APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri.

1924, February 13.

NIMMAGADDA VENKATESWARLU (FIRST DEFENDANT), APPELLANT,

v

BODAPATI LINGAYYA AND TWO OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2 AND 4), RESPONDENTS.*

Suit by lessee for declaration of title and for other reliefs—Lessor party defendant – Dismissal of suit by lower Courts, holding against title—Second appeal preferred by lessor, who was defendant—Competency of appeal—Right of appeal of defendant, where suit is dismissed—Decree to embody declaration—Effect of decree, without such embodiment, on right of appeal.

Where a suit has been dismissed, the true test for determining whether the defendant can appeal is to see not merely the form but the substance of the decree and judgment : and where the point decided adversely to the defendant, is 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 is precluded from agitating the matter on appeal, merely because the suit was dismissed on some other ground.

Yusuf Sahib v. *Durgi*, (1907) I.L.R., 30 Mad., 447, referred to ; and *Secretary of State* v. *Saminatha Kounden*, (1914) I.L.R., 37 Mad., 25, distinguished.

In suits where declaration and consequential relief are sought and the consequential relief is refused because the Court is against the plaintiff's rights which he seeks to declare, the decree should formally embody the result as to the declaration ; but even if it does not do so but simply dismisses the suit, the decree in substance is one where the declaration is refused.

Where the plaintiff, who was the lessee of suit lands from the first defendant, sued for establishment of his title and for a declaration that the sale to the second defendant by the third defendant, who was the Official Receiver in insolvency of the first defendant's father, was inoperative as they had become divided long prior to the insolvency of the father and the suit

* Second Appeal No. 340 of 1921.

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lands had fallen to the son's share, and the suit was dismissed by both the lower Courts holding against the partition, on a second appeal being preferred by the first defendant,

Held, that the first defendant was competent to prefer the second appeal.

SECOND APPEAL against the decree of A. S. KRISHNASWAMI AYYAR, the Subordinate Judge of Bapatla, in Appeal Suit No. 116 of 1920 (Appeal Suit No. 417 of 1920, District Court of Guntūr) preferred against the decree of the Court of District Munsif of Ongole in Original Suit No. 477 of 1916.

The material facts appear from the Judgment.

B. Somayya for appellant.

K. Krishnaswami Ayyangar for respondent.

JUDGMENT.

The first defendant is the appellant. The plaintiff is a lessee from the first defendant under a cowle (Exhibit F), dated the 29th day of February 1916. The document is a lease for 11 years of the immovable property in dispute which it is alleged fell to the share of the first defendant in pursuance of a partition entered into in the year 1898. The first defendant's father became an insolvent and the Official Receiver sold the property and the second defendant purchased the same. As the partition was long before the insolvency, it is contended that the sale by the Official Receiver passed no property to the second defendant. Both the District Munsif and the Subordinate Judge held against the alleged partition and dismissed the plaintiff's suit.

The present second appeal is not by the plaintiff but by the first defendant, and a preliminary objection is taken that, as both the lower Courts dismissed the plaintiff's suit with costs against the first defendant, the second appeal by him is not competent, as there can

be no appeal against a mere finding. Reference has been made to *Ram Doss Lushkur* v. *Hureehur Mookerjee*(1), *Venkatasuryanarayana* v. *Sivasankara Narayana*(2), *Naganna* v. *Venkata Krishnamma*(3), *Nand Lal Pal* v. *Naresh Chander Deb*(4), *Muthu Pillai* v. *Veda Vysa Chariar*(5), *Byomkes* v. *Bhut Nath*(6), and *Secretary of State* v. *Saminatha Kownden*(7).

For the appellant it is contended that the first defendant being a lessor and his title being in dispute, the decree, though it nominally dismissed the suit of the lessee, dismissed it on the ground that the first defendant the lessor had no title, that, as between the first and the other defendants, the question at issue was whether the first defendant had any title to the property, that the matter would be *res judicata* between co-defendants and that consequently the first defendant is entitled to appeal. Reference is made to *Krishna Chandra Goldar* v. *Mohesh Chandra Saha*(8), *Yusuf Sahib* v. *Durgi*(9) and *Nagalla Kotayya* v. *Nagalla Mallayya*(10).

