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Tyabji J.

I will not therefore make the declaration or give a decree to the plaintiff on the basis that the marriage is subsisting.

The second issue is that on which there was contest before me by the 3rd defendant. I have already held that the plaint discloses a cause of action against the 3rd defendant and have at the same time referred to those general considerations which affect both aspects of this matrimonial suit. The 3rd defendant appeared at the hearing and tendered himself for cross-examination. The plaintiff's evidence is so unsatisfactory, that against the 3rd defendant also, I should have been prepared to dismiss the suit even if there had been no evidence before me to contradict that of the plaintiff. But certainly after the cross-examination of the 3rd defendant I have no doubt that there cannot be a decree against the 3rd defendant. I disbelieve the allegation that the 3rd defendant enticed away the 1st defendant, and the other allegations made by the plaintiff against the 3rd defendant. The suit will therefore be dismissed with costs against the 3rd defendant.

Attorneys for defendants: Messrs. *Dorab & Co.*

Suit dismissed.

G. C. O'G.

APPELLATE CIVIL.

Before Mr. Justice Rangnekar.

1934
November 15

MOTIBHAI JESINGBHAI PATEL (ORIGINAL DEFENDANT), APPLICANT *v.* RANCHODBHAI SHAMBHUBHAI PATEL AND ANOTHER (ORIGINAL PLAINTIFFS), OPPONENTS.*

Civil Procedure Code (Act V of 1908), Order XLI, rules 27, 28, 29 and sections 115, 151—Trial Court disallowing certain questions to plaintiffs' witness and excluding evidence—Suit dismissed—Appellate Court setting aside decree and remanding the case to trial Court—Appeal from order—Procedure—Interlocutory order—Inherent jurisdiction—High Court—Revision.

The plaintiffs filed a suit for a declaration that they were entitled to cultivate the lands in suit on payment of assessment and local fund cess only, on the ground that

* Appeal from Order No. 58 of 1933 (converted into Revision Application No. 515 of 1934).

they were permanent tenants of the defendant. The trial Court dismissed the suit. In appeal, the District Judge was of opinion that certain evidence, tendered on behalf of the plaintiffs, was wrongly excluded by the trial Court and certain questions put to a witness were wrongly disallowed. He, therefore, set aside the decree and sent down the case with a direction that the plaintiffs should be allowed to put in such evidence as they liked. The defendant appealed against the order. A preliminary objection was raised that no appeal lay against the order:

Held, (1) that even if the order be treated as one made under Order XLI, rule 27, of the Civil Procedure Code, 1908, no appeal lay against such order;

(2) that on the merits and circumstances of the case, the appeal could be allowed to be converted into a revisional application and be treated as such;

(3) that under the provisions of Order XLI, rules 27, 28 and 29, the District Judge had no jurisdiction to set aside the decree made by the Subordinate Judge and to make the order which he made;

(4) that the order could not be supported under the inherent jurisdiction of the Court, as the Civil Procedure Code provided a clear rule under Order XLI, rule 27 which the District Judge could not ignore:

Ghuznavi v. *The Allahabad Bank, Ld.*,[1] followed;

(5) that the High Court has jurisdiction to revise interlocutory orders from which no appeal lies:

Shiva Nathaji v. *Joma Kashinath*,[2] followed;

(6) that the District Judge in setting aside the entire decree of the trial Court acted with material irregularity which warranted interference by the High Court under section 115 of the Civil Procedure Code, 1908.

There is a tendency on the parts of the Subordinate Courts to ignore the provisions of Order XLI, Civil Procedure Code, 1908, and to set aside the whole decree of the trial Court. It is high time that Courts realized that they should not, as far as possible, travel beyond the provisions of the Code and make an order, to support which, the so-called inherent jurisdiction of the Court has to be brought in.

APPEAL from Order passed by D. V. Vyas, District Judge of Kaira at Nadiad, reversing the decree passed by J. D. Rana, Second Class Subordinate Judge at Umreth.

Suit for declaration.

