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the Subordinate Judge of Mainpuri. Having regard to the fact that the question is a new one and much could be said on either side, we direct that the parties pay their own costs in the court below and in this Court.

FULL BENCH.

Before Sir Grimwood Mears, Chief Justice, Mr. Justice Boys and Mr. Justice Young.

RAM KINKAR RAI AND ANOTHER (PLAINTIFFS) *v.* TUFANI AHIR AND OTHERS (DEFENDANTS).*

1930 *June*, 27.

Practice and pleading—Point of law raised for the first time in second appeal—Whether permissible—Civil Procedure Code, order XLI, rule 2.

A point not taken in the court below, whether the omission was by the appellant in that court or whether the respondent failed to support his decree by taking the point, will not be permitted to be raised, except possibly—

I. Where the point may be described as involving a question of public policy, e.g., (1) involving jurisdiction, (2) involving the principle of *res judicata*, (3) where the decision of the point would prevent future litigation. In the above instances the point will be allowed to be argued only if it can be decided upon the materials before the court and does not involve the taking of further evidence or the sending of the case, or any issue, back to the lower court, or a decision of a question of fact.

II. Where the plaint discloses no cause of action, or the written statement no ground of defence.

It is not a ground for permitting a new point to be argued, merely (1) that it was omitted by oversight in the court below, or (2) that the materials are all on the record and that the answer to the point is plain.

[The question whether a point of limitation can, under certain conditions, be entertained if raised for the first time in second appeal was expressly left open by the Full Bench.]

* Second Appeal No. 1157 of 1928, from a decree of Krishna Das, Subordinate Judge of Ghazipur, dated the 29th of May, 1928, reversing a decree of Rikheshwari Prasad, Munsif of Ghazipur, dated the 28th of February, 1928.

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Muhammad Ismail v. *Chattar Singh* (1), *Tek Narain Rai* v. *Dhondh Bahadur Rai* (2), *Chhadami Lal* v. *Shyama Charan* (3), *Bibi Wasilan* v. *Mir Syed Hussain* (4), *Bechi* v. *Ahsan-ullah* (5), *Ranga Charya* v. *Reoti Raman* (6) *Mitthu Lal* v. *Deojit* (7), *Secretary of State for India in Council* v. *Sukhdeo* (8), *Sheo Dayal* v. *Jagar Nath* (9), *Kamlapat Moti Lal* v. *Union Indian Sugar Mills Co.* (10), *Skinner* v. *Naunihal Singh* (11), *Chhote Lal* v. *Chandra Bhan* (12), *Brij Lal Singh* v. *Bhawani Singh* (13), *Kanhia* v. *Mahin Lal* (14), *Balkaran Singh* v. *Dulari Bai* (15), *Partap* v. *Ram Sewak* (16), *Jai Ram Das* v. *Raj Narain* (17), *Sadho Kandu* v. *Mst. Jhinka Kuer* (18), *Iqbal Haidar* v. *Mst. Wasi Fatima* (19), *Subramaniam Pattar* v. *Kizhakkara Uthamanthil* (20), *Girish Chandra Choudhury* v. *Gopal Chandra Poddar* (21), and *Manindra Chandra Nand* v. *Durga Prasad Singh* (22), referred to.

The facts of the case fully appear from the following referring order :—

YOUNG, J. :—I think that the preliminary point raised in this appeal ought to be decided by a Bench of three Judges.

The suit was brought by the plaintiffs on the ground that the defendants were trespassers, and the plaintiffs sought the ejectment of the defendants from the plots in question. In the plaint the plaintiffs alleged that they had obtained judgment in the revenue court against the defendants and that in execution of that decree they obtained possession of the plots, but that, in spite of their obtaining possession, the defendants unlawfully and high-handedly took possession of the plots, and that they were, therefore, in possession unlawfully and were trespassers. The whole question which was argued both in the trial court and the lower appellate court was whether one Chatardhari and Baldeo were joint or separate at the time of the death of Baldeo, for it was alleged that the widow of Baldeo had granted a lease to the defendants,

(1) (1881) I. L. R., 4 All., 69.
(2) Weekly Notes, 1898, p. 104.
(3) (1913) 22 Indian Cases, 12.
(4) (1928) I. L. R., 8 Pat., 107.
(5) (1890) I. L. R., 12 All., 461.
(6) [1929] A. L. J., 229.
(7) (1927) I. L. R., 49 All., 809.
(8) (1899) I. L. R., 21 All., 341.
(9) (1911) 8. A. L. J., 922.
(10) [1929] A. L. J., 1289.
(11) (1913) I. L. R., 35 All., 211.
(12) (1922) I. L. R., 45 All., 59 (65).
(13) (1910) I. L. R., 32 All., 651 (656).
(14) (1888) I. L. R., 10 All., 495.
(15) (1926) I. L. R., 49 All., 55.
(16) (1926) 96 Indian Cases, 304.
(17) (1922) I. L. R., 45 All., 21.
(18) A. I. R., 1929 All., 456.
(19) (1922) I. L. R., 45 All., 53.
(20) A. I. R., 1922 Mad., 519.
(21) A. I. R., 1925 Cal., 1184.
(22) (1917) 15 A. L. J., 432.

