

APPELLATE CIVIL.*Before Das and Adami J.J.*

BADRI NARAYAN

v.

EAST INDIAN RAILWAY COMPANY.*

1926.

May, 14.

Code of Civil Procedure, 1908 (Act V of 1908), Order XLI, rule 20, scope of—some only of joint claimants impleaded as respondents—appeal incompetent—rule inapplicable.

There is no power in the court under Order XLI, rule 20, Civil Procedure Code, 1908, to revive an appeal or to give power to an appellant to present an appeal when there is none at all in the file of the court.

Giris Chandra Lahiri v. Sashi Shekhareswar Roy(1), *Padarath Mahto v. Hitan*(2), distinguished.

Manindra Chandra Nandi v. Bhagabati Devi Chowdhurani(3), referred to.

A joint decree was passed in favour of seven plaintiffs and the defendants preferred an appeal to the District Judge but impleaded some only of the plaintiffs as respondents. At the hearing of the appeal it was objected on behalf of the respondents that the appeal was incompetent; but the District Judge, acting under the provision of Order XLI, rule 20, Code of Civil Procedure, added the omitted respondents as parties-respondents to the appeal and dealt with the appeal.

Held, that the order of the District Judge was without jurisdiction, inasmuch as the appeal being against some only of the joint claimants, it was incompetent, and the effect of the order was to give power to the appellants to present the appeal although it was time-barred at the time when the particular order was passed.

Held, further, that Order XLI, rule 20, applies only when there is an appeal pending in the court on which a decision may be given by the court.

* Appeal from Appellate Decree nos. 393, 410, 411, 412, 413 of 1924, from a decision of Rai Bahadur Jyotirmay Chatterji, District Judge of Shahabad, dated the 18th December, 1923, reversing a decision of Babu Phanindra Lal Sen, Subordinate Judge of Arrah, dated 24th July, 1922.

(1) (1906) I. L. R. 33 Cal. 329.

(2) (1924) 5 Pat. L. T. 509.

(3) (1925-26) 30 Cal. W. N. 45.

1926.

Appeal by the plaintiffs.

BADRI
NARAYAN
v.
E. I. Ry
Co.

The facts of the case material to this report are stated in the judgment of Das, J.

S. N. Bose, for the appellants.

N. C. Sinha, N. C. Ghosh and B. B. Ghosh, for the respondents.

DAS, J.—These appeals are directed against the decision of the learned District Judge of Shahabad dated the 18th December, 1923, by which he allowed the appeals of the East Indian Railway Company, as against the plaintiffs. It is not necessary for me to deal with the facts of the case, for in my view the appeals to the court of the learned District Judge were incompetent and he should have dismissed those appeals on that ground.

The suits were filed by seven individuals—Badri Narayan, Behari Lal, Srinath, Harinath, Kashi Nath, Kanhyajee and Gopaljee, the last four of these persons being minors. The court of first instance decreed the claim of the plaintiffs on the 24th July, 1922. Appeals were presented to the court of the learned District Judge of Shahabad on the 15th September, 1922. The appeals came on for hearing sometime in September 1923. It was then discovered that the railway company, had appealed only as against Badri Narayan, Behari Lal and Srinath. It is quite true that Harinath and Kashi Nath were brought on the record as respondents, but although they were minors that fact was not stated in the memoranda of appeals at all and Kanhyajee and Gopaljee were altogether omitted from the memoranda of appeals. The result was that the appeals were only against Badri Narayan, Behari Lal and Srinath. I may mention that the decree obtained by the seven plaintiffs was a joint decree and under that decree it was competent for any of these plaintiffs to execute the decree for the full amount.

When the appeals were called on for hearing it was objected on the part of the respondents that the appeals were incompetent. Obviously they were incompetent, because the claim being a joint claim all the joint claimants had to be brought on the record as respondents. Time was taken by the railway company to deal with the point and on the 28th September, 1923, an application was put in asking in substance for leave to bring the omitted respondents on the record under the provisions of Order XLI, rule 20, of the Code. There was also a prayer to the effect that time may be extended under the provisions of section 5 of the Limitation Act.

The learned Judge dealt with the whole matter and he thought that he had complete jurisdiction to deal with it under Order XLI, rule 20, of the Code. Acting under that particular rule he added the omitted respondents as parties-respondents to the appeals and dealt with the appeals. He allowed them and dismissed the plaintiffs suits. The plaintiffs have appealed to this Court.

