

APPELLATE CIVIL—FULL BENCH.

*Before Sir Lionel Leach, Chief Justice,
Mr. Justice Mockett and Mr. Justice Krishnaswami Ayyangar.*

VATTIPALLE ESWARIAH (APPELLANT—
THIRD DEFENDANT), APPELLANT,

1940,
March 4

v.

VATTIPALLE RAMESWARAYYA AND SEVEN OTHERS
(RESPONDENTS—PLAINTIFF AND DEFENDANTS 1, 2 AND
4 TO 8), RESPONDENTS.*

*Civil Procedure Code (V of 1908), O. XLI, rr. 11 and 12—
Admission of appeal—As a whole and not in part only.*

Under the terms of Order XLI, rules 11 and 12, of the Code of Civil Procedure, there are only two courses open to a Court in dealing with an appeal, namely, to dismiss or admit the appeal as a whole. It cannot direct that the appeal be admitted in part only.

Case-law reviewed.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of Cuddapah in Appeal Suit No. 17 of 1935 preferred against the decree of the Court of the District Munsif of Nandalur in Original Suit No. 410 of 1930.

V. S. Narasimhachar for appellant.—The second appeal is against a partition decree and relates to a number of items of property. At the time of its admission GENTLE J. allowed the appeal to be admitted in respect of one item only. I submit the order restricting the admission of the appeal in respect of a particular item only is erroneous and is *ultra vires*. Once an appeal is admitted the entire appeal is before the Court. The Bench finally hearing the appeal is not bound by any restrictions made at the time of admitting it. The terms of Order XLI, rules 11, 12 and 16, of the Civil Procedure Code are opposed to any such restrictions being imposed.

* Second Appeal No. 921 of 1936.

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Under Order XLI, rules 11 and 12, an appeal must be admitted or rejected as a whole. There is no provision to admit or dismiss an appeal in part. In *Lukhi Narain Serowji v. Sri Ram Chandra Bhuiya*(1) it was held that an order confining the hearing of an appeal to some only of the grounds mentioned in the memorandum of appeal was not valid and binding. This decision was approved and followed in *Nasir Sheikh v. Emperor*(2) in regard to an appeal under section 422 of the Criminal Procedure Code and the same principle was held to apply. These two decisions were followed by this Court in *Nagalingam Chetty v. Pichu Chetty*.* The decision in *Lukhi Narain Serowji v. Sri Ram Chandra Bhuiya*(1) was reaffirmed in *Janaki Nath Hore v. Prabhasini Dasee*(3). These decisions of the Calcutta High Court were cited with approval by the Bombay High Court in *Krishnaji Shrinivas v. Madhusa Appansa*(4), but the Full Bench in that case went further and held that where an appeal involved questions which were severable it could be dismissed in part by an express order to that effect and be admitted in regard to the rest. This view is not justified by the terms of Order XLI, rules 11 and 12, of the Civil Procedure Code and it may give rise to difficulties in drafting the order. The Patna High Court does not agree with the Bombay view; see *Rekha Thakur v. Ramnandan Rai*(5). WADSWORTH J., however, seems to follow in *Pyuda Suryanarayanamurthy v. Vuppuloori Kamayya Sastry*† the view of the Bombay High Court. In any case, GENTLE J. has not expressly dismissed any portion of the present appeal.

Ch. Raghava Rao for third respondent—Properly construed, the order of GENTLE J. amounts to a dismissal of the appeal in part. The view of the Bombay High Court is correct. The terms of Order XLI, rules 11 and 12, of the Civil Procedure Code do not preclude the dismissal of an appeal in part. A decree may be composite in character and consist of several separable and separate subject-matter. In an appeal against such a decree there is nothing to prevent a Court from admitting some portions of the appeal and dismissing others. It has been held under clause 15 of

* Second Appeal No. 2198 of 1912.

† Second Appeal No. 1141 of 1934.

(1) (1911) 16 C.W.N. 921.

(2) (1913) I.L.R. 41 Cal. 406.

(3) (1915) I.L.R. 43 Cal. 178.

(4) (1933) I.L.R. 58 Bora. 406 (F.B.).

(5) (1935) I.L.R. 15 Pat. 96.

the Letters Patent of the Madras High Court that if leave to appeal is granted on some points the appeal must be confined to those points only; see *Bulliraju v. Satyanarayanamurti*(1).

[LEACH C.J.—The terms of clause 15 of the Letters Patent are different from those of Order XLI, rules 11 and 12, of the Civil Procedure Code. As the rules stand at present we think that admission or dismissal of an appeal in part is not justified.]

[Counsel then argued on the merits in respect of all the items included in the memorandum of appeal.]

N. Appu Rao for first respondent.

Other respondents were not represented.

JUDGMENT.

LEACH C.J.—This second appeal has been placed before this Full Bench as it raises the important question whether the Court in dealing with an appeal under Order XLI, rule 11, of the Code of Civil Procedure, can direct that it be admitted in part only. The appeal arises out of a suit filed in the Court of the District Munsif of Nandalur for the partition of seventy-two items of property held in common by eight people. The first respondent in the appeal was the plaintiff. A decree for partition was granted by the District Munsif who gave his decision on the claims of the parties to the various items of property. The appellant and the third respondent appealed to the Subordinate Judge of Cuddapah. The Subordinate Judge set aside the allotments of the District Munsif and made fresh allotments. The appellant was dissatisfied with the Subordinate Judge's decision in so far as it related to items Nos. 29, 30, 31, 33, 37 and 38 of the properties and he filed the present appeal which was placed before GENTLE J. on the question of admission. The learned Judge passed an order admitting the appeal only in respect of item No. 30.