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which it was within her power to do, and, therefore, the defendants were not trespassers. The trial court held that Chatardhari and Baldeo were joint when Baldeo died and that, therefore, Baldeo's widow could not grant a valid lease. The lower appellate court held that Chatardhari and Baldeo were separate when Baldeo died and that, therefore, Baldeo's widow could grant a lease and that the defendants were, therefore, not trespassers and the plaintiff's suit must fail.

It is now submitted by Dr. *Agarwala* in second appeal that even taking as correct, which he must do, the findings of the lower appellate court, the widow of Baldeo, being one co-sharer, had no power to grant a lease of joint land without the consent of the other co-sharers. It is perfectly obvious that this is a point of law which has never been taken in either the trial court or the lower appellate court and, indeed, it is admitted by Dr. *Agarwala* that this is so. He contends, however, that the High Court in second appeal should allow him to take this point now.

I have myself held last year in this Court that, in accordance with the rule obtaining in matters of appeal in England, no appellant should be allowed to raise points of law not raised by him in the lower court, but that it was open to a respondent to defend his decree by any means within his power. My impression is that this point has been decided by Mr. Justice Boys and myself last year in a two-Judge case. Neither counsel for the appellant or respondent in this case, however, can assist in referring me to this particular case. There was a case in *Sheo Dayal* v. *Jagar Nath* (1), in which two Judges of this High Court held that where a plea which goes to the root of the case was not raised in the lower court, it might be raised in appeal. This decision would cover most points of law which appellants desire to raise. On the other hand, two Judges in the case of *Balkaran Singh* v. *Dulari Bai* (2), held that "this court sitting either in Letters Patent or in second appeal ought not to entertain points which should have been alleged in the pleadings and made the subject of an issue and argument and of decision by the trial court." Sitting by myself I would follow the latter decision rather than the former. My own opinion is that no appellant should be allowed, under any circumstances, to raise points not taken by him in the lower

(1) (1911) 8 A. L. J., 923. (2) (1926) I. L. R., 49 All., 55.

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courts, but as the matter is of importance and coming up very frequently in courts and there are apparently two different views of this High Court on the matter, I think it is advisable that this point should be settled once and for all by a tribunal competent to deal with the differing views of two-Judge Courts. I do not think that order XLI, rule 2 really deals with this particular point at all. That rule merely deals with the question whether grounds of objection *not set forth in the memorandum of appeal* should be heard or not. It does not deal with the point as to whether points not argued in the courts below should be heard in an appellate court or not.

Dr. *M. L. Agarwala*, for the appellants.

Messrs. *S. C. Goyel* and *S. B. L. Gaur*, for the respondents.

MEARS, C.J., BOYS and YOUNG, JJ. :—This is a Full Bench appointed to consider the question whether, to use the language of Mr. Justice YOUNG, "a point of law which has never been taken in either the trial court or the lower appellate court can be raised in second appeal." The plaintiffs sued eight defendants in ejectment and for damages. The defence of the first group of defendants was that they were tenants, holding by virtue of an agreement with defendant No. 3, a widow by name Mst. Batasi, her husband being by name Baldeo. The second group of defendants were co-sharers who did not join in the action. In the year 1926 the defendants had been actually ejected from the land in dispute but they subsequently regained possession; and the principal point that was discussed before the munsif and the lower appellate court was whether the defendants were trespassers—a matter which involved the right of Mst. Batasi to grant a lease to defendant No. 1. The munsif, on the issue of jointness or separation, held that Baldeo, the husband of Mst. Batasi, died as a member of a joint Hindu family, and therefore decreed the suit. On appeal Mr. Krishna Das held that Baldeo was separate from the plaintiffs. He, therefore, dismissed the suit,

holding that Mst. Batasi had power to grant the lease. Counsel for the plaintiffs omitted to raise in their pleading the legal position which later in this Court they sought to raise, viz, that even if Baldeo was separate from the plaintiffs Mst. Batasi could not thereby grant a lease to defendant No. 1, and that in the further alternative the suit of the plaintiffs ought to have been decreed in part. Nor were these alternatives discussed in the lower appellate court. When these points were sought to be taken before Mr. Justice YOUNG, he declined to receive them upon the ground that no appellant should be allowed to raise points not taken by him in the lower courts. He noticed, however, that this matter frequently arose, and was of opinion that the matter should be authoritatively settled. Dr. *Agarwala*, who appeared on behalf of the plaintiffs, called our attention to a number of cases which can be conveniently grouped under five heads :—

