
(1915) 07 CAL CK 0042
In the Calcutta High Court

Abjal Majhi and Others

APPELLANT

Vs

Intu Bepari and Others

RESPONDENT

Date of Decision : 27-07-1915

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33

Citation : 32 Ind. Cas. 494

Hon'ble Judges : Richardson, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal by the plaintiffs in a suit for arrears of rent. The plaintiffs claimed rent at the rate of Rs. 34-6-0 a year. The defendants admitted that rent was payable at the rate of Rs. 24 a year. The Court of first instance decreed the suit in part and allowed the claim at the rate of Rs. 24 a year. The plaintiffs appealed against this decree. The defendants were satisfied with this decree; they did not prefer an appeal nor did they file a cross-objection as provided in the Code. But the District Judge on the appeal by the plaintiffs has dismissed the entire suit. The plaintiffs have now appealed to this Court and have argued that the District Judge should not on their appeal have deprived them of the benefit of the decree of the Trial Court. In support of this contention, reliance has been placed upon the cases of Rangamlal v. Jhandu 11 Ind. Cas. 640; 34 A. 32; 8 A.L.J. 111 and Ganga Dhar Muradi v. Banabashi Padhari (2). On behalf of the defendants-respondents, reliance has been placed upon Rule 33 of Order 41 of the Code, which authorises the Appellate Court to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require. The rule further lays down that this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

2. This rule is, no doubt, very widely expressed; but, clearly, it should not be

applied so as to enable a party litigant to ignore the other provisions of the Code or the provisions of Statute, like those which relate to limitation or payment of Court-fees. Rule 22 of Order 41 of the Code provides that any respondent, who has not appealed from any part of the decree, may take cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service, on him or his Pleader, of notice of the day fixed for hearing the appeal or within such further time as the Appellate Court may deem fit to allow. Court-fee ad valorem, is also required to be paid on the memorandum of cross-objection under Article, 1 Schedule I, of the Court Fees Act, 1870. In the case before us, the defendants not only did not prefer an appeal against the decree of the Trial Court in so far as it was adverse to them, they did not file a memorandum of cross-objection. When the District Judge permitted them to contend before him that the decree against them should be discharged on the appeal preferred by the plaintiffs, he allowed them in substance to evade the provisions of the Civil Procedure Code, the Limitation Act and the Court Fees Act. We are of opinion that even if it be assumed that Rule 33 is applicable to a case of this description, the judicial discretion vested in the Court of Appeal below has not been properly exercised. We may also observe that, as was pointed by Jenkins, C.J., in *Ganga Dhar Muradi v. Banabashi Padhari* 24 Ind. Cas. 208; 22 C.L.J. 390 ordinarily Rule 33 should be limited to those cases where as a result of the Appellate Court's interference with the decree in favour of the appellant, further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience. This is the rule recognised in England under Order 58, Rule 4, Rules of Supreme Court, which furnished the basis for Order XLI, Rule 34 of our Code [*Attorney-General v. Simpson* (1901) 2 Ch. D. 671; 70 L.J. Ch. 828; 85 L.T. 325; 17 T.L.R. 768; *Middleman v. Wilson* (1875) 10 Ch. App. 230; 44 L.J. Ch. 476; 32 L.T. 105; 23 W.R. 301]; though a different rule was possibly recognised in earlier decisions [*Rawlins v. Powel*. (1715) 1 P. Wms. 297; 24 E.R. 397; *Waits v. Symes* (1851) 1 De G. (sic) G. 240; 21 L.J. Ch. 713; 16 Jur. 114; 42 E.R. 644; 91 R.R. 69]. If the course followed by the Court of Appeal below were approved, a party would be penalised merely because he had preferred an appeal against the decree of the Court of first instance. We cannot persuade ourselves to hold that this could have been the intention of the Legislature.

3. The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the Court of Appeal below.