

## APPELLATE CIVIL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,  
Mr. Justice Krishnan and Mr. Justice Beasley.*

M. D. VENKATASAM CHETTY AND ANOTHER, APPELLANTS,

1925,  
October 27.

*v.*

MOTHICHAND GULABCHAND, RESPONDENTS.\*

*Practice—Memorandum of objections in Original Side appeals—  
Competency of.*

Under the provisions of the Civil Procedure Code and the rules made by the High Court thereunder, it is competent for a respondent in an appeal from the Original Side of the High Court to file a memorandum of objections against the decree appealed from. *Sabitri Thakurain v. Savi*, (1921) I.L.R., 48 Calc., 481 (P.C.), applied. *Bhimasena Rao v. Venugopal Mudali*, (1925) I.L.R., 48 Mad., 631, overruled.

MEMORANDA of cross-objections sought to be preferred by the respondents against the decree of DEVADOSS, J., passed in the exercise of the ordinary Original Civil Jurisdiction of the High Court in O.S. No. 376 of 1918 and against the order of WALLER, J., passed in the exercise of Insolvency Jurisdiction in I.P. No. 112 of 1917.

## ORDER OF REFERENCE TO A FULL BENCH.

KUMARASWAMI SASTRI, J.—In this case the question raised is whether a memorandum of objections can be filed in an appeal from the Original Side. The petitioner before us filed a memorandum of objections but it was returned by the office on the ground that no memorandum of objections could be filed, relying on a decision of the CHIEF JUSTICE and SRINIVASA

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\* S.R. Nos. 5433 and 7519 of 1925 in O.S. Appeal Nos. 83 of 1924 and 22 of 1925, respectively.

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AYYANGAR, J., in *Bhimasena Rao v. Venugopal Mudali*(1). We find it difficult to see why a memorandum of objections should not be filed in a Original Side appeal. Their Lordships of the Privy Council have in *Sabitri Thakurain v. Savi*(2) (to which the attention of the learned Judge does not seem to have been drawn, and which overruled the view in *Sesha Ayyar v. Nagarathna Lala*(3)) held that the fact that Letters Patent appeals from judgments on the Original Side are not from one Court to another but from one Judge of the High Court to two or more Judges does not prevent the sections of the Code as to security for costs from being applicable and the main ground given by SRINIVASA AYYANGAR, J., does not therefore hold. Turning to the rules of our Court and the Code, rule 1 of Order XLI-A of the Civil Procedure Code which refers to appeals to the High Court from the original decrees of subordinate courts, says that "the rules contained in Order XLI shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this Order." So, except for the modifications there, the whole of the Code applies, and under this Order, there is provision made for memorandum of objections being filed. Then rule 1 of Order XLI-B says that "the rules of Order XLI-A shall apply so far as may be to appeals to the High Court of Madras under clause (15) of the Letters Patent of the said Court; provided that it shall not be necessary to file copies of the judgment and decree appealed from." Then rule 2 of that order says that "notice of the appeal shall be given in the manner prescribed by Order XLI-A, rule 6." So that Order XLI-B distinctly applies to appeals under clause (15) of the Letters Patent. So far as the Civil Procedure Code is concerned, section 117 says that "Save as provided in this part or in part X or in rules, the provisions of this Code shall apply to such High Courts . . ." Section 120 of the Code refers to the provisions which will not apply to the High Court in the exercise of its Original Jurisdiction. Then section 121 refers to the rules in the body of the Code and says that those rules shall be in force until they are annulled or modified in accordance with the rule-making powers given in the Code. Section 129 gives the High Court power to make rules not inconsistent with the Letters Patent to regulate its own procedure. Order XLIX, rule 3, gives the rules which will not apply to the Original Side of the High Court and, so far as

(1) (1925) I.L.R., 48 Mad., 631. (2) (1921) I.L.R., 48 Cal., 481 (P.C.).

(3) (1904) I.L.R., 27 Mad., 121.

Order XLI is concerned, the only rule which is not applicable is rule 35 about the signing of the decrees.

