APPELLATE CIVIL.

Before Guha and Bartley JJ.

HARACHANDRA DAS

v.

BHOLANATH DAS.*

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Jan. 16, 17, 22.

Appeal—Statutory right—Persons who may appeal—Test of appealability—Finding, adverse, if appealable—Code of Civil Procedure (Act V of 1908), ss. 2 (2), 100.

The Code of Civil Procedure, by the provisions relating to the right of appeal, as they now stand, does not provide for an appeal against a finding contained in a judgment.

On grounds of justice and recognising that on that ground the implication of suitable exceptions or qualification may, however, be justifiable and even necessary, it is proper to follow the rule engrafted on the statute by a current of decisions by High Courts in British India that an aggrieved party may have a right of appeal, though the decree is in his favour ; and that the test to be applied in such a case is whether the *finding* sought to be appealed against is one, to which the rule of *res judicata* may be held to be applicable, so as to disentitle the aggrieved party to agitate the questions covered by the *finding* in any other proceeding.

The rule now practically adopted in British India has to be given effect to, on the assumption that it was not the intention of the legislature to prejudice the rights of parties ; and it has to be determined in each particular case, in which it is sought to be applied, whether the finding in a judgment against a party decided adversely to him was on a point directly and substantially in issue, and whether the rule of *res judicata* would be a bar in the matter of parties being allowed to re-agitate the question, involved in the finding, in other proceedings.

Case-law reviewed.

SECOND APPEAL by the defendants Nos. 1 to 3.

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

Amarendranath Basu and *Jitendrakumar Sen Gupta* (for *Manmathanath Das Gupta*) for the appellants.

* Appeal from Appellate Decree, No. 475 of 1932, with cross-objection, against the decree of N. G. A. Edgley, District Judge of Sylhet, dated July 29, 1931, affirming the decree of Sureshchandra Sen, Third Subordinate Judge of Sylhet, dated March 31, 1931.

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Saratchandra Basak, Senior Government Pleader, and *Chandrashekhar Sen* for the respondents.

Cur. adv. vult.

GUHA J. The plaintiffs in the suit, out of which this appeal has arisen, sought to exercise their right of pre-emption, in respect of the property described in the plaint, against the defendants Nos. 1, 2 and 3 in the suit, as purchasers of the property in question from the defendants Nos. 4 and 5 by a *kabâlâ*, Ex. B in the case, dated the 25th *Bhâdra*, 1335. The plaintiffs and the defendants Nos. 4 and 5 were admittedly co-sharers in regard to the property in dispute, and the right of pre-emption sought to be exercised in the suit was the right to a certain share in joint property, owned by the plaintiffs and the defendants Nos. 4 and 5, the vendors of the defendants Nos. 1, 2 and 3 in the suit. The claim to the exercise of the right of pre-emption as made by the plaintiffs was resisted by the defendants Nos. 1, 2 and 3; the defendants Nos. 4 and 5 supported the case of these defendants by the written statement filed by them, but they did not appear at the hearing of the suit.

The plaintiffs' claim for pre-emption, as made in the suit, was dismissed by the court of first instance on the ground that the suit was barred by limitation. On appeal by the plaintiffs, the learned District Judge of Sylhet, reversed the decision of the trial court on the question of limitation; according to the judge the suit was not barred by limitation. The court of appeal below, however, came to the decision that the *kabâlâ*, Ex. B in the case, had never been legally registered owing to the fact that the Sub-Registrar registering the same had not been vested with requisite powers. There was no sale in respect of the property covered by the *kabâlâ*, Ex. B, and it followed from that that the plaintiffs had no cause of action. Although the reasons were different from those recorded by the Subordinate Judge in the court

of first instance, the conclusion of the District Judge in the court of appeal below was the same as that at which the trial court had arrived, namely, that the plaintiffs' suit should be dismissed. The defendants Nos. 1 to 3 appealed to this Court; and the appeal is directed, as stated in the memorandum of appeal, "against a finding of the lower appellate court, "although the appeal before that court was dismissed, "and the appellants were respondents in that appeal". There were cross-objections preferred by the plaintiffs respondents in the appeal to this Court.

