

APPELLATE CIVIL.

Before Mr. Justice Brown.

MAUNG KYAW AND ONE

v.

KO AYE AND ONE.*

1927

Feb. 18.

Civil Procedure Code (Act V of 1908), Order 47, Rule 1—Decree passed in one suit according to agreement to abide by the decision of High Court in another suit—Effect of reversal of the High Court decision on appeal—Review.

In an ejectment suit filed in the Small Cause Court, Rangoon, parties agreed to keep the case pending and to abide by the decision of the High Court in another suit between them. The High Court decreed the suit in favour of the plaintiffs and consequently the Small Cause Court also passed a decree in their favour in its case. The High Court decision was subsequently reversed on appeal. Defendants then applied for a review of the Small Cause Court decree which was granted and the decree was set aside.

Held, that the review was properly granted. The effect of the appellate decree was to set aside the original decree of the High Court. The decree sought to be reviewed was based on the assumption that the original decree of the High Court was valid, but which assumption was subsequently proved to be wrong. The appellate decree is not a mere subsequent event but has the effect of voiding the original decree from its inception.

Waghela v. Masludin, 13 Bom. 330—*followed*.

Kotaghiri Venkata v. Vellanki, 24 Mad. 1—*distinguished*.

Kyaw Zan—for the Applicant.

BROWN, J.—I do not think that there is any substance in this application. The petitioners filed a suit in the Small Cause Court, Rangoon, for ejectment of the respondents from a house. The case was kept pending until the decision of another case on the Original Side of this Court. This Court in that suit finally passed orders in favour of the plaintiffs, and the Small Cause Court in the suit now under revision then passed orders decreeing this suit. This was said to be in accordance with an agreement by the parties that the decision in this case should be

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governed by the decision in the case by this High Court. Subsequently the decision of the Original Side of this Court was set aside on appeal. The defendents then filed an application in review, and their application was granted and the decree against them set aside.

It is contended that no sufficient ground for review was made out, and I have been referred to the case of *Kotaghiri Venakta Subbamma Rao v. Vellanki Venkatarama Rao* (1). In that case it was held that something which did not exist at the passing of a decree could not be a good ground for review. But a review had been asked for then on the ground of an agreement came to by two of the parties after the decree. In the present case it is true that the decree of the High Court on appeal was passed after the decree of the Small Cause Court. But the effect of that appellate decree was to set aside the original decree of the High Court. The decree sought to be reviewed was based on the assumption that the original decree of the High Court was valid and binding. That assumption was subsequently proved to be wrong. The passing of the appellate decree was not merely an event subsequent to the decree sought to be reviewed. It had the effect of voiding the original decree from its inception. That such circumstances do afford a good ground for review was the view taken in *Waghela Raisangji Shivosangji v. Shaik Mashudin* (2) and in that view I concur. It does not seem to me that that decision was or was intended to be, overruled by the decision of their Lordships of the Privy Council in the Madras case. I would further note that one of the grounds of review in the present case was that the judgment

(1) (1901) 24 Mad. 1.

(2) (1889) 13 Bom. 330.

sought to be reviewed was passed without any evidence being recorded. In this ground also there would appear to be some force as I cannot find on the records an agreement to be bound by the High Court decree whether it were set aside on appeal or not.

I dismiss this application.

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APPELLATE CIVIL.

Before Sir Guy Ruttledge, Kt., F.C., Chief Justice, and Mr. Justice Brown.

C. E. DOOLY AND FOUR OTHERS

v.

M. E. MOOLLA AND THREE OTHERS.*

1927
 Feb. 21.

Letters Patent, Clause 13—Civil Procedure Code (Act V of 1908), section 92 and Order 1, Rule 10—Consent of Government Advocate whether necessary for making parties defendants—Order refusing to join persons as parties in a suit under section 92 is judgment under clause 13 of Letters Patent.

Held, that under the provisions of section 92 of the Civil Procedure Code persons who are made or added as defendants to a suit under that section do not require any consent in writing of the Government Advocate, as do the plaintiffs.

A suit under section 92 operates *in rem* and an order refusing to join persons as parties, finally adjudicates or concludes the matter so far as these persons are concerned and is therefore a judgment within the meaning of clause 13 of the Letters Patent.

Commercial Bank of India v. Subju Sahib and others, 24 Mad. 252—referred to.

Ormiston—for Appellants.

Munshi—for Respondents.

RUTLEDGE, C.J., AND BROWN, J.—This is an appeal by five persons who sought to be joined as defendants in Civil Regular No. 28 of 1925, a suit brought by the first three respondents against the 4th respondent under section 92 of the Civil Procedure Code. If the learned Judge had refused to join the appellants by reason of the lateness of their application we consider that he would have

* Civil Miscellaneous Appeal No. 150 of 1926.