In *Yusuf Sahib* v. *Durgi*(9) it was held, following the decision of WOODROFFE, J., in *Krishna Chandra Goldar* v. *Mohesh Chandra Saha*(8), that where a decision dismissing a suit is in fact wholly against the defendant, such defendant can appeal against it. The decision in *Secretary of State* v. *Saminatha Kownden*(7), which was quoted, was simply to the effect that a judgment dismissing a suit would not give a right of appeal merely because there was an adverse finding on a point which is not directly and substantially in issue between the parties and which would not act as *res judicata* between co-defendants in other proceedings.

(1) (1875) 23 W.R., 86.
(2) (1915) 17 M.L.T., 85.
(3) (1896) 6 M.L.J., 86.
(4) (1917) 41 I.C., 468.
(5) (1921) 60 I.C., 397.
(6) (1921) 34 C.L.J., 489.
(7) (1914) I.L.R., 37 Mad., 25.
(8) (1905) 9 .W.N., 584.
(9) (1907) I.L.R., 30 Mad., 447.
(10) (1910) M.W.N., 719.

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I think the true test in cases of this kind is to see not merely the form but the substance of the decree and judgment. Where the point adversely decided to the defendant is directly and substantially in issue and where in other proceedings the matter would be *res judicata*, I think it would be contrary to all principles of justice and equity to hold that he is precluded from agitating the matter in appeal merely because the suit was decided in his favour on some other ground.

In the present case it is clear that the question as to whether the first defendant was divided or not from his father long before the insolvency of his father would be *res judicata* in subsequent proceedings between the Official Receiver and his assignee and the first defendant. I am therefore of opinion that the first defendant is entitled to appeal. I think that in suits where declaration and consequential relief are sought and the consequential relief is refused because the Court is against the plaintiff's rights which he seeks to declare, it would be better if the decree formally embodied the result of the declaration; but even if it does not do so but simply dismisses the suit, the decree in substance is one where the declaration is refused.

It is argued for the appellant that the question as to the factum and bona fides of the partition alleged in the plaint is *res judicata* by reason of the proceedings in suit No. 175 of 1908 on the file of the District Munsif of Ongole, which was filed by the next friend of the first defendant against the first defendant's father and certain attaching creditors and the question in issue was whether the partition now set up was valid. The District Munsif held that the partition was *bona fide* and valid and decreed the plaintiff's suit. Exhibit A is a copy of the judgment of the District Munsif. This judgment was confirmed in appeal by the District Judge

of Guntūr. Exhibit B is a copy of the judgment of the District Judge. A second appeal was filed in the High Court but it was dismissed by Justice SANKARAN NAYAR. A Letters Patent Appeal which was filed was also dismissed by MILLER and SADASIVA AYYAR, JJ., as appears from Exhibit C. It is argued that long before the Insolvency Proceedings the issue as to the partition being *bona fide* or not was decided in favour of the first defendant and against his father (the insolvent), and that consequently the Official Receiver in the Insolvency Proceedings, which were subsequent to the above decision, and the second defendant the purchaser cannot be in a better position than the insolvent. I agree with this contention and hold that the question as to whether the first defendant and his father were divided or undivided is *res judicata*. There were later suits which it is alleged by the respondents' vakil, took away any effect which Suit No. 175 of 1908 gave rise to.

