APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice H. G. Smith

RAM RAJ TEWARI (DEFENDANT-APPELLANT) *v.* RAM OUDH AND OTHERS (PLAINTIFFS-RESPONDENTS)* 1934 *September*, 7

Civil Procedure Code (Act V of 1908), Order XLI, rules 20 and 33—Appellate Court's power to pass or modify decree to the prejudice of a person not party to appeal.

While it is open to an appellate court to vary the decree of the lower court in favour of the plaintiffs who have not joined in the appeal filed by the co-plaintiff, it is not open to any appellate court to pass or modify any decree to the detriment of a person who is not a party to appeal before it. The discretionary power of the court under Order XLI, rules 20 and 33 of the Code of Civil Procedure, however ample it may be, could not be used to the detriment or prejudice of any person against whom no appeal had been preferred before the lower appellate court. *Saktiprasanna Bhatacharya* v. *Naliniranjan Bhattacharya* (1), relied on. *Abdul Rahiman* v. *Maidin Saiba* (2), *Chokalingam Chetty* v. *Seethai Acha* (3), *Rajendra Nath Chatterjee* v. *Mahes Lata Debi* (4), *Rukia* v. *Mewa Lal* (5), *Madan Lal* v. *Gajendrapal Singh* (6), and *Muniruddin Kedwai* v. *Mst. Raisul-Nisa* (7), referred to.

Mr. *Hyder Husain*, for the appellant.

Mr. *Radha Krishna*, for the respondents.

NANAVUTTY and SMITH, JJ.:—This is a defendant's appeal from an appellate judgment and decree of the court of the learned Subordinate Judge of Sultanpur, upholding a judgment and decree of the Munsif of Musafirkhana in the district of Sultanpur.

*Second Civil Appeal No. 178 of 1932, against the decree of Pandit Kishen Lal Kaul, Subordinate Judge of Sultanpur, dated the 7th of April, 1932, confirming the decree of S. Abid Raza, Munsif of Musafirkhana at Sultanpur, dated the 16th of November, 1931.

(1) (1931) I.L.R., 58 Cal., 923. (2) (1898) I.L.R., 22 Bom., 500.
(3) (1927) L.R., 55 I.A., 7. (4) (1926) I.L.R., 53 Cal., 270.
(5) (1929) I.L.R., 51 All., 63. (6) (1929) I.L.R., 51 All., 575.
(7) (1932) I.L.R., 8 Luck., 115.

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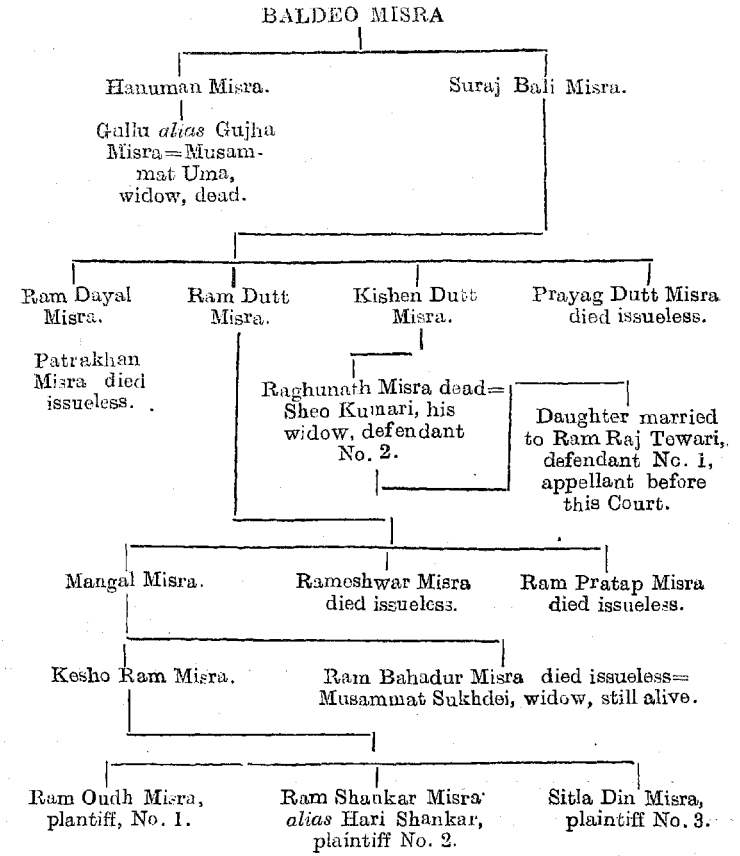
The following pedigree will serve to elucidate the facts of this case:



