1890

JAGRUP RAI v. RADHEY SINGH.

in the order proposed by the learned Chief Justice and the form which the decree should take.

TYRRELL, J.—I also concur.

MAHMOOD, J.—I am also of the same opinion, and only wish to say that in the case of *Shaki Ram Shib* v. *Lal* (1) I had the honor of considering this question with Mr. Justice Oldfield, and the views which were then expressed were approved, as my brother Straight has pointed out, by Petheram, C. J., and my brother Tyrrell in the case of the *Himalaya Bank, Limited*, v. *The Simla Bank, Limited*, (2). Indeed, at page 28 a passage from that judgment is quoted which is of importance in this matter; and I give my concurrence all the more willingly, because now a Bench consisting of the whole of this Court as now constituted has approved it.

KNOX, J.—I agree with the learned Chief Justice.

Appeal decreed.

1890
December 11.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

BISHEN DAYAL (JUDGMENT-DEBTOR) *v.* THE BANK OF UPPER INDIA, LIMITED, (DECREE-HOLDER). *

Execution of decree—Party improperly brought on the record as representative of deceased Judgment-debtor—Appeal—Costs—Civil Procedure Code, ss. 2, 244, *cl.* (c). 540.

One B. D. was made a party to an application for execution of a decree as one of the representaives of a deceased judgment-debtor. It had been decided in a previous suit that B. D. was not related to the judgment-debtor in such a manner that he could become his legal representative, and in this proceeding also he objected that he was not such representative, and his objection was allowed and the order allowing it remained unappealed and became final. The Court, however, while allowing the objection, did not give the objector his costs.

Held that the objector did not, by being improperly brought into the execution proceedings, lose his right of appeal, and further, that he could under the circumstances appeal on the question of costs alone.

* First appeal No. 196 of 1889 from a decree of G. J. Nicholls, Esq., District Judge of Cawnpore, dated the 24th August 1889.

(1) Weekly Notes, 1885, page 63. (2) I. L. R., 8 All. 23.

1890

BISHEN DAYAL v. THE BANK OF UPPER INDIA, LIMITED.

The facts of this case are fully stated in the judgment of Mahmood, J.

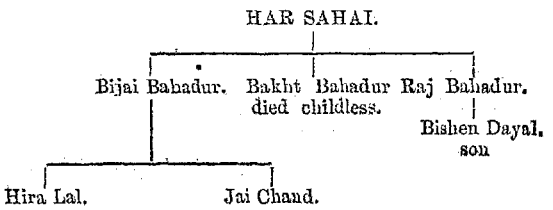
Munshi *Ram Prasad*, for the appellant.

Mr. *J. E. Howard*, for the respondent.

MAHMOOD, J.—This is a first appeal, purporting to have been presented to this Court under the provisions of cl. (*c*) of s. 244 of the Code of Civil Procedure, read with the definition of decree contained in the interpretation clause of s. 2 of that enactment (Act XIV of 1882), and as such the appeal must be regarded as one falling under the purview of s. 540 of that enactment.

When the case was originally heard by me, Mr. *Ram Prasad* appearing on behalf of the appellant, a preliminary objection was raised on behalf of the respondent that no such appeal lay. Another point was urged against the appeal, *viz.*, that even if the appeal did lie, the Court below had exercised a discretion vested in it by s. 220 of the Civil Procedure Code, and that discretion was not open, under the circumstances of this case, to interference by this Court in appeal, because the question related only to costs and not to the substantial merits of the dispute between the parties.

In order to render the contention thus presented to me intelligible, and also because the learned Judge of the Lower Court in recording his judgment has in more than one instance mixed up the names of the parties, I consider it necessary to give the following tabular statement as representing the relative position of the parties whose names are important for the disposal of this appeal.



The family represented by the above table is a family of Sribastub Kayasthas, whose religious doctrines, apparently, are so undefined that it became necessary for Bishen Dayal, the son of Raj Bahadur, to

1890

BISHEN DAYAL v. THE BANK OF UPPER INDIA, LIMITED.

sue the latter and other members of the family in order to establish that the family were Hindus and not Muhammadans, or at least that the Hindu law of inheritance applied to the family and not the Muhammadan law of the Kurán. This cause finally came up before a Division Bench of this Court, consisting of my brothers Straight and Tyrrell, who, in the case named *Raj Bahadur* v. *Bishen Dayal* (1) disposed of this question, and that report shows the exact decision at which the learned Judges arrived.

It is unnecessary for me to say more about that decision than that I have referred to it because it explains the preliminary circumstances of the question which I am going to decide in this case. The decision of the High Court was passed on the 22nd March 1882, and that decision became final and is so admitted by the parties.

Subsequently to this decision it appears that upon a hypothecation bond jointly executed by Bakht Bahadur and Bijai Bahadur, the Bank of Upper India, Ld., respondent in this appeal, obtained a decree on the 25th August 1884, and that decree, being a money-decree by enforcement of lien, also became final.

Bakht Bahadur died childless on the 14th April 1889, leaving, as the table which I have already stated shows, certain relatives, among others a brother, Raj Bahadur, the father of Bishen Dayal the present appellant before me.

Matters stood thus when on the 27th May 1889, the Bank, decree-holder, filed an application for execution under s. 235, of the Civil Procedure Code, for execution of the decree of the 25th August 1884, and in that application, acting apparently under s. 234 of the Code, the decree-holder represented the judgment-debtors to be Bijai Bahadur, the original debtor of the decree, and along with him Jai Chand and Hira Lal, as sons of the deceased Bijai Bahadur, and besides these Raj Bahadur and Bishen Dayal, described in the application as the heirs of Lala Bakht Bahadur, the deceased.

