
(1916) 06 AHC CK 0023
In the Allahabad High Court

Gajraj Mati Tiwarin

APPELLANT

Vs

Swami Nath Rai and Others

RESPONDENT

Date of Decision : 20-06-1916

Acts Referred:

Citation : AIR 1917 All 281 : (1917) ILR (All) 13

Hon'ble Judges : Walsh, J;Sundar Lal, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Sundar Lal, J.—This is an appeal under Order XLIII, Rule 1(d), of the Code of, Civil Procedure, from an order rejecting an application made under Rule 13 of Order IX of the Code to set aside a decree passed ex parte.

2. The circumstances under which the appeal has arisen may be briefly recapitulated, before proceeding to deal with the point arising in the appeal. On the 6th of October, 1899, Nand Lal, Rai Misra and others instituted a suit in the court of the Subordinate Judge of Gorakhpur for the sale of property to realize the sum of Rs. 39,468 on foot of a mortgage, dated the 20th of June, 1891, alleged to have been executed by defendants of the first set named Krishan Nath Tiwari, Govind Nath Tiwari and Balbhadar Nath Tiwari, and also by the defendant of the second set named Musammat Gajraj Mati Tiwarin, who is the mother of the defendants of the first set. From the recitals in the deed of mortgage and from the judgment in appeal of this Court it appears that the property mortgaged stood in the name of Musammat Gajraj Mati Tiwarin. Some decrees for money had been passed against her, in execution of which the property in dispute had been attached. The defendants of the first set had brought a suit to obtain a declaration that the property which stood in the name of the lady was really their property. A decree was given to them by the court of first instance which was reversed in appeal by this Court. The defendants of the first set intended to carry the case up in appeal to the Privy Council when by a compromise between the parties, the idea of appealing in the Privy Council was given up, and the

mortgage in suit was executed under the terms of the compromise. There were other defendants to the present suit, with whom we are not concerned in this appeal. The suit was contested by defendants of the first set. and by one Bishambhar Nath Tiwari. The defendants of the first set admitted the execution of the deed of mortgage in suit. They, however, raised a number of pleas in defence which formed the subject of adjudication, both by this Court and the court below. With these we are not concerned in this appeal. Musammat Gajraj Mati Tiwarin did not appear in the suit, which proceeded ex parte against her. On the 30th of June, 1900, the learned Subordinate Judge of Gorakhpur gave a decree for the realization of a sum of Rs. 26,916 with costs and future interest by sale of the property mortgaged against all the defendants to the suit Against the said decree, the defendants of the first set and Bishambhar Nath Tiwari (viz., all the four persons who had defended the suit), preferred an appeal to this Court). The plaintiffs alone were made respondents to the appeal. Neither Musammat Gajraj Mati Tiwarin, nor the other defendants to the suit were parties to this appeal, which was registered as F.A. No. 305 of 1900. The appeal came on for hearing before a Division Bench of this Court presided over by the Honourable the Chief Justice, Sir John Stanley, and Mr. Justice Burkitt, who on the 2nd of December, 1903, decreed the appeal in part by reducing the rate of interest and allowed certain objections preferred u/s 561 of the old CPC by the plaintiffs respondents, thereby increasing the amount of the sum decreed by Rs. 4,000 principal and interest accruing due thereon. The decree made in the appeal runs in the following terms:

It is ordered and decreed that this appeal and the objection u/s 561 of the CPC filed by the plaintiffs respondents be allowed in part, and that, in modification of the decree of the Subordinate Judge of Gorakhpur, it is decreed and hereby declared that on the 30th day of May, 1904, a sum of Rs. 34,654-2-3 will be payable to the plaintiffs respondents, viz. Rs. 13,200 for principal and Rs. 19,720-12-9 interest thereon due on the mortgage, dated the 20th of June, 1891, at the rate of 12 per cent, per annum up to the date of the decree, and it is hereby ordered that upon the defendants appellants paying to the plaintiffs respondents or into court on the 30th of May, 1904, aforesaid, the said sum of Rs. 34,654-2-3 with future interest at the rate of 6 per cent, per annum from the date of the decree, the plaintiff respondent shall deliver to the defendants appellants or such persons as they appoint all documents in their possession or power relating to the property specified. But if such payment is not made on or before the 30th of May, 1904, then it is ordered that the said property or a sufficient part thereof be sold, etc., etc.