The plaintiffs sued for a declaration that they were entitled to cultivate the two plaint fields on payment of assessment and local fund cess only, on the ground that they were the permanent tenants of the defendant.

[1] (1917) 44 Cal. 929 F. B. [2] (1883) 7 Bom. 341 F. B.

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The Subordinate Judge held that the plaintiffs had failed to prove that they were liable to pay assessment and local fund cess only. He, therefore, dismissed the suit.

On appeal, the District Judge set aside the decree and sent back the case to the Subordinate Judge observing as follows :—

"When the trial of the suit was in progress before the Subordinate Court their learned pleader sought to lead evidence both oral and documentary to show that there was a custom in virtue of which all customary tenants were paying only the assessment and local fund cess to Narvadars and nothing more. With that object he put in two applications exhibits 76 and 77 which were rejected by the Subordinate Judge saying that the evidence sought to be led was not relevant. His refusal to allow these applications appears to me to be improper and has prejudiced the case of the plaintiffs very materially. * * * . Some questions were put to exhibit 75 when he was in the witness box by the learned pleader of the plaintiffs in order to elicit the information whether other permanent tenants had succeeded in their dispute with the Narvadars to pay only the assessment or something more. Those questions also were disallowed by the learned Subordinate Judge saying that they were irrelevant. I have already said that such information is relevant for the decision of this suit. As the exclusion of it has prejudiced the case of the appellants I direct that such evidence as plaintiffs wish to put in in order to show the practice and custom among other customary tenants of the locality should be allowed to be led. After the consideration of that evidence and rebutting evidence if any and the other evidence which is already on record the suit should be decided."

The defendant appealed to the High Court against the order.

U. L. Shah, for the applicant.

G. N. Thakor, with *C. K. Shah*, for the opponents.

RANGNEKAR J. This appeal arises out of a suit brought by the respondents for a declaration that they were entitled to cultivate the two suit fields on payment of assessment and local fund cess only, on the ground that they were permanent tenants of the appellant.

The trial Court held that the respondents had failed to establish that they were liable to pay only the assessment and local fund cess, and were not entitled to the declaration

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sought for, and dismissed the suit. The respondents appealed against that order.

In appeal, the learned Judge thought that certain evidence, which was tendered on behalf of the plaintiffs, was wrongly excluded by the trial Court; similarly, certain questions, which were put to a witness on behalf of the plaintiff, were wrongly disallowed by the trial Court. The learned Judge thereupon came to the conclusion that the exclusion of that evidence had prejudiced the appellants before him, set aside the decree made by the trial Court, and sent down the case with a direction that the plaintiffs should be allowed to put in such evidence, as they liked, on the particular point to be presently mentioned, and that the suit should be decided after consideration of that evidence and rebutting evidence, if any, together with the other evidence which was already on record. The defendant now appeals against that order.

Mr. Thakor, on behalf of the respondents, has raised a preliminary objection, that no second appeal lies from the order made by the appellate Court. He says that the order was made, not under Order XLI, rule 27, of the Civil Procedure Code, but under the inherent jurisdiction of the Court, and that no appeal lies. He further says that, even if the order is treated as one made under Order XLI, rule 27, Civil Procedure Code, there is no second appeal.

The learned advocate on behalf of the appellant concedes that, even if the order is treated as one made under Order XLI, rule 27, of the Code, no second appeal lies; but he applies that the appeal should be converted into an application in revision.

In my view, on the merits and the circumstances of the case, this is a proper case in which I should allow the appeal to be converted into a revisional application; and, accordingly, I direct that it should be treated as a revisional application.

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The point in dispute was short. The plaintiffs, claiming to be permanent tenants of the defendant, stated in their plaint that they were liable to pay the assessment and local fund cess only to the defendant, and that the defendant was not entitled to receive any further amount from them. They further pleaded that the defendant, on no occasion, had received anything more than the assessment and local fund cess. Then they stated that, although they had been paying the assessment and local fund cess, the defendant brought a suit in the Small Causes Court claiming more than the assessment and local fund cess and obtained a decree. The plaintiffs presented an application in revision to this Court. The said application was rejected, reserving to the plaintiffs a right to bring a separate suit for the purpose of ascertaining what was their liability and what rent was payable by them. Accordingly, the present suit was instituted.

