LETTERS PATENT APPEAL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Blagden.

SEIN DASS v. LAKHAJEE AND ANOTHER.*

1940

May 2.

Parties to an appeal—Suit against principal and agent in the alternative—Unsuccessful defendant's appeal—Necessity of joining successful defendant as respondent—Appeal time-barred against successful defendant—Valuable substantive right—Letters Patent Appeal—Point on which certificate granted—Appellate Court's jurisdiction—All circumstances and disputes between relevant parties open for consideration—Question of costs—Civil Procedure Code, O. 41, r. 33.

If a person who has contracted with some one upon the footing that the latter is an agent is in doubt whether to proceed against the principal or against the self-styled agent, it is but reasonable that he should make each of them defendants in the alternative in his suit. When he obtains judgment against one and the other is dismissed from the suit, the unsuccessful defendant cannot by omitting to join the successful defendant as a respondent in the appeal and then showing that the latter was really liable deprive the plaintiff of his right to establish his claim.

Ma Than May v. *Mohamed Ensoof*, I.L.R. 9 Ran. 624; *S. Pearson & Son, Ltd.* v. *Lord Mayor of Dublin*, (1907) A.C. 351; *U Po Sein* v. *Bodi*, I.L.R. 13 Ran. 180, referred to.

If the appeal is barred as against the successful defendant he cannot be joined as a respondent and the appeal cannot proceed. The successful defendant has acquired a substantive right of a valuable kind of which he cannot lightly be deprived.

V.P.R.V. Chetty v. *Seethai Achi*, I.L.R. 6 Ran. 29 (P.C.), referred to.

In view of the wide provisions of O. 41, r. 33 of the Civil Procedure Code the appellate Court is not confined to a consideration of the point upon the basis of which a certificate for a further appeal has been granted, but has jurisdiction to pass a decree which should have been passed by the subordinate Court in all the circumstances which gave rise to the litigation originally and to all the disputes between all the relevant parties in the matter.

Devi Charan Lal v. *Hussain*, 20 Cal. W.N. 1303, referred to.

Per BLAGDEN, J.—A "case" certified to be fit for further appeal includes an order for costs made or refused in that case. Neither the precise form of the certificate nor any failure by the appellant to file a document which he should have filed under O. 41, r 1 of the Civil Procedure Code could deprive the appellate Court of its statutory power under O. 41, r. 33 to pass or make such further or other decree as the case may require.

---

* Letters Patent Appeal No. 13 of 1939 arising out of Special Civil 2nd Appeal No. 18 of 1939 of this Court from the judgment of the District Court Myitkyina in Civil Appeal No. 15 of 1938.

1940

DASS
v.
LAKHAJEE.

Doctor for the appellant.

Hay for the first respondent.

K. C. Sanyal for the second respondent.

ROBERTS, C.J.—This is a Letters Patent Appeal arising out of a suit on a promissory note for Rs. 1,120 with interest at 2 per cent per month, brought by the plaintiff-appellant against the two respondents as defendants. His plaint averred that the defendant, Lakhajee, executed a promissory note on the 1st October 1932 "as agent and for Ranglal", who was the proprietor of the Irrawaddy Rice Mill whilst Lakhajee was his manager. Alternatively, he claimed relief against Lakhajee. This relief would, of course, be in the nature of damages for breach of warranty of authority to act as Ranglal's agent if it were proved that Lakhajee was not acting as such ; and the sum due as damages would be the amount due under the note.

In the Subdivisional Court of Mogaung it was held that Ranglal was liable and though Lakhajee was not expressly dismissed from the suit he was dismissed by implication. The plaintiff therefore obtained a decree against Ranglal alone. The date of the judgment was the 30th April 1938.

Ranglal appealed to the District Court on the 2nd June and Sein Dass was served with notice of the appeal on the 25th June, The period of limitation running in Lakhajee's favour expired on the 29th June.

In his grounds of appeal to the District Court Ranglal set out the contention that the lower Court had "erroneously come to the conclusion that the appellant is responsible for a debt contracted by one Lakhajee" and had "erroneously decided that the appellant ratified the acts of Lakhajee." It is clear therefore that his sole ground of appeal was that not he but Lakhajee

1940

DASS
v.
LAKHAJEE.

ROBERTS, C.J.

was liable to the plaintiff. He did not join Lakhajee as a respondent as he ought to have done if he had desired to prove Lakhajee responsible for the debt.

