

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
 DURGA PRASAD AND ANOTHER (DEFENDANTS) v. JAI NARAIN AND OTHERS
 (PLAINTIFFS).*

1911
 January 7.

Civil Procedure Code (1908), section 100, order XLV, rule 27—Refusal to admit additional evidence in appeal—Discretion of Court—Appeal.

A refusal in the exercise of discretion to admit additional evidence under order XLI, rule 27, of the Code of Civil Procedure, will not afford a ground for second appeal. *Ram Piari v. Kallu* (1) followed.

THE plaintiffs in this case sued the defendants for the price of goods sold. Two of the defendants, who contested the suit, denied having purchased any goods from the plaintiff. The Subordinate Judge decreed the suit. Against this decree there was an appeal filed, on the 7th of January, 1910, to the District Judge. In their last ground of appeal to the District Judge the defendants prayed that they might be allowed to adduce additional evidence, but they did not disclose the nature of the evidence they wanted to produce. On the 28th of June, the defendants put in an application asking the court to take additional evidence. This additional evidence, according to the application, consisted of certain account books and some railway receipts showing that it was not true that the plaintiffs had sold their entire stock-in-trade to the defendants, but that they had sent some goods to Cawnpore after the date of the alleged sale. No definite order was passed on the application, but in his judgement the learned District Judge referred to the defendants' prayer for additional evidence and in the end decided the appeal on the evidence as it stood on the record and affirmed the decree of the Subordinate Judge. The defendant appealed to the High Court.

Munshi *Gokul Prasad*, for the appellant, contended that the Judge had not passed any order on the application of the 28th of June. He was bound to pass some order. There was therefore no proper trial.

Dr. *Tej Bahadur Sapru*, for the respondent:—

The grounds of appeal contained a prayer for additional evidence, but it was not suggested what the nature of it was.

* Second Appeal No. 808 of 1910 from a decree of H. Dupernex, District Judge of Mainpuri, dated the 7th of July, 1910, confirming a decree of Nihal Chandra, Subordinate Judge of Mainpuri, dated the 9th of December, 1909.

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The Judge had exercised his discretion and refused to take additional evidence and his action could not be impugned; *Ram Piari v. Kallu* (1). The defendants could have withdrawn the appeal and applied for review to the court of first instance. The lower appellate court could not take additional evidence, order XLI, rule 27; *Kessowji Issur v. G. I. P. Ry. Co.* (2), *Krishnama v. Narasimha* (3), *Ramappa bin Dareppu v. Dharmabina bin Rama* (4).

Munshi Gokul Prasad, in reply:—

The defendants could not apply for review, as the appeal was pending before the District Judge; *Navivahu v. Turner* (5). The learned Judge did not dispose of the application praying for additional evidence to be taken. The nature of the evidence was disclosed in the application.

STANLEY, C. J., and BANERJI J.—The sole ground of appeal in this case is that the lower appellate court erred in deciding the appeal without taking additional evidence and that this irregularity prejudiced the appellant's case. The suit was for the price of stock-in-trade alleged to have been sold by the plaintiffs to the defendants. Some of the defendants did not dispute the claim, but the appellants, Durga Prasad and Sital Prasad, filed written statements in which they alleged that no cloth was received in the defendants' shop, nor had the plaintiffs any shop for the sale of cloth at any time. The court of first instance decreed the plaintiffs' claim, and an appeal was thereupon preferred by the defendants appellants. During the pendency of the appeal an application was made to the lower appellate court to have certain documents, including railway receipts and certain account books, sent for. This application was ordered to be put up with the record, no order having been made at the time upon the application. The learned District Judge, however, considered the application, as is clear from the language of the judgement. In his judgement he says:—"Appellants take up a peculiar position. First, they say that they could put up a better defence than was actually made if they were now allowed to import fresh evidence into the case. Secondly, they take exception to the

(1) (1900) I. L. R., 28 All., 121.

(3) (1908) I. L. R., 31 Mad., 114.

(2) (1907) I. L. R., 31 Bom., 381.

