ground that this suit was unnecessary, because the purchaser could have obtained in the previous suit the relief which he seeks in the present suit. That the two prayers can be joined in the first suit was decided in *Ranjit Singh* v. *Kalidasi Debi*(1). I concede that a purchaser ought to be permitted for convenience to claim both reliefs at once in order to prevent disregard of his rights by a vendor as bold as the present appellant. Yet in strict form the right to sue for possession on his title does not arise until the conveyance has already been executed, and unless thereafter the vendor refuses to give possession: prior to execution of the conveyance, there being no right to obtain possession, the denial of a right that has not arisen cannot furnish a cause of action. I allude to these purely technical considerations merely for the purpose of deciding the question of costs. It would have been entirely in keeping with the vendor's conduct to have raised this technical objection if the purchaser had added a prayer for possession in his first suit. The vendor cannot be permitted after he has opposed his purchaser's just claim through three Courts to turn round and say that these proceedings are unnecessary. He cannot now contend what he might have contended if he had been ready and willing to give possession without any legal proceeding. I am therefore of opinion that the defendants should be made to pay the costs throughout.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

MUNISAMY MUDALY (SECOND DEFENDANT), APPELLANT,

v.

ABBU REDDY AND SIX OTHERS, (PLAINTIFF AND DEFENDANTS NOS. 1 AND 3 TO 7), RESPONDENTS.*

1912. October 23 and 24. November 18 and 1913. January 20.

Civil Procedure Code (Act V of 1908), O. XLI, r. 22—Cross-objections, memorandum of, by one respondent against another, maintainability of.

Under Order XLI, rule 22, Civil Procedure Code, one respondent can file a memorandum of cross-objections against another.

(1) (1909) I.L.R., 37 Calc., 57.

* Appeal No. 40 of 1909.

MUNISAMY MUDALY v. ABBU REDDY.

Jadunandan Prosad Singh v. *Koer Kallyan Singh* (1861) 15 C.L.J., 61 not followed.

APPEAL against the decree of V. VENUGOPALA CHETTI, the District Judge of Chingleput, in Original Suit No. 17 of 1907.

The facts of the case appear sufficiently from the following ORDER OF REFERENCE MADE BY THE CHIEF JUSTICE TO THE FULL BENCH.

WHITE, C.J.

WHITE, C.J.—In this case the plaintiff sued on a mortgage. The second defendant pleaded failure of consideration to the extent of Rs. 700. The seventh defendant impeached the mortgage altogether on the ground of fraud. The District Judge held the mortgage was good, that there had been no partial failure of consideration, and gave the plaintiff a decree for the amount of his claim. The second defendant appealed. The seventh defendant did not appeal but put in a memorandum of objections in which he asked for a declaration that the mortgage was fraudulent and not binding on him.

As regards the appeal of the second defendant I think the District Judge was right for the reasons stated in the judgment of my learned brother, which I have had the advantage of reading. I think his appeal should be dismissed with costs.

Objection was taken to the memorandum of objections on the ground that the seventh defendant, not having appealed, could not in the appeal by his co-defendant, the second defendant, against the decree on the ground that there had been a partial failure of consideration, obtain relief by way of memorandum of objections on the ground that the mortgage was bad *in toto*. The further point was taken that, if it was open to the seventh defendant to put in a memorandum of objections, he could only do so on payment of the proper Court fee.

The objection which has been taken raises the question :—Can a respondent proceed by way of memorandum of objections against a party to the appeal other than the appellant?

In Calcutta the decisions under section 561 of the Civil Procedure Code of 1882 are to the effect that the procedure by way of cross-objections can, as a general rule, only be adopted where the cross-objections are raised as against the appellant. See *Bishun Churn Roy Chowdhry* v. *Jogendra Nath Roy*(1). A

(1) (1899) I.L.R., 26 Calc., 114.

different view has been taken by this Court. In *Kulaikada Pillai* v. *Viswanatha Pillai*(1), SUBRAHMANIA AYYAR, J., observed (p. 235): "According to the decisions of this Court, a memorandum of objections may legally be filed even where the question arises between co-respondents only." WHITE, C.J.