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Turning to the Original Side rules, we find that specific provision is made for filing memorandum of objections. Rule 351 expressly refers to the respondents' case being printed and refers to the memorandum of objections specifically. So that the rules contemplate the filing of a memorandum of objections. Article 37 of the Fee Rules provides a fee for the filing of a memorandum of objections—Rs. 75.

The only objection that can be taken is that an appeal from the Original Side to the Appellate Side is not an appeal from one Court to another but an appeal from one Judge of the High Court to one or more Judges of that Court, but this objection has been considered by the Privy Council and has been overruled, so far as it relates to security for costs, in *Sabitri Thakurain v. Savi*(1). Their Lordships of the Privy Council dealt with the various sections of the Code and said that the fact that the appeal was from one Judge of the Court to another under the Letters Patent is no ground for not applying the provisions of the Code.

This decision overrules the judgment of BHASHYAM AYYANGAR, J., in *Sesha Ayyar v. Nagarathna Lala*(2). Evidently SRINIVASA AYYANGAR, J., who delivered the judgment in *Bhimasena Rao v. Venugopal Mudali*(3), had in mind the decision of BHASHYAM AYYANGAR, J., in *Sesha Ayyar v. Nagarathna Lala*(2). When he speaks of an appeal under the Letters Patent as not being an appeal from one Subordinate Court to another his attention evidently does not seem to have been drawn to the decision of their Lordships of the Privy Council in *Sabitri Thakurain v. Savi*(1), and to the various rules referred to above both in the Civil Procedure Code and in the Original and Appellate Side Rules of the High Court. It seems to me that the argument that an appeal under the Letters Patent from the Original Side is not governed by the Code could not be entertained after the decision in *Sabitri Thakurain v. Savi*(1). With all respect I do not agree with the decision in *Bhimasena Rao v. Venugopal Mudali*(3). But in view of the fact that a Bench of this Court has held otherwise, and that the question is one of procedure which is likely to arise very frequently, I think the case should be referred to a Full Bench so that there

(1) (1921) I.L.R., 48 Calc., 481 (P.C.). (2) (1904) I.L.R., 27 Mad., 121.

(3) (1925) I.L.R., 48 Mad., 631.

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GULABCHAND. may be an adjudication once and for all on the matter. I would therefore refer for the decision of a Full Bench the following question :—“ Whether it is competent for the respondent in an appeal from the Original Side to file a memorandum of objections against the decree appealed from ? ”

KaISHNAN, J.—I agree with my learned brother that the question whether a memorandum of objections could be filed in an appeal from the Original Side should be decided by a Full Bench. The practice has always been to allow such memoranda of objections. Till recently there was nothing contrary to it; but our attention has been drawn to the decision of the CHIEF JUSTICE and SRINIVASA AYYANGAR, J., in *Bhimasena Rao v. Venugopal Mudali*(1), where it was held that such a memorandum of objections was not competent in the case of Original Side appeals. It seems to me that this matter requires further consideration. Order XLI-A of the Civil Procedure Code deals with appeals to the High Court from original decrees of subordinate courts. Rule 12 of that Order refers to memorandum of objections. Order XLI-B says that “ the rules of Order XLI-A shall apply, so far as may be, to appeals to the High Court of Madras under clause (15) of the Letters Patent of the said Court, provided that it shall not be necessary to file copies of the judgment and decree appealed from.” This Order seems to contemplate that a memorandum of objections can be filed in Original Side appeals in the same manner as in mufassal appeals, for there is nothing in Order XLI-B to prevent it being considered to be wide enough to include memorandum of objections. This view is supported by the practice that has been hitherto followed. The sections of the Code giving power to the High Court to make rules for regulating its own procedure have been referred to by my learned brother and I do not want to cover the same ground again. It is clear that the rules of practice referred to by my learned brother contemplate the filing of memorandum of objections, and one of them fixes the Court fee payable. They are rules made with authority and it would therefore seem that a memorandum of objections is competent in the case of Original Side appeals as well.

The question regarding the taking of security for costs in an Original Side appeal was considered by the Privy Council and the attention of their Lordships was drawn to the case reported in *Sesha Ayyar v. Nagarathna Lala*(2), in which BHASHYAM

(1) (1925) I.L.B., 48 Mad., 331.

