Before Mr. Justice Lindsay and Mr. Justice Ashworth.

NANNU PRASAD (PLAINTIFF) *v.* NAZIM HUSAIN (DEFENDANT).* 1927 December 7.

Civil Procedure Code, sections 11, 96 *and* 100; *order XLI, rule* 35—Res judicata—*Cross-appeals from a decree in one suit disposed of by one judgement followed by two separate decrees—Appeal to High Court against one decree only—Act No. XVIII of* 1879 *(Legal Practitioner's Act), section* 28—*Oral agreement as to setting off fees to be earned by the debtor against amount due on a promissory note.*

Plaintiff sued to recover Rs. 3,270-15-0 as due on a promissory note executed by defendant. The defence was that owing to a certain collateral agreement nothing at all was due. The trial court found for the plaintiff to the extent of Rs. 1,721-9-2. Both sides appealed, the plaintiff claiming the full amount claimed in the plaint; and the defendant again denying his liability *in toto*. These two appeals were decided by one judgement, which reduced the amount payable to the plaintiff to Rs. 1,145, and in consequence dismissed the plaintiff's appeal. Two separate decrees were, however, prepared, and the plaintiff appealed against the decree passed in his own appeal, but not against the decree passed in the defendant's appeal. *Held*, that the appeal was not barred by the principle of *res judicata*.

The defence in the suit was that there was an oral agreement between the parties that the amount ostensibly due on the promissory note should not be paid in cash, but should be, so to speak, "worked off" by professional services to be rendered by the defendant, who was a pleader. *Held*, that in view of the distinct provisions of section 28 of the Legal Practitioners Act, 1879, this defence was not open.

Ghansham Singh v. *Bhola Singh* (1), *Damodar Das* v. *Sheoram Das* (2), *Lalla Rughoobuns Sahoy* v. *Musammat Asloo* (3), *Muhammad Sulaiman Khan* v. *Muhammad*

*Second Appeal No. 1279 of 1926, from a decree of M. F. P. Herschenroder, Additional Judge of Agra, dated the 9th of February, 1926, confirming a decree of Lakshmi Narain Tandon, Subordinate Judge of Agra, dated the 12th of September, 1925.

(1) (1923) I.L.R., 45 All., 506. (2) (1907) I.L.R., 29 All., 730.
(3) (1873) 20 W.R., 294.

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Yar Khan (1), *Mariamnissa Bibi* v. *Joynab Bibi* (2), *Panchanada Velan* v. *Vaithinatha Sastrial* (3), *Zaharia* v. *Debia* (4), and *Ram Kirpal* v. *Rup Kuari* (5), referred to.

THE facts of this case were as follows:—

The suit was brought in the court of the Subordinate Judge of Agra for the recovery of Rs. 3,270-15, alleged to be due in respect of a promissory note executed by the defendant.

The defendant, Syed Nazim Husain, who was a pleader in the Agra District Court, resisted the claim and pleaded that nothing was due from him. He admitted in his written statement that he had executed the promissory note upon which the suit was brought, but he put forward the plea that there was an agreement between himself and the plaintiff that the amount entered in the promissory note was to be liquidated by fees to be earned by him for doing professional work for the plaintiff.

The result of the suit in the court of first instance was that the plaintiff's claim was decreed to the extent of Rs. 1,721-9-2 with future interest at 6 per cent.

Both parties were dissatisfied with the decree of the court of first instance, and there were two appeals before the District Judge. The appeal of the plaintiff was numbered 456 of 1925, and that of the defendant was numbered 510 of 1925. Both these appeals were decided by one judgement, which was delivered by the Additional District Judge on the 9th of February, 1926.

The result of the trial of the two appeals in the court of the Additional District Judge was that the sum of Rs. 1,721-9-2, which the first court had awarded to the plaintiff, was reduced to Rs. 1,145. This decision

(1) (1888) I.L.R., 11 All., 267. (2) (1906) I.L.R., 33 Calc., 1101.
(3) (1905) I.L.R., 29 Mad., 333. (4) (1910) I.L.R., 33 All., 51.
(5) (1883) I.L.R., 6 All., 269.

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was come to by the learned Judge after an examination of the accounts put forward by the parties respectively.

On this finding, that the plaintiff was only owed Rs. 1,145 by the defendant, it necessarily followed that the plaintiff's appeal was dismissed, for, as already mentioned, in his appeal he was claiming the difference between Rs. 1,721-9-2 allowed him by the first court and Rs. 3,270-15, the amount of claim as stated in the plaint.

