

of section 17, the proceeding, namely, the appeal, which might have been had in the Court at Saharanpur, may now be had in the Court to which the business of the Saharanpur Court has by the notification of Government been transferred, namely, the Court of the District Judge of Meerut. On this point there can be no doubt, having regard to the language of section 17. Reference was made in the argument to section 21 of the Act. But that section must be read subject to the other provisions of the Act, including section 17. Consequently, the appeal in this case lay to the Court of the District Judge of Meerut and not to the Court of the District Judge of Saharanpur. We accordingly direct the District Judge of Meerut to receive and entertain the memorandum of appeal which was presented to him on the 17th of April 1905 and which he returned by his order of the 27th of that month, and we further direct that the original memorandum of appeal filed with the application for revision be returned to the applicants. Costs of this application will be costs in the cause.

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APPELLATE CIVIL.

 1905
 July 5.

Before Mr. Justice Banerji and Mr. Justice Richards.

ABDUL GHANI (DEFENDANT) v. MUHAMMAD FASIH (PLAINTIFF) AND
 ABDUL MAJID AND OTHERS (DEFENDANTS).*

Civil Procedure Code, sections 544 and 561—Appeal—Practice—Appeal by defendant against plaintiff and other defendants—Objections by plaintiff-respondent when entertainable as against co-respondents.

Where it is necessary for the proper decision of an appeal before it, it is competent to an appellate Court to take into consideration objections filed under section 561 of the Code of Civil Procedure by one of the respondents, not only as against the appellant, but, it may be, as against the co-respondents with the objector also, and to modify the decree as against them accordingly. *Bishun Churn Roy Chowdhry v. Jogendra Nath Roy* (1) followed. *Mahomed Ameer v. Frankishora Deb* (2) referred to. *Kallu v. Manni* (3) distinguished.

ONE Muhammad Fasih brought a suit for a share of profits against five defendants. One of the questions raised by the

* Second Appeal No. 755 of 1903, from a decree of J. Sanders, Esq., District Judge of Benares, dated the 17th of July 1903, modifying a decree of J. Larkin, Esq., Assistant Collector, 1st class, of Benares, dated the 16th of February 1903.

(1) (1898) I. L. R., 26 Calc., 114. (2) (1874) 21 W. R., 338.
 (3) (1900) I. L. R., 23 All., 93.

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suit was whether the profits of *sir* land should be calculated at the rates of rent paid by tenants at will or at the rates paid by ex-proprietary tenants. The Court of first instance (Assistant Collector of Benares) decided against the plaintiff upon that point, and decreed a part of his claim jointly as against all the five defendants. One of the defendants, Abdul Majid, alone appealed, making the plaintiff and the other defendants parties to the appeal. The plaintiff preferred objections under section 561 of the Code of Civil Procedure disputing the correctness of the decree of the Court of first instance in so far as it related to the principle upon which the profits of *sir* land were assessed. The lower appellate Court (District Judge of Benares) held that the objections were valid, and allowed them, thereby raising the amount of the decree by about Rs. 64. One of the defendants, Abdul Ghani, appealed to the High Court from this decree, contending that as the plaintiff had not appealed as against him, he was not competent, under section 561 of the Code of Civil Procedure, to prefer objections in regard to the decree so far as this defendant was concerned.

Maulvi *Muhammad Ishaq* and Dr. *Satish Chandra Banerji*, for the appellant.

The Hon'ble Pandit *Madan Mohan Malaviya* and Munshi *Gokul Prasad*, for the respondents.

BANERJI and RICHARDS, JJ.—The suit which has given rise to this appeal was brought by Muhammad Fasih, plaintiff, for his share of profits against five defendants. One of the questions involved in the suit was whether the profits of *sir* land should be calculated at the rates of rent paid by tenants-at-will or at the rates paid by ex-proprietary tenants. The Court of first instance decided against the plaintiff upon that point, and decreed a part of his claim jointly against all the five defendants. One of those defendants, Abdul Majid, alone appealed, making the plaintiff and other defendants parties to the appeal. The plaintiff preferred objections under section 561 of the Code of Civil Procedure disputing the correctness of the decree of the Court of first instance in so far as it related to the principle upon which the profits of *sir* land were assessed. The lower appellate Court held that the

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objections were valid, and allowed them, thereby raising the amount of the decree by about Rs. 64. It is contended by the appellant before us that as the plaintiff did not appeal against him, he was not competent, under section 561 of the Code of Civil Procedure, to prefer objections in regard to the decree in so far as it concerned this defendant. The question thus raised is no doubt one of some difficulty. After considering the rulings upon the point which have been laid before us and the arguments addressed to us, we are of opinion that the scope of the section was correctly explained in the following observations of the learned Judges of the Calcutta High Court in *Bishun Churn Roy Chowdhry v. Jogendra Nath Roy* (1):—"As a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellants, and it is only by way of exception to this general rule that one respondent may urge cross-objections as against the other respondents, the exception holding good (we do not attempt to lay down any definite exhaustive rule on the point), among other cases, in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents." We think the present case is an exception to the general rule, and that the appeal of one of the defendants opened out questions as between the plaintiff and all the defendants, some of whom were the co-respondents of the plaintiff. The Court of first instance had decided the suit upon a ground common to all the defendants. Consequently, under section 544 of the Code of Civil Procedure, on the appeal of only one of the defendants, the appellate Court could modify or set aside in favour of all the defendants the decree of the lower Court. The whole case was thus opened out in appeal, not only as between the plaintiff and the defendant who had appealed, but also as between the plaintiff and other defendants, who had been made respondents apparently because they had not joined in the appeal. Having regard to the nature of the suit, and of the decree passed by the Court of first instance, those defendants were necessary

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parties to the appeal and complete justice could not be done without having them before the Court. Under the circumstances of the case they were to all intents and purposes appellants in the lower appellate Court. The objections under section 561 were preferred not only against these other defendants, the co-respondents of the plaintiff, but also against the appellant. As the Court of first instance had made a decree jointly against all the defendants, and, as we have already said, the appellate Court could not do complete justice between all the parties without opening up the whole case, we hold that this is one of the exceptional cases in which the plaintiff respondent could be allowed to prefer objections under section 561 as against his co-respondents. As the Court on the appeal of one of the defendants could have varied or set aside the decree in favour of all the defendants, it seems to us to be just and equitable that it should also have the power upon objections taken by the plaintiff to vary the decree against all the defendants. This case is similar to the case of *Mahomed Ameer v. Prankishore Deb* (1). The case of *Kallu v. Manni* (2), to which the learned vakil for the appellant invited our attention, is distinguishable. In our judgment the appeal has no force. Accordingly we dismiss it with costs.

Appeal dismissed.

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July 6.

REVISIONAL CRIMINAL.

Before Mr. Justice Richards.

EMPEROR v. DOST MUHAMMAD.*

Criminal Procedure Code, section 133—Order for removal of obstruction on public land—Defence raising question of title—Procedure.

When in a matter under section 133 of the Code of Criminal Procedure the person called upon to show cause raises a question of title it is for the trying Magistrate to decide whether the question so raised is raised *bonâ fide*. But the trying Magistrate ought not to go further and decide whether the title set up does or does not exist.

* Criminal Revision No. 286 of 1905.

(1) (1874) 21 W. R., 338.

(2) (1900) I. L. R., 23 All., 93.