(1) Cases in which the doctrine of *res judicata* has been allowed to be invoked;

(2) Cases of limitation;

(3) Cases in which on a study of the pleadings no cause of action has been put forward by the plaintiff, or defence shown by the written statement;

(4) Jurisdiction; and

(5) Points which the courts have allowed to be taken upon the specific ground that all the material being before the court, a decision would result in the saving of further litigation.

On the question of *res judicata* he referred us to *Muhammad Ismail* v. *Chattar Singh* (1), which is an authority for the proposition that the plea of *res judicata*, though not brought forward either before the munsif or the lower appellate court, can be brought

(1) (1881) I. L. R., 4 All., 69.

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forward for the first time in second appeal, and must be entertained by the Bench, who have two courses open to them,—either to decide the question on the record as it stands, or after a remand upon findings of fact. Decisions to the same effect are to be found in *Tek Narain Rai* v. *Dhondh Bahadur Rai* (1), *Chhadami Lal* v. *Shyama Charan* (2) and *Bibi Wasilan* v. *Mir Syed Hussain* (3).

On the question of limitation we were referred to *Bechi* v. *Ahsan-ullah* (4), in which a Full Bench of this Court decided that a question of limitation, when it arises upon the facts before a court, must be heard and determined, whether or not it is directly raised in the pleadings or in the grounds of appeal.

In *Ranga Charya* v. *Guru Reoti Raman* (5), the Court held that where the facts necessary to support a plea of limitation are either admitted or are apparent on the face of the record, the High Court will not be justified in refusing to entertain the plea even if raised for the first time in second appeal.

The third case is that of *Mitthu Lal* v. *Deojit* (6), in which it was held that a plea of limitation can be raised at any moment prior to the decision of the appeal.

On the question as to the duty of the court when the plaint discloses so cause of action, we were referred to *Secretary of State for India in Council* v. *Sukhdeo* (7). In the case it came to the notice of the court that the plaint in the suit disclosed no cause of action against the defendant. The court examined the plaint, upheld that contention and thereupon decided that that plea must prevail, though taken before the second appeal Bench for the first time. To the same effect is *Sheo Dayal* v. *Jagar Nath* (8).

(1) Weekly Notes, 1898, p. 104.
(2) (1913) 22 Indian Cases, 12.
(3) (1928) I. L. R., 8 Pat., 107.
(4) (1890) I. L. R., 12 All., 461.
(5) [1929] A. L. J., 229.
(6) (1927) I. L. R., 49 All., 809.
(7) (1899) I. L. R., 21 All., 341.
(8) (1911) 8 A. L. J., 922.

Dr. *Agarwala* also referred us to the Privy Council case of *Kamlapat Moti Lal* v. *Union Indian Sugar Mills Co.* (1). In that case it was pointed out to their Lordships of the Privy Council that a scheme, which it was essential should have been laid before the shareholders for their approval, had by omission not been so laid before them. It was "tentatively suggested" in the High Court that a decision by the shareholders should precede sanction by the court, but the point was not pressed. When, however, the omission was brought to the notice of their Lordships of the Privy Council, they at once gave effect to it. This is an example of a point taken which involved the jurisdiction of the High Court.

On the fifth head, viz. the desirability of allowing a fresh point to be taken which, if decided, will prevent further litigation, we were referred by Dr. *Agarwala* to *Skinner* v. *Naunihal Singh* (2) and *Chhote Lal* v. *Chandra Bhan* (3). Three other cases, lying outside these groups, to which our attention was drawn by counsel for the plaintiffs are :—

Brij Lal Singh v. *Bhawani Singh* (4), where at page 656 a claim was allowed to be amended which enabled the plaintiffs appellants to redeem both mortgages, and thereby to save the expenses of a fresh suit. It is to be noticed that the Court held that that was not an unreasonable application, and it was not objected to by the advocate for the respondents.