In *S. Pearson & Son, Limited* v. *Lord Mayor, etc., of Dublin* (1) Lord Halsbury remarked that if a case cited to him as authority were supposed to decide that the principal and agent could be so divided in responsibility that like the school boys' game of "I did not take it: I have not got it" the united principal and agent might commit fraud with impunity it would be quite new to our jurisprudence. It must frequently happen that a person who has contracted with some one upon the footing that the latter is an agent is in doubt whether to proceed against the principal or against the self-styled agent, and that it is reasonable to make each of them defendants in the alternative. When he obtains judgment against one and the other is dismissed from the suit, the unsuccessful defendant cannot, by omitting to join the successful defendant as a respondent in the appeal and then showing that the latter was really liable deprive the plaintiff of his right to establish his claim. Ranglal did not appeal against the dismissal of Lakhajee from the suit.

When the right of appeal against the dismissal of Lakhajee from the suit was time-barred, Lakhajee was no longer an interested party. I respectfully agree with the finding of the learned Judge in second appeal on this point and I need hardly add to his exhaustive researches into the authorities. It is enough to say that Lakhajee was entitled to hold the decree in his favour; it was, in the words employed by Sir John Wallis in *V.P.R.V Chockalingam Chetty* v. *Seethai Acha and others* (2), "a substantive right of a very valuable kind of which he should not lightly be deprived."

(1) (1907) A.C. 351, 357. (2) (1927) I.L.R. 6 Ran. 29 (P.C.)

1940

DASS
v.
LAKHAJEE.

ROBERTS, C.J.

What then was the position of Ranglal? Assume he succeeded by showing that Lakhajee was really liable (and he did not attempt to succeed by any other means) there would be in existence two inconsistent decrees, one of the District Court and another of the Subdivisional Court, with respect to the subject-matter of the suit. Applying the principle in *Ma Than May* v. *Mohamed Eusoof* (1), Ranglal's appeal ought not to have been allowed to proceed in the absence of Lakhajee as a necessary party.

In the events that have happened the lower appellate Court set aside the decree against Ranglal and passed a decree against Lakhajee alone. The learned Judge in second appeal has, in my respectful opinion, rightly concluded that no decree should have been passed against Lakhajee as he was improperly joined as a respondent; but he has also agreed with the lower appellate Court that Ranglal was not liable on the promissory note and has dismissed the cross-objection of Sein Dass against Ranglal's appeal in respect of the costs in the District Court. The result of all this is that each of the respondents has escaped liability on the promissory note on which admittedly one of them was liable, and each of them is awarded costs against the person who plainly ought to be paid.

The learned Judge incorporated into one judgment his decision on Lakhajee's appeal, Special Civil Second Appeal No. 18 of 1939, and Ranglal's appeal against the order depriving him of his costs, Civil Second Appeal No. 19 of 1939, and the cross-objection filed in the latter. He then certified that the case was a fit one for a further appeal under clause 13 of the Letters Patent because it raised the question whether

(1) (1931) I.L.R. 9 Ran. 624.

Lakhajee could have been properly joined by the District Court as a respondent. It is now contended that our jurisdiction is limited to a consideration of this point alone but in view of the wide provisions of Order XLI, rule 33, I am of opinion that we are not so fettered, but may make such further or other decree or order as the case may require.

We have had cited to us the case of *Devi Charan Lal* v. *Sheik Mehdi Hussain* (1). In that case the learned Chief Justice of the Patna High Court (Chamier C.J.) pointed out that though ordinarily a point is not to be taken in a Letters Patent appeal which had not been taken before the single Judge, there may be a case in which a point must be allowed to be taken in order to remedy what appears to be a serious failure of justice. It is perfectly clear that no learned Judge would ever grant a certificate of appeal against his judgment in such circumstances that the Court could only answer one specific question : to do that the Judge proceeds by referring a particular question : to assume that when leave is granted the appeal and the terms of the certificate are to be regarded as a reference only is, in my opinion, an error, and the appellate Court has the right and duty to pass whatever decree should have been passed by the subordinate Court in all the circumstances of the case, and that means, in all the circumstances which gave rise to the litigation originally and to all the disputes between all the relevant parties in the matter.

The nature of the decree which should have been passed in the plaintiff-appellant's suit against the two respondent-defendants is one which it is proper to determine in the circumstances, and the conclusion at which we have arrived is that the appeal of

(1) 20 Cal. W.N. 1303.

1940

DASS
v.
LAKHAJEE.

ROBERTS, C.J.

Ranglal was incompetent unless Lakhajee was added by him as a necessary party. The whole of this question was reviewed by the learned Judge in second appeal and it cannot be said now that this Court is powerless to see that the appellant recovers the money which is due to him and in respect of which he brought a suit against each of the defendants in the alternative.

