

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Wassoodew.

1938
February 2

DHONDO NARAYAN SHIRALKAR (ORIGINAL PLAINTIFF), APPLICANT *v.*
ANNAJI PANDURANG KOKATNUR AND ANOTHER (ORIGINAL DEFENDANTS),
OPPONENTS.*

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1; O. XLI, r. 22 (d)—Appeal—Withdrawal of appeal—Respondent obtaining rights under appeal—Whether withdrawal permissible—Procedure—Practice—Transposition of parties.

An appellant is entitled as of right to withdraw his appeal, provided that the respondent has not acquired any interest thereunder. But if the respondent has obtained any rights under the appeal, it is not open to the appellant to withdraw his appeal without the leave of the Court.

Kalyan Singh v. Rahmu,⁽¹⁾ relied on.

Where an appellant desires to withdraw and the Court has no jurisdiction to allow him to do so, the proper course may be to transpose the parties, making the respondent appellant, and the appellant respondent. The Court might adopt this course in a proper case, but is not bound to do so in every case where the appellant withdraws.

CIVIL REVISION APPLICATION against the order passed by
A. M. Khan, District Judge at Belgaum.

Suit to recover amount due on a mortgage.

Plaintiff (Dhondo) filed a suit in the Second Class Subordinate Judge's Court at Athni to recover Rs. 2,268-6-3 on a mortgage executed by Annaji (defendant No. 1). The trial Court passed a decree for Rs. 1,747-1-2.

The defendant appealed to the District Court and the plaintiff filed cross-objections in regard to the sum of Rs. 215. In appeal, the Assistant Judge held that accounts ought to be taken between the parties under s. 13 of the Dekkhan Agriculturists' Relief Act and remanded the case to the trial Court for taking accounts on that basis. The hearing of the cross-objections was reserved till the findings of the trial Court were received.

The trial Court appointed a Commissioner to take accounts. The Commissioner reported that a sum of Rs. 10,689-3-0

*Civil Revision Application No. 392 of 1936.

⁽¹⁾ (1901) 23 All. 130.

was due to the plaintiff on the mortgage. The Subordinate Judge agreed with the finding of the Commissioner and varied the decretal amount by substituting the sum found due by the Commissioner for the original decretal amount.

When the appeal was again heard by the Assistant Judge, he was of opinion that, having regard to the amount found due, the appeal did not lie to the District Court but lay to the High Court. He, thereupon, purported to dismiss the appeal.

From the order of dismissal, the plaintiff preferred a second appeal to the High Court. The order was set aside, and the appeal was ordered to be heard by the District Court. When the appeal was taken up for hearing by the District Judge the defendants applied to withdraw their appeal. The application was opposed by the plaintiff, but the District Judge allowed the appeal to be withdrawn. The District Judge, however, allowed the cross-objections filed by the plaintiff and passed a decree in his favour for Rs. 1,962-1-2.

The plaintiff applied to the High Court in revision against the order of the District Judge allowing the appeal to be withdrawn.

S. A. Desai, with *A. G. Desai*, for the applicant.

R. A. Jahagirdar, for the opponents.

BEAUMONT C. J. This is an application in revision against an order made in appeal by the District Judge of Belgaum. The case is rather a peculiar one. The plaintiff was entitled to a mortgage executed by defendant No. 1, and he instituted this suit to recover the amount due, claiming that the amount due under the mortgage was Rs. 2,268-6-3. The Second Class Subordinate Judge of Athni passed a decree in favour of the plaintiff for Rs. 1,747-1-2. The defendants then appealed to the District Court, and in appeal the Assistant Judge held that accounts ought to be taken between the parties under s. 13 of the Dekkhan Agriculturists' Relief Act, and he, therefore, referred the