The wording of Order XLI, rule 22, differs from that of the section which it reproduces in certain respects. The word "cross-objection" is used instead of "objection." The words "the party who may be affected by such objection" are used instead of the word "appellant." The word "cross-objection" seems appropriate as regards a question between the appellant and a respondent; inappropriate, as regards a question between two co-respondents.

On the other hand the substitution of the words "the party who may be affected by such objections" for the word "appellant" would seem to indicate that the legislature intended to bring questions between co-respondents within the scope of the rule.

The point raises an important question of practice, and it seems desirable to have an authoritative decision in the matter.

I would refer to a Full Bench the question, whether under the Civil Procedure Code of 1908 and the Rules, a party to an appeal can claim relief against a co-respondent by way of memorandum of cross-objections.

BAKEWELL, J.—This is a suit by the assignee of a mortgage for sale of the mortgaged property, in which the second defendant (appellant) one of the mortgagors, has pleaded that Rs. 700, part of the mortgage monies, were not paid by the original mortgagee; and the seventh defendant (seventh respondent) who attached the land in execution of a decree against one of the defendants, has pleaded that the whole mortgage is void as against him. The District Judge decided both these points in favour of the plaintiff, and the second defendant has presented this appeal against this decree, and the seventh defendant has presented a memorandum of cross-objections by which he seeks to reverse the finding against his plea. The decree is the usual mortgage decree for sale. BAKEWELL, J.

(1) (1905) I.L.R., 28 Mad., 229.

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[Then his lordship discussed the evidence on the question whether there was failure of consideration as pleaded by the second defendant and found it against him.]

BAKEWELL, J. With respect to the memorandum of objections, a preliminary point has been raised that the seventh defendant should have come to this Court by way of appeal, and that it is not open to him under cover of an appeal by another party upon different grounds to attack a decree in favour of his co-respondent.

It is well settled that a Court will not ordinarily give relief to a defendant in a suit and will not travel beyond the limits of the plaint, and it seems to me that the same general principle should ordinarily be applied to appeals, to which the same rules apply as in suits (see Civil Procedure Code, section 107, clause 2). An appellate Court has now full power to do justice between the parties, although they may not have filed any appeal or objections (Order XLI, rule 33), and therefore, if it thinks fit to reverse or vary a decree, it may make any order necessary to protect the interests of all parties.

The question, therefore, appears to me to be one not of the jurisdiction of the Court, but of practice, that is, as to the manner in which a party aggrieved by a decree should ordinarily place his case before the appellate Court, and whether the legislature intended by Order XLI, rule 22, to provide that in addition to his remedy by memorandum of appeal, which is the method prescribed by Order XLI, rule 1, a respondent should have a further remedy by memorandum of cross-objections.

I think the wording of Order XLI, rule 22, shows that the legislature intended to define the position of a respondent as against the appellant and to make it clear that he can avail himself of any defence or attack in order to meet the appellant's case; thus, he can not only change front and refute his arguments in the lower Court (this is the first part of the rule) but can also deliver a counter-attack by bringing into debate a matter which the apellant has not included in his appeal. I think that the legislature had in view the case where a party has for reasons of expediency not thought fit to appeal but has been forced into Court and wishes to avail himself of all his means of offence and defence. Hence a memorandum of objections is in effect a cross appeal, and notice must be given not only to the appellant but to all parties affected, sub-rule (3)

and the former cannot defeat the attack by withdrawing from his appeal, sub-rule (4). I am unable to conjecture what object the legislature may have had, upon the seventh respondent's construction of this rule, in giving a respondent two separate remedies, one by a regular appeal and one contingent upon another party appealing on a totally different matter.

