1935.

MAHABIR PRASAD MARWARI v. SYED SHAH MOHAMMAD YEHIA.

VARMA, J.

but the papers do not seem to have been filed. The case was actually taken up for hearing on the 13th June, 1932, and the judgment was delivered on the 8th August, 1932. No steps seem to have been taken under Order XI, rule 21, of the Civil Procedure Code. It seems that the plaintiff after filing the petitions mentioned above did not press the matter any further, nor did he seek the assistance of the court in getting those documents produced. Therefore, this point also fails.

Appeal dismissed.

APPELLATE CIVIL.

Before Fazl Ali and Luby, JJ.

1935.

September, 20, 23, 24.

REKHA THAKUR

v.

RAMNANDAN RAI*.

Code of Civil Procedure, 1908 (Act V of 1908), Order XLI, rules 11 and 12—appellate court admitting an appeal, whether competent to restrict the appeal to a specific ground—whole appeal, whether open to discussion— court hearing appeal under rule 11, whether competent to make a note of point abandoned.

It is not competent to a court of appeal under Order XLI, rule 12, of the Code of Civil Procedure, 1908, to restrict an appeal to a specific ground and, therefore, when the appeal is admitted the whole appeal, and not only the selected ground upon which it is admitted, is open to discussion.

Lukhi Narain Serowji v. *Sri Ram Chandra*(1) and *Janaki Nath Hore* v. *Prabhasini Dasee*(2), followed.

If, however, at the time when the appeal is heard under Order XLI, rule 11, the appellate Court is informed that the appeal will be confined to certain specified grounds only and

*Appeal from Appellate Decree no. 1192 of 1932, from a decision of Babu Ananta Nath Banarji, Additional Subordinate Judge of Saran, dated the 27th May 1930, reversing a decision of Babu Nirmal Chandra Munsif of Chapra, dated the 7th April, 1931.

(1) (1911) 15 Cal W. N. 921.

(2) (1915) I. L. R. 43 Cal. 178.

that the other grounds are abandoned or if it is conceded on behalf of the appellant that grounds other than those specified are not fit to be urged in appeal, there is nothing to prevent the court before which the appeal is placed under Order XLI, rule 11, from making a note of this fact.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

Hareshwar Prasad Sinha, for the appellant.

S. N. Rai, for the respondents.

FAZL ALI, J.—This appeal arises out of a suit instituted by the plaintiff for a declaration that a certain zarpeshgi deed executed by the first defendant Rajpalo Kuer in favour of the second defendant Ramanandan Rai was not binding on him. Rajpalo Kuer was the widow of one Kari Thakur and it is not disputed now that Kari Thakur and the plaintiff were descended from a common ancestor. The case of the plaintiff as put forward in his plaint was that Kari Thakur, the husband of Rajpalo Kuer, had predeceased his father Ramruch and upon the death of Ramruch all his properties were inherited by the plaintiff's father and the plaintiff but Rajpalo was allowed to remain in possession of those properties in lieu of maintenance. It was also asserted alternatively that even if it be held that Rajpalo had a title to the estate of Ramruch, the zarpeshgi deed was not binding upon the plaintiff who was the person presumptively entitled to the estate after the death of Rajpalo. At a later stage, the case that Kari Thakur had predeceased Ramruch and that the plaintiff and his father were the real owners of the disputed property at the time the zarpeshgi deed was executed was abandoned and the plaintiff confined himself only to the alternative case. His case as to the zarpeshgi deed was that it had been obtained by fraud and deceipt by defendant no. 2 who was related to Rajpalo and that no consideration had actually passed. In the deed itself there was a

1935.

REKHA THAKUR v. RAMNANDAN RAI.

FAZL ALI, J.

recital that the sum of money for which the deed was executed had been borrowed by Rajpalo to marry her daughter Kismato and to meet certain other necessary expenses. The plaintiff, however, contended that Kismato Kuer was not the daughter of Rajpalo and that there was no legal necessity to justify the execution of the zarpeshgi deed. The trial court came to the conclusion that Kismato was not the daughter of Rajpalo and that there was no legal necessity to justify the execution of the zarpeshgi deed and upon this footing passed a decree in favour of the plaintiff.

Upon an appeal by the defendant, however, the decision of the Munsif was reversed and the plaintiff's suit was dismissed. The learned Subordinate Judge who heard the appeal accepted the defendant's case that Kismato was the daughter of Rajpalo and briefly disposed of the question of legal necessity by pointing out that once it was established that Kismato was the daughter of Rajpalo it followed that the document was justified by legal necessity. The plaintiff thereupon preferred this second appeal which being placed before a Judge of this Court for hearing under Order XLI, rule 11, the following order was recorded:

"This appeal is dismissed on the question whether Kismato was the daughter of Kari and Rajpalo. It will be heard on the question whether the zarpeshgi deed executed by Rajpalo is binding on the plaintiff".