The failure on the part of Ranglal to join Lakhajee as a respondent has resulted in the latter's exoneration from liability to the plaintiff's claim and the alleged principal cannot offer a shield to one who has styled himself as his agent, and then escape liability himself by proving that such self-styled agent was never his agent at all and was really all the time liable personally in damages for breach of warranty of authority, or, alternatively, upon the note.

It has been contended that Sein Dass ought to have appealed against Lakhajee's dismissal from the suit. But Sein Dass had only asked for a decree against one or other of the defendants and, having secured it against one, had no need, and indeed no right, to pursue his claim against the other. It was incumbent on that other, if he desired to appeal against the judgment in Lakhajee's favour, to do so. [See *U Po Sein* v. *E. M. Bodi* (1).]

The order of the Court will be that the decree of the Subdivisional Court against Ranglal will be restored with costs here, advocate's fee in this Court thirty gold mohurs and in all the Courts below to be paid to the appellant. The cross-objection of the appellant is allowed with costs in the Court below. The decree of the learned Judge in second appeal with regard to Lakhajee is affirmed ; Sein Dass to pay his costs here

(1) (1934) I.L.R. 13 Ran. 189.

and in all the Courts below, advocate's fee in this Court fifteen gold mohurs, and Sein Dass to recover from Ranglal the amount of the costs which the former shall be obliged to pay to Lakhajee.

BLAGDEN, J.—I agree and desire only to add this.

Mr. Sanyal contended, amongst other things, that even if his client was—as he denied—bound at his peril to make Lakhajee a party to his appeal to the District Court, if he wished there to contend that Lakhajee and not he was liable, the plaintiff was really to blame for Lakhajee's absence. Mr. Sanyal submitted that the plaintiff could have either (*a*) appealed against the order of the Subdivisional Court in effect dismissing Lakhajee from the suit, or (*b*) lodged his application to the District Court for Lakhajee to be added before that order had become unappealable, or (*c*) presented, if necessary, a petition under section 5 of the Limitation Act.

I do not agree that the first course was even open to him for the reasons given by my Lord. As to the second course (which in fact he, not unreasonably, did take within a not unreasonable time, though it was actually then too late) and the third course, it may well be that in fact here he could have taken one or other of them. But why should he have to act with feverish haste in order to preserve to himself the benefit of his original prudence in suing both defendants? Why should the time limited to him for taking the suggested steps be fixed not by any statute or rules of Court but by the whim of the unsuccessful defendant? It is quite possible, if Mr. Sanyal is right, to imagine a case in which a combination of delay by the unsuccessful defendant, error by the trial Court and (say) illness of the successful plaintiff might put the Courts in the

1940

DASS v. LAKHAJEE.

BLADGEN, J.

position of having to make two inconsistent decrees and deprive the plaintiff wholly of his rights.

It being admitted that A or B is liable to C, the lower Court having decreed that A is liable and B is not, and the latter part of the decree having become unappealable, the nett result, if the appellate Court thought that B was liable, would be that C would have to pay costs to both of two persons one of whom was admittedly in his debt. This cannot be right. One and a sufficient answer to the cases cited to us on election by taking judgment against one of the persons liable in the alternative is, in my opinion, that in every one of those cases the judgment was effectual and subsisting. They do not decide that a judgment can at the option of an unsuccessful defendant be set aside on appeal in so far as it adversely affects the unsuccessful defendant and preserved in so far as it benefits a person who is admittedly liable if he is not, and it would be absurd if such were the law. I have no doubt it is not, and therefore Lakhajee was in law a necessary party to Ranglal's appeal to the District Court, which should, in Lakhajee's absence, have been dismissed.

With regard to the point that no appeal has been lodged against the decree in Civil Second Appeal No. 19 of 1939 but only against the decree in Special Civil Second Appeal No. 18 of 1939, I do not think this has any substance. This appeal is an appeal in a "case" certified to be fit for appeal, and the word "case" is a very wide word. A case, in my opinion, includes an order for costs made or refused in that case, which is obviously ancillary to the substantive order made in the case. Neither the precise form of the certificate nor any failure by the appellant to file a document which he should have filed under Order XLI, Rule 1 (and I do not decide that there was any such failure), could, I think, deprive this Court of its statutory

power under Order XLI, rule 33, to pass or make such further or other decree as the case may require, and I have no doubt that the present case before us does require the order which we are making.

1940

DASS
v.
LAKHAJEE.

BLAGDEN, J.