1902 NOV. 4, 19 & DEC. 1.

CRIMINAL REVISION.

30 C. 508 =7 C. W. N. 404.

the same. It may be mentioned that a member of this Bench was a party to the decision on the case referred to.

Even if it cannot, in strictness, be said that the Magistrate in the case before us acted without jurisdiction or declined jurisdiction, we consider that, having regard to the view which we entertain as to the effect of his action, the case is one in which we ought to interfere in the exercise of the general powers of superintendence vested in this Court under 24 and 25 Vict., c. 104, section 15.

At the same time, we are not prepared to say that a mere refusal to summon or examine a particular witness or particular [516] witnesses cited by a party in proceedings under Chapter XII of the Criminal Procedure Code is necessarily a ground for interference by this Court. Each case must be determined upon its own circumstances.

For the reasons stated, therefore, we set aside the order complained of.

It must be left to the discretion of the Magistrate to say whether, having regard to the existence or otherwise of circumstances likely to lead to a breach of the peace, the proceedings should be dropped, or taken up again and a reasonable opportunity afforded to the petitioner to produce his witnesses with the assistance of the process of the Court, if necessary.

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30 C. 516.

APPELLATE CIVIL.

PERCIVAL *v.* COLLECTOR OF CHITTAGONG.* [31st July, 1900.]

Court-fee—Decree—Memorandum of appeal, amendment of—Civil Procedure Code (Act XII of 1882) ss. 53, 582—Court-fees Act (VII of 1870.)

In the generality of cases, an appellate Court cannot pass a decree for a larger amount than that claimed in the memorandum of appeal, unless, before the judgment is pronounced, an amendment of the memorandum of appeal is allowed and the additional court-fee paid in.

APPLICATIONS

THESE applications arose out of an appeal from original decree, preferred by the plaintiffs, H. Percival and others.

There were 22 references made to the Civil Court under s. 18 of the Land Acquisition Act by the Collector, and the cases were tried together by the Subordinate Judge of Chittagong. The lands were acquired for the Assam-Bengal Railway. The total [517] amount of the compensation decreed by the Subordinate Judge was Rs. 21,726-4-10. The plaintiffs Nos. 1, 2, and 5 appealed to the High Court, and the appeal being valued at Rs. 13,000 court-fees were paid for that amount.

The appeal was heard by the High Court on the 20th July 1900, and the amount of the compensation was raised to over Rs. 40,000. After the judgment was delivered, the learned Government Pleader for the Collector of Chittagong, who was the defendant-respondent in the appeal, pointed out that the appeal had been valued at Rs. 13.000 only, and that, under the decree passed by the High Court, the appellants would get much more than that amount. This objection was not taken at the hearing; and the learned counsel who appeared for the appellants

* Applications in appeal from Original Decree No. 201 of 1897, against the decree of Jadu Nath Dass, Subordinate Judge of Chittagong, dated Feb. 22, 1897.

1900 JULY 31.

APPELLATE CIVIL.

30 C. 516.

urged that if the objection had been taken at the proper time, he would have made an application for leave to amend the memorandum of appeal, or for liberty to put in additional court-fees. Thereupon the following order was passed by the High Court:—

"Under the circumstances we ought to allow the appellant's leave to put in sufficient court-fee to cover the amount hereby decreed. This order is made subject to any application that the Secretary of State in Council may be advised to make."

Accordingly, on the 23rd July 1900, an application was made on behalf of the appellants for leave to put in the additional court-fees; and an application was also made on behalf of the Government, praying that, in the circumstances of the case, the compensation awarded by the Lower Court should not be raised beyond the amount stated in the memorandum of appeal.

Mr. *Pugh* and Mr. *Percival* for the appellants.

Senior Government Pleader (Babu *Ram Charan Mitter*) and the *Junior Government Pleader* (Babu *Srish Chunder Chowdhry*) for the respondent.