This application initiated the present litigation, and in the course thereof, among other matters which ensued, and to which I need not

(1) I. L. R. 4, All., 343.

refer, Bishen Dayal, the present appellant before me, came forward as an objector, alleging that he had been wrongfully impleaded, because he was not the heir of the deceased Bakht Bahadur, the judgment-debtor, nor in any manner liable to the decree of the 25th August 1884, which was being put into execution. In other words, he stated that he was in no manner concerned with the decree, either by dint of representing any interest of Bakht Bahadur, or otherwise, and that the action of the Bank, decree-holder, in thus impleading him was so wrong that he had been dragged into a litigation with which he had no concern.

This objection was, rightly or wrongly, decided in the Court below and resulted in an order passed by the lower Court in the following terms :—

"Bishen Dayal on his own objection is struck out of the record, the objectors bearing their own costs."

From this adjudication no appeal has been preferred by the Bank, decree-holder, and it must, therefore, be taken that the adjudication of the Court below as to Bishen Dayal having no interest as legal representative of the deceased judgment-debtor, Bakht Bahadur, under the decree of the 25th August 1884, is a final adjudication.

But Bishen Dayal, the objector, who had thus succeeded in the Court below, has preferred this appeal, and the learned argument which has been addressed on his behalf by Mr. *Ram Prasad*, has been considered by me, bearing fully in my mind the necessity for the Court of appeal not lightly to disturb an order as to costs made under s. 220 of the Civil Procedure Code.

I have said so repeatedly and wish to repeat it now that orders as to costs should not unnecessarily be made subject of appeal, because an appellate Court would not on slight grounds disturb the discretion of the Court of first instance.

But it seems to me that in this case the decree of this Court of the 22nd March 1882, which had not only been passed but had also been published in the Official Reports, in volume 4 of the I. L. R., Allahabad series, page 343, ought to have put the decree-

1890

BISHEN DAYAL v. THE BANK OF UPPER INDIA, LIMITED.

holder upon caution as to whether or not Bishen Dayal was to be impleaded in the cause.

First of all, before I give effect to this circumstance, I must dispose of the preliminary objection to which I have referred, *viz.*, that no appeal lay in this case.

In the Full Bench case of *Seth Chand Mal* v. *Durga Dei* (1) I gave expression to the views which I still hold in a judgment to be found at pages 325 to 328, especially the observations made by me at page 326.

In the present case it has been argued on behalf of the respondent that because the lower Court has held that Bishen Dayal was not a representative of the deceased debtor Bakht Bahadur, therefore, he has no right of appeal at all, and much learned argument was addressed as to this matter. It seems to me that when this petition of the 27th May 1889, praying for execution, was filed, Bishen Dayal was already impleaded in the cause and no question arose over that petition as a petition for execution of decree. It was a *lis* of which the array of parties was distinctly stated in the petition whereby it was initiated; and, being so initiated, and the array of parties being such as that petition represented, the adjudication of the Court that the appellant was not the legal representative of Bakht Bahadur will not take away the right which cl (*c*) of s. 244, confers upon him, read with s. 540 of the Civil Procedure Code. What he says is that he was called the representative of a dead judgment-debtor, Bakht Bahadur, but he was not such representative, that he was a stranger to the suit and a stranger to the decree of the 25th August 1884, in which that suit resulted, that he had been wrongly dragged into Court by the erroneous behaviour of the decree-holder, and that, because of this, the Court rightly decided that he was a third party, and in consequence that he was released from such liability as might have arisen under that decree imposing burden upon him. I have no doubt that the words of the Civil Procedure Code give him the right of appealing in order to

(1) I. L. R., 12 All., 313.

complain of the costs which have not been awarded in his favour for having been thus wrongly impleaded.

Then as to the merits of the order itself. As a question of discretion, I hope it will always be remembered by Courts of Justice when exercising their jurisdiction under the discretionary power of s. 220, that when an innocent party is dragged into a *lis* and has to stand the brunt of a trial, he has to undergo much vexation of mind independent of expenses, for wrongly being dragged into a cause, and such circumstances are enough consideration for allowing at least such costs as the law allows to a successful litigant.

In this case the judgment of the learned Judge of the lower Court shows the repeated mistakes he has made over the relationship of the parties. I find the name of Bakht Bahadur on more than one occasion used instead of that of Bishen Dayal, and that Bishen Dayal has been wrongly described in the cause as a party to the litigation.

It was probable on this account that the learned Judge did not follow the general rule of the law that a successful party is entitled to his costs and that the mistakes of the opposite party are no reason for departing from the general rule. Indeed the proviso to s. 220 of the Civil Procedure Code itself gives the warning to the effect that there should be reason for any orders as to costs which do not follow the event. In the judgment of the learned Judge there are no reasons, other than that the Bank, decree-holder, was not sufficiently cautious to ascertain who were the parties against whom to proceed in the execution of their decree of the 25th August 1884.

I think I have said enough to show that the order of the Court below, so far as it relates to the costs of Bishen Dayal, objector, appellant before me, cannot be sustained. No other party has appealed, and therefore my order in this is case that this appeal, be allowed, that the order of the lower Court so far as it disallows the costs incurred by the appellant Bishen Dayal, be reversed, and that the Bank, respondent, bear the costs of the appellant in both the Courts.

Appeal decreed.