3. It is noticeable that the order to pay the amount is addressed to the defendants appellants, It is they who are to pay the amount and redeem the property, and in default of payment by them it is to be sold as ordered. I have already noted that Musammat Gajraj Mati Tiwarin was no party to the decree, so far as this decree is concerned her very existence is ignored. The plaintiffs in due course applied for an order absolute for sale u/s 89 of Act IV of 1882, and having

obtained it put the decree in execution, and brought to sale the mortgaged property. The sale was duly confirmed, and the purchasers (who were the decree-holders themselves) were put in possession. On 3rd of February, 1915, Musammat Gajraj Mati Tiwarin filed a petition in the court of the Subordinate Judge of Gorakhpur under Rule 13 of Order IX of the Code to set aside the decree of the 30th of June, 1900, on the various grounds set forth in the said petition. She alleged in that petition that she had do notice of the suit, that it was not properly served on her, and that it was for the first time on the 27th of January, 1915, when she received a summons to give evidence, that she came to know of the decree and what had transpired in execution thereof. The decree-holders filed a reply to the said petition on the 20th of March, 1915. The court below, without trying the application on the merits, has rejected it on the sole ground that as the final decree in the case was made by this Court on appeal on the 2nd of December, 1903, he had no jurisdiction to set aside his own decree against the applicant. Musammat Gajraj Mati Tiwarin has preferred this appeal against the said order on the ground that the decree made by this Court on the 2nd of December, 1903, was not a decree to which she was a party. The only decree passed against her was the decree of the court of first instance, dated the 30th of June, 1900, which alone she is interested in getting set aside. The fact that some other of the defendants preferred an appeal to this Court), to which she was not a party, and in which this Court, therefore, could not and in fact did not deal with her rights, does not preclude this defendant from making the present application. Rule 13 of Order IX of the CPC enacts that when a decree is passed ex parte against a defendant) such defendant "may apply to the court by which the decree was passed for an order to set it aside," on certain grounds set out in the said rule. The court, if satisfied that such grounds are well founded, may make an order to set aside the decree as against him. There is a proviso added to the rule, under which, where the decree is of such a nature that it cannot be set aside as against such defendants only, it may be set aside against all or any of the other defendants also. It is clear from this rule that an application under it can be made only by a person against whom a decree has been made, and that such application can be made only to the court which passed the decree. The plaintiffs respondents have, however, urged that the only decree capable of execution, and in fact the only final decree made in this case, is the decree made by this Court in appeal, into which the decree of the court of first instance must be taken in law to have merged, and that Musammat Gajraj Mati Tiwarin, though not named as a party to the decree of this Court, must be deemed in law to have been a party against whom also this Court must be taken to have made the decree. The application, therefore, should have been made to this Court to set aside the decree of December 2, 1903, and the court below has, therefore, rightly rejected the application made to it. The learned Counsel for both the parties have referred to numerous cases in course of their able arguments. In view of the great importance of the question involved in the appeal, as also in view of the fact that there has been considerable divergence of views in the various High Courts in India upon the point, we took time to

consider our judgment.

4. I propose to consider the question in the first place upon the language of the various sections bearing upon the point in Act XIV of 1882, under which the decree was made by this Court, as also to consider what difference, if any, has been made in this respect by the present Code of Civil Procedure. I propose to consider, not what decree might have been made by this Court in the appeal, but what the decree was which it actually made in the appeal. I shall also examine the course of case-law in the various High Courts in India upon this point.

5. The decree made in a civil suit is the final culmination of the suit. It ought as a rule to be self-contained and should embody the result of the suit. Under Rule 6 of Order XX of the Code (Section 206 of Act XIV of 1882) it should contain:

- (a) the number of the suit,
- (b) the names and descriptions of the parties.
- (c) the particulars of the claim, and
- (d) the relief granted, or other determination of the suit.

6. Similarly, a decree made by a court in appeal should under Rule 35 of Order XLI of the Code (Section 579 of Act XIV of 1882) contain:

- (a) the number of the appeal,
- (b) the names and descriptions of the appellant and respondent, and
- (c) a clear specification of the relief granted or other adjudication made.