The present suit was brought by the plaintiffs as reversionary heirs of Raghunath Misra, who died sonless, leaving defendant No. 2 as his widow. In his lifetime, on the 17th of December, 1921, Raghunath Misra gifted $9\frac{1}{2}$ pies of his zamindari share to his son-in-law, Ram Raj Tewari, defendant No. 1, and mutation of names in the revenue register was made in favour of Ram Raj Tewari on the basis of this deed of gift. Raghunath Misra died on the 13th of June, 1927, without leaving a son. The plaintiffs alleged that they are the nearest reversioners of Raghunath Misra and that the deed of gift in favour of Ram Raj defendant is fictitious and invalid, and that in any case the share of Raghunath

Misra in the family property was 9 pies, and not 9½ pies. Upon these allegations they filed the suit on the 7th of July, 1931. The defendant No. 1 denied that the family of Raghunath was joint, and pleaded limitation.

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The trial court decreed the plaintiffs' suit for half a pie share, finding that Raghunath Misra was only owner of a 9 pie share. It also held that it was not proved that Raghunath Misra was a member of the joint Hindu family, or that the deed of gift in favour of Ram Raj Tewari was fictitious, as alleged by the plaintiffs.

The lower appellate court held that the deed of gift was fictitious and invalid, but that the plaintiffs could not succeed in the lifetime of Musammat Sheo Kumari, who was the widow of Raghunath Misra and was entitled to the possession of the property for her life, and so he dismissed the plaintiffs' suit. As regards the extent of Raghunath Misra's share, the lower appellate court held that he was owner of a 9½ pies share, and not a 9 pies share only, as found by the trial court. As, however, all the plaintiffs had not appealed, the learned Subordinate Judge held that he could not vary the decree of the trial court to the detriment of the plaintiffs who had not joined in the appeal. He accordingly dismissed the cross-objections also.

Dissatisfied with the judgment of the lower appellate court, the defendant-appellant Ram Raj Tewari, has filed this present appeal. It has been strenuously contended before us by the learned counsel for the defendant-appellant, Mr. *Hyder Husain,* that the lower appellate court erred in dismissing the cross-objections with regard to a half pie share in the property in suit, even though it found that the appellant was entitled to the same. It was further argued before us that the lower appellate court erred in law in holding that the cross-objections of the defendant-appellant could not be allowed, as all the plaintiffs had not appealed to that court, although plaintiff No. 1 had expressly stated in

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his memorandum of appeal that his appeal in the lower appellate court was for the benefit of all the plaintiffs. In support of his contention the learned counsel cited a ruling reported in *Abdul Rahiman and another* v. *Maidin Saiba and others* (1). In this ruling it was held that where there is a common ground or interest amongst the plaintiffs or the defendants, an appeal by one is virtually an appeal by all under section 544 of the old Code of Civil Procedure, though they may not be parties to the record. Section 544 of the old Code of Civil Procedure corresponds to Order XLI, rule 4 of the present Code of Civil Procedure, which runs as follows:

> "Where there are more plaintiffs or mere defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