(2) (1904) I.L.R., 27 Mad., 121.

AYYANGAR, J., had held that the Civil Procedure Code did not apply to appeals from the Original Side and that security could not be taken in an Original Side appeal. Their Lordships dissented from that view and held that the Code applied in such a case. There are observations in that case which make it clear that the Code will apply not only to security proceedings which was the matter which was being dealt with by their Lordships but also to other matters arising in appeals under the Letters Patent. After that decision it is difficult to say that there is anything wrong in allowing a memorandum of objections to be filed in an Original Side appeal. I, therefore, with all respect, think that the decision of the CHIEF JUSTICE and SRINIVASA AYYANGAR, J., requires reconsideration and I agree to the question proposed by my learned brother being submitted to the Full Bench.

VENKATASAN  
CHETTY  
J.  
GULABCHAND.

#### ON THIS REFERENCE

*V. Radhakrishna Ayya* for respondent.—Order XLI, rule 22, Civil Procedure Code, allows memorandum of objections in mufassal appeals. On the view that this rule does not apply to Original Side appeals, *Bhimasena Rao v. Venugopal Mudali*(1) forbids a memorandum of objections in Original Side appeals. Rule 351 of Original Side Rules allows impliedly a memorandum of objections in Original Side appeals. Section 117, Civil Procedure Code, allows the application of Order XLI to Original Side appeals. Moreover Order XLI-A and Order XLI-B of the Appellate Side Rules framed under section 122 make Order XLI applicable to Original Side appeals. Article 37 of Appendix II of Original Side Rules provides for fees in memorandum of objections in Original Side appeals. Order XLIX, Civil Procedure Code, rule 3, permits Order XLI being made applicable to Original Side appeals except rule 35. See also *Sabitri Thakurain v. Savi*(2), applying Order XLI, rule 10, to Original Side appeals, in cases of security for costs overruling *Sesha Ayyar v. Nagarathna Lala*(3). See also *A. M. K. Goulding, In re*(4).

*K. S. Narayana Ayyangar* in the insolvency appeal submitted that his arguments were the same and referred to *Virupaksha Rao v. Ranganayaki Ammal*(5).

The appellants were not represented.

(1) (1925) I.L.R., 48 Mad., 631.

(2) (1921) I.L.R., 48 Cal., 481 (P.C.).

(3) (1904) I.L.R., 27 Mad., 121.

(4) (1924) I.L.R., 51 Cal., 695.

(5) (1925) 21 L.W., 662.

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## OPINION.

The judgment of the Privy Council in *Sabitri Thakurain v. Savi*(1) makes it clear that the provisions of Order XLI will apply to Original Side appeals under the Letters Patent. Rule 22 of that Order expressly provides for cross-objections being raised by respondents. If there were any doubt about it, it would be resolved by the provisions of our own Orders XLI-A and XLI-B. See also Order XLIX, rule 3. Had the Privy Council case been cited before the Court in the case of *Bhimasena Rao v. Venugopal Mudali*(2) it would no doubt have come to a different conclusion. We decide accordingly that the memorandum of objections in this case is competent.

Costs will be costs in the cause.

*Grant and Grestorex*, Attorneys for the respondents in Original Side Appeal No. 22 of 1925.

N.R.

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 APPELLATE CIVIL—SPECIAL BENCH.

*Before Sir Murray Coultts Trotter, Kt., Chief Justice,  
Mr. Justice Krishnan and Mr. Justice Beasley.*

THE COMMISSIONER OF INCOME-TAX, MADRAS

(REFERRING OFFICER),

1925,  
October 29.

v.

KING AND PARTRIDGE (RESPONDENTS).\*

*Income-tax Act (XI of 1922), sec. 11.—Profession tax paid to Municipality under sec. 111 of the Madras City Municipal Act (IV of 1919), not a proper deduction under sec. 11 of Income-tax Act.*

Profession tax paid by a person under section 111 of the Madras City Municipal Act (IV of 1919) is not a proper

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(1) (1921) I.L.R., 48 Calc., 481 (P.O.). (2) (1925) I.L.R., 48 Mad., 631.

\* Referred Case No. 3 of 1925.