

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

1898
November 14.

IN THE MATTER OF THE PETITION OF DURGA PRASAD.*
Civil Procedure Code, sections 372, 582—Appeal—Devolution of interest pending appeal—Array of parties in appeal.

By virtue of the first portion of section 582 of the Code of Civil Procedure, section 372 of the Code applies to appeals in cases of assignment, creation or devolution of any interest pending the appeal otherwise than by death, marriage or insolvency. In the matter of the petition of Sarat Chandra Singh (1) followed. *Rajaram Bhagwat v. Jibai* (2) and *Ramji Morarji v. J. E. Ellis* (3) referred to. *The Collector of Muzaffarnagar v. Husaini Begam* (4) distinguished.

THIS was an application in a second appeal to substitute as respondent a person who alleged that he had during the pendency of the appeal purchased the decree in dispute from the successful plaintiff respondent. The facts of the case sufficiently appear from the order of the Chief Justice.

Pandit *Sundar Lal*, for the applicant.

Babu *Satish Chander Banerji*, for the defendant appellant.

STRACHEY, C. J.—In this case an application is made that the name of the applicant may be placed on the record of an appeal pending in this Court in place of the original respondent.

The original respondent was the successful plaintiff in the suit. The applicant claims to be placed on the record as the assignee of the decree from the original respondent. It is not denied that he is such an assignee, and that the assignment was effected shortly after the institution of the appeal.

The application is opposed by the appellant on the ground that this Court has not the power at the stage of appeal to substitute for the original respondent the person who claims as assignee of the decree. That objection is based on certain observations made in a judgment of this Court in the *Collector of Muzaffarnagar v. Husaini Begam* (4).

Now that judgment appears to me to be clearly distinguishable. In the first place, it appears from the last paragraph of the judgment that the observations which have been relied upon were *obiter*, as the application was dismissed solely on the ground that

* Application in Second Appeal No. 712 of 1898, dated November 14th, 1899.

(1) (1896) I. L. R., 18 All., 285.

(3) (1895) I. L. R., 20 Bom., 167.

(2) (1884) I. L. R., 9 Bom., 151.

(4) (1895) I. L. R., 18 All., 86.

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the assignee, who was the only person apparently interested in maintaining or entitled to support the decree obtained by the original respondent, objected to being made a party. In the second place, the observations relied on were expressly limited to an expression of a doubt. In the third place (and this is the most important ground of distinction), the devolution of interest there did not take place pending an appeal, but between the passing of the decree in the Court below and the presentation of the appeal to this Court. It is not necessary for us to express any opinion one way or another as to whether, in a case of such devolution, we should follow the observations of the learned Judges in that case; but it is clear that their reasoning, especially in regard to the words "pending the suit" in section 372 of the Code, had reference to the particular circumstances of that case, and especially to the fact that the devolution of the interest took place before any appeal was instituted, and not while any suit or appeal was actually pending. On the other hand, the decision of Mr. Justice Banerji in *In the matter of the petition of Sarat Chandra Singh* (1), is precisely in point. I entirely agree with the view expressed in that case.

It may be, as was pointed out in the earlier of the two cases I have mentioned, that by reason of the concluding words of section 582 the word "suit" in Chapter XXI could be held to include an appeal in proceedings arising out of the death, marriage or insolvency of parties, and therefore would not include an appeal in such proceedings as section 372 contemplates, which do not arise out of death, marriage or insolvency. But that does not make inapplicable to section 372 as well as to other parts of the procedure of Courts of first instance the earlier part of section 582; so that although in section 372 the word "suit" may not include an appeal, the appellate Court nevertheless has in appeals as nearly as may be the same power as a Court of first instance has under section 372 in a suit. Any other view would, I think, lead to obvious anomalies. To take the present case,—the assignee is given by section 232 a power, subject to the discretion of the Court, to have the decree executed in the same manner and subject to the same conditions as the original respondent, and it

(1) (1896) I. L. R., 18 All., 235.

seems improbable that the assignee should have an express power of executing the decree and absolutely no power at all to defend that decree when attacked in appeal. I think it was to avoid that anomaly, among others, that the Legislature enacted the earlier part of section 582. Other anomalies are pointed out by Mr. Justice Banerji in his judgment. If there is no way to enable this applicant to be brought upon the record as respondent to the appeal, the result is that the appeal will go on against the original respondent who no longer holds the decree attacked and has no longer any interest in defending it. Presumably the appeal would be dealt with *ex parte*, the only person interested in maintaining the decree having no opportunity to support it, and yet, the assignment having taken place during the pendency of the appeal, the applicant, though unable to support the decree, might nevertheless be held bound by its reversal. A similar anomaly would be the result if the assignor instead of having succeeded in the Court below had lost, had appealed against the decree, and afterwards had assigned his rights. The view that the Court has the power in appeal to bring on the record the assignee of the original respondent is supported by decisions of the Bombay High Court in *Rajaram Bhagwat v. Jibui* (1), and *Ramji Morarji v. J. E. Ellis* (2). For these reasons I am of opinion that this application should be granted by adding the name of the applicant as respondent to the appeal along with the original respondent. The applicant will get costs of this application.

BANERJI, J.—I adhere to the view I expressed in *In the matter of the petition of Surat Chandra Singh* (3), and hold that, by virtue of the first portion of section 582, section 372 applies to appeals in cases of assignment, creation or devolution of any interest pending the appeal otherwise than by death, marriage or insolvency. That view is supported by the rulings of the Bombay High Court to which the learned Chief Justice has referred. In the case of *The Collector of Muzaffarnagar v. Husaini Begam* (4), the question with which we have to deal in this case was not decided.

I agree in the order proposed by the learned Chief Justice.

(1) (1884) I. L. R., 9 Bom., 161.

(2) (1895) I. L. R., 20 Bom., 167.

(3) (1896) I. L. R., 13 All., 285.

(4) (1895) I. L. R., 13 All., 86.

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