One question which is now raised on behalf of the appellant is whether it is competent to a Court of appeal under Order XLI, rule 12, of the Code of Civil Procedure to restrict an appeal to a specific ground and whether, when the appeal is admitted, the whole appeal or only the selected ground upon which it is admitted is open to discussion. It appears that this was precisely the question raised in *Lukhi Narain Serowji* v. *Sri Ram Chandra*(1) and it was held by a Division Bench of the Calcutta High Court that it was not competent to a court of appeal to admit an appeal only on some specified grounds

(1) (1911) 15 Cal. W. N. 921.

1935.

JEKHA THAKUR v. RAMNANDAN RAI.

FAZL ALI, J.

and that once the appeal is admitted the whole appeal is open to discussion. This view was reiterated by the same High Court in *Janaki Nath Hore* v. *Prabhasini Dasee*(1) and no contrary view seems to have been expressed by any other High Court. As is pointed out in these cases, there is no provision in the Code of Civil Procedure enabling the Court of appeal to pass an order partly admitting and partly dismissing the appeal and I think that in the present state of the law it must be held that an appeal cannot be admitted on a limited ground only but that once it is admitted it has to be heard as a whole. At the same time it appears to me that if at the time when the appeal is heard under Order XLI, rule 11, the appellate Court is informed that the appeal will be confined to certain specified grounds only and that the other grounds are abandoned or if it is conceded on behalf of the appellant that the grounds other than those specified are not fit to be urged in appeal, there is nothing to prevent the court before which the appeal is placed under Order XLI, rule 11, from making a note of this fact. However that may be, in the present case although the learned Advocate for the appellant has tried to reopen the question as to whether Kismato is the daughter of Kari and Rajpalo, yet on hearing him fully on the subject I have no hesitation in holding that the learned Judge of this Court was right in expressing the opinion that so far as that question is concerned the decision of the lower appellate Court is final and the matter cannot be reopened in second appeal. The question now sought to be reopened is a question of fact and the decision of the lower appellate Court on that question is definite. The lower appellate Court in dealing with the question frankly conceded that the oral statements made by the witnesses taken by themselves would not be sufficient for deciding the case, because

> " the oral evidence adduced by one side cannot be said to be so superior to that adduced by the other side that it can be accepted as true without hesitation ".

(1) (1915) I. L. R. 43 Cal. 178.

1935.

REKHA THAKUR v. RAMNANDAN RAI.

FAZL ALI, J.

The learned Subordinate Judge has also made it clear in his judgment that such documentary evidence as had been adduced in the case was also not of much assistance in deciding the case. The fact, however, which greatly weighed with the learned Subordinate Judge was that the plaintiff had abandoned his main case and that he had made an admission that Rajpalo was in possession of Kari's property not in lieu of maintenance but in her own right as his widow. According to the learned Subordinate Judge this was the decisive factor in the case because it showed that the evidence adduced on behalf of the plaintiff was tainted and unreliable. Upon this reasoning the learned Subordinate Judge gave his decision in favour of the defendant and in my opinion he was perfectly competent to do so and this Court cannot in second appeal interfere with the finding that Kismato is the daughter of Rajpalo and Kari.

Now it is obvious that this finding is not sufficient to dispose of the litigation and it was incumbent on the lower appellate Court to record a clear finding on the second question, namely, whether the zarpeshgi deed was justified by legal necessity or not. On this question all that the learned Subordinate Judge says in his judgment is as follows:—

> " I find thus the first point raised in the appeal in favour of the appellants and necessarily the second point also is decided against the respondents ".

It appears that it being recited in the zarpeshgi deed that the bulk of the amount raised under the deed had been borrowed to meet the marriage expenses of Kismato, the learned Subordinate Judge thought that once it was established that Kismato is the daughter of Rajpalo the deed must be upheld. The fallacy committed by the learned Subordinate Judge was that he assumed without giving any reasons that the recital in the deed that the money had been actually borrowed for the marriage of Kismato was correct or sufficient for the purpose of deciding the case. As a matter of fact what the learned Subordinate Judge had to decide was, first,

whether the money was actually borrowed for the purpose of marrying Kismato and meeting other necessary expenses. It was incumbent upon the learned Subordinate Judge to record definite findings on these questions, because the trial Court has come to the conclusion that out of the consideration stated in the deed only Rs. 25 had been received by Rajpalo. In these circumstances it seems to me that the question of legal necessity has not been properly investigated by the learned Subordinate Judge and this case should be remitted to him for recording a clear and proper finding on that question.

It may also be mentioned that in course of the argument it was brought to our notice that Musammat Kismato Kuer had stated in her deposition that she had a son. Now, if it is a fact that Kismato has a son then it seems to be clear that the present plaintiff has no *locus standi* to bring the suit. The question, therefore, whether Kismato has a son or not also requires investigation and in remitting this case to the learned Subordinate Judge we direct him to submit his finding on this question also. The findings of the Subordinate Judge should be submitted to this Court as soon as possible when this appeal will be finally disposed of. If the parties choose to adduce additional evidence on the question whether Kismato has a son or not, they should be permitted to do so.

LUBY, J.—I agree.

Appeal allowed.

Case remanded.