

MISCELLANEOUS CIVIL.

1914
November, 8.*Before Mr. Justice Chamier and Mr. Justice Figgott.*PAGEKAURI RAUT AND ANOTHER (PETITIONERS) v. RAM KHILAWAN
CHAUBE (OPPOSITE PARTY).**Civil Procedure Code (1908), order I, rule 10—Parties—Competence of court
to add parties in second appeal.*

Held that the High Court cannot in second appeal add a person as a party unless such person was a party to the appeal before the lower appellate court, notwithstanding that he was a party to the suit in the court of first instance. *Chunni Lal v. Lala Ram* (1) followed.

THE facts out of which this application arose are as follows :—

The respondent sued to set aside a sale deed by which his father had transferred certain property to the appellant. His contention was that he along with his father and elder brother constituted a joint Hindu family and his father had no right to alienate joint family property without any legal necessity. His elder brother was an attesting witness to the sale deed and was impleaded as a defendant. The plaintiff respondent himself was a minor at the time of the sale.

The court of first instance (Munsif of Gorakhpur) allowed the claim, holding that no legal necessity was proved, and set aside the sale deed. The appellant appealed to the lower appellate court, but failed to make the elder brother a party to the appeal. His appeal was dismissed by the lower appellate court. In second appeal a ground was taken that the share of the elder brother should have been charged with the purchase money and the present application was made to bring him on the record as a respondent.

Mr. *Shamnath Mushran* (Mr. *Jawahar Lal Nehru* with him), for the applicant :—

The court had power under order XLI, rule 20, to bring the elder brother on the record. *Paya Matathil Appu v. Kovamel Amina* (2). The case of *Chunni v. Lala Ram* (1) was opposed to this view. But the provisions of order XLI, rule 33, were quite new and gave power to the court to do everything which the lower appellate court could have done. The elder brother was interested in the result of the appeal, and the lower appellate court could even

* Miscellaneous application in Second Appeal No. 922 of 1914.

(1) (1898) I. L. Rs., 16 All., 5.

(2) (1895) I. L. B., 19 Mad., 151.

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now bring him on the record. No question of limitation arose when the court took action under order XLI, rule 20, old section 559; *Bindeshri Naik v. Ganga Saran Sahu* (1). If the question of limitation was out of the way there was no reason why this Court should not exercise the power.

Munshi *Parmeshwar Dayal*, for the opposite party :—

This Court could only implead a person who was on the record of the lower appellate court. It could not add in second appeal a party who was not a party in the lower appellate court; *Chunni v. Lala Ram* (2). It was the fault of the other side that the elder brother was not on the record before the lower courts. A new point was taken in the appeal for the first time. Limitation had barred the right as against him now; *Ram Ratan Chuckerbutty v. Jogesh Chandra Bhattacharya* (3). No decree could be passed against him, and if no decree could be passed against him it was no use bringing him on the record. The provisions of order XLI, rule 33, did not apply.

CHAMBER and PIGGOTT, JJ.—This is an application by the appellants in S. A. No. 922 of 1914, praying the court to make one Gajadhar Prasad a party to the appeal. The object of the suit brought by the respondent was to have a deed of sale executed by his father in favour of the appellants set aside. The respondent's elder brother, Gajadhar Prasad, who attested the deed of sale, was impleaded as a defendant. The first court decreed the claim. The defendants appealed, but they did not make Gajadhar Prasad a party to the appeal; and it is admitted that they did not ask the court to exclude the share of Gajadhar Prasad from the operation of the decree of the first court. In this second appeal the defendants are apparently asking this Court to exclude from the operation of the decree the share of Gajadhar Prasad on the ground that he attested the sale deed. The application is resisted on the strength of a decision of this Court in *Chunni v. Lala Ram* (2). This ruling has not been accepted by the Madras High Court; but so far as we are aware it has been consistently followed by this Court, or at all events has never been dissented from.

(1) (1892) I. L. R., 14 All., 154. (2) (1893) I. L. R., 16 All., 5.

(3) (1906) 12 C. W. N., 625.

On the broad question whether a court in second appeal can under order I, rule 10, make a person who was not a party in the lower appellate court a party in second appeal, we are not prepared to differ from the decision of this Court. We note, however, that in the present case our decision will not tie the hands of the Bench trying the second appeal. If the Bench hearing the appeal comes to the conclusion that the lower appellate court ought to have taken up the question which has now been raised, it will be able to remand the case under order XLI, rule 23, and the lower appellate court will then be able to make Gajadhar Prasad a party. The substantial point for decision at the hearing of the appeal will be whether the defendants are entitled to raise the question at this stage. We have been referred to order XLI, rule 33. We express no opinion as to the applicability of this rule beyond saying that we are certainly not prepared to act under it at this stage. The present application is dismissed with costs.

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Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott.

BANWARI LAL (PLAINTIFF) v. KHUBI RAM AND OTHERS (DEFENDANTS)*
Act (Local) No. II of 1901 (Agra Tenancy Act), section 97—Attestation of instrument by Revenue Court or officer—Act No. XVI of 1908 (Indian Registration Act), section 47.

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 November, 6.

Held that where a lease has been attested by a Revenue Court or officer under section 97 of the Agra Tenancy Act, 1901, such attestation, in the same way as registration under the Indian Registration Act, relates back to the date of execution of the document.

THE facts of this case were as follows :—

Certain occupancy tenants executed a sub-lease in favour of the plaintiff on the 21st of November, 1910 for a period of five years. The lease was registered on the same day. The same lessors executed another sub-lease of a portion of the same land in favour of the defendant on the 15th of November, 1910. This lease was, in lieu of registration, attested before a kanungo on the 7th of

* Second Appeal No. 13 of 1913 from a decree of Rama Das, First Subordinate Judge of Aligarh, dated the 6th of September, 1913, confirming a decree of P. K. Roy, Munsif of Koil, dated the 20th of February, 1913.