In our opinion Order XLI, rule 4 of the Code of Civil Procedure merely authorizes the appellate courts to reverse or vary the decree *in favour of all the plaintiffs or defendants, as the case may be.* It does not authorize the appellate court to reverse or vary the decree of the trial court to the detriment of the plaintiffs or the defendants, as the case may be. Order XLI, rule 20 of the Code of Civil Procedure gives power to the appellate court to adjourn the hearing of an appeal, and to direct that such persons as may appear to it to be interested in the decision of the appeal be made respondents in the appeal. In the present case the defendant-appellant did not file any cross-appeal against the decision of the trial court. He contented himself with merely filing cross-objections to the appeal filed by the

(1) (1898) I.L.R., 22 Bom., 500.

plaintiff No. 1, and on the date when he filed his cross-objections, his right to file a cross-appeal had been barred by limitation. In *Chockalingam Chetty* v. *Seethai Acha and others* (1), it was pointed out that the addition of a respondent whom the appellant has not made a party to the appeal is expressly dealt with in rule 20 of Order XLI of the Code of Civil Procedure, which empowers the court to make such party a respondent when it appears to the court that "he is interested in the result of the appeal."

Again, in *Rajendra Nath Chatterjee* v. *Mahes Lata Debi* (2) it was held by a Bench of the Calcutta High Court that the Code of Civil Procedure does not contemplate the filing of cross-objections against a person who was not a party to the appeal, and that it is not open to the appellate court to add a party to the appeal simply for the purpose of allowing the respondent to make a cross-objection against him.

In the present case the defendant No. 1, when he filed his cross-objections in the lower appellate court, ought to have seen that only plaintiff No. 1 had appealed to the lower appellate court, and should have, therefore, filed a cross-appeal instead of filing cross-objections, as it was not open to the lower appellate court to add plaintiffs Nos. 2 and 3 to the appeal of plaintiff No. 1 simply for the purpose of allowing the respondent to make his cross-objections valid as against them.

In *Rukia and another* v. *Mewa Lal* (3) it was held by the Allahabad High Court that the powers given to a court by Order XLI, rule 33 of the Code of Civil Procedure, were of a very special nature, and should be exercised sparingly, and in that case before them their Lordships held that it was not one which called for the exercise of those powers.

And again in *Madan Lal and others* v. *Gajendrapal Singh* (4) it was held by a Bench of two learned Judges of the Allahabad High Court that Order XLI, rule 33

(2) (1927) L.R., 55 I.A., 74 O.W.N., 1231.
(2) (1926) I.L.R., 53 Cal., 270.
(3) (1929) I.L.R., 51 All., 63.
(4) (1929) I.L.R., 51 All., 575

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of the Code of Civil Procedure, did not authorise the passing of a decree against a person who was not a party to the appeal, though it allowed a decree in favour of a plaintiff who had not appealed. It is thus clear that while it is open to an appellate court to vary the decree of the lower court in favour of the plaintiffs who have not joined in the appeal filed by the co-plaintiff, it is not open to any appellate court to pass or modify any decree to the detriment of a person who is not a party to the appeal before it.

This position was made still more clear by a decision of the Calcutta High Court in *Saktiprasanna Bhattacharya* v. *Naliniranjan Bhattacharya* (1), in which it was held that the discretionary power of the Court under Order XLI, rules 20 and 33 of the Code of Civil Procedure, however ample it may be, could not be used to the detriment or prejudice of any person against whom the suit had been dismissed by the trial court and against whom no appeal had been preferred before the lower appellate court. This ruling completely covers the facts of the present case. In the present case the plaintiffs' suit was decreed to the extent of a half pie share in the property in suit. The defendant-appellant, if he felt aggrieved by this decision, ought to have filed a cross-appeal, challenging the correctness of the decision of the trial court on this point. He, however, contended himself with merely filing cross-objections to the appeal filed by the plaintiff No. 1 in respect of his claim to a 9 pies share in the property in suit, which the trial court had dismissed. By filing his cross objections the defendant No. 1 could only succeed in defeating the claim of the plaintiff No. 1 to the $\frac{1}{2}$ pie share. He could not get any decree in his favour in respect of the portion of the $\frac{1}{2}$ pie share which had been decreed to plaintiffs Nos. 2 and 3, who had not appealed.