After this judgement, disposing of both appeals, was written, two decrees were prepared, one in the plaintiff's appeal No. 456 of 1925, and the other in the defendant's appeal No. 510 of 1925.

The plaintiff appealed against the appellate decree of the Additional District Judge of Agra in appeal No. 456 of 1925, that is to say, the plaintiff's own appeal, but preferred no appeal against the decree of the Additional District Judge allowing the defendant's appeal No. 510 of 1925. A preliminary objection was, therefore, raised by the defendant respondent that because the plaintiff failed to put in an appeal against the decree allowing the defendant's appeal in the lower appellate court his appeal could not be heard, on the ground of *res judicata*.

On this appeal—

Dr. *Kailas Nath Katju*, for the appellant.

Mr. *Abu Ali* (for whom Munshi *Shiva Prasad Sinha*), for the respondent.

THE judgement of LINDSAY, J., after reciting the facts as above, thus continued :—.

We have heard much argument on this point and have been referred in particular to the Full Bench case of *Ghansham Singh* v. *Bhola Singh* (1) in which the

(1) (1923) I.L.R., 45 All., 506.

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previous decisions of this Court on this particular question of *res judicata* were examined and many of them overruled.

It is to be noticed, however, that one of the earlier cases on this point, *Damodar Das* v. *Sheoram Das* (1), was approved, it being held by the Full Bench that it had been correctly decided.

That was a case for an adjustment of an account between the plaintiff and the defendants. The court of first instance made a decree against which both parties appealed to the District Judge, who found in favour of the defendants. The plaintiff filed a second appeal against the decree which the District Judge had passed in the appeal brought by the defendants. He omitted to appeal against the decree which had been passed against him in his own appeal and it was argued that by failing to challenge the decree so passed against him by the District Judge he was precluded from maintaining the second appeal which, as already said, challenged the decree made in defendant's favour in the lower appellate court. Although the lower appellate court had drawn up separate decrees, one in each appeal, it was held by the Bench that "there was in fact but one decree settling the accounts between the parties". It is said in the report that the two separate decrees made by the District Judge were "duplicates". It was held that in the circumstances there was no force in the plea of *res judicata* raised in the preliminary objection.

The case now before us is similar as regards the facts. There was one suit only and, necessarily, one decree only in the trial court. Both parties were dissatisfied and the result of the trial of both the appeals was that the first court's decree was modified in favour of the defendant. There is this difference, however,

(1) (1907) I.L.R., 29 All., 730.

namely, that the two decrees in this case prepared in the District Court are not "duplicate" decrees in the sense that they are both drawn in the same language.

In my opinion this difference does not affect the principle observed in the case of *Damodar Das* v. *Sheoram Das* (1).

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There was but one suit, and on the pleadings the suit was in substance a suit for accounts and the only issue was "what sum, if any, is due to the plaintiff".

The trial court awarded the plaintiff Rs. 1,721 odd, and the lower appellate court, having heard both the appeals, came to the decision that the sum which the plaintiff was entitled to recover was Rs. 1,145 only. That is what was decided between the parties upon the only issue which had to be determined and that is the *res judicata*—the adjudication of the appellate court which, so far as that court was concerned, conclusively determined the rights of the parties in respect of the matter in controversy in the suit.

No doubt, in order to comply with the provisions of order XLI, rule 35, it was necessary for the lower appellate court to draw up separate decrees, but in such a case where there are cross-appeals from a decree in one suit there is, in fact though not in form, a single decree.

I would refer here to an old case which, to my mind, lays down the law very clearly, the case of *Lalla Rughoobuns Sahoy* v. *Mussammat Asloo* (2), and I quote the following passage from the judgement of PHEAR, J :—.

"It is, however, obvious that when two parties to a suit appeal so that the one appeal is but the cross-appeal of the other, there ought to be only one final decree made between the two parties."

The law, in my opinion, contemplates that there should be only one decree in one suit, except in certain

(1) (1907) I.L.R., 29 All., 730. (2) (1873) 20 W.R., 294.

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cases in which the Code of Civil Procedure lays down that there may or must be two decrees, one preliminary and one final. A suit like the one now under consideration is not one of the exceptional cases in which two decrees are allowed or made necessary.

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In this connection I would also refer to the Full Bench ruling of this Court in *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (1), where it was laid down that the decree of the appellate court supersedes the decree of the first court even where the appellate decree merely affirms the original decree and does not reverse or modify it.