AMEER ALI AND BRETT, JJ. In the Land Acquisition case (No. 204 of 1897) we delivered our judgment on the 20th of July 1900. After the judgment had been pronounced, Babu Ram Charan Mitter, the Government Pleader, called our attention to the amount of the claim stated in the memorandum of appeal. We have no doubt, from what we know of the learned [518] gentleman, that had his attention been directed to the amount therein stated, he would have brought it to the notice of the Court at the earliest stage. Apparently the matter did not strike him or come to his knowledge until judgment had been delivered.

Upon his mentioning the matter, Mr. Pugh, who appeared for the appellant, objected to the question being raised at that late stage, for he contended that, had his attention been called to it at the hearing, he would have applied for leave to pay in the additional court-fee, so as to cover whatever had been found by the Court the claimants were entitled to. At the time we were under the impression that leave might be granted to the appellant to put in the extra court-fees, and that a formal application to that effect by the learned counsel for the appellant would be necessary.

With regard to the objection urged by the learned Government Pleader, we directed that the objection should be made formally by a petition, and accordingly on the 23rd July an application was made on behalf of the appellants for leave to put in the extra court-fee, and at the same time a petition was presented on behalf of the Government, stating that, inasmuch as in the memorandum of appeal, the appellants have chosen to put the amount of the claim at Rs. 13,000, the Court should not enhance the award made by the Subordinate Judge to an amount beyond that stated in the memorandum of appeal.

Upon the question of valuation, our attention was drawn to the various sections of the Court-fees Act, and in an ancillary manner, to some of the provisions of the Civil Procedure Code, but reliance was chiefly placed on the provisions of the Court-fees Act.

It appears to us that the controversy which has arisen, in consequence of the mistake, or otherwise, on the part of the appellants, and owing to the objection taken by the learned Government Pleader, after the pronouncement of the judgment, does not seem to turn upon the

1900 JULY 31.

APPELLATE CIVIL.

30 C. 516.

question of valuation so much as upon the jurisdiction of the Court to allow the appellant to amend the momorandum of appeal, or, in other words, to allow the award to be raised beyond the amount stated in the [519] memorandum of appeal as the amount in respect of which the appeal was brought.

c It is quite clear that in the majority of cases, the plaintiff is bound by the amount of the claim which he puts forward in his plaint, excepting in certain cases provided for by the Statutes; for example, as regards claims for mesne profits. The Court has no power to make a decree in favour of the plaintiff beyond the amount of the claim stated in the plaint.

We may take one instance as an illustration. A suit is brought upon a balance of accounts, and the plaintiff, instead of claiming whatever may be found due upon the taking of accounts, stated a specific sum as the amount claimed. It does not seem to us that the Court would be entitled, without an amendment of the plaint, to award a decree for more than what is claimed. Section 53, Code of Civil Procedure, gives the Court the power of allowing the plaint to be amended at any time before judgment, upon such terms as to the payment of costs as the Court may think fit, so that the power of allowing the amendment is restricted to the time before judgment is delivered, and it would be open to the plaintiff, in the event of his stating the amount of his claim by inadvertence, or if he has not chosen to proceed upon the basis of the taking of the accounts, to ask for amendment at any time before the judgment is pronounced; but under the Code, the plaintiff is not allowed the amendment after judgment. By section 582, Code of Civil Procedure, the provisions of the Code relating to suits are made applicable to appeals, and the question for consideration is whether the principle applicable to the amount of claim mentioned in the plaint is also applicable to the amount of claim stated in the memorandum of appeal. It is of course open to the appellant to appeal for the whole amount disallowed by the Court below, or only in respect of a part thereof. He must choose his own course. It is not the duty of the respondent to bring to the notice of the appellant any omission or inadvertence on his part; and the Courts, in the generality of cases, except in cases of mesne profits and the like, which are regulated by Statutes, cannot pass a decree for a larger amount than that stated in the memorandum of appeal and in respect of which the appeal is actually brought. Suppose, for [520] instance, a plaintiff brings a suit for Rs. 50,000 in the Court below and obtains a decree for Rs. 30,000, the claim for Rs. 20,000 being disallowed. For some reason or other, the plaintiff appeals for Rs. 10,000. There is nothing to show that unless an amendment is allowed before judgment is pronounced, the Court could in appeal decree anything more than the amount for which the appeal is brought.

