1911
July, 21.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, Mr. Justice Banerji and Mr. Justice Tudball.

RANGAM LAL AND ANOTHER (PLAINTIFFS) *v.* JHANDU (DEFENDANT.)*

Civil Procedure Code (1908), *order XLI, rule* 33—*Appeal—Procedure- Power of appellate court to interfere with portion of decree not challenged by either party.*

Plaintiff sued defendant for rent and obtained a decree for a portion of his claim. Plaintiff then appealed against the disallowance of the balance of the amount claimed, but defendant submitted to the decree and neither filed a cross appeal nor took objections under order XLI, rule 22, of the Code of Civil Procedure, 1908.

Held that it was not competent to the appellate court acting under order XLI, rule 33, to interfere with the decree obtained by plaintiff in so far as it had not been challenged by defendant. *Attorney General* v. *Simpson* (1) referred to.

THE facts of this case were as follows :—

The plaintiffs brought a suit against the defendant for rent of a holding and claimed Rs. 294-7-0. The defendant alleged that the claim had been discharged. The Assistant Collector gave the plaintiffs a decree for Rs. 96-11-11 and dismissed the rest of their claim. The plaintiffs appealed with respect to the portion of their claim dismissed by the first court. The defendant submitted to the order in so far as it was against him, nor did he file any objections under order XLI, rule 22, in the plaintiffs' appeal. The District Judge remitted certain issues to the first court and on return of the findings he dismissed the entire suit of the plaintiffs, holding that he had power to do so under order XLI, rule 33, even though the defendant had not appealed against that part of the decree which was against him. The finding of the first court on remand was that a certain sum had been paid twice over. The plaintiffs appealed to the High Court.

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

When the Legislature enacted order XLI, rule 33, it was not intended to do away with the provisions of order XLI, rule 22, which required that objections should be filed by the respondent if he meant to challenge any part of the decree within a certain

* Second Appeal No. 79 of 1911 from a decree of D. L. Johnston, District Judge of Meerut, dated the 23rd of September, 1910, reversing a decree of Mahesh Prasad, Assistant Collector, first class, of Meerut, dated the 23rd of March, 1910.

(1) [1901] 2 Ch. D., 671.

time. The interpretation of order XLI, rule 33, accepted by the Judge, would over-ride the necessity of paying court fee in certain cases, and make the provisions of the law of limitation regarding appeals absolutely nugatory. The language of the section showed that it only applied to cases where there were several respondents, against some of whom only a decree was passed. It had to be interpreted consistently with other provisions of law; Maxwell on Interpretation of Statutes, 247. In the case of several respondents the question of limitation would not arise, as they would all be on the record. The appeal would be within time and the court fee paid. He referred to order LVIII, rule 4, of the rules of the Supreme Court of Judicature in England and to *Attorney-General* v. *Simpson* (1).

Munshi *Mangal Prasad Bhargava*, for the respondent, relied on *Bikramjit Singh* v. *Husaini Begam* (2).

RICHARDS, C. J., and BANERJI and TUDBALL, JJ. :—This appeal arises out of a suit brought by a zamindar against a tenant for rent. The rent claimed was the sum of Rs. 294-7-0. The defence was that the claim had been discharged. The Assistant Collector, who tried the case in the first instance, found that the defendant was entitled to certain credits, but that there was a balance due of Rs. 96-11-11, for which he gave a decree. The plaintiff appealed against the decree in so far as it dismissed any part of his claim. The defendant submitted to the decree. He neither filed a cross appeal nor objections, as provided by order XLI, rule 22 of the Code of Civil Procedure. On appeal the learned District Judge referred certain issues. It would rather appear that he was influenced by certain matters which either were not before the court of first instance or were not urged in that court. These issues in substance involved a retrial by the court of first instance of the very issues which that court had already decided. The result, however, of the findings was that the learned District Judge considered that the plaintiff's claim had been fully discharged; and he consequently in exercise of what he considered to be the powers conferred upon him by order XLI, rule 33, dismissed the plaintiff's suit *in toto*.

(1) [1901] 2 Ch. D., 671. (2) (1881) I. L. R., 3 All., 643.

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The plaintiff comes here in second appeal and contends that the learned District Judge was not justified under the circumstances in making such a decree.

The question is one of considerable importance, because rule 33 of order XLI is a new rule introduced into the Code of Civil Procedure for the first time in 1908 The rule is as follows:—

"The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order that case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection.

Illustration.

A claims a sum of money as due from him by X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The appellate court decides in favour of X. It has power to pass a decree against Y."