Suit No. 905 of 1912 on the file of the District Munsif of Ongole was by the mother of the present first defendant and the wife of the insolvent. The first defendant in that suit was an attaching creditor, the second defendant was the husband of the plaintiff and the third defendant a lessee from her. An issue was raised as to the partition as between the second defendant and his son as it was alleged that the plaintiff got the suit property for her maintenance. It was held that there was no arrangement as pleaded by the plaintiff settling the suit property on her at the partition between the second defendant and his son. The judgment in that suit is marked as Exhibit II. It was not necessary to decide in that suit whether the partition was *bona fide* as the claim of the plaintiff was based on an oral arrangement contemporaneous with the partition giving her the property in dispute. Suit No. 299 of 1917 on the file of

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the Principal District Munsif's Court of Bezwada which was transferred to the Additional District Munsif's Court of Bezwada and numbered there as suit No. 19 of 1919 was filed by the present first defendant against his father and the other members of his family to establish his exclusive right to certain lands. The first defendant's father was the ninth defendant in that suit. It was alleged by the plaintiff in that suit that there was a partition between him and his father the ninth defendant. It appears from paragraph 9 of the judgment which has been filed as Exhibit V that a subsidiary issue was raised as to whether the partition alleged by the plaintiff was true. The District Munsif held that there was no *bona fide* partition and that the alleged partition was merely a cloak to be used against subsequent transferees from plaintiff's father.

The suit was filed in 1917 while the insolvency petition of the first defendant's father was in 1912. The Official Receiver was not a party. The lease to the present plaintiff was on the 9th February 1916 and the sale by the Official Receiver to the second defendant herein was on the 16th September 1916. Neither the plaintiff nor the second and third defendants herein were parties to the litigation of 1917 and it is clear that the findings in that suit are not *res judicata* against them. The only party to that suit who is a party to these proceedings is the present appellant. It is true that the appellant's father was the ninth defendant in the suit, but he had become insolvent long before and all his properties had vested in the Official Receiver. If the decision in the suit of 1917 was that the partition was *bona fide* it would be open to the Official Receiver and his vendee to plead that it is not binding on them as they were not parties. I find it difficult to see how they can now say that the decision being the other way renders

the question *res judicata* so far as the first defendant is concerned. After the lease by the first defendant and after the insolvency of his father they ceased to have an interest in the property sufficient to make them represent the alienees.

It seems to me, however, that the finding of both the District Munsif and the Subordinate Judge that it has not been shown that the land in dispute fell to the share of the first defendant at the partition or was in the possession or enjoyment of the first defendant is a finding of fact which cannot now be questioned. Even assuming that there was a partition, the plaintiff who seeks for a declaration that the lease to him is valid and binding on the defendants has to show that the lands which were leased to him by the first defendant fell to the share of the first defendant and that they were in the possession and enjoyment of his lessor. So far as the litigation in Suit No. 175 of 1908 was concerned, it did not decide that the lands now in dispute fell to the share of the first defendant who was the plaintiff in that suit. All that it decided was that there was a partition and that the land in question in that suit fell to the share of the plaintiff. Strong reliance was placed upon a registered letter, Exhibit K, dated the 19th of August 1898 and it is argued that that letter shows that there was a partition at which the suit land fell to the share of the first defendant. This letter was not filed in the previous suits or proceedings, and both the District Munsif and Subordinate Judge do not place any reliance on the letter. The District Munsif in his judgment observes :

"The letter, Exhibit K, which is now filed in this Court has not been filed in the previous suits and no grounds are now alleged for the non-filing of the same in those suits. I cannot attach much weight to the letter as evidencing partition. After all, the partition appears to me to be a cloak to be used against the alienees from first defendant's father."

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The Subordinate Judge says in appeal with reference to Exhibit K:

"The preservation of that letter and the production of it by the first defendant's father proves beyond the shadow of a doubt that the alleged partition was a bogus affair and that the first defendant's father brought into existence letters like Exhibit K to serve as evidence to defraud his alienees and creditors."

Both the lower courts having refused to attach any weight to Exhibit K as evidence of the fact that at the partition in the year 1898 the suit land fell to the share of the first defendant, I do not see how I can in Second Appeal reverse these findings of fact. It is also found that the first defendant was not in possession and enjoyment. The plaintiff before he can succeed in this suit has to show not only that there was a partition but at the partition the properties in dispute were allotted to the share of the first defendant and that they were in his possession and enjoyment. As he has not done so, the suit was rightly dismissed. The Second Appeal fails and is dismissed with costs.

K,R.