7. A decree properly prepared under either of these rules should, therefore, tell us against whom, and in favour of which of the parties it has been made. It should state, without reference to any other document on the record, the names of all the persons against whom it has been passed and who will be affected thereby. If an order u/s 544 of the CPC (order XLI, Rule 4) was made in favour of a party who has not appealed, it should, I think, in a properly prepared decree be embodied in it. The persons thus affected by it could, if so advised, apply for a re-hearing of the suit, though I am not sure what they would have to ask for a re-hearing in most cases of this class. Judged by this test, Musammat Gajraj Mati Tewarin is not one of those persons against whom the decree of this Court has been made. No relief has been granted by this Court to the plaintiffs against her. Her very existence is ignored by the decree and no relief is granted to her by it. "I have already pointed out that the plaintiffs respondents had filed in this Court objections u/s 561 of the CPC against so much of the decree of the court of first instance as had dismissed a portion of the claim. The objections were filed against the defendants appellants in that case alone and they alone had notice of them. These objections were allowed by this Court so far as the principal mortgage money and interest thereon was concerned. The amount decreed was thus increased. To these objections Musammat Gajraj Mati and the other

defendants, who had not appealed, were not made parties, and the decree of this Court therefore should not affect them. If it was the intention of this Court to impose a further liability on them by increasing the amount of the decree, it would certainly have made them parties to the appeal and passed a decree against them after giving them an opportunity of being heard in the case. This Court could not have intended to make a decree for a further sum of Rs. 4,000 and interest against the lady, without even making her a party to the appeal. The decree of this Court is against the defendants appellants alone. Can it be said that the said decree is a decree against a person not party to* it by reason of any rule of law or procedure? Section 544 of the Code of 1832, which was in force when the appeal in this Court was heard, and which corresponds to Rule 4 of Order XLI of the present Code, directs that when there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or all the defendants, any one of the plaintiffs or defendants may appeal from the whole decree, and thereupon the appellate court may reverse or vary the decree in favour of all the plaintiffs or defendants as the case may be. The conditions necessary for the application of this section are:

(a) that the decree appealed from must proceed on a ground common to all the plaintiffs (where the appeal is on behalf of one of them), or to all the defendants (where the appeal is by one of them);

(b) the appeal must be an appeal from the whole decree.

8. And the appellate court is empowered to reverse or modify the decree in favour of all the plaintiffs or all the defendants as the case may be; it can pass a decree or modify it in favour of the absent parties, but not against them. I do not think that under this section the court in appeal could have made any decree against Musammat Gajraj Mati increasing the amount payable by her without making her a party to the appeal.

9. The decree, so far as the defendants admitting the mortgage are concerned, proceeds on the admission of the mortgage as its basis. It proceeds against the defendants who did not appear on proof of execution of the mortgage. It also proceeds against the contesting defendants on an admission that the property mortgaged belongs to them. Musammat Gajraj Mati apparently (judging from her present application) claims the property as belonging to her, and if she denies the mortgage, there is no further common defence left. In view of these facts the decree does not apparently proceed on a common ground.

10. Reliance has also been placed upon Rule 33 of Order XLI of the Code. This is taken from Rule 4 of order LVIII of the Rules of the Supreme Court of Judicature in England. It did not find place in any of the Codes of Civil Procedure in force prior to Act V of 1908. The High Court in appeal could not in this case have made a decree against Musammat Gajraj Mati Tiwarin under the Act then in force. Rule 33 of Order XLV of the present Code was then not in existence. The rule, which is

meant to be applicable only in very exceptional circumstances, while it empowers the court of appeal to modify a decree in favour of a party who has not appealed, does not, I think, contemplate the making of a decree against him without impleading him as party to the appeal, and thus giving him a chance of showing why no such decree should be made against him. In fact, under the rulings of this Court which were made while the old Code was in force, it was held that no such modification nor even a modification in favour of the person who had not appealed could be made under the law then in force, unless he had preferred an appeal or cross-objections u/s 561 of the Code. I may mention in this connection the cases of *Atma Ram v. Balkishen* I.L.R 1883 All. 266, *Farzand Ali Khan v. Bismillah Begam* ILR 1905 All. 23, *Lohre v. Deo Hans* I.L.R 1908 All. 48, *Nizam-ud-din v. Abdul Aziz* I.L.R (1909) All. 521. This being so, it is, I think, clear that the decree of this Court in appeal was not passed against *Gajraj Mati Tiwarin*. She was not aggrieved by the said decree, and that not being a party to it, she had no locus standi to apply for its being set aside.

