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APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

SHIVAPPA BIN PARSA SAVADE (ORIGINAL OPPONENT), APPELLANT *v.* RAMCHANDRA NARSINH DESHPANDE AND ANOTHER BY THEIR NEXT FRIEND THE COURT OF WARDS (ORIGINAL APPLICANTS), RESPONDENTS*.

1921.

February 28.

Civil Procedure Code (Act V of 1908), Order XLVII, Rule 1, and Order XLI, Rule 11—Review—Dismissal of appeal to High Court under Order XLI, Rule 11—Application for review made to lower Court—Lower Court has no jurisdiction to proceed with the review application.

When an appeal to the High Court stands dismissed under Order XLI, Rule 11 of the Civil Procedure Code, 1908, no application for a review can be entertained or proceeded with in the lower Court.

APPEAL against the order passed by N. B. Deshmukh, Assistant Judge of Belgaum.

Application for review.

The facts appear sufficiently set out in the judgment of the learned Chief Justice.

G. S. Rao, for the appellant.

Sir T. J. Strangman with *A. G. Desai*, for the respondents.

MACLEOD, C. J.:—This is an appeal from the decision of the Assistant Judge of Belgaum, who allowed an application for a review of the judgment of the District Judge in Appeal No. 1 of 1915 and directed that it should be reheard on its merits.

* Appeal No. 8 of 1920 from Order.

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The plaintiffs filed the suit in 1913 for possession of the suit property and mesne profits. The trial Court dismissed the suit on the 26th November of 1914. The decree was confirmed by the District Judge on the 9th August of 1915. Thereafter the plaintiffs applied for a review and notice was issued on the 27th September of 1915. On the 15th November 1915 the plaintiffs filed a Second Appeal in the High Court which was dismissed under Order XLI, Rule 11, on the 11th February of 1916. An application for a review of the order of dismissal was entertained on the 16th June of 1916 and a rule was granted, apparently on the ground that the plaintiffs' application for a review of the judgment appealed against was pending. The application in the High Court was unfortunately allowed to remain undisposed of, while the application in the District Court was proceeded with. A point was taken that as the Second Appeal had been dismissed the District Court could no longer entertain an application for a review of its own judgment. On the authority of *Bapu* v. *Vajir*[1] the District Judge held that the summary dismissal of an appeal left the decree of the lower Court untouched and therefore he had still jurisdiction to review that decree. He then directed that the question whether the plaintiffs had strictly proved the allegations upon which the prayer for review was based should be tried. On the 13th November of 1919 the Assistant Judge decided that the evidence which the plaintiffs sought to adduce was not only new, but also important as having a very close and material bearing on the issues raised in the appeal, and that the appeal should be reheard on its merits. The appellant appeals against both decisions of the lower Court. On the first question it appears to be most unfortunate that the rule for review issued by the High Court was

[1] (1896) 21 Bom. 548.

not first disposed of. If the review had been allowed and the order made under Order XLI, Rule 11, set aside the first question dealt with by the District Judge would not have arisen, for it is clear that an application for a review of a lower Court's judgment if made before an appeal from the same decision is disposed of can be proceeded with. It is equally clear that if the application for review in the District Court had been made after the dismissal of the Second Appeal, it would not have been entertained. If the argument of the District Judge were sound an application for review of the lower Court's judgment could always be entertained whether made before or after an order under Order XLI, Rule 11, because the substantive decree is the decree of the lower Court even after the dismissal of the appeal. The fact that in *Bapu* v. *Vajir*[1] the High Court decided that an application to amend a decree, an appeal from which had been summarily dismissed, should be made to the lower Court, does not appear to decide the point before us. The Judges may very well have thought that an application to amend a decree under section 206 of the Code of 1882 in the limited circumstances mentioned therein should be made to the Court which passed the decree, and not to the Court which summarily dismissed an appeal therefrom, and the *ratio decidendi* may have been that the decree of the lower Court continued to be the substantive decree, but that decision is not binding on us when having to determine an entirely different question, and it has been dissented from by the High Courts of Calcutta, Madras and Allahabad. There would be an end to all certainty in litigation if a case could be reopened in the lower Court after an appeal to the High Court had been disposed of. This was the view taken by the Calcutta High Court in *Pyari Mohan Kundu* v. *Kalu Khan*[2].