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In my opinion the learned Judge erred in admitting the appeal only in part. As he considered that there was a question which called for an answer he had no discretion in the matter in view of the wording of Order XLI, rules 11 and 12 (1).

Rule 11 says :

“ (1) The appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.”

Rule 12 (1) is in these words :

“ Unless the appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal.”

By virtue of rule 11 the appellate Court may dismiss the appeal without serving notice on the respondent but if it does not dismiss the appeal summarily it must, by virtue of rule 12 (1), fix a day for hearing “the appeal”. There is nothing in either rule which suggests that the Court may admit the appeal in part.

This question has been raised before in this Court and also in the Calcutta, Bombay and Patna High Courts. It was raised apparently for the first time in the Calcutta High Court. In *Lukhi Narain Serowji v. Sri Ram Chandra Bhuiya*(1) a Bench of that Court held that it was not competent for a Court of Appeal to restrict the appeal to some specified grounds. Once the appeal is admitted all points in the memorandum

(1) (1911) 15 C.W.N. 921.

are open to the appellant. This decision was affirmed in *Janaki Nath Hore v. Prabhasini Dasee*(1).

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A Full Bench of the Bombay High Court considered the matter in *Krishnaji Shrinivas v. Madhusa Appansa*(2). The Court expressed agreement with the view of the Calcutta High Court in *Lukhi Narain Serowji v. Sri Ram Chandra Bhuiya*(3) and in *Janaki Nath Hore v. Prabhasini Dasee*(1) that it was not open to a Judge to admit an appeal and at the same time to restrict the grounds on which it was to be heard, but it was of the opinion that, if the appeal involved questions which were severable, the Judge could dismiss the appeal in part and admit it in part under Order XLI, rule 11, "just as at the final hearing, the Court may dismiss the appeal in part and allow it in part." There is nothing in Order XLI which permits of severance and therefore I do not share this opinion. It may be desirable to provide for such a course but as the question has to be decided on the present wording of Order XLI, in my judgment there are only two courses open to the Court, namely, to dismiss or admit the appeal as a whole.

In *Rekha Thakur v. Ramnandan Rai*(4) the Patna High Court saw no objection, if at the time when the appeal is admitted the Court is informed that the appeal will be confined to certain specified grounds only and that the other grounds are abandoned or if it is conceded on behalf of the appellant that grounds other than those specified are not fit to be urged in appeal, to the Court making a note of the fact. Making a note of the fact is quite a different thing from passing a substantive order. Relying on the Calcutta cases

(1) (1915) I.L.R. 43 Cal. 178.

(2) (1933) I.L.R. 58 Bom. 406 (F.B.).

(3) (1911) 15 C.W.N. 921.

(4) (1935) I.L.R. 15 Pat. 96.

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the Patna High Court held that an appeal cannot be admitted on a limited ground.

There are two decisions of this Court but neither has been reported. The first decision is *Nagalingam Chetty v. Pichu Chetty* *. There, SESHAGIRI IYER and KUMARASWAMI SASTRI JJ. followed the decision in *Lukhi Narain Serowji v. Sri Ram Chandra Bhuiya*(1). It was pointed out that the direction to the appellant to confine his arguments to particular points while placing him at a disadvantage was calculated to interfere with the prerogative of the Bench hearing the appeal and on principle the Court thought that the restriction was unsustainable. The second case is *Pyuda Surya Narayanamurty v. Vuppu-loori Kamayya Sastri* † which was decided by WADSWORTH J. The learned Judge appears to have accepted the Bombay opinion that an appeal can be dismissed in part provided that there is an express order of dismissal in part. I have indicated that in my opinion this view is not justified by the terms of Order XLI, rules 11 and 12.

I hold that the appellant is not confined in his appeal to the question raised with regard to item No. 30 but is at liberty to challenge the decree on all the grounds mentioned in his memorandum of appeal.

The Subordinate Judge has omitted to deal with item No. 30 and it is agreed that the appellant is entitled to a one-third share in this piece of property and the first respondent to a one-sixth share. The appeal, however, fails in respect of the other items. The appellant has omitted to print the whole of the record and from the parts of the record which

* Second Appeal No. 2198 of 1912.

(1) (1911) 15 C.W.N. 921.

† Second Appeal No. 1141 of 1934.

he has printed he is unable to show that the Subordinate Judge erred in not giving him a greater share in those items. The first respondent has filed a memorandum of objections in respect of items Nos. 32, 34 and 47, but this must also be dismissed as the printed record does not provide material for supporting the objections. The result is that the decree of the Subordinate Court will be modified by granting the appellant a one-third share in item No. 30 and the first respondent a one-sixth share in it. The value of item No. 30 is only Rs. 2-4-0. The appellant has substantially failed and must therefore pay the costs of the third respondent. There will be no order as to costs on the memorandum of objections.

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MOCKETT J.—I agree.

KRISHNASWAMI AYYANGAR J.—I agree.

N.S.

APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice King and Mr. Justice Krishnaswami Ayyangar.

CHIKKANNA CHETTIAR *alias* V. S. NANJAPPA
CHETTIAR (PETITIONER-APPELLANT), PETITIONER,

1940,
February 23.

v.

V. S. PERUMAL CHETTIAR AND ANOTHER (RESPONDENTS),
RESPONDENTS.*

Land Acquisition Act (I of 1894), ss. 3 (d) and 30—Reference under sec. 30 to Subordinate Judge—Decision appealable.

An appeal lies from the decision of a Subordinate Judge appointed by the Provincial Government under section 3 (d)

* Civil Revision Petition No. 729 of 1938.