11. It has been finally argued that on general principles where a case has gone up in appeal at the instance of any party, and the court of appeal has passed a decree in the appeal, such decree is the final decree in the case as against all the parties to the suit, no matter whether they were parties to the appeal or not, nor whether their interest in the decree was the subject-matter of adjudication by the court of appeal. Reliance has been placed in support of this contention upon several cases, with which I shall deal later on. It may, however, be at once conceded that as a matter of general rule where a decree has been affirmed, reversed or varied by a court of appeal, as between the parties to it, it is the decree of the court of appeal which is the decree in the case for the purpose of execution, or amendment of decree. The principle was affirmed so long ago as 1882, when a Full Bench of this Court laid down the principle that as a rule it is the decree of the court of last instance which alone is capable of execution; *Shohrat Singh v. Bridgman* I.L.R (1882) All. 376. This evidently means the court of last instance, so far as the particular parties against whom it is sought to be executed are concerned. The view was again affirmed by another Full Bench in 1888, in the case of *Muhammad Sulaiman Khan v. Muhammad Yar Khan* ILR (1888) All. 267, in connection with an application for the amendment of the decree which had been made by the court of first instance after that decree had been affirmed in appeal by this Court. The rule has recently been affirmed by their Lordships of the Privy Council in the case of *Brij Narain v. Tejbai Bikram Bahadur* I.L.R (1910) All. 295. The only question is whether it is limited to cases in which the party concerned was also a party in the court of appeal, or it is applicable also to all other cases in which such person was no party to the appeal, or was not a party in whose favour a court of appeal has made an order u/s 544 of Act XIV of 1882 (order XLI, Rule 4) or under Rule 33 of Order XLI of the present Code. If the contention for the respondent be correct, then it must follow that if a case has been taken to a court of appeal at the instance of any party, no matter whether the appeal refers to the whole decree or only a part of

it, the only court to which any defendant who -was no party to the appeal can apply under Rule 13 of Order IX is the court which decided the appeal. The result of this is that in every case which has once been touched, by a court of appeal by deciding any portion of the claim at the instance of any party, every other person, though no party to the decree under appeal, must apply to the court of appeal to set aside a decree, though it has not been made against him. Thus in the case of a decree passed in second appeal by this Court at the instance of one of the defendants, any other defendant, who was no party to the appeal and against whom the court of first instance passed a decree ex parte must apply to this Court to set aside the ex parte decree made by the court below. It is this Court which alone, in this view would have to try and determine the question whether the notice of the suit was duly served on the applicant, and whether he was prevented by sufficient cause from appearing when the suit was called on for hearing in the court of first instance. This Court would in a large number of cases have to record evidence on the point for the determination of the question. It cannot with propriety send the case to the court of first instance for this purpose as to do so would in most cases be to delegate its own functions to another tribunal. The same would probably happen in a case which would come up in revision to this Court. In appeals from Revenue Courts which in special cases come up to the Civil Court, the application by a defendant against whom the decree was made ex parte would have to be made to a Civil Court, who if it sets aside its own decree may, if it likes, proceed to hear the rent suit, as a court of original jurisdiction against a defendant, who has raised no question of title or who is otherwise not competent to appeal to the Civil Court. To carry the principle to its logical extent, if the case went up in appeal to His Majesty in Council at the instance of any one, the application under Rule 13 of Order IX, must be made to His Majesty in Council. Their Lordships of the Privy Council, unless they could by some special rule relating to their own procedure, send the case down for trial of the issue to some court in India, would have to try the question themselves and the applicant would have, in the absence of some such special rule of procedure regulating practice of that tribunal, to take his evidence to England and produce it before that tribunal. The recording of the evidence and the trial of the questions upon which the passing of the order will depend, may be had in India, but the application for re-hearing would have to be made in England, as the court in India would have no jurisdiction in the matter. The number of cases in which applications of this class are likely to be made will, I fear, increase as soon as the rule is better known. It seems to me that ordinarily the decree of the court of first instance does not merge in the decree of the court of appeal, except as between the parties to the appeal, or between parties in whose favour the court of appeal has exercised the powers conferred on it by Rule 4 of Order XLI (Section 544 of Act XIV of 1882).

