APPELLATE CIVIL.

Before Mr. Justice Zafar Ali and Mr. Justice Dalip Singh.

1928

April 23.

MUL CHAND-GANGA BISHEN (DEFENDANTS) Appellants

versus

R. M. DOWNIE AND CO., LTD., (PLAINTIFFS).
RAM CHANDAR-KANHAYA LAL AND ANOTHER (DEFENDANTS). } Respondents.

Civil Appeal No. 526 of 1924.

Civil Procedure Code, Act V of 1908, Order XXII, rule 8 (1) and (2) and Order XLI, rule 22 (4)—Appeal—abatement thereof—Cross-objections—whether can continue.

Plaintiffs' suit was decreed as against defendant No. 1 and dismissed as against defendants Nos. 2 and 3. Defendant No. 1 alone appealed from the decree making plaintiffs and defendants 2 and 3 respondents, and the plaintiffs-respondents lodged cross-objections against defendants-respondents 2 and 3. During the pendency of the appeal appellant having been adjudicated an insolvent and the Official Receiver, not having given security for costs as directed, defendant-respondent No. 3 put in a petition under Order XXII, rule 8 (1) and (2), Civil Procedure Code, praying that the appeal be declared to have abated and be ordered to be dismissed.

It was *held* that the appeal had abated and defendant-respondent No. 3 was entitled to a declaration to this effect.

Held further, that as the appeal had abated the cross-objections could not be heard.

First appeal from the decree of Diwan *Som Nath, Senior Subordinate Judge, Delhi, dated the 29th November 1923, granting a preliminary decree to the plaintiff against defendant No. 1.*

JAGAN NATH BHANDARI, for SARDHA RAM, for Appellants.

RAM KISHORE, BISHAN NARAIN, JAGAN NATH AGGARWAL, D. C. RALLI and HEM RAJ, for Respondents.

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The Judgment of the Court was delivered by—

DALIP SINGH J.—Plaintiffs in this case sued defendant No. 1 for the price of certain goods which the plaintiffs alleged the defendant had contracted to buy from them, and they sued defendants 2 and 3 as acceptors of certain drafts for the price of the said goods which defendants 2 and 3 finally refused to honour. The trial Court granted the plaintiffs a preliminary decree holding that defendant No. 1 had contracted to buy the said goods from the plaintiffs, that the property in the said goods had passed, but as the plaintiffs had sold some portion of the goods on their own account they were entitled to damages from defendant No. 1 for the difference in price by resale and for the price of the goods still unsold which was to be determined after further enquiry. It refused a decree against defendants 2 and 3 holding that the property in the goods had passed to defendant No. 1 and the drafts were against shipping documents or against goods which the plaintiffs were not in a position to deliver to defendants Nos. 2 and 3.

Defendant No. 1 alone appealed from the decree making the plaintiffs, as respondent No. 1 and defendants 2 and 3 *pro-forma* respondents, as respondents 2 and 3. The appeal was lodged in this Court in 1924. The plaintiffs-respondents No. 1 lodged cross-objections against defendants-respondents 2 and 3 on the 12th of March 1926. On the 26th of January 1928 when the appeal came on for hearing before a Division Bench Counsel for the appellant stated that his client had been adjudicated insolvent. Under Order XXII, rule 8, Civil Procedure Code, the Division Bench ordered notice to the Official Receiver directing him to take steps to continue the appeal if he wished to do so. They also ordered that if he decided to pro-

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ceed with the appeal he should furnish security for the costs of the appeal within two months from that date, namely, the 26th of January 1928.

The appeal has now come on for hearing and the Official Receiver has notified that he is unable to give security as the Insolvency Court will not allow him to do so. Counsel for the defendant-respondent No. 3 has put in a petition under Order XXII, rule 8 (1) and (2), Civil Procedure Code, praying that the appeal be declared to have abated as the Official Receiver is not continuing the same and has not furnished the required security, and further that the appeal be ordered to be dismissed and costs awarded to the petitioner-respondent No. 3 against the estate of the insolvent. Counsel for plaintiff-respondent No. 1 has contended that the appeal does not abate. He has referred to the history of the rule and points out that in the Civil Procedure Code of 1859 the word 'abatement' is definitely used. In the Civil Procedure Code of 1882 he contends that there was no abatement but only dismissal of the suit. He contends that under Order XXII, rule 8 the only course open in a case where the appellant has become insolvent and the Official Receiver declines to continue the appeal and to furnish security is for the defendant to apply for a dismissal of the suit with costs, and if he does not do so the appeal does not abate but remains suspended.

In support of his contention he has cited *Khunni Lal* v. *Rameshar* (1), *Lekhraj Chunilal* v. *Shamlal-Narrondas* (2), and *Kissen Gopal* v. *Sukhlal* (3). Counsel for defendant-respondent No. 3 has cited *Ibrghim* v. *Agdul Rahiman* (4).