The cross-objections filed in this Court were not pressed.

At the hearing of the appeal objection was raised on behalf of the plaintiffs, respondents, as to the maintainability of the appeal to this Court, by the defendants Nos. 1, 2 and 3 in the suit, in view of the dismissal of the plaintiffs' suit, by the court of appeal below, in concurrence with the trial court. It was urged, in support of the objections to the maintainability of this appeal, that section 100 of the Code of Civil Procedure was a complete bar in the matter of preferring an appeal by the defendants Nos. 1, 2 and 3: there was a decree of dismissal of the plaintiffs' suit passed by the court of appeal below, and the defendants in the suit were not entitled to maintain this appeal. The decree of the lower appellate court was in their favour, and they could not appeal to this Court, with a view to attack the propriety of the grounds assigned in the judgment of the lower appellate court in support of the judgment. The position taken up, as indicated above, by way of a preliminary objection to the hearing of the appeal is, it may be noticed, in consonance with an observation contained in the decision of this Court in the case of *Byomkes Seth* v. *Bhut Nath Pal* (1), and is founded upon the wording of the provisions of the Code of Civil Procedure giving the right of appeal to a litigant before the civil court.

(1) (1921) 34 C. L. J. 489.

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The question raised before us in support of the position that an appeal to this Court is maintainable on the facts and in the circumstances mentioned above is of general importance, and we proceed to discuss the same under two different heads, in view of the line of argument followed before us.

I. The appeal before us is an appeal from an appellate decree, and the right to appeal is conferred by section 100 of the Code of Civil Procedure, which provides for an appeal to this Court from every decree in appeal on any of the grounds specified in clauses (*a*), (*b*) and (*c*) of that section. It may be conceded that the grounds of this appeal are such as come within the purview of any or all of those clauses. The question, however, is whether the appellants are persons, against whom there is a decree, which may be the subject of an appeal. The statute as it stands provides for an appeal from a decree and not from a finding on a question of law or fact, on which that decree is based. "Decree" has been defined in the Code of Civil Procedure [section 2 (*2*)]; it means the formal expression of an adjudication, which, so far as the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. This definition purports to be exhaustive in its nature; and a decree under this definition does not include a judgment or any finding on which the decree is based; and on the definition of the decree, the right of appeal given to a party cannot necessarily be extended to a finding contained in a judgment, as it was the trend of argument on behalf of the appellants before us. The observation of Sir Asutosh Mookerjee J. in *Byomkes Seth's* case (1) referred to above that a party cannot appeal against a decree in his favour solely with a view to attack the propriety of the grounds assigned in the judgment in support of that decree is based upon an interpretation of the wording of the statute, and have special significance so far as the question

(1) (1921) 34 C. L. J. 489.

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of a general right of appeal, as conferred by the Code of Civil Procedure, is concerned. In our judgment, on the provisions of the Code, as they now stand, there cannot be an appeal "against a finding of the lower "appellate court, although the appeal was dismissed, "and the present appellants were respondents in the "said appeal" as mentioned in the memorandum of appeal presented to this Court. An appeal is a creature of the statute, and as it has been said it cannot be assumed that there is a right of appeal in all matters coming for consideration of the court; unless a right of appeal is expressly given, it does not exist, and the litigant may have independently of any statute a right to institute a suit for nullifying the effect of any decision of a court. As it was noticed by the Judicial Committee of the Privy Council, it was incumbent upon an appellant to show that there was a statutory right of appeal; an appeal does not exist in the nature of things; a right of appeal from any decision must be given by express enactment, and it cannot be implied [See *Rangoon Botatoung Company, Ld.* v. *The Collector, Rangoon* (1) and *Sandback Charity Trustees* v. *North Staffordshire Railway Co.* (2), cited there]. It may be noticed in this connection that, so far as the statute goes, it gives a right of appeal only against decrees and certain orders against which an appeal is expressly given, and there is nothing contained in the Code of Civil Procedure, with reference to which it could be said that appeals could lie against a finding contained in a judgment.