(4) (1906) I. L. R., 30 Bom., 625.

(5) (1889) I. L. R., 18 Bom., 520; L. R., 16 I. A., 157.

character of the account books produced, apparently on account of their size." He did not allow the defendants to produce any further evidence, clearly believing that the defence was not a genuine and *bona fide* defence. He dismissed the appeal and confirmed the decree of the court below.

This second appeal has been preferred, the sole ground of appeal being the alleged irregularity which we have already stated. The order under which an appellate court is empowered to allow a party to produce additional evidence is to be found in order XLI, rule 27. That order expressly forbids the court to allow additional evidence to be produced, except in a case in which the court below has refused to admit evidence which ought to have been admitted, or the appellate court itself requires any document to be produced, or any witness to be examined, to enable it to pronounce judgement or for any other substantial cause. The learned District Judge in this case did not consider that any grounds had been shown sufficient to justify him in allowing the further evidence referred to in the application of the defendants to be adduced. He exercised his discretion in the matter, and, as it appears to us, impliedly, if not expressly, refused the application. This being so, the question arises whether or not the action of the court below is such as would justify us in allowing a second appeal. We think not. A similar question was considered in the case of *Ram Piari v. Kalbu* (1). In that case one of us was a party to the judgement. It was there held that a refusal in the exercise of the discretion given to the court by section 568 of the Code of Civil Procedure, 1882, which corresponds with order XLI, rule 27, to admit additional evidence was not an error or defect coming within section 584 of that Code. In the judgement in that case one of us remarked as follows:—"Under section 568 of the Code a party to an appeal is not entitled to produce additional evidence in the appeal as of right, but the court may in its discretion admit additional evidence. Where the court has exercised its discretion, and in the exercise of its discretion has refused to admit additional evidence, it cannot be said

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that a substantial error or defect in procedure has taken place, which affords a ground of second appeal under section 584." This decision, which we are bound to follow, is conclusive against this appeal. The lower appellate court did, we think, exercise its discretion, and having exercised its discretion no second appeal will lie. For these reasons we dismiss the appeal with costs.

Appeal dismissed.

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January 18.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
SARJU PRASAD AND OTHERS (PLAINTIFFS) v. BINDESHRI BAKHSII PAL SINGHI AND OTHERS (DEPENDANTS).*

Civil Procedure Code (1882), section 317—Prior and subsequent mortgagees—Purchase of part of mortgaged property in execution of decree on prior mortgage—Suit on second mortgage—Auction purchaser alleged to be benamidar of mortgagor—Act No. IV of 1882 (Transfer of Property Act), section 43.

A portion of certain mortgaged property was purchased by a third party at auction sale in execution of a decree on a prior mortgage.

Held on suit for sale by the subsequent mortgagee that it was not open to the subsequent mortgagee to bring this portion again to sale upon the ground that the auction purchaser was merely a benamidar for the mortgagor. Ram Narain v. Mohanian (1) followed.

THIS was a suit brought by the representatives of the original mortgagee to enforce a mortgage executed by one Bindeshri Bakhsh Pal Singh on the 20th August, 1895, and comprising shares in several villages. So far as the share in one village—Rusia—was concerned, the suit was resisted upon the ground that it had been purchased at an auction sale in execution of a prior mortgage decree by Musammât Jairaj Kunwari, the wife of Bindeshri Bakhsh Pal Singh. The plaintiffs alleged that this purchase was made merely as the *benamidar* of Bindeshri Bakhsh Pal Singh. Musammât Jairaj Kunwari's defence was that this contention was not open to the plaintiffs in view of the provisions of section 317 of the Code of Civil Procedure, 1882. The court of first instance (Additional Subordinate Judge of Gorakhpur) dismissed the suit except as regards a very small portion of the mortgaged property. The plaintiffs appealed to the High Court.

* First Appeal No. 1 of 1909 from a decree of Banke Behari Lal, Additional Subordinate Judge of Gorakhpur, dated the 24th of September, 1908.