Dr. *Agarwala* concluded his argument by very properly presenting to us two cases which were contrary to the contention that he was urging :—*Kanhia* v. *Mahin Lal* (5) and *Balkaran Singh* v. *Dulari Bai* (6). In the latter case the court said: "We have

(1) [1929] A. L. J., 1289.
(2) (1913) I. L. R., 35 All., 211.
(3) (1922) I. L. R., 45 All., 59. (65).
(4) (1910) I. L. R., 32 All., 651. (656).
(5) (1888) I. L. R., 10 All., 495.
(6) (1926) I. L. R., 49 All., 55.

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repeatedly stated in this Court that lower appellate courts and this Court, sitting either in Letters Patent or in second appeal, ought not to entertain points which should have been alleged in the pleadings and made the subject of an issue and of argument and of decision by the trial court and also stand in the grounds of appeal clearly and directly. The trial Judge does not have an opportunity of giving a decision upon a point such as this and it is not fair to a lower court to upset an appeal on a ground never submitted to it."

In answer to these authorities Mr. *Gaur* referred us to many cases of which the following are the principal,—they are in addition to the last two cases cited by Dr. *Agarwala*: *Partap* v. *Ram Sewak* (1), *Jai Ram Das* v. *Raj Narain* (2), *Sadho Kandu* v. *Mst. Jhinka Kuer* (3), *Iqbal Haidar* v. *Mt. Wasi Fatima* (4), *Subramaniam Pattar* v. *Kizhakkara Uthamanthil* (5), *Girish Chandra Choudhary* v. *Gopal Chandra Poddar* (6), and *Balkaran Singh* v. *Dulari Bai* (7).

Further he contended that before the points which Dr. *Agarwala* sought to raise in second appeal could be decided, it would be necessary to send down issues, inasmuch as the defendants' case would be that Mst. Batasi was in exclusive possession of the property which was the subject of the lease, and that that was a matter which could only be decided by evidence as to whether there was a private arrangement by which cosharers were entitled to have exclusive possession over certain particular agreed portions of property.

The question, then, for decision is, should the raising of a new point ever be permitted, and if the answer is in the affirmative, then in what circumstances? The question is really analogous to that dealt with in order XLI, rule 2, which lays down that "the appellant shall

(1) (1926) 96 Indian Cases, 304.
(2) (1922) I. L. R., 45 All., 21.
(3) A. I. R., 1929 All., 456.
(4) (1922) I. L. R., 45 All., 53.
(5) A. I. R., 1922 Mad., 519.
(6) A. I. R., 1925 Cal., 1184.
(7) (1926) I. L. R., 49 All., 55.

not, except by leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the appellate court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule."

From all the very numerous cases to which we have referred, and many others, we deduce the following principles, which we approve :—

A point not taken in the court below, whether the omission was by the appellant in that court or whether the respondent failed to support his decree by taking the point, will not be permitted to be raised, except possibly—

I. Where the point may be described as involving a question of public policy, e.g., (1) involving jurisdiction, (2) involving the principle of *res judicata*, (3) where the decision of the point would prevent future litigation. In the above instances the point will be allowed to be argued only if it can be decided upon the materials before the court and does not involve the taking of further evidence or the sending of the case, or any issue, back to the lower court, or a decision of a question of fact.

II. Where the plaint discloses no cause of action, or the written statement no ground of defence.

It is not a ground for permitting a new point to be argued, merely.

(1) that it was omitted by oversight in the court below, or

(2) that the materials are all on the record and that the answer to the point is plain.

In this connection the principles enunciated by their Lordships of the Privy Council in *Manindra Chandra Nandi* v. *Durga Prasad Singh* (1) are of interest. Their Lordships said: "In the absence of

(1) (1917) 15 A. L. J., 432.

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any exceptional conditions, it was not open to the appellant to raise a fresh point in appeal, an issue which had not been raised before the Subordinate Judge or the High Court and might then have been raised in a convenient form and at an opportune time, and that there was no valid reason in the present case for departing from the established practice of the Privy Council."

A reference to the authorities given above shows the uniformity with which courts in India have in fact refused to allow new points to be raised in second appeal, when they lie outside the area of the special classes we have mentioned.

It will be noticed that we have excluded limitation from the type of cases in which the new point can, under certain conditions, be entertained. We have done this because we are of opinion that when next it is sought in this Court to put forward a plea of limitation which was not argued in the lower court, the decision of *Bechi* v. *Ahsan-ullah* (1) will have to be considered and contrasted with that of *Baldeo Prasad* v. *Sukhdeo Prasad* (2). An authoritative decision can then be given on this point.

We therefore dismiss the appeal with costs.

(1) (1890) I. L. R., 12 All., 461.

(2) F. A. F. O. No. 143 of 1927, decided on the 9th of March, 1929.