Turning now to the authorities, it has been held in a long series of decisions of the Calcutta High Court under section 561 of the Civil Procedure Code of 1882, that as a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellant (see *Bishun Churn Roy Chowdhry* v. *Jogendra Nath Roy*(1), and by this Court, that that section did not contemplate such a limitation [*Timmayya* v. *Lakshmana*(2), and see *Kulaikada Pillai* v. *Viswanatha Pillai*(3) *per* SUBRAHMANYA AYYAR, J.]. Since the date of those decisions and presumably in view thereof, the legislature has amended the rule by the introduction of the word "cross" before objection; and I am of opinion that the intention was to adopt the construction of the Calcutta High Court. A respondent cannot now take objection generally to a decree, but only "cross-objections," that is, objections to the appellant's case. In *In re Cavander's Trusts*(4), JESSEL, M.R., points out that an appeal on a point which does not affect the original appellant cannot be a cross appeal, and a respondent who desires to bring forward a case with which the appellant has nothing to do must give a notice of appeal. I agree with the learned Chief Justice that the question stated by him should be referred to a Full Bench.

D. V. Nilamegha Achariyar for the appellant.

V. Narasimha Ayyangar for *T. Ranga Achariyar* and *E. Duraiswami Ayyar* for *T. R. Venkatarama Sastriyar* for the first respondent.

S. Subrahmanya Ayyar for the seventh respondent.

OPINION.—It seems to us that the answer to the question which has been referred to us should be in the affirmative.

This is in accordance with the practice which appears to have prevailed in this Court under section 561 of the Code of 1882 and we do not read Order XLI, rule 22, as indicating that

(1) (1889) I.L.R., 26 Calc., 114.
(2) (1884) I.L.R., 7 Mad., 215.
(3) (1905) I.L.R., 28 Mad., 229 at p. 235.
(4) (1881) 16 Ch.D., 270.

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the framers of the rules intended to make it clear that the practice should be otherwise.

With all respect to the learned Judges who dealt with the question in *Jadunandan Prosad Singh* v. *Koer Kallyan Singh*(1), a case which was decided under Order XLI, rule 22, it seems to us more convenient to follow a fixed rule than to decide the question with reference to the particular facts of the case in which the question is raised.

We answer in the affirmative.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Miller and Mr. Justice Sankaran Nair.

1913. April 15 and 28.

ANGAMMAL (PLAINTIFF—APPELLANT IN ORIGINAL SIDE APPEAL No. 7 OF 1910), APPELLANT.

v.

M. M. S. ASLAMI SAHIB (DEFENDANT—RESPONDENT IN ORIGINAL SIDE APPEAL No. 7 OF 1910), RESPONDENT.*

Landlord and Tenant—Tenancy, determination of—Improvements, non-removal of, during tenancy—Right to them or their value after determination of tenancy—Transfer of Property Act (IV of 1882), sec. 108 (h).

The plaintiff's husband took a house-site on lease from the predecessor in title of the first defendant in 1883. After 1883 and before 1st May 1898 the plaintiff built a house thereon to the knowledge of the landlord, and the lease was renewed by the first defendant on 1st May 1898 in plaintiff's favour who thereby agreed to vacate the land on a month's notice. While the plaintiff was in possession under that lease, the first defendant filed a suit in ejectment, in the Small Cause Court, Madras, and though the present plaintiff then set up the claim now advanced, viz., a right to the superstructure built by her or its value, she was ordered without the determination of the right set up by her, to deliver possession of the land on or before the 26th February 1907, and on her failure to do so, the first defendant was put in possession on that date.

On the 1st August following, the first defendant gave the plaintiff, notice to remove the superstructure within a fortnight. She did not do so but in 1908 instituted the present suit for (*a*) a declaration that she was the owner of the house built by her and for its possession or (*b*) in the alternative to be paid compensation for it or (c) if that was not granted, to be allowed to remove the

(1) (1912) 15 C.L.J., 61 at p. 63.

* Letters Patent Appeal No. 59 of 1911.