying the decree of the trial court in favour of the other defendants also, who did not appeal and who were not even made respondents in the appeal before the lower appellate court. Order XLI, rule 4 of the Code of Civil Procedure provides that, where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and, thereupon, the appellate court may reverse or vary the decree in favour of all the plaintiffs or the defendants, as the case may be. From this provision of law it is clear that anyone of the defendants can appeal from the whole decree, if the decree appealed from proceeds on any ground common to all the defendants, and,

thereupon, the appellate court can vary the decree in favour of all the defendants. It is not, however, clear from rule 4 quoted above whether the other defendants or plaintiffs, who have not appealed should be made respondents in the appeal. If, however, rule 4 be read along with rule 33 of Order XLI, the position appears to be that on an appeal by one of the defendants the appellate court can pass such decree as the case may require and this power 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. It further appears from rule 33 that the exercise of this power by the appellate court is not confined only to the cases of respondents, who are parties to the appeal but the power can be exercised in favour of persons who are parties to the suit. The learned advocate for the appellants contends that the word "parties" in rule 33 means parties to the appeal. I am, however, unable to accept this contention, inasmuch as the rule speaks of *respondents* or *parties* and, if parties mean parties to the appeal, then the word "respondents" would be redundant. It seems to me, therefore, that a decree may be varied in favour of a defendant, who has not appealed and has not been made a party to the appeal but who was a party to the suit. Reading, therefore, rules 4 and 33 of Order XLI together there can be no doubt that one of the defendants can file an appeal without impleading the other defendants as respondents, if the decree appealed from proceeds on a ground common to all of them and that the appellate court may, thereupon, exercise the power of varying the decree in favour of the non-appealing defendants, although they have not been made parties to the appeal. This point was considered by this Court in the case of *Dasarath Patel v. Brojo Mohon Gaontia* (1). Mookerjee J. in that case observed as follows:—

Rule 4 of Order XLI of the Code, in so far as it is applicable to the case before us, provides that where there is more defendant than one in a suit and the decree appealed from proceeds on any ground common to all the defendants, any one of the defendants may appeal from the whole decree, and

1934

*Kamalakanta
Debnath*

v.

*Tamijaddin.**Nasim Ali J.*

1934

—
Kamalakanta
Debnath
 v.
Tamijaddin.
 —
Nasim Ali J.

thereupon the appellate court may reverse or vary the decree in favour of all the defendants. In the case before us, there is more defendant than one in the suit. The decree of the court of first instance proceeds on a ground common to all the defendants. The court of first instance held in the first place that the *lambardâr* defendant was not competent to grant a lease of the land to the other defendants: and in the second place, that if the *lambardâr* had authority to grant such a lease, that authority had been validly terminated. These were grounds which affected all the defendants in an equal degree. It was consequently open to the first defendant to prefer an appeal against the whole decree and to obtain thereupon a reversal of that decree in favour and for the benefit of all the defendants. This course was open to the court below, notwithstanding the fact that the other defendants had not been joined as parties respondents to the appeal.

The learned advocate for the appellants placed much reliance upon the decision in the case of *Jogesh Chandra Banerjee v. Sarada Kumar Chakravorti* (1). This case, however, was considered in a later case by this Court in the case of *Bhut Nath Deb v. Sashimukhi Brahmani* (2). Suhrawardy J. with reference to *Jogesh Chandra's* case (1) observed as follows:—

The first case is not decided on the construction of Order XLI, rule 33 and is based upon its own particular facts.

The learned Judge while discussing the meaning of the words "respondents" or "parties" in rule 33 of Order XLI made the following observation:—

By the use of the expression "respondents or parties" in the section I understand that the appellate court may pass an order in favour of the respondents who have not appealed and it may similarly decide any question in favour of a party, by which I understand a party to the suit and who is not a respondent in the appeal.

Again in the case of *Madan Lal v. Gajendrapal Singh* (3), the learned Judges of the Allahabad High Court observed as follows:—

Rule 33 states that the appellate court shall have power to pass any decree which ought to have been passed, and this is wide enough to allow a decree against a party to the suit who is not a party to the appeal.

This view apparently does not lead to any injustice or cause any prejudice to any party. Order XLI, rule 33, authorises the appellate court to pass a decree *in favour of* a party who has not been heard. It does not authorise the court to pass a decree *against*

(1) (1918) 23 C. W. N. 223.

(2) (1926) 45 C. L. J. 119, 121, 122.

(3) (1929) I. L. R. 51 All. 575, 578.

a person who is not a party to the appeal, or in other words powers under rule 33 cannot be exercised to the prejudice of a person who is not given a hearing. A person, who has been heard in appeal, cannot object to a decree being passed in favour of a person merely because that person is not a party to the appeal and has not been heard. The decree passed by the lower appellate court cannot, therefore, in my opinion be successfully challenged on the ground stated above, as it is admitted in this case that the decree of the trial court proceeded on a ground common to all the defendants.

The next point urged, in support of the appeal, is that the lower appellate court should not have passed a decree for joint possession with defendants other than defendants Nos. 1 and 4. There is no substance in this contention, because the plaintiffs have succeeded in proving their title only to an undivided 8 annas share of the property. They are to get joint possession with all the defendants, who according to their own case are in actual possession of the lands.

The last point urged by the learned advocate in support of the appeal is that the lower appellate court, in arriving at the finding on the question of plaintiffs' title, did not give proper effect to the presumption arising out of the record-of-rights. It, however, appears from the judgment of the learned Subordinate Judge that he raised this presumption in favour of the plaintiffs. But, in view of the evidence in the case, he was of opinion that that presumption was rebutted. There is, therefore, no substance in this contention.

The result, therefore, is that this appeal is dismissed with costs.

Appeal dismissed.

1934

*Kamalakanta
Debnath*

v.

Tamijaddin.

Nasim Ali J.