The function of the appellate court is to determine what decree the court below ought to have made, and it follows that where the trial court has passed only one decree, there can be substituted for that decree only one decree, should the case come up in appeal. So, while it may be that for purposes of procedure and in order to formally complete the records it may be necessary in the case of cross-appeals to draw up a separate decree in each case, there is, in fact, only one and the same decree which ought to be incorporated with each appellate record. Either decree, read, if necessary for purposes of interpretation, with the decree of the trial court ought to produce the same result, and in the present case that result which is the *res judicata* is that the plaintiff who was claiming Rs. 3,270-15-0 is entitled to Rs. 1,145 only. And this being the decision which the appellant calls in question in this second appeal, it appears to me that no question of *res judicata* arises at all. I would, therefore, overrule the preliminary objection.

(1) (1888) I.L.R., 11 All., 267.

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Coming now to the merits of the case, we have to notice in the first place the plea which is raised in the second ground of appeal. The defendant respondent is a legal practitioner, and in his written statement he put forward, by way of defence, an agreement with the plaintiff that he was to be allowed to liquidate the debt owing under this promissory note by appropriating to its extinction various sums which were to become due to him for the performance of professional services on behalf of the plaintiff. The services were to be rendered from time to time.

Dr. *Katju* has taken the plea here that under section 28 of the Legal Practitioners' Act no such agreement can be set up unless it is an agreement in writing.

Unfortunately this plea was not taken in the pleadings. It seems to have been mentioned before the Subordinate Judge, whose inclination apparently was to decide it in favour of the plaintiff, but for some reason or other he seems to have changed his opinion and to have gone on to open up the accounts between the parties, thereby giving effect to the defence plea that such an agreement for the liquidation of the debt existed.

The terms of section 28 of the Legal Practitioners' Act are very clear. No agreement such as was pleaded by the defendant in his written statement could be put forward unless it was an agreement in writing.

I have examined the record of the statement made by the defendant on oath in the trial court. He was asked expressly whether he could produce any written agreement regarding his remuneration for legal services. His answer was that the agreement between himself and the plaintiff was a verbal and not a written agreement. That admission of the defendant, therefore, concludes this part of the case. In this view I need not proceed to examine another plea which was raised by Dr. *Katju*

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on behalf of the plaintiff, namely, that the proof of such an agreement as the respondent set up was excluded under the provisions of section 92 of the Evidence Act. The result of this is that it must be taken that there was no real defence to the suit. The promissory note which was brought into suit was one of the 14th of November, 1915, on which date the account had been taken between the parties and the defendant was found owing Rs. 2,405. The defendant admits both in the written statement and in his deposition in the court that this account was taken and that he accepted the account as correct. It follows, therefore, that there should be a decree in full for the plaintiff on this promissory note. I would allow this appeal, set aside the decree of the lower court and direct that the plaintiff's claim be decreed in full with costs in all three courts.

ASHWORTH, J.—I entirely concur with the judgement of my learned brother generally and in particular with the following passage in it:—"The law, in my opinion, contemplates that there should be only one decree in one suit, except in certain cases in which the Code of Civil Procedure lays down that there may or must be two decrees, one preliminary and one final." This opinion is qualified to some extent by the following passage:—"So, while it may be that for purposes of procedure and in order to formally complete the record it may be necessary in the case of cross-appeals to draw up a separate decree in each case, there is, in fact, only one and the same decree which ought to be incorporated with each appellate record."

Now up to the present date there has never been any doubt expressed in the various decisions of this Court that where two appeals arise out of the decision in a single case it is proper for the appellate court to frame two decrees. The only question on which there has been

divergence of opinion is whether, *for the purposes of a second appeal*, these two decrees so framed may be regarded as one decree.

Up to the year 1907 it appears that the Allahabad High Court had rigorously enforced the necessity of separate appeals wherever there were two decrees, even if those decrees might be identical. Then came the case of *Damodar Das* v. *Sheoram Das* (1), wherein it was held that if the two decrees were practically identical, an appeal from one of them would operate as an appeal from both of them. Reliance was placed on a Calcutta case *Mariamnissa Bibi* v. *Joynab Bibi* (2) and a Madras case, *Panchanada Velan* v. *Vaithinatha Sastrial* (3).