In this particular case, no doubt the appellants contended upon various facts, which we found partly to be well founded, for a considerable sum of money far in excess of that awarded by the Subordinate Judge and stated in the memorandum of appeal; and upon a consideration of those facts we are of opinion that they were entitled to somewhere like Rs. 40,000.

We regret that the attention of the Court was not called to this circumstance until after the pronouncement of the judgment. It should have been done during the course of the hearing, because it might have

had some bearing upon some parts of the case; but so far as this is concerned the respondent owns no duty to the appellants, but to the Court.

As the appellants made no application to us before the judgment was pronounced, we think we cannot, after delivery of judgment, allow him leave to amend his memorandum of appeal, and that under the provisions of section 582, Code of Civil Procedure, we ought to restrict our award to the amount stated in the memorandum of appeal, *plus* the amount allowed by the Lower Court, and the usual statutory allowance.

Under the circumstances, we make no order as to the costs of these applications.

Decree modified.

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30 C. 521 (=7 C. W. N. 121).

[521] ORIGINAL CIVIL.

NOGENDRA-NANDINI DASSI *v.* BENOY KRISHNA DEB.*

[20th, 21st and 28th August, 1902.]

Hindu Law—Dayabhaga—Will, construction of—Idol—Bequest to Idol not in existence—Inheritance—Stridhan—Unchastity—Consanguinity—Spiritual benefit.

A bequest to an idol not in existence at the time of the testator's death is void.

Unchastity does not debar a Hindu woman from inheriting the *stridhan* property of her female relatives.

Ganga Jati v. *Ghasita* (1), followed. *Ramnath Tolapattro* v. *Durga Sundari Debi* (2), *Ramananda* v. *Raikishori Barmani* (3), distinguished.

Under the Bengal School of Hindu Law, inheritance depends on consanguinity so far as the near relatives are concerned, but in the case of remoter relations the law falls back on the principle of spiritual benefit.

[(1) Hindu Law—Bequest to Idol not in existence. **Over.** 37 C. 123; **Ref.** 12 C. W. N. 808=8 C. L. J. 489. 10 C. L. J. 355=14 C. W. N. 18.

(2) Unchastity—No ground of seclusion from inheritance to stridhan. **Ref.** 31 M. 100=18 M. L. J. 70=2 M. L. T. 533.]

ONE Chander Kally Ghose, a Hindu inhabitant of Calcutta, died in the month of January 1897, leaving him surviving his sole widow and heiress, Sreemutty Patit Pabani Dassee. The deceased left a will dated the 29th January 1893, whereby after bequeathing certain legacies to various persons devised and bequeathed the residue of his property, both real and personal, to Patit Pabani Dassee, and appointed her the sole executrix and trustee of his will. On the 10th April 1897, Patit Pabani obtained probate of the will.

A year later, on the 16th April 1898, Patit Pabani died childless leaving her surviving, her mother, Nogendra-Nandini Dassee the plaintiff, and her husband's eldest brother. Patit Pabani left a will dated the 4th April 1898, and appointed the defendant, Raja Benoy Krishna Deb, her sole executor.

By her will, after giving certain pecuniary legacies, Patit Pabani directed that a *Shiva Thakur* be established, and dedicated [522] certain property for the benefit of that idol; and she further directed that if there be any surplus of the dedicated funds, such money should be accumulated and set apart for the feeding of the poor.

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* Original Civil Suit No. 524 of 1899.

(1) (1875) I. L. R. 1 All. 46.
(2) (1878) I. L. R. 4 Cal. 550.
(3) (1894) I. L. R. 22 Cal. 347.