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matter back to the lower Court to take the accounts on that basis. The lower Court then appointed a Commissioner to take the accounts, and the Commissioner held that a sum of about Rs. 11,000 was due on the mortgage, that is to say, he largely increased the amount which the learned Judge had held to be due. The Subordinate Judge agreed with the finding of the Commissioner, and varied the decretal amount by substituting the sum found due by the commissioner for the original sum found due by the Court; and the appeal then came again before the Assistant Judge. The learned Judge held that, having regard to the amount found due, the appeal did not lie to the District Court but lay to the High Court, and he purported thereupon to dismiss the appeal, which was clearly wrong, as he could not dismiss an appeal which did not lie. He ought to have returned the memorandum for presentation to the proper Court. However, he did dismiss the appeal; and from that order there was a second appeal to this Court. This Court held that the appeal did lie to the District Court, and it, therefore, allowed the appeal and remanded the matter to the District Court to be dealt with under the original appeal. When the matter came before the District Court again for disposal of the appeal, the appellants withdrew the appeal and alternatively asked the Court for leave to withdraw the appeal. The learned District Judge was disposed to take the view that the appellants were entitled to withdraw the appeal without leave; but he also considered the matter on the basis that the leave of the Court was necessary, and he came to the conclusion that if the leave of the Court was necessary he ought to grant it, and he did grant it accordingly on terms as to costs. I should have mentioned that the plaintiff originally filed cross-objections against the decree of the trial Court, claiming that the amount due to him under the decree should be increased by a sum of Rs. 215. The learned District Judge in appeal, having held that appellants were entitled to withdraw the appeal, disposed

of the cross-objections which he allowed, and in the result he made an order that the amount originally found due by the trial Court should be increased by the sum of Rs. 215, and he directed the defendants to pay the costs of the appeal including the costs of both the appellate Courts, together with the costs of the remand and the Commissioner's fees. Against that order the plaintiff comes in revision. His contention is that the appellants were not entitled to withdraw the appeal either with or without the leave of the Court, and that the Court was bound to grant a decree in favour of the plaintiff holding that the amount found due by the Commissioner was the correct amount.

The question we have to consider is, whether it was open to the appellants to withdraw their appeal either with or without the leave of the Court. If the Court had power to grant leave, it is not open to us in revision to consider whether the Judge exercised his discretion rightly, though I see no reason for doubting that he did.

There is no provision in the Civil Procedure Code dealing with the right to withdraw an appeal. Under O. XXIII, r. 1, a plaintiff may withdraw a suit at any time. But if he does so without obtaining the permission of the Court to file a fresh suit under sub-r. (2), then he is precluded from instituting a fresh suit in respect of the subject-matter of the original suit. That rule does not in terms apply to an appeal, and clearly the provision of sub-r. (2) as to withdrawal with leave to file a fresh suit would be inapplicable to an appeal. Nor is the case of the applicant improved in any way by s. 107 of the Civil Procedure Code, which merely confers upon an appellate Court powers and duties similar to those possessed by Courts of original jurisdiction but does not confer upon the parties to an appeal all the rights which the parties to a suit may enjoy. There being no express provision in the Code as to the withdrawal of an appeal, in my opinion, the correct rule is that the appellant is entitled as of right to withdraw his appeal, provided

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that the respondent has not acquired any interest thereunder. That rule was laid down in *Kalyan Singh v. Rahmu*,⁽¹⁾ though it was there held that an appeal could not be withdrawn if there were cross-objections. But the objection as to cross-objections is now removed by the terms of O. XLI, r. 22 (4). But, in my opinion, if the respondent has obtained any rights under the appeal, it is not open to the appellant to withdraw his appeal without permission. In this case, I think that the interlocutory order made by the appellate Court directing accounts under the Dekkhan Agriculturists' Relief Act did confer a right upon the respondent, and I think that after that order was made, it was not open to the appellants to withdraw their appeal without leave. But, in my opinion, it was open to the Court to grant leave. It is difficult to see what an appellate Court can do, if the appellant desires to withdraw, and the Court has no jurisdiction to allow him to do so. It is suggested that the proper course in such a case is to transpose the parties, making the respondent appellant, and the appellant respondent. It may be that in a proper case the Court might adopt that course, but it seems to me impossible to hold that the Court is bound to adopt that course in every case where the appellant withdraws. Here the learned Judge did not think fit to adopt that course. The respondent could have claimed in his cross-objections a greater amount as due than the amount which he did claim, but, in my opinion, he was not entitled to insist upon the appeal being prosecuted. The learned Judge had jurisdiction to allow the appeal to be withdrawn and in so allowing was guilty of no irregularity. In my opinion, therefore, this revisional application must be dismissed with costs.

WASSOODEW J. I agree.

Application dismissed.

J. G. R.

⁽¹⁾ (1901) 23 All. 130.