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This view was dissented from by a decision of a Full Bench consisting of Sir JOHN STANLEY, Mr. Justice TUDBALL and Mr. Justice CHAMIER in *Zaharia* v. *Debia* (4). In that case it was held, relying on the Privy Council decision in the case of *Ram Kirpal* v. *Rup Kuari* (5), that although section 13 of the then Code did not apply to separate appellate decrees arising out of one suit, still section 13 of the Code was not exhaustive and the principle of *res judicata* applied. It was also held, overriding *Damodar Das* v. *Sheoram Das* (1), that it made no difference if the two appellate decrees were identical or not; there must be an appeal from each of them. The ground given was that if one of these decrees were altered in second appeal and the other decree were to stand there would be two inconsistent decrees.

Next we have the decision of *Ghansham Singh* v. *Bhola Singh* (6). There was one concurrent judgement by Sir GRIMWOOD MEARS, C. J., PIGGOTT, WALSH and RYVES, JJ. There was another judgement, agreeing as to the particular conclusion in the case but dissenting

(1) (1907) I.L.R., 29 All., 730.
(2) (1906) I.L.R., 33 Calc., 1101.
(3) (1905) I.L.R., 29 Mad., 333.
(4) (1910) I.L.R., 33 All., 51.
(5) (1883) I.L.R., 6 All., 269.
(6) (1923) I.L.R., 45 All., 506.

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as to reasons, by Sir P. C. BANERJI. The majority held, overruling *Zaharia* v. *Debia* (1), that *Damodar Das* v. *Sheoram Das* (2) had been rightly decided, and that where there were two appellate decrees, practically identical, arising out of one suit, an appeal from one would operate as an appeal from both of them. They went further and held that, even if the two appellate decrees were different to some extent, an appeal from one of them would operate as an appeal from the other *to the extent that the two decrees were identical*. It arrived at this conclusion by overruling the view of the Full Bench in *Zaharia* v. *Debia* (1) that the principle of *res judicata* applied; for it held that the decree not appealed against was not final inasmuch as "the ultimate rights of the parties must be adjusted and regulated according to the final decision of the last court of appeal" in the appeal appealed against.

I would remark that in the present case we should arrive at the same decision as we did, if we adopted the reasoning therein, but we adopt a different reason. Both these Full Bench decisions were indeed *obiter dicta*, so far as they decided anything other than that in the one case two appeals must be filed and in the other that one appeal would suffice. In the earlier case *Zaharia* v. *Debia*, there were two suits by independent plaintiffs and so the question of two decrees in one suit did not arise, although the Bench went out of its way to consider the law applicable to two decrees in one suit. In the later case, *Ghansham Singh* v. *Bhola Singh*, as BANERJI, J., pointed out, the decree not appealed against could stand without affecting the success of the other appeal, and so the question whether it operated as *res judicata* did not really arise.

It will be seen that in none of these judgements was it denied that there could be two appellate decrees aris-

(1) (1910) I.L.R., 33 All., 51. (2) (1907) I.L.R., 29 All., 730.

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ing out of one suit. The sole question considered was whether the rule of *res judicata* applied.

Now there appear to me to be two settled rules of law. One is that contained in sections 96 and 100 of the Code,—that an appeal shall lie from every decree passed whether by a first court or by an appellate court. The other rule is one not expressly declared in the Code, but one to be inferred from the rule of *res judicata* contained in section 11, and it is a rule which has been expressly affirmed by the Privy Council in *Ram Kirpal* v. *Rup Kuari* (1). It is this. A decree not appealed against is final, that is to say, the only method of getting rid of a decree is by an appeal. It appears to me that this Privy Council decision is against the view adopted in *Ghansham Singh* v. *Bhola Singh* that an appellate decree can be set aside by an appeal from a different decree even though that different decree be wholly or partly identical. No doubt there are cases in which a decision can be ignored, but that is only where a court tries a subsequent suit and has to decide a matter settled by a decree of another court, which court was not competent to hear the latter suit. *Ghansham Singh* v. *Bhola Singh*, in effect, may be said to hold that an appellate court may set aside indirectly a decree arising out of a suit, by its decision in another appeal arising out of that suit. A "decree" is "a formal expression of an adjudication". Why should an appellate court allow a formal expression of an adjudication from which it dissents to stand, while setting it aside indirectly? It would seem desirable that in a second appeal this High Court should, where the effect of appeal from one decree is to set aside in part or in whole another decree arising out of the same suit, expressly and formally set aside that other decree to the extent necessary. It appears to be thought that it cannot do so because there is no appeal from that

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(1) (1883) I.L.R., 6 All., 260

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other decree, but if the existence of the decree is ignored for one purpose why hold it effectual for another purpose? I would also point out that it seems undesirable that any formal expression of an adjudication should be set aside indirectly, on the ground that the substance of a decree and not its form is to be looked at. The provision as to the drawing up of a decree is designed to leave a clear and certain record. If a decree can be set aside indirectly, this object is not attained.

