31 C. 643 (=8 C. W. N. 496.)

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[643] FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Ghose, Mr. Justice Harington and Mr. Justice Brett.

RUP JAUN BIBEE *v.* ABDUL KADIR BHUYAN AND OTHERS.*

[16th March, 1904.]

Contribution, suit for—Appeal—Decree—Defendants—Appellate Court, power of, to make another defendant liable where no appeal by plaintiff.

In a suit for contribution in which the plaintiff asked for relief against several defendants separately and the first Court gave a decree against defendant No. 1 and dismissed the suit against defendant No. 2.

Held, that in an appeal by the defendant No. 1, in which the defendant No. 2 was made a party respondent, the Appellate Court had power to alter the decree so as to make defendant No. 2 liable, as the real contest in the case was between the defendants.

Upendra Lal Mukerjee v. *Girindra Nath Mukerjee* (1), upheld. *Hudson* v. *Basdeo Bajpye* (2), referred to.

[**Foll.** 35 Cal. 538=12 C. W. N. 720 ; **Cons.** 28 Mad. 229=15 **M. L.** J. 212. **Ref.** 3 N. L. R. 85 ; 31 Mad. 442=4 M. L. T. 104=18 M. L. J. 452 ; 5 I. C. 654=12 C. L. J. 137 ; 34 Mad. 249 ; **Dist.** 27 All. 23=A. W. N. 1904, 155.]

APPEAL by Rup Jaun Bibee, Defendant No. 2.

Reference to a Full Bench by Rampini and Handley, JJ.

The Order of Reference was as follows :—

" The suit out of which this Second Appeal arises is one for contribution. The plaintiff sued for contribution for an amount, which he had to pay to save a *patni taluk*, in which he and the defendants are co-sharers, from sale. The plaintiff asked for relief against all the defendants separately. The Munsif gave him a decree for Rs. 580-5 against the defendant No. 1 and for Rs. 49-11 against defendant No. 3 and dismissed the suit against defendant No. 2.

The plaintiff did not appeal, but the defendant No. 1 did, contending that he was not liable for the amount for which the Munsif had given a decree against him. He made the defendant No. 2 a party respondent to this appeal. The Subordinate Judge decreed the appeal of the defendant No. 1, and as he considered that the defendant No. 2 was liable for the arrears for which the *taluk* had been about to be sold, he gave the plaintiff a decree for Rs. 580-5 against the defendant No. 2 instead of against the defendant No. 1.

[644] The defendant No. 2 now appeals and urges that the Subordinate Judge was not empowered to give a decree against her, as the plaintiff did not appeal against her, and that on the appeal of defendant No. 1 the Subordinate Judge could not under the provisions of Section 544, Code of Civil Procedure, re-open the case as against her.

It appears to us that the contention of the Appellant is right and that in the circumstances the Subordinate Judge was justified in setting aside the Munsif's decree as against the defendant No. 1, but had no power to give a decree against the defendant No. 2.

The Subordinate Judge cites the case of *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee* (1), as an authority for acting as he has done. It may be admitted that the facts of that case are very similar to those of the present. In that case the plaintiff did not appeal against the decree of the Court of First Instance, but one of the defendants did. The Court then made certain other defendants parties respondents and gave the plaintiff a decree against them, exonerating the defendant, who had appealed. The High Court held that this was right. In the judgment of this Court it is said—" The plaintiffs having obtained a decree against defendant No. 9 and being satisfied with

* Reference to Full Bench in Appeal from Appellate Decree No. 978 of 1900.

(1) (1898) I. L. R. 25 Cal. 565. (2) (1898) I. L. R. 26 Cal. 109.

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that decree were not under any necessity for preferring any appeal to make the other defendants liable. But if, at the hearing of the appeal, the Court found that the defendant No. 9 was not liable, we do not think that there was anything wrong in the Lower Appellate Courts making them respondents and passing a decree against them. The view we take is to some extent supported by the decision of the Bombay High Court in the case of *Soiru Padmanabh* v. *Narayan Rao* (1)." The view taken by the learned Judges, who decided this case, does not appear to me to be justified by any provision of the Code of Civil Procedure. Section 544 would appear to have no application, because the appeal of the defendant No. 9 did not raise any ground of defence common to all the defendants. Had the defendant No. 9's contention been that the plaintiff was not entitled to any contribution at all, then no doubt under Section 544, the Court would have been justified in reversing the First Court's decree against all the defendants, but there is no provision in the Code, as far as we are aware, which gives authority for the adoption of the procedure followed by the learned Judges, who decided the case of *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee* (2) and by the Subordinate Judge in this case. The case of *Soiru Padmanabh* v. *Narayan Rao* (1) does support the view taken by the learned Judges, who decided the case of *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee*, (2) for the learned Judges of the Bombay High Court affirmed the judgment of a Subordinate Judge, who in an appeal had modified the decree of the Court of First Instance similarly to the way in which the Subordinate Judge varied the decree of the Munsiff in this case. But the judgment of the Bombay High Court is no more justified by any provision of the Code of Civil Procedure than the decision in *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee* (2) is. The learned Judges of the Bombay High Court were no doubt actuated, as also probably were the Judges, who decided the case of Upendra Lal Mukerjee, by equitable considerations, but in our opinion in matters of procedure, there is no room for the applications of equitable principles.

