1895

RADHAN SINGH v. KUARJI DICHHIT.

Judge, having disposed of the suit on the preliminary point of pedigree, did not try the issue as to whether there existed such necessity as entitled Musammat Gulab Kuar to make the mortgages in question or either of them. We set aside the decree of the Court below, and we remand the case under section 562 of the Code of Civil Procedure for disposal of such issues as arise in the case and have not already been disposed of. We allow this appeal with costs.

Appeal decreed.

FULL BENCH.

1895
November 28.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair and Mr. Justice Burkitt.

LEKHA (PLAINTIFF) *v.* BHAUNA AND OTHERS (DEFENDANTS) *

Civil Procedure Code, section 549—Security for costs—Failure of appellant to file security—Rejection of appeal—Appeal from order of rejection—Order for security not to state specific amount for which security is required.

An order rejecting an appeal under section 549 of the Code of Civil Procedure is not appealable either as an order or as a decree. *Siraj-ul-haq* v. *Khadim Husain* (1) overruled.

Where a Court, acting under section 549 of the Code, orders an appellant to give security for costs, it is not necessary that any specific sum for which security is to be given should be named in the order for security. It is sufficient for the order to direct the appellant to furnish security within a time to be stated "for the costs of the appeal" or "for the costs of the original suit," or "for the costs of the appeal and of the original suit." *Thakur Das* v. *Kishori Lal* (2) overruled on this point.

THE facts of this case and the arguments in support of the appeal are fully stated in the judgment of the Court.

Mr. *J. Simeon* for the appellant.

Babu *Ratan Chand* for the respondents.

The judgment of the Court (EDGE, C. J., KNOX, BLAIR AND BURKITT, J. J.) was delivered by EDGE, C. J.:—

This appeal was presented to this Court as an appeal from a decree of an appellate Court and was entered in the register of

*Second Appeal No. 1176 of 1893, from a decree of H. P. Mulock, Esq., District Judge of Moradabad, dated the 24th June 1893, confirming a decree of Pandit Rajnath, Subordinate Judge of Moradabad, dated the 29th March 1893.

(1) I. L. R., 5 All. 380. (2) I. L. R., 9 All. 164.

1895

LEKHA v. BHAUNA.

second appeals. The appellant here was an appellant in the Court below and plaintiff in the suit. His suit was dismissed with costs by the first Court. After his appeal had been admitted in the Court below, the respondent to that appeal, who is respondent here also, presented, on the 30th May 1893, an application under section 549 of the Code of Civil Procedure asking for an order for security for "costs." He did not specify whether his application related to the costs of the first Court or the costs of the appeal or of both. In our opinion that application must be read as an application for an order for security for the costs of the original suit and of the appeal. What the respondent sought was an order which would secure him against the costs which he had incurred in the original suit and against those which he might incur in the appeal. On the 10th of June 1893, the lower appellate Court made an order fixing the 22nd of June as the date upon which the appellant was to show cause against the application for security for costs. On the 22nd of June the appellant's pleader appeared and stated that he was not instructed as to the application. He was, however, the pleader engaged in the case on behalf of the appellant. The appellant now says that he had missed the train, and consequently did not arrive on the 22nd of June. It is apparent that he had had notice of the order of the 10th of June. On the 22nd of June, the Court made an order that security for costs should be given by the appellant on or before the 24th of June 1893, and that if such security was not given the appeal would be rejected. On the 24th of June, the appellant asked for time for three months. The Court on that day made an order under section 549 rejecting the appeal. From that order this appeal has been brought as an appeal from a decree.

Mr. *Simeon* has contended that an appeal lies from an order under section 549 rejecting an appeal. He has also contended that the order of the 22nd of June was bad in that it did not specify the amount, *i.e.*, the number of rupees, for which security should be given. In support of each of these contentions he has relied upon authorities of this Court.

In support of the first contention he has relied on the decision of this Court in *Siraj-ul-haq* v. *Khâdim Husain* (1). In that case all that the Court said in its judgment upon this point was :— "We are of opinion that the order striking off the appeal, because security was not furnished as directed under section 549, Civil Procedure Code, is a decree within the meaning of section 2 from which an appeal will lie,"—and gave no reasons for the opinion which it expressed. We shall deal first with the question as to whether an appeal lies.

