

1932

SHAHZAD
SINGH
v.
JLACHHA
KUNWAR.

the specific performance of the contract can be enforced only under section 27 of the Specific Relief Act, which section makes an exception in favour of a transferee for value who has paid his money in good faith and without notice of the original contract. We therefore think that no matter what principle or statute governs the obligation of the representatives, the provisions contained in section 27 of the Specific Relief Act must apply, and the defendant who is a transferee for value without notice is protected and the contract cannot be enforced against him.

The plaintiff alleged that the transaction was one of sale, but the finding of the lower appellate court that it was a transaction of exchange is conclusive against him. The suit has therefore been rightly dismissed and we dismiss this appeal with costs.

FULL BENCH.

Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji and Mr. Justice King.

AFZALI BEGAM (APPLICANT) v. KANHAIYA LAL
(OPPOSITE PARTY).*

1932
June, 6.

Civil Procedure Code, order XLI, rules 10 and 11—Hearing under rule 11—Admission made conditional on appellant depositing decretal amount as well as costs—Ultra vires.

At the hearing of a first appeal under order XLI, rule 11, of the Civil Procedure Code the Court made an order that if the appellant deposited in Court, within a given time, the decretal amount as well as a sum by way of security for costs, the appeal was to be admitted, otherwise it was to stand automatically rejected.

Held, that apart from the discretion under order XLI, rule 10 to demand security for costs, there is no power in the appellate court under order XLI, rule 11 to make the order for issue of notice to the respondent conditional on payment of the decretal amount by the appellant. If the appeal has no merits, it should be dismissed; otherwise the court had to

*Application in First Appeal No. 372 of 1931.

1932

AFZALI
BEGAM
v.
KANHAIYA
LAL.

order notice to issue, and not to impose conditions on the appellant. The order passed was *ultra vires* and must be vacated, and the appeal must be deemed to be still pending under order XLI, rule 11, even though the time for deposit had expired.

Messrs. *A. M. Khwaja* and *S. B. Johari*, for the applicant.

SULAIMAN, C. J., MUKERJI and KING, JJ. :—This is an application in a first appeal from a preliminary decree passed under order XXXIV, rule 4 in a mortgage suit for sale. The memorandum of appeal was presented in this Court and was duly admitted, and the appeal was ordered to be put up for hearing under order XLI, rule 11, either for dismissal or issue of notice. On the 8th of December, 1931, a Bench of this Court passed the following order: "If the appellant brings into Court the sum of Rs.5,478, and Rs.500 for security for costs, within four months from this date the appeal is to be admitted, otherwise the appeal is to stand automatically rejected and no further time will be given under any circumstances."

Before the expiry of the time allowed the appellant filed an application praying that the appeal should be unconditionally admitted and notice be issued to the respondent. There is no doubt that after the memorandum of appeal is admitted under order XLI, rule 9, and even before the issue of notice to the respondent under rule 11, the appellate court has discretion under rule 10(1) to demand from the appellant security for the costs of the appeal or of the original suit or of both. The rule goes on to provide that in certain cases such an order must of necessity be passed. But that discretion is confined to demanding security for the costs only, and not for an order to deposit the whole of the decretal amount. It is only when an application for stay of proceedings of execution is made under rule 5 that the court is given power to demand security for the due performance of such decree or order as may ultimately be binding upon the appellant.

1932

ARZALI
BEGAM
v.
KANHAIYA
LAL.

Under rule 11(1) the court has power to dismiss the appeal obviously when it is of opinion that the appeal has no merits. Rule 12(1) then provides that unless the appellate court dismisses the appeal under order XLI, rule 11, it shall fix a day for the hearing of the appeal. Similarly rule 13(1) provides that where the appeal is not dismissed under rule 11, the appellate court shall send notice of the appeal to the court from whose decree the appeal is preferred.

It seems to us that apart from the discretion to demand security for costs, there is no power in the appellate court to make the order for issue of notice to the respondent conditional on payment of the decretal amount by the appellant. The admission or rejection of the appeal is to be on the merits. Where the case is a fairly arguable one and there is a reasonable prospect of a success the court has to order notice to issue, and not to impose conditions on the appellant. On the other hand, if the case has no merits, the appeal should be dismissed forthwith.

We are, therefore, of opinion that the order quoted above, which demanded not only security for the costs but also the full decretal amount, which was to be realised by the sale of the mortgaged property after the final decree is passed hereafter, was *ultra vires*. Although it purported to be a final order involving an automatic rejection of the appeal and was not a provisional order, we think that the order being *ultra vires* must be vacated, and the appeal, even though the time for deposit has expired, must be deemed to be still pending, particularly as the appellant filed an application for the reconsideration of the order before the expiry of the prescribed period.

We accordingly set aside that order, leaving it open to the Bench hearing the appeal under order XLI, rule 11, either to demand security for costs under order XLI, rule 10(1), or to deal with the appeal at once under order XLI, rule 11.