II. The next branch of the arguments in support of the maintainability of the appeal as preferred, relates to the position that the Code of Civil Procedure, in the provisions relating to appeals, does not mention persons who may appeal; and it was, therefore, urged that any party to the suit adversely affected by the decree as passed by a court may appeal.

(1) (1912) I. L. R. 40 Calc. 21; L. R. 39 I. A. 197.

(2) (1877) 3 Q. B. D. 1.

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There is no doubt that High Courts in this country have held, apart from the provisions of the Code of Civil Procedure, that a party adversely affected by a decree may prefer an appeal from the decree; and that the question whether a party is adversely affected by a decree is a question of fact to be determined in each case according to its peculiar circumstances.

In *Krishna Chandra Goldar* v. *Mohesh Chandra Saha* (1), it was held by Sir John Woodroffe J., on review of authorities, that a defendant had a right of appeal notwithstanding that the suit had been dismissed as against him, if he was aggrieved by the decree. The decree sought to be assailed in the case was undisputedly one adjudicating the right of the defendant seeking to appeal, although it was a decree of dismissal of the suit. It was observed in the judgment that the question, who may appeal, was determinable by the commonsense consideration that there could be no appeal, when there was nothing to appeal about, and that it was not because the suit was formally dismissed as against the defendant that no appeal lay, but because such dismissal was ordinarily not merely no grievance, but an actual benefit to the defendant. There was in such cases nothing to complain of; if there was, then, notwithstanding that the suit was dismissed against him, he might appeal.

In *Jumna Singh* v. *Kamar-un-nisa* (2), according to the opinion of the Full Bench of the Allahabad High Court, there was no appeal maintainable in the case before the Full Bench for the reason that the finding, against which it was directed, would not bar the adjudication of the question in a subsequent suit, and also on the ground that under the law it was inferable that the parties, who are allowed to appeal, are those who may desire that a decree should be varied or reversed, Stuart C. J. confining himself to the latter of the two aspects of the case before the court. The majority of the learned Judges expressed the opinion that the finding sought to be challenged

(1) (1905) 9 C. W. N. 584.

(2) (1880) I. L. R. 3 All. 152.

in appeal would not bar a suit by one against another for the establishment of the validity of the sale deed in question, the finding between the plaintiff and the defendants in the suit, and not between the defendant vendor and the defendants vendees, who were not then litigating, would not bar an adjudication of the matter in issue between them, in a suit brought by the latter for the establishment of the validity of the sale deed.

In *Jamna Das* v. *Udey Ram* (1), it was held that an appeal could lie against a decree, even though it was not a decree against an appellant, if it implied a finding, but for which the decree could not have been given in favour of the plaintiffs in the case.

In *Nimmagadda Venkateswarlu* v. *Bodapati Lingayya* (2), it was laid down that where a suit was dismissed the true test for determination, whether the defendant could appeal, was to see, not merely the form, but the substance of the decree and the judgment; and where the point decided adversely to the defendant was directly and substantially in issue, and, where in other proceedings, the matter would be *res judicata*, it would be contrary to all principles of justice and equity to hold that the defendant was precluded from agitating the matter on appeal, merely because the suit was dismissed.

The case of *Krishna Chandra Goldar* v. *Mohesh Chandra Saha* (3), referred to above, was cited in the judgment of this Court in *Nirode Chandra Banerjee* v. *Profulla Chandra Banerjee* (4), and it was said by Sir Asutosh Mookerjee J. that *Krishna Chandra Goldar's* case (3) showed that even a defendant may appeal against a decree, which dismisses the suit against him, but prejudices his position.