Section 549 is a section applicable only to an appellate Court, and does not provide any procedure to be followed by a Court in dealing with an original suit as a Court of first instance. Consequently section 582 of the Code does not enable us to read into the procedure relating to orders under section 549 the terms or definitions used in those chapters of the Code relating to the trial and disposal of original suits. An order under section 549 is not a 'final expression of an adjudication upon any right claimed or defence set up' within the meaning of the first paragraph of the definition clause relating to decree in section 2 of the Code. We cannot read an order rejecting a plaint in the second paragraph of that definition clause as an order rejecting an appeal under section 549. Consequently, in our opinion, for these reasons, if they stood alone, an order rejecting an appeal under section 549 is not a decree within the meaning of the Code. An order under section 549 is not appealable as an order under the Code. We are fortified in this opinion by an examination of section 549 itself. The object of that section was to secure the respondent in an appeal from the risk of having to incur further costs which he might never succeed in getting out of the appellant. As we understand the section it was intended under the first paragraph that the Court should have entire discretion in all cases not coming under the second paragraph in making or refusing an order for security for costs. Under the second paragraph, which is the proviso to the first, the Court is given no discretion in the matter. In cases falling within that proviso the Court has to follow the mandate of the statute and

(1) I. L. R., 5 All., 380.

1895

LEKHA v. BHAVNA.

make an order for security for costs. An order for security for costs having been made under either the first paragraph or the second, it is by the third paragraph of the section enacted that if such security be not furnished within such time as the Court orders the Court shall reject the appeal. There again the Court is given no discretion in the matter. It could not have been the intention of the Legislature that an appeal should lie from an order under section 549 rejecting an appeal when the order for security for costs was compulsorily made by the Court under the second paragraph of that section; and it could not be the intention of the Legislature that an appeal should lie if the original order for security for costs was one under the first paragraph of the section and should not lie if the original order for security was one under the second paragraph of the section. There is no appeal given by the Code from an order under the first or second paragraph of the section for security as to costs, and it could not have been intended that the order for security for costs, which was unappealable, might be questioned by an appeal from the act of the Court compulsorily done under the section on security for costs not being given as ordered. For the above reasons we are of opinion that an order rejecting an appeal under section 549 is not appealable either as an order or as a decree.

Mr. *Simeon* pressed us with the decision of a Full Bench of this Court in *J. R. Williams* v. *A. T. Brown* (1) in which the Full Bench held that an order under section 381 dismissing a suit for failure by the plaintiff to furnish security for costs as ordered was a decree within the meaning of section 2 of the Code and was appealable as such. All we need say is that that Full Bench decision was not a decision on the construction of section 549. It appears to us that the first paragraph of the definition clause of section 2 refers to a final adjudication deciding a suit or an appeal so far as the Court deciding it is concerned, and then only when such adjudication was on a right claimed or defence set up.

It is not strictly necessary to express an opinion on the second point argued by Mr. *Simeon*, namely, whether an order under

(1) I. L. R., 8 All., 108.

section 549 for security for costs is or is not a good order if it does not specify the amount in rupees for which security is to be given. However, as it involves a matter of some importance so far as practice is concerned, we think it better to express the view which we all hold upon this point.

In support of his contention Mr. *Simeon* relied upon the case of *Thakur Das* v. *Kishori Lal* (1). In our opinion an order for security for costs should follow the words of s. 549 and should not specify the particular amount in rupees for which security should be given. It would be a good order under the section if it directed the appellant to furnish the security within a time to be stated "for the costs of the appeal," or "for the costs of the original suit," or "for the costs of the appeal and of the original suit." To hold, that the order must specify the amount in rupees of costs for which security should be given would, in our opinion, either be to frustrate the intention of the Legislature in framing the section, or to make the order a purely speculative order. The object of the section is that the respondent at the earliest moment which suits him may take advantage of the section; and, before incurring any expenses in the appeal beyond the 8 annas stamp on his application for security, may obtain security for the costs of the appeal. At that time it would be impossible for the respondent, the appellant or the Court to say what might be the costs of the appeal. Advocates and vakils might or might not be employed by the respondent in an appeal; a remand under s. 566 might become necessary in the appeal, and expenses might be incurred on that account. We think that the Legislature intended that the order should be one simply "for the costs" of the appeal, of the suit, or of the suit and the appeal, without specifying the amount. Indeed the last paragraph of the section points to the security being one for an indefinite and not for a definite amount. We do not say that an order specifying the amount would be a bad order, but we consider that the better practice is that the amount should not be specified in the order.

We dismiss this appeal with costs.

Appeal dismissed.

(1) I. L. R., 9 All., 164.