(1) (1921) I. L. R. 43 All. 621.
(2) (1892) I. L. R. 16 Bom. 404.
(3) (1926) I. L. R. 53 Cal. 844.
(4) (1875) 12 Bom. H. C. R. 257.

After considering all these rulings we are of opinion that the Order XXII, rule 8 (1) is too clear to admit of any debate on the point. It states that the appeal shall not abate unless certain contingencies happen, clearly implying thereby that if those contingencies happened the appeal shall abate. Counsel for the plaintiffs-respondents has contended that the rule is badly drafted and contends that in Order XXII, rule 1 similar words occur but are followed by Order XXII, rule 3 in which it is definitely stated that the appeal shall abate, whereas in sub-rule (2) of Order XXII, rule 8 it is stated that the appeal shall be dismissed, and in Order XXII, rule 9 a remedy is provided both for abatement and for dismissal. The rule certainly does not seem to be very happily drafted, for instance, it is pointed out by counsel on both sides that whereas in the first portion of the rules the words are 'that the Official Receiver may neglect or refuse to continue the suit or to furnish security,' in sub-rule (2) the words are 'the Official Receiver refuses or neglects to continue the suit and to furnish security.' Whatever may be the exact effect of the use of the word "and" in the second portion of the rule it is clear that the two rules cannot be read as if the words 'shall not abate' had no meaning whatsoever. Why in sub-rule (2) the word 'dismissal' is put for 'abate' is certainly not very clear, but be that as it may, we are of opinion that the appeal does abate, even without the defendant's application for dismissal with costs. In this particular case the defendant has applied both for dismissal and for costs, as well as for a declaration that the appeal has abated and we accept his contention and declare that the appeal has abated and is dismissed, as abated, with costs against the insolvents estate. We have ascertained the costs of the defendant-respondent No. 3

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and of plaintiffs-respondents No. 1, and we allow defendant No. 3 Rs. 23-4-0 for printing and Rs. 100 as counsel's fees We allow plaintiffs-respondents No. 1 who has also orally applied for costs Rs. 159-2-0 for printing and Rs. 875 as counsel's fees.

Counsel for the plaintiffs-respondents No. 1 next contended that his cross-objections against defendants-respondents 2 and 3 could proceed although the appeal has been held to have abated. He cites Order XLI, rule 22 on this point and contends that the change in the rule, *i.e.*, the omission of the words "upon the hearing" and the change in sub-rule (3) by which for the word 'appellant' the words 'the party who may be affected by such objection' have been substituted shows that any respondent may now urge cross-objections against any other co-respondent without reference to the fate of the appeal. provided an appeal has been duly lodged. That is to say he admits that in the case of an appeal barred by limitation the cross-objections could not be heard. But he contends that sub-section (4) is merely illustrative and an appeal which has abated was once in existence and therefore is no bar to the hearing of the cross-objections. It might, however, as well be contended that the words 'upon the hearing' were omitted from sub-rule (1) of Order XLI, rule 22 because of the insertion of sub-rule (4) and that sub-rule (4) is exhaustive of the cases in which cross-objections may be heard even though the appeal is not heard. The form of the draft seems to us to suggest that the latter view is the more correct one and that except for the cases provided in sub-rule (4) cross-objections share the fate of the appeal, and this view is supported by the only authority brought to our notice, namely, *Murugapa Chettiar* v. *Ponnusami Pilai* (1). There it

(1) (1921) I. L. R. 44 Mad. 828.

was definitely held that in a case of abatement cross-objections could not be heard. It is, therefore, unnecessary for us to go into all the points which were urged by counsel for defendant-respondent No. 3 as to whether the cross-objections against co-respondents could be urged in the circumstances of this particular case. It is sufficient for us to hold that the appeal has abated in the present case and the cross-objections, therefore, cannot be heard. We, therefore, dismiss the cross-objections and allow Rs. 100 costs to counsel for defendant-respondent No. 3 in the same.

A. N. C.

Appeal abated and dismissed.

Cross-objections dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Agha Haidar.

DITTA—APPELLANT,

versus

THE CROWN—RESPONDENT.

1928

April 26.

Criminal Appeal No. 212 of 1928.

Criminal Procedure Code, Act V of 1898—Charge of murder—Acquittal—causing disappearance of evidence—conviction under section 201, Indian Penal Code, 1860—without fresh charge—legality of.

Where there is clear and independent proof that a person has caused evidence to disappear in order to screen some person or persons unknown, the fact that he had been tried and acquitted of the offence of murder would not, in itself, prevent his conviction under section 201 of the Indian Penal Code.

The mere fact, that the original charge was one under section 302 of the Indian Penale Code and the accused was tried and convicted under section 201 of the Indian Penal Code and no formal charge was framed in respect of an offence under the latter section, would not make his trial and conviction under that section illegal.