(1) (1896) 21 Bom. 548.

(2) (1917) 44 Cal. 1011.

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In my opinion, therefore, as long as the appeal to the High Court stood dismissed, whether under Order XLI, Rule 11, or after hearing, no application for a review could be entertained or proceeded with in the lower Court. It is necessary therefore to deal with the rule granted by Batchelor J. on the 16th June of 1916. Neither in the application for review nor in the applicant's affidavit are any grounds stated on which the application could have been granted, but we may assume that it was mentioned to the learned Judge that an application for review was pending in the District Court. The plaintiffs of course should have asked the Court, when the Second Appeal came on for admission, either for leave to withdraw it or for a postponement until the result of the review proceedings had become known: *In the matter of the petition of Nand Kishore*[1] and *Ramu Kutti* v. *Mamad*[2]. The fact that they continued to press for the admission of the appeal, and incurred the risk of the appeal being dismissed, when they knew that they were asking the lower Court for a rehearing on fresh evidence, shows that their legal advisers had no clear conception of the trouble which would arise from concurrent proceedings in two Courts. For, if my view is correct and the District Judge was incompetent to review his own decree as long as the Second Appeal stood dismissed then all his proceedings in review had been without jurisdiction, and if we set aside the order under Order XLI, Rule 11, the application for review would have to be considered afresh in the lower Court. But in my opinion there is no sufficient reason within the meaning of Order XLVII, Rule 1 (1), why we should grant a review of the order under Order XLI, Rule 11. If a party elects to proceed with an appeal and gets a decision against him, it is no ground for a review that

(1) (1909) 32 All. 71.

(2) (1895) 18 Mad. 480.

if he had known the decision would go against him he would have taken a different course. No new facts had become known since the decision sought to be reviewed, and that is really what the Legislature has ordained should be shown before a review can be granted. If the words for "any other sufficient reason" were read in their widest sense a review could always be granted on the same state of circumstances as existed at the time of the hearing, and there would be an end to all finality of judicial proceedings.

I would therefore discharge the rule of the 16th June of 1916.

However, as all the judgments of the lower Court are before us I should like to say that it does not appear that any case was made out for the review of the original judgment of the District Judge. The real question at issue was whether the defendants could take advantage of section 83 of the Bombay Land Revenue Code. It was proved that they and their ancestors had been on the land since 1799 and there was no evidence with regard to the origin of their possession, which clearly went far enough back into antiquity to give rise to the presumption that their possession was co-extensive with the plaintiffs' title. Whether the plaintiffs were owners of the soil or only grantees of the land revenue, a point to which the learned Assistant Judge seems to have attached such great importance, is absolutely immaterial in determining the nature of defendant's possession, and considering that it appears from the judgment of the Court in first appeal that all parties took it as admitted that the defendant's family had been in possession since 1799 at least, there is nothing in the documents which the plaintiffs now seek to rely upon which could destroy the effect of that admission or prove the origin of the tenancy.

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Therefore, however much I might be inclined to overlook any matters of defective procedure in order that the issues between the parties might be finally determined on the materials now alleged to be available, it seems obvious that the evidence which the plaintiffs seek to produce would not result in a reversal of the decree dismissing the plaintiffs' suit.

The appeal, therefore, must be allowed and the rule for review of the decision of this Court dismissing the appeal under Order XLI, Rule 11, discharged. The plaintiffs must pay the defendant's costs of all proceedings in all the Courts.

A question might have arisen if the order for rehearing of the appeal in the District Court had been allowed to stand, whether the appellate Court should have admitted the additional evidence or sent the case back to the trial Court. The proper procedure is by no means clear. The evidence would not have been additional evidence which an appellate Court can take itself under Order XLI, Rule 27, nor would Rule 23 or Rule 25 apply, and it seems to me that the logical result of the appellate Court granting the review would be that the suit would have to go back to the trial Court for a fresh decision of the issues after recording the fresh evidence.