It is clear from the judgment of the appellate Court that the plaintiffs contended in appeal that their case was that they were customary tenants and that there was a custom under which they as customary tenants were not liable to pay anything more than the assessment and local fund cess. This case was never made out in the plaint, nor was any issue raised about it.

During the trial of the suit, the plaintiffs attempted to prove certain receipts passed by one Ranchhod Mathur to one Chaturbhai Dharmadas for the purpose of showing that the latter also was a tenant of the appellant and was paying only assessment and local fund cess. They also tendered a judgment in a case with the object of showing that another tenant of the appellant was also paying only assessment and local fund cess. In effect, the evidence, which they attempted to lead, was for the purpose of proving that there was no usage in this particular locality which enabled a landlord to claim from his permanent tenants anything more than the assessment and local fund cess, and for the

purpose of proving that the landlord had not enhanced the rent. This evidence was excluded by the trial Judge. The learned District Judge, in appeal, thought that the evidence was relevant. This is what he observed :—

"In my opinion, it is of great importance to decide whether other tenants of the class and character of the plaintiffs in the same locality used to pay only the assessment and the local fund cess to the Narvadars or something more."

And, on this ground, he interfered with the decree made by the trial Court dismissing the suit. The questions, which the trial Court disallowed and which the appellate Court thought were relevant, were put in order, as the appellate Court observed, "to elicit information whether other permanent tenants had succeeded in their dispute with the Narvadars to pay only the assessment or something more."

This, then, being the evidence, which was excluded by the trial Court, the question was, whether that evidence was relevant. It was open to the learned District Judge to hold that the evidence was relevant. Then, the only question, which would remain, would be: what procedure he should have followed ?

In my view, the only course, apart from the inherent jurisdiction which every Court has, open to him was to turn to Order XLI, rule 27, of the Civil Procedure Code. That rule provides that :—

"If—

(*a*) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(*b*) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined."

Rule 28 of Order XLI of the Code provides that :—

"Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court."

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Rule 29 then proceeds to provide that :—

"Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified."

It is clear, from these provisions, that there was no jurisdiction in the Court to make the order which it has made. Having held that the evidence was relevant, he, in the first place, did not specify clearly, as he should have, what the points were, to which the evidence should be confined. Apart from that, however, he had no jurisdiction to set aside the decree made by the Subordinate Judge.

The question then is : whether this order can be supported as one which was made under the inherent jurisdiction of the Court ?

Mr. Thakor relies upon *Ghuznavi* v. *The Allahabad Bank Ld.*[1] and, if I may say so, I respectfully agree with the decision in that case. One of the points decided in that case was, that "inherent jurisdiction must be exercised with care, subject to general legal principles and to the condition that the matter is not one with which the Legislature has so specifically dealt as to preclude the exercise of inherent power."

When, therefore, the Civil Procedure Code has provided a clear rule, I am unable to see how the appellate Court could ignore that rule and proceed to act in the exercise of its inherent jurisdiction. It seems to me that the provisions of Order XLI, rule 27, of the Code, were either not drawn to the attention of the learned District Judge ; or, if they were, they seem to have been ignored by him.

The question, which now arises, is : whether I should interfere, in the exercise of the revisional jurisdiction of this Court, with the order which the learned District Judge has made.

[1] (1917) 44 Cal. 929, F. B.

The learned counsel has referred me to several cases of this Court as well as of the other High Courts. It is argued by him: firstly, that this Court will not act in the exercise of its revisional jurisdiction when the order complained of was an interlocutory order; and, secondly, that, even supposing the order was wrong it cannot be said that it falls within sub-clause (*c*) of section 115 of the Civil Procedure Code.

As to the first point, I find some difficulty in agreeing with the contention that the order was an interlocutory order. Assuming that the order made by the appellate Court was interlocutory, what is the position? To give the High Court jurisdiction to revise an interlocutory order, it is clear on the authorities that, amongst other things, it must be a "case decided" within the meaning of section 115.