As indicated by the decisions in the cases referred to above, it may be taken to be the view of courts in India generally, that a party to the suit adversely affected by a finding contained in a judgment, on

(1) (1898) I. L. R. 21 All. 117.
(2) (1924) I. L. R. 47 Mad. 633.
(3) (1905) 9 C. W. N. 584.
(4) (1923) 40 C. L. J. 535.

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which a decree is based, may appeal; and the test applied in some of the cases for the purpose of determining whether a party has been aggrieved or not was whether the finding would be *res judicata* in other proceedings. This rule permitting an appeal from a finding in a judgment in a case, in which the decree is in favour of the party seeking to appeal, is engrafted on the provisions in the Code of Civil Procedure bearing on the question of the right of appeal, on principles of justice and equity, and on the ground of common sense. The rule now practically adopted in this country has to be given effect to, on the assumption that it was not the intention of the legislature to prejudice the rights of parties; and it has to be determined in each particular case, in which it is sought to be applied, whether the finding in a judgment against a party decided adversely to him was on a point directly and substantially in issue, and whether the rule of *res judicata* would be a bar in the matter of parties being allowed to re-agitate the question involved in the finding in other proceedings. It may be taken to be well settled that to constitute a matter directly and substantially in issue it is not necessary that a distinct issue should have been raised upon it; it is considered sufficient if the matter was in issue in substance. Further, an issue is *res judicata* when the judgment of an appellate court shows that the issue was treated as material and was decided, although the decree passed merely affirms the decree of the trial court, which did not deal with the issue [See the judgment of this Court quoted *in extenso* and adopted by the Judicial Committee in *Midnapore Zamindary Company, Ltd.* v. *Naresh Narayan Roy* (1)]. The question also has to be considered, whether in view of the position that it is not enough to constitute a matter *res judicata* that it was in issue in the former suit; it is necessary that it must have been in issue directly and substantially; and a matter cannot be directly and substantially in issue in a suit

(1) (1924) I. L. R. 51 Calc. 631 ; L. R. 51 I. A. 293.

unless it was alleged by one party and denied or admitted either expressly or by necessary implication, by the other.

In the case before us, the finding sought to be challenged in appeal to this Court is on a question, not directly put in issue; it was on a matter not alleged by any party and denied or admitted by the other. No issue, directly or in substance, was suggested on the point, in regard to which a finding adverse to some of the defendants in the suit was arrived at by the lower appellate court. In our judgment, the finding so arrived at might, and it does, sustain a decree of dismissal of the suit, but it cannot be held to be one, which does or could disentitle the defendants Nos. 1, 2 and 3 in the suit from re-agitating the question of registration of the *kabâlâ*, Ex. B, in any other proceeding; the finding could not further be held to operate as *res judicata* on the question, whether there has been a valid sale in respect of the property covered by the *kabâlâ*, Ex. B.

To summarise our conclusions, the Code of Civil Procedure, by the provisions relating to the right of appeal, as they now stand, does not provide for an appeal against a finding contained in a judgment; the appellants in this Court have, therefore, no right of appeal under the law. On grounds of justice, and recognising that, on that ground, the implication of suitable exception or qualification may be justifiable and even necessary, we are prepared to follow the rule engrafted on the statute by a current of decisions by High Courts in this country, that an aggrieved party may have a right of appeal, and that the test to be applied in such a case is whether the finding, sought to be appealed against, is one, to which the rule of *res judicata* may be held to be applicable, so as to disentitle the aggrieved party to agitate the question covered by the finding in any other proceeding. In the case before us, the defendants Nos. 1, 2 and 3 are not parties, against whom the finding could operate as *res judicata* for the reasons stated above.

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In the result the preliminary objection raised by the plaintiffs, respondents in the appeal—that the appeal was not maintainable—is allowed to prevail.

The appeal is dismissed; there is no order as to costs in the appeal.

The cross-objections preferred by the plaintiffs respondents are also dismissed without costs.

BARTLEY J. I agree.

G. S. *Appeal dismissed.*