SHAH, J. :—In this case the District Court decided the appeal on the 9th August 1915 against the plaintiffs. The plaintiffs then filed an application for review in the District Court on the ground of discovery of new and important evidence on the 20th September and a rule was granted on the 27th September. On the 15th November the plaintiffs filed a Second Appeal in this Court. This appeal was summarily dismissed under Order XLI, Rule 11, on the 11th February 1916. An application for a review of this order dismissing the

Second Appeal was made and a rule was granted. That rule is still pending.

After obtaining this rule the plaintiffs proceeded with the review petition in the District Court. That Court held on the 22nd July 1918 that it had jurisdiction to deal with the petition in spite of the dismissal of the Second Appeal. The application was then transferred to the Assistant Judge, who heard it on the merits, made the rule absolute and directed a rehearing of the appeal on the 13th November 1919.

The defendants have appealed from this order. We have now heard the appeal from order and the rule on the application for review in the Second Appeal.

In my opinion the result of the appeal must ultimately depend upon the view which we take of the plaintiffs' application for the review of the dismissal of their Second Appeal. I shall, therefore, first deal with the review petition.

The petition does not clearly state the grounds for review, and there is no affidavit as to the circumstances under which the appeal came to be dismissed. It is obvious, however, that the applicants seek to get rid of the dismissal of the appeal, which might stand in their way as regards the review proceedings in the District Court. There is no substantial difference between an appeal dismissed under Rule 11 of Order XLI and an appeal withdrawn in the result, except as regards its effect on the right of the appellants to apply for a review of the lower appellate Court's decree. By asking this Court to review its order of dismissal, the appellants do not ask us to adjudicate the merits of the appeal in any different sense but seek merely to get rid of a legal bar to their review application, which when it was made to the District Court was in order. For the purpose of the review here, it must

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be assumed, and in the present case the assumption would not be without justification in view of the conclusion reached by the lower appellate Court on the merits of the review petition, that the applicants may have reasonable grounds to apply for a review of the decree of the District Court. Under such circumstances this Court has usually not refrained from helping the applicant, as the judgment in *Narayan bin Sidoji* v. *Davudbhai valad Fatehbhai*[1] would show. The discretion must be exercised with reference to the circumstances of each case as to whether it is requisite in the interests of justice to grant a review. Speaking for myself I should be disposed to allow the review asked for. But my Lord the Chief Justice is not prepared to grant the review: and in view of the irregular procedure adopted by the applicants, and the lapse of time, I am not prepared to dissent from that conclusion. The result, therefore, is that the application for review must be rejected.

The appeal from order must necessarily be considered on the footing that the dismissal of the Second Appeal stands. It is clear that the appeal must be considered subject to the limitations contained in Rule 7 of Order XLVII. It is also clear that the order made by the lower appellate Court is not open to any of the objections mentioned in Rule 7 (1). The application was made in time, it is found to satisfy the requirements of Rule 4 and the order is made in accordance with the provisions of Rule 2. I do not think that it is open to us to go into the merits of the order beyond the scope of the objections stated in Rule 7.

It is urged, however, that the application for review became wholly incompetent when the High Court dismissed the Second Appeal, and that the subsequent proceedings are without jurisdiction.

[1] (1872) 9 Bom. H. C. 238.