Now, interlocutory orders are of two kinds, namely:—

A. Those from which an appeal lies under section 104 (*1*). These are orders made by the Court of first instance.

B. Those from which no appeal lies. These may be—

(*a*) orders made by the Court of first instance from which no appeal is allowed under section 104 (*1*); or

(*b*) orders passed in first appeal from which no second appeal lies having regard to the provisions of section 104 (*2*).

As regards the first class of interlocutory orders, undoubtedly, the High Court has no jurisdiction to revise them as they are appealable orders. As regards the second, there seems to be a conflict of decisions as to the exact meaning of the word or expression "case". One view which is taken is, that "case" would include a part of the case. According to that view, it is clear that the High Court can interfere in revision with such orders, though, as a matter of practice, the High Court is not bound to interfere, and very rarely interferes, with such orders. This latter view is

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accepted by the Calcutta, Madras, Patna and Rangoon High Courts. Our own High Court took the same view so far back as 1883 in *Shiva Nathaji* v. *Joma Kashinath*.[1] Speaking for myself, I think that view is correct.

The next question is, whether the appellate Court has acted with material irregularity. The real principle underlying section 115, which the Privy Council has laid down, seems to me to be that, where there is a wilful disregard or conscious violation by a Judge of a rule of law or procedure, the case is one of material irregularity.

In this case, as I have pointed out, nothing can be clearer than the provisions of Order XLI, to which I have referred. It is difficult to see on what principle or under what procedure the learned District Judge proceeded when he set aside the entire decree of the trial Court even though he thought that the refusal to admit evidence by the trial Court was improper.

Recently I have noticed a tendency on the part of the subordinate Courts to ignore the provisions of Order XLI and to set aside the whole decree of the trial Court. In my opinion, it is high time that the Courts realized that they should not, as far as possible, travel beyond the provisions of the Code and make an order, to support which the so-called inherent jurisdiction of the Court has to be brought in.

I hold that, in the circumstances of this case, the learned District Judge acted with material irregularity, and, therefore, the order made by him must be set aside.

Apart from this, it has been argued by the learned advocate on behalf of the appellant, that this was not an interlocutory order. In view of the conclusion to which I have come, it is not necessary for me to express an opinion on that point; but I am not prepared to say that there is no force in that contention, because the whole decree of the trial Court

[1] (1883) 7 Bom. 341, F. B.

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was set aside, and, for purposes of that appeal, the appeal was disposed of. Any further appeal from the original Court after remand would be a separate proceeding. In this view, it is difficult to see how the order complained of can be said to be an interlocutory order.

The application, therefore, will be allowed, and the order set aside.

The case will, therefore, be remanded to the lower appellate Court for trial on the merits of the case.

Costs will be costs in the appeal before the District Judge.

Application allowed.

J. G. R.

APPELLATE CIVIL

Before Mr. Justice Murphy, Acting Chief Justice.

1934
July 9

JAGANNATH RAVJI KONDKAR AND OTHERS (HEIRS OF ORIGINAL DEFENDANT), APPELLANTS *v.* LAXMIBAI ANANT KONDKAR (ORIGINAL DARKHASTDAR), RESPONDENT.*

Court-fees Act (VII of 1870), Schedule II, Art. 17 (vii)—Decree against heir of original defendant in personal capacity—Appeal—Amount of decree not disputed—Appeal against decree by heir and legal representative against personal liability—Court-fees.

Where a defendant is brought on record as heir and legal representative of the original defendant and a decree is passed against him personally and he appeals only on the ground that his liability under the decree was as an heir and legal representative and not personally, the memorandum of appeal can be stamped for court-fees with a stamp of Rs. 15, under Article 17 (*vii*) of the Second Schedule of the Court-fees Act, 1870.

REFERENCE under section 5 of the Court-fees Act, 1870, made by K. A. Athalye, Taxing Officer, High Court, Appellate Side, Bombay.

Court-fees.

*First Appeal Stamp No. 1268 of 1934.