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That the matter is one of great difficulty would appear from the fact of the very different views, taken in two Full Bench rulings, of this case. It appears to me that the view of my learned brother that there can be only one decree in one suit cuts away the whole cause of difficulty. There can be no question of *res judicata* if there is only one decree at a time in a suit.

But there appears to be some ground for considering that the Civil Procedure Code recognizes more than one decree in a suit. Certainly practice does. The practice is, where there are two cross-appeals, to frame two separate decrees.

I will attempt to show that the Civil Procedure Code should not be construed to permit of two decrees at one time in a suit. It is true there may be a preliminary and a final decree, but as soon as the final decree is passed it swallows up and cancels the preliminary decree. The whole difficulty in construing the Code appears to me to arise from the necessity of providing for preliminary and final decrees in the same suit. Act VIII of 1859, which is the first Civil Procedure Code, only contemplated a judgement being written when there had been adjudication of "the point or points" for determination. The decree was to "bear the date on which the judgement was passed and to specify clearly the relief granted or other determination of the suit"; see sec-

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tions 185 and 189. In that Act there was no definition of decree. Then we come to Act X of 1877. There a decree was defined as follows:—"Decree means the formal order of the court in which the result of the decision of the suit is embodied." In the same Code "judgement" was defined as "the statement given by the Judge as to the grounds of the decree by which a suit is determined." These definitions clearly contemplated a single judgement on the whole case. The definition of decree in Act XIV of 1882 still more definitely indicated that there should be one judgement and one decree for each suit. "Decree" was defined to mean "the formal expression of an adjudication, upon any right claimed, or defence set up, in a civil court, when such adjudication, so far as regards the court expressing it, decides the suit or appeal." And "judgement" was defined to mean "the statement given by the Judge of the grounds of a decree." We then come to the present Code of 1908. The definition of decree contained in section 2 (2) was designed, *inter alia*, to provide for a final and a preliminary decree. The definition is as follows:—

"Decree means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard *to all or any of the matters* in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or 144, but shall not include:—

(*a*) any adjudication from which an appeal lies as an appeal from an order, or

(*b*) any order of dismissal for default."

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

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The definition of judgement remains as it was, namely "the statement given by the Judge of the grounds of a decree." Now it appears clear to me that there was no intention, in framing this definition of decree, to alter the rule that a whole suit should be adjudicated, so far as was possible *without further proceedings* (i.e., proceedings other than mere adjudication), by a single judgement and a single decree. Unfortunately the words in the definition, "with regard to all or any of the matters in controversy", do not make it clear that the words "or any" were merely inserted because part of the adjudication might only justify "a preliminary decree". It leaves it open to the construction that separate questions may be decided by separate judgements and a separate decree drawn up for each judgement. The proper meaning would be better expressed by substituting for the words in the definition "with regard to all or any of the matter in controversy" the words "with regard to all the matters in controversy in the suit so far as they can, for the time being, be adjudicated upon without further proceedings (other than mere adjudication)." This seems to be what is intended by the provision in the Code that the decree shall bear the date of the judgement. If there could be more than one judgement at one time, this provision would be impossible to conform with. In the same way if there are two cross-appeals against a single first court judgement, they should be settled by the appellate court by a single judgement and a single decree. If we adopt this view, the question involved in the present case, which has been settled differently by two High Courts, would cease to exist. There could be no question of *res judicata*.

My view, then, is that the Civil Procedure Code only contemplates a single decree at one time in any one

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suit. So far as any rules in the schedule provide to the contrary, they should be amended. So far, again, as any practice of the court recognizes more than one decree in one suit, that practice should be discontinued, whether the practice is carried out in the filing of records or otherwise. Whenever an appellate court decides an appeal against a decree of a lower court, the appellate court should frame as its decree a comprehensive document, which would remove all need or reference to any other document for the purpose of knowing what must be held to be the adjudication in the whole suit. It appears to me to be more desirable for the appellate court to frame a document settling the actual final adjudication than to leave it for a lower court to do so, in execution or otherwise, by harmonizing the various documents on the file miscalled "decrees." A decree set aside by an appellate order or swallowed up by a final decree should have endorsed thereon this fact.

BY THE COURT.—The order of the court is that the appeal is allowed, the decree of the lower court is set aside and a decree will be drawn up decreeing the plaintiff's claim in full with costs in all three courts.

Appeal allowed.