It is clear on the admitted facts that the review petition was in order when it was presented to the District Court. Under section 114 of the Code of Civil Procedure, the plaintiffs were entitled to apply for a review of the decree of the District Court as at the date of the application no appeal was preferred to this Court. It is also clear that the mere fact of their having preferred the Second Appeal did not create any bar in the way of their proceeding with the application. It has been held that the pendency of the appeal subsequently filed would not deprive the lower Court of its jurisdiction to hear the application : see *Narayan Purushottam* v. *Laxmibai*[1], *Chenna Reddi* v. *Peddaobi Reddi*[2] and *Pyari Mohan Kundu* v. *Kalu Khan*[3]. It is also indisputable that if an application for review were made to the District Court after the appeal from the decree sought to be reviewed is preferred to the High Court and dismissed by that Court, the District Court will have no jurisdiction to entertain the application : see *Narayan bin Sidoji* v. *Dawudbhai valad Fatehbhai*[4], and *Ramappa* v. *Bharma*[5]. The question that arises in this appeal is whether an application properly filed becomes incompetent in virtue of the subsequent dismissal of the appeal under Rule 11 of Order XLI by the High Court. There is no *decision* on this point. The opinion expressed in *Pyari Mohan Kundu* v. *Kalu Khan*[3] on this point was not necessary for the decision of the case. That opinion, however, is entitled to weight. It seems to me rather anomalous that the Court which has jurisdiction to deal with a review application properly made to it, should cease to have jurisdiction to proceed with it because of an order in the appeal from that decree of

(1) (1914) 38 Bom. 416.
(2) (1909) 32 Mad. 416.
(3) (1917) 44 Cal. 1011.
(4) (1872) 9 Bom. H. C. 238.
(5) (1906) 30 Bom. 625.

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the Court, which leaves the decree untouched, and which has not the effect of confirming or varying that decree. The observations in *Bapu* v. *Vajir*[1] as to the effect of summary dismissal of an appeal on the decree appealed from ought to have the same force in a case like the present. It is true that the application in *Bapu* v. *Vajir*[1] was one for an amendment of the decree and not for a review thereof. A review application is subject to certain statutory limitations which do not apply to an application for an amendment of the decree. It is clear that after the appeal is summarily dismissed, it is difficult to predicate, as required by the provisions of the Code, that no appeal has been preferred from the decree sought to be reviewed. It is difficult to extend the concession in favour of the party seeking a review beyond the stage to which the decisions of the type of *Narayan Purushottam* v. *Laxmibai*[2] have carried it. Though it may be somewhat anomalous it seems to me that in virtue of the dismissal of the appeal under Rule 11 by this Court, the District Court ceased to have jurisdiction to proceed with the review petition, which was quite in order, when it was made.

Though it has not been suggested in argument, I have considered whether the pendency of the rule issued on the application to this Court for a review of the dismissal of the appeal, could justify our holding that the appeal was pending during all that time. If the appeal can be legitimately treated as pending while the rule was pending in this Court, the position would be covered by the decisions to which I have referred. But I do not think that without straining language beyond all reasonable limit, the appeal which was dismissed can be held to be pending simply because the rule on the review petition was pending.

(1) (1896) 21 Bom. 548. (2) (1914) 38 Bom. 416.

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In form and in substance the appeal was disposed of, when it was dismissed.

Without expressing any opinion on the merits of the application for review in the District Court, the appeal from order must be allowed. Accordingly I concur in the order proposed by the Chief Justice.

Appeal allowed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1921.

March 2.

B. B. & C. I. RAILWAY COMPANY (ORIGINAL DEFENDANT), APPLICANT *v.* DAYARAM BECHARDAS, MANAGER OF THE FIRM OF BECHARDAS NAROTTAMDAS (ORIGINAL PLAINTIFF), OPPONENT*.

Railway—Goods consigned for carriage—Risk note, form H.—Loss of goods—Wilful neglect—Robbery from running train—Burden of proof.

Where a consignment of goods handed over to a Railway Company for carriage under risk note, form H, had been short-delivered in respect of six complete packages, and the Company, when sued, adduced practically all the available evidence :

Held, that, though the effect of the evidence was not definitely to establish the suggested fact of robbery from a running train, yet the theory of wilful neglect on the part of the Railway servants, which might have been established by cross-examination, had been sufficiently excluded.

Per MACLEOD, C. J. :—"Strictly speaking, he [*sc.* the plaintiff] would have to show that there was wilful neglect by the Company before the Company have the liability thrown on them to prove that the loss is due to a theft in the running train."

APPLICATION under Extraordinary Jurisdiction praying for reversal of a decree passed by P. M. Bhat, First Class Subordinate Judge at Broach, in Small Cause Suit No. 200 of 1920.

Suit to recover money.

*Civil Application under Extraordinary Jurisdiction No. 279.