12. I will now examine the cases which have been decided by the various High Courts on the point. The first important case upon the point is that of the Madras High Court in the case of Rama-nadhan Chetti v. Narayanan Chetty I.L.R (1904)

Mad. 602. In this case the plaintiff applied for the review of judgment in a case decided against him. by the court of first instance. While that application was pending in that court the plaintiff also preferred an appeal against the said decree to the court of appeal u/s 113 of the Code (corresponding to Section 617 of Act XIV of 1882). An application for review is permissible in case of a decree or order from which an appeal is allowed, only when no appeal has been preferred. The moment an appeal is preferred by the same party, the application for review cannot be proceeded with. The point in controversy in that case was covered by the express language of the Act. In the next case decided by the Madras High Court-Sankara Bhatta v. Subraya Bhatta I.L.R (1907) Mad. 536, a munsif had made a decree, against which some of the defendants had appealed. On dismissal of the appeal, another defendant, against whom the decree was passed ex parte, applied to the judge for setting aside the decree in appeal. It is not clear from the report whether the applicant had been a party respondent to the appeal. His application was to set aside the whole proceedings under Sections 108 and 560 of the Civil Procedure Code. The latter section applies to the case of a party to the appeal against whom the appeal has been decided ex parte, and it might possibly be inferred from this fact that he was probably a party respondent to this case. The Madras High Court, following the ruling in the case of Ramanadhan Chetti v. Narayanan Chetty I.L.R (1904) Mad. 602, directed the Judge to re-hear the application and dispose of it according to law, as "the filing of the appeal had divested the munsif of his jurisdiction to deal with the case." The observation is perfectly correct in so far as an application for review of judgment is concerned and is based upon the express provisions of the Statute. We have no corresponding provision in the Act as to applications under Rule 13 of Order IX (Section 108 of Act XIV of 1882) and the case in ILR 27 Mad. 602, upon which the judgment in this case is based is no authority for the decision of that case.

13. The fact that the mere pendency of the appeal does not take away the jurisdiction of the court of first instance to entertain an application under Rule 13 of Order IX (or Section 108 of Act XIV of 1882) has been ruled in several cases by the Calcutta High Court-Damodar Manna v. Sarat Chandra Dhal (1907) 13 C.W.N. 846 : 3 Indian Cases 468, Kumud Nath Roy Chowdhury v. Jotindra Nath Chowdhury I.L.R (1910) Cal . 394 and Shajan Bibi v. Saffiruddin (1912) 26 Indian Cases 412. The view taken by the Madras High Court is obviously not supported by any provision of the CPC and is contrary to the course of decisions in the Calcutta High Court.

14. I will now turn to another class of cases decided by the Calcutta High Court. In the case of Dhonai Sardar v. Tarak Nath Chowdhary (1910) 12 C.L.J. 53, the plaintiffs had instituted a suit for joint possession against seven defendants, of whom six defended the suit. The court of first instance decreed the suit. Defendants nos. 1 to 4 appealed against the said decree, but the appeal was dismissed. The seventh defendant subsequently applied to the court of first instance for a re-hearing of the suit u/s 108, Civil Procedure Code. Caspersz and

Doss, JJ., held that the application was not maintainable on the ground that the decree passed by the court of first instance was a joint decree, and it proceeded on the ground common to all the defendants, viz., that they had no title to the land and that they had unlawfully dispossessed the plaintiff from it. Their Lordships were of opinion that on the appeal of the six defendants, the court might have dismissed the suit in toto. The seventh defendant in that case u/s 544, Civil Procedure Code, would have the benefit of the appeal filed by the others, and they inferred from this circumstance, that the dismissal of the appeal must also be taken to have been a dismissal of the seventh defendant's case by the court of appeal". The language of Section 544, Civil Procedure Code, however, makes it quite clear that it only enables the court to make a decree in favour of the absent defendant, and not a decree against him. This was made clear in a later case-*Intu Miah v. Dar Bakhsh Bhuiyan* (1911) 16 C.W.N. 798. , Chitty and Chatterji, JJ., thus observe on the point: "This, however, seems to lose sight of the fact that the power to pass a decree in favour of parties who are absent and who have not expressly asked for such relief was expressly conferred by Section 544 of the Civil Procedure Code, 1882, now represented by Order XLI, Rule 4, and supplemented by Rule 33. There can, after all, be no harm in deciding in a man's favour even in his absence and without any direct request by him, But the converse does not necessarily follow, and indeed it is a well established principle of our jurisprudence that no person is bound by a decree passed against him in his absence and against which he has had no opportunity of showing cause." Again referring to the case of *Dhonai Sardar v. Tarak Nath Chowdhary* (1910) 12 Cri .L.J. 53, their Lordships in the latter case observe at page 799 as follows: "At the same time it is not clear from the report or from the file of that case in this Court which we have examined, that defendant No. 7 was not made a party respondent to the appeal of defendants Nos. 1 and 4 which was dismissed."" If defendant No. 7 was made a party respondent to the