The words are no doubt very wide, but we think that care and judicial discretion must be used by appellate courts in the exercise of the powers conferred by the rule. In a proper case the court, of course, is quite entitled and should not hesitate to exercise them. It is not easy, nor perhaps expedient, to lay down any hard and fast rule. We think, however, that one principle may be safely stated. The courts in the exercise of the powers conferred by order XLI, rule 33, should not lose sight of the other provisions of the Code of Civil Procedure itself, nor of the Court Fees Act nor of the Law of Limitation. In particular it should bear in mind the case stated by way of illustration at the foot of the rule. Rule 22 of the same order provides:— "Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him before the court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the

appeal or within such further time as the appellate court may see fit to allow."

This rule clearly shows that it was intended that, *primâ facie* at least, a respondent should not be allowed to take exception to so much of a decree as was against him without complying with the provisions of the rule.

In a case in which there is no sufficient reason for a respondent neglecting either to appeal or to file objections, we think the court should hesitate before allowing him to object at the hearing of the appeal filed by the appellant. The object of rule 33 is manifestly to enable the court to do complete justice between the parties to the appeal. Where, for example, it is essential in order to grant relief to an appellant that some relief should at the same time be granted to the respondent also, the court may grant relief to the respondent, although he has not filed an appeal or preferred an objection. Of such cases the illustration to the rule is a type. In the supposed case the appellate court could not do justice to the appellant without doing injustice to the respondent unless it was enabled to make a decree against "Y."

The rule itself is for the most part taken from order LVIII, rule 4, of the rules of the Supreme Court of Judicature in England. The case of the *Attorney General* v. *Simpson* (1) is another illustration of the class of cases which calls for the exercise of the powers conferred by rule 33. That was a case in which an action was brought on behalf of the public for a declaration that the public were entitled to use certain locks on the river Ouse without payment of tolls. A further declaration was claimed that the defendant was under an obligation to repair, and keep in repair the locks. The court of first instance made a decree declaring that the public were entitled to use the locks without payment of tolls; but it, at the same time, contrary to the plaintiff's claim, declared that the defendant was under no obligation to repair the locks. The Court of Appeal found that the public were not entitled to use the locks without payment of tolls to the defendant. At the same time they were of opinion that the defendant was under an obligation to repair the locks.

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The plaintiff, however, not unnaturally, had taken no exception to that part of the declaration of the court of first instance which absolved the defendant from the obligation to keep the locks in repair. The Court of Appeal felt that they were justified, while declaring that the public were liable to pay tolls, to declare that the defendant was liable to keep the locks in repair, notwithstanding that no appeal or objection had been taken to that part of the decree by the plaintiff.

In our opinion the dismissal by the learned District Judge of the plaintiff's suit in its entirety was not a proper exercise by him of the powers conferred by order XLI, rule 33. If the defendant was aggrieved by the decree against him for Rs. 96, there was no reason why he should not have appealed or filed objections.

We accordingly allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance. We decree that the parties shall pay their own costs in this Court. The defendant respondent will have his costs in the lower appellate court.

Appeal allow

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Before the Hon'ble Mr. H. G. Richards, Chief Justice, Mr. Justice Banerji and Mr. Justice Tudball.

MUHAMMAD SHARIF AND ANOTHER (PLAINTIFFS) *v.* BANDE ALI AND OTHERS (DEFENDANTS.)*

Act No. 1 *of* 1872 (*Indian Evidence Act*), *section* 108—*Evidence—Presumption of death—Burden of proof.*

Held that the presumption which it is permissible to make under section 108 of the Indian Evidence Act, 1872, does not go further than the mere fact of death. If the period which has elapsed since the time that the person whose death is in question was last heard of is more than seven years, there is no presumption that such person died during the first period of seven years and not at any subsequent period.

Dharup Nath v. *Gobind Saran* (1) discussed. *In re Phene's Trusts* (2), *Narayan Bhagwant* v. *Shriniwas Trimbak* (3), *Fani Bhushan Banerji* v. *Surjya Kanta Roy Chowdhry* (4) and *Srinath Das* v. *Probodh Chunder Das* (5) referred to.

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* Second Appeal No. 67 of 1911 from a decree of C. Rustomji, District Judge of Allahabad, dated the 14th of September, 1910, confirming a decree of Pirthwi Nath, Subordinate Judge of Allahabad, dated the 2nd of March, 1910.

(1) (1886) I. L. R., 8 All., 614.
(2) (1869) L. R., 5 Ch. A., 139.
(3) (1905) 8 Bom., L. R., 226.
(4) (1907) I. L. R., 35 Calc., 25.
(5) (1910) 11 C. L. J., 580.