Order XLI, rule 20, runs as follows:—

“ Where it appears to the court at the hearing that any person who was a party to the suit in the court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the court may adjourn the hearing to a future day to be fixed by the court and direct that such person be made a respondent.”

To my mind it is perfectly clear that Order XLI, rule 20, will only apply where there is an appeal pending in the court on which a decision may be given by the court. It seems to me that there is no power in a court under Order XLI, rule 20, to revive a dead appeal or to give power to an appellant to present an appeal where there is none at all in the file of the court. Now, in this case the appeals which were presented on the 14th September, 1922, were incompetent. They were filed as against three of the joint claimants who had obtained decrees as against the appellants. The appeals could not proceed in the absence of those who were not made parties to the

1926.

BADRI
NARAYAN
v.
E. I. Ry.
Co.
DAS, J.

1926.

BADRI
NARAYANv.
E. I. Ry.
Co.

DAS, J.

appeals. By the course which the learned District Judge adopted he in effect gave power to the appellants to present the appeals, although there was no right in the appellants to present them at the time when this particular order which is the subject-matter of the contention before us was passed by the learned District Judge. The learned District Judge has referred to a case in *Giris Chandra Lahiri v Sashi Shekhareswar Roy*⁽¹⁾, but in truth that case has nothing whatever to do with this question. In that case there was a perfectly good appeal pending in the High Court, but the appellant had not brought on the record one of the persons who was a party to the suit in the court below. The appeal was a good appeal and the court could adjudicate on the rights of the parties in that appeal and the High Court took the view that in order to do complete justice between the parties it was necessary to have before it those persons who were defendants in the suit but who had not been made respondents in the appeal. To the same effect is the decision of this court in *Padarath Mahto v. Hitan*⁽²⁾. But this is an entirely different case. As was pointed out by the Calcutta High Court in *Manindra Chandra Nandi v. Bhagabati Debi Chaudhurani*⁽³⁾ "it," that is to say, Order XLI, rule 20, "is not intended to override the provisions of Order XXII of the Civil Procedure Code. The right obtained by a respondent when the appeal abates as against him is a valuable right and should not be lightly treated." The right of those respondents who were not made parties to the appeals is a valuable right, because they were not made parties to the appeals and the appeals as against them would be barred by limitation at the date when they were added. In my opinion the learned District Judge was wholly wrong in having recourse to Order XLI, rule 20, of the Code.

It was then contended that the learned District Judge in substance condoned the delay and gave leave

(1) (1908) I. L. R. 33 Cal. 329. (2) (1924) 5 Pat. L. T. 509,

(3) (1925-26) 30 Cal. W. N. 45.

under section 5 of the Limitation Act. But the learned District Judge has not dealt with the matter on that footing. As it appears the railway company was much to blame in the matter. We are informed that the judgment of the court of first instance had to go from office to office until it was finally decided that an appeal should be presented to the court of the District Judge of Arrah. Under these circumstances there was very little time available to the pleader to prepare the grounds of appeal. In my opinion no ground has been shown for extension of time under section 5 of the Limitation Act

I would accordingly allow these appeals, set aside the judgment and the decree passed by the court below and restore the judgment and the decree passed by the court of first instance. The appellants are entitled to their costs throughout.

ADAMI, J.—I agree.

Appeals allowed.

LETTERS PATENT.

Before Dawson Miller, C. J., and Foster, J.

KUMAR RAMESHWAR NARAIN SINGH

v.

MAHABIR PRASAD.*

Chota Nagpur Tenancy Act, 1908 (Bengal Act VI of 1908), section 231—Rent decree—execution sale—suit to avoid sale on the ground of fraud—Limitation Act, 1908 (Act IX of 1908), Schedule I, Articles 12 and 95.

Under section 231 of the Chota Nagpur Tenancy Act, 1908, "all suits.....instituted.....under this Act for which no period of limitation.....is provided elsewhere in this Act shall be commenced.....within one year from the date of the occurring of the cause of action".

*Letters Patent Appeal no. 69 of 1925, from a decision of Kulwant Sahay, J., dated the 29th April, 1925, affirming a decision of Rai Bahadur Amrita Nath Mitra, Subordinate Judge of Ranchi, dated the 12th April, 1922, reversing a decision of Maulavi Shaikh Ali Karim, Munsif of Hazaribagh, dated the 31st January, 1921.

1926.

BADRI
NARAYAN

v.
E. I. Ry.
Co.

Das, J.

1926.

May, 27.