

1897

NABBU
KHAN
v.
SITA.

of the Code of Civil Procedure, with directions to readmit it under its original number in the register and to try it on the merits. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

1897
July 6.

Before Mr. Justice Banerji and Mr. Justice Aikman.

PURAN MAL (PLAINTIFF) v. KRANT SINGH (DEFENDANT).*

Civil Procedure Code, section 544—Appeal—Ground of appeal common to all the judgment-debtors—Reversal or modification of decree as against all on appeal by one only.

Section 544 of the Code of Civil Procedure does not enable an appellate Court to decide, upon a ground which it considers to be common to all the defendants, an appeal preferred by one only of such defendants, and to reverse or modify the decree of the Court below in favour of all the defendants, unless the lower Court has proceeded upon a ground common to all the defendants. It is only when the decree appealed against has proceeded upon a ground common to all the defendants, that is, when the Court below has made a decree against several defendants upon a finding which applies equally to all of them, that under section 544 any one of the defendants may appeal against the whole decree and the appellate Court may reverse or modify that decree in favour of all the defendants. *Protab Chunder Dutt v. Koorbanissa Bibee* (1) referred to.

THE facts of this case are fully stated in the judgment of Banerji J.

Babu *Durga Charan Banerji*, for the appellant.

Babu *Satya Chandar Mukerji*, for the respondent.

BANERJI, J. :—This was a suit for possession of certain property purchased at auction in 1882 by the plaintiff appellant as the property of one Ajab Singh and his son Umed Singh. The suit was brought against these persons only. Krant Singh, another son of Ajab Singh, intervened, under section 32 of the Code of Civil Procedure, and was added as a defendant. Ajab Singh did not enter an appearance. Umed Singh defended the suit by alleging that after the auction sale a compromise took place between him and the plaintiff, under which the plaintiff received

* Second Appeal No. 1163 of 1895, from a decree of W. Tudball, Esq., Additional Judge of Aligarh, dated the 9th September 1895, reversing a decree of Maulvi Abdur Rahim Munsif of Kasganj, dated the 27th November 1894.

(1) 14 W. R., 130.

the purchase money from him and surrendered the property to him. Krant Singh's defence was to the effect that the property originally belonged to his grandmother Musammatt Pohpa; that after her it passed to him, Krant Singh, and to his brothers Umed Singh and Dhaukkal Singh; that the plaintiff acquired by his auction purchase only the one-third share of Umed Singh, and that his claim in respect of two-thirds of the property was untenable. The Court of first instance decreed the claim against all the three defendants. Neither Ajab Singh nor Umed Singh appealed, and they allowed the decree to become final as against them. Krant Singh alone preferred an appeal, and contended, first, that the plaintiff did not acquire more than a third share of the property by virtue of his auction purchase; and, secondly, that under a private arrangement, which took place after his auction purchase, the plaintiff withdrew from his purchase. He thus urged for the first time in appeal a ground which he had not taken in his defence in the Court of first instance. The lower appellate Court held this ground of appeal to be a valid one, and, purporting to act under section 544 of the Code of Civil Procedure, it set aside the decree of the Court of first instance and dismissed the suit. The other grounds of appeal were not tried at all.

In my opinion the learned Judge has erred in applying section 544 to this case. That section does not enable an appellate Court to decide upon a ground which it considers to be common to all the defendants, an appeal preferred by one only of such defendants, and to reverse or modify the decree of the Court below in favour of all the defendants, unless the lower Court has proceeded upon a ground common to all the defendants. It is only when the decree appealed against has proceeded upon a ground common to all the defendants, that is, when the Court below has made a decree against several defendants upon a finding which applies equally to all of them, that under section 544 any one of the defendants may appeal against the whole decree and the appellate Court may

1897

PURAN MAJ
v.
KRANT
SINGH.

1897

PULAN MAJ

v.

KRANT
SINGH.

reverse or modify that decree in favour of all the defendants. This view is supported by the ruling of the Calcutta High Court in *Protab Chunder Dutt v. Koorbannisa Bibee* (1). In this case there was no ground common to the defence set up by Umed Singh and that put forward by Krant Singh. On the contrary, the case of the latter was inconsistent with that of the former. Whilst Umed Singh urged that the whole of the property claimed had been reconveyed to him by the plaintiff after the auction sale, Krant Singh contended that Umed Singh had no more than a third share in the property, and that the plaintiff had acquired that share only under his auction purchase. The Court of first instance also considered the case of Umed Singh separately from that of Krant Singh. It held that Musammat Pohpa, the owner of the property had died before Krant Singh and Dhaukkal Singh were born and the property passed to Umed Singh alone. It found that the allegation made by Umed Singh that the plaintiff had surrendered the property to him on receipt of the sale consideration had not been proved. That Court therefore in making its decree did not proceed upon a ground common to all the defendants. Consequently Krant Singh was not competent to appeal against the whole decree and the lower appellate Court had no authority, under section 544, to reverse or modify that decree in favour of all the defendants on the appeal of Krant Singh alone.

The Court has, in my opinion, erred in allowing Krant Singh to set up in appeal a case inconsistent with that put forward by him in the Court of first instance. As I have said above, his contention in the Munsif's Court was that Umed Singh owned only a one-third share in the property, and that consequently the plaintiff's claim for the remaining two-thirds of the property was untenable. Inconsistently with that defence he urged in appeal that the plaintiff had no right whatever to the property, inasmuch as he had withdrawn from his auction purchase. This last contention suggests that the plaintiff had purchased the

whole property. Such an inconsistent plea he could not be allowed to raise in appeal, and the lower appellate Court ought not to have considered that plea and to have decided the appeal with reference to that plea.

I would allow the appeal as between the parties to it, and, setting aside the decree below, remand the case to the lower appellate Court under section 562 of the Code of Civil Procedure for a trial of the other questions raised in the appeal before that Court. The appellant will get his costs of this appeal.

AIKMAN, J. :—I concur in the judgment of my brother Banerji and in the decree proposed by him. As this appeal is allowed “as between the parties to it,” it will not affect any benefit which the defendants to the suit who are not parties to it may have obtained by the decree of the lower appellate Court.

Appeal decreed and cause remanded.

FULL BENCH.

1897

July 7.

Before Mr. Justice Knox, Mr. Justice Blair, and Mr. Justice Burkill.
AMJAD ALI AND OTHERS (PLAINTIFFS) v. MUHAMMAD ISRAIL AND
OTHERS (DEFENDANTS).*

*Act No. VII of 1870 (Court Fees Act), sections 12 and 28—Court fee—
Finality of decision of Court on question of Court fee.*

The decision of the Court on a question of the court fee payable on a plaint or memorandum of appeal which is to be “final as between the parties to the suit” must be a decision made between the parties on the record and after they have had an opportunity of being heard, and not a decision based upon the report of a munsarim before the plaint or memorandum of appeal is filed and therefore before any parties are before the Court.

Hence where a Court of first instance held on the report of the Munsarim that a plaint presented to it had been insufficiently stamped, but subsequently, both parties being before the Court and arguments having been heard, decided that the court fee originally paid was sufficient; it was held that the latter decision was the decision which was final as between the parties within the meaning of section 12 of the Court Fees Act, 1870.

* Second appeal No. 889 of 1894, from a decree of H. G. Pearse, Esq., District Judge of Agra, dated the 26th July 1894, confirming a decree of Maulvi Aziz-ul Rahman, Subordinate Judge of Agra, dated the 12th March 1894.

1897

PURAN MAJ

v.

KRANT
SINGH.