[645] Furthermore, the decisions in these two cases are in conflict with the decisions in the cases of *Grish Chunder Singh* v. *Gour Mohun Banerjee* (3), *Gudadhur Banerjee* v. *Mun Mohinee Dossea* (4) and *Atma Ram* v. *Bal Kishen* (5) The two former cases were decided under the Code of 1859, but there is no difference in principle between the provisions of Section 337 of Act VIII of 1859 and those of Section 544 of the present Code. The case of *Atma Ram* v. *Bal Kishen*, however, was decided under Act XIV of 1882. The learned Judges who decided Upendra Lal Mukerjee's case have noticed this case in their judgment, but only with reference to the provisions of Section 559. They have not explained why they dissent from the view taken by the Judges of the Allahabad High Court, that as long as the plaintiff did not appeal, the decree, which exonerated one defendant, could not be altered on the appeal of another, so as to render the former liable.

In this conflict of authority and the rule laid down in Upendra Lal Mukerjee's case being founded on no provision of the Code of Civil Procedure, we feel constrained to refer this Second Appeal for the decision of a Full Bench, which we accordingly do.

The questions which arise in this case for the decision of the Full Bench are.— (i) Was the case of *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee* (2) rightly decided ? and (ii) Can an Appellate Court, when a decree has been given against one defendant only, alter the decree so as to render liable another defendant against whom the plaintiff has preferred no appeal."

Moulavi *Sirajul Islam* and Moulavi *Z. R. Zahed* for the appellant.

Babu *Kritanto Kumar Bose* and Babu *Harendro Narayan Mitter* for the respondents.

MACLEAN, C. J. We are of opinion that, in a suit for contribution such as the present the case of *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee* (2) was rightly decided. We may add that that case was subsequently followed by a Division Bench of this Court in the case of *H. W. Hudson* v. *Basdeo Bajpye* (6) to which decision, I notice, one of the present referring Judges was a party. It appears from the judgments both of the Munsif and of the Subordinate Judge that the real contest

(1) (1893) I. L. R., 18 Bom. 520.
(2) (1898) I. L. R. 25 Cal. 565.
(3) (1867) 7 W. R. 49.
(4) (1867) 7 W. R. 366.
(5) (1883) I. L. R. 5 All. 266.
(6) (1898) I. L. R. 26 Cal. 109.

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was not between the plaintiff and the defendants, but between defendant No. 1 and defendant No. 2.

[646] As regards the second question it is too general for an answer. We confine ourselves to saying that, in a suit such as is the present, an appellate Court, when a decree has been given against one defendant only, can alter the decree so as to render liable another defendant, against whom the plaintiff has preferred no appeal.

The consequence is that the appeal must be dismissed with two separate sets of costs payable to the two separate sets of respondents, including the costs of the reference.

PRINSEP, J. I agree.

GHOSE, J. I agree.

HARINGTON, J. I agree.

BRETT, J. I agree.

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31. C. 647 (=8. C. W. N. 446.)

[647] FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Ghose, Mr. Justice Harrington and Mr. Justice Brett.

TAMIZUDDIN v. ASHRUB ALI.*
[29th March, 1904.]

Suit—Possession—Non-occupany raiyat—Specific Relief Act (1 *of* 1877) s 9—*Limitation Act* (*XV of* 1877), *art.* 120 *and art.* 142.

Held by the Full Bench (Prinsep, J. dissenting)—

The period of limitation applicable to the case of a non-occupancy raiyat, who has been dispossessed from his holding, otherwise than in execution of a decree, is either six or twelve years as provided for in art. 120 or art. 142 of the Limitation Act (XV of 1877).

The remedy indicated in s. 9 of the Specific Relief Act (I of 1877) is not the only remedy which the Legislature has provided for a non-occupancy raiyat, who has been dispossessed otherwise than in due course of law.

Bhagabati Charan Roy v. *Luton Mondal* (1) overruled.

[Ref. 7. C. L. J. 72=12 C. W. N. 899.]

REFERENCE to the Ful Bench by Rampini and Handley, JJ.

The Order of Reference was in the following terms:—

"The plaintiff's bring the suit out of which the Second Appeal arises to recover possession of certain plots of land, from which they allege they have been dispossessed by the defendants. They claim to have a right to the land under a *kabuliat* executed by them in favour of the 5 annas 17½ gundas co-sharer landlords, in which the remaining 4 annas 2½ gundas co-sharers acquiesced about a month after its execution. They aver that they had posssession of the land under this *kabuliat*, until dispossessed by the defendants in Bysack 1305, or April 1898. The defendants traverse the plaintiffs' allegations, and allege that they are in possession of the land under a settlement with the landlords.

"The Munsif found in favour of the plaintiffs, and held the defendants to be trespassers.

"The defendants appealed and the Subordinate Judge remanded the case under section 566 for the recording of the evidence of certain witnesses, whom the Munsif had neglected to examine. The Munsif, before whom the case came on remand, found the plaintiffs' *kabuliat* to be genuine, but came to the conclusion that the 4 annas 2½ gundas co-sharers had never agreed to it. The Subordinate Judge, when

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* Reference to Full Bench in Appeal from Appellate Decree No. 851 of 1900.

(1) (1902) 7 C. W. N. 218.