In *Munir Uddin Kedwai* v. *Musammat Raisul-Nisa* (2), it was held that where a person had not been

(1) (1931) I.L.R., 58 Cal., 923 (2) (1932) I.L.R., 8 Luck., 115

impleaded in an appeal and the right of appeal against him had become barred by limitation, in an appeal against other persons in which the person omitted was also a necessary party, the Court could not make such other person a respondent in the appeal under Order XLI, rule 20 of the Code of Civil Procedure.

We, therefore, consider that the appellant cannot successfully challenge the decree in respect of the portion of the half pie share granted to the plaintiffs Nos. 2 and 3 by the trial court.

The defendant-appellant, however, contends that even if the entire half pie share which the trial court decreed to the plaintiffs cannot be given back to him, still 1/3rd of this half pie share, belonging to the plaintiff No. 1, who was a party to the appeal in the lower appellate court, should have been decreed by that court to him. In our opinion this contention must prevail, and the defendant-appellant is, on the findings of the lower appellate court, entitled to this 1/3rd of a half pie share, and to that extent his appeal ought to be allowed.

We will now take up the cross-objections of the plaintiffs-respondents. Grounds Nos. 1 to 4, set forth in the cross-objections of the plaintiffs-respondents, merely challenge the findings of fact arrived at by the lower appellate court. These findings of fact, though based upon inferences drawn from documents, are binding upon this Court in second appeal, and cannot be challenged by the plaintiffs-respondents. As regards ground No. 5 set forth in the objections of the plaintiffs-respondents, we are of opinion that the question raised therein does not arise, because Musammat Sheo Kumari, the widow of Raghunath Misra, was alive on the date when the plaintiffs filed their suit, and during her life-time the plaintiffs could get no decree in respect of the property left by Raghunath Misra. There is, therefore, in our opinion no force in these cross-objections filed under Order XLI, rule 22 of the Code of Civil Procedure, by the plaintiffs-respondents.

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For the reasons given above we dismiss the cross-objections with costs, and we partially allow the appeal of the defendant-appellant, and modify the decree of the trial court by excluding therefrom 1/3rd of a half pie share granted to plaintiff No. 1, and dismiss the plaintiff No. 1's suit *in toto*, leaving intact the two-thirds of a half pie share granted by the trial court to plaintiffs Nos. 2 and 3. In the circumstances of this case we direct that the parties should bear their own costs in respect of this appeal.

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GOKUL PRASAD (PLAINTIFF-APPELLANT) *v.* KUNWAR BAHADUR AND OTHERS (DEFENDANTS-RESPONDENTS)*

Limitation Act (IX of 1908), sections 5 and 12—Computing time to be excluded—Decree remaining unsigned for some time—"Time requisite for obtaining copy" of decree—Interval not to be excluded unless application for copies is made and applicant is actually delayed—Delay in filing appeal—Lower appellate court excusing delay—High Court not to interfere, if discretion exercised judicially—Second appeal—Finding of fact.

In computing the time to be excluded under section 12 of the Limitation Act from a period of limitation the 'time requisite for obtaining a copy' does not begin until an application for copies has been made. If therefore after judgment, the decree remains unsigned, such interval is not to be excluded from the period of limitation, unless an application for copies having been made, the applicant is actually and necessarily delayed, through the decree not having been signed. *Bechi* v. *Ahsanullah Khan* (1), followed. *Bani Madhub Mitter* v. *Matungini Dassi* (2), referred to.

Where after a consideration of all the circumstances, the lower appellate court is of opinion that the appellant before him should be excused under scetion 5 of the Limitation Act, the

*Second Civil Appeal No. 124 of 1933, against the decree of Pandit Shyam Manohar Nath Shargha, District Judge of Gonda, dated the 25th of March, 1933, reversing the decree of Babu Har Charan Dayal, Subordinate Judge of Bahraich, dated the 3rd of October, 1932.

(1) (1890) I.L.R., 12 All., 461 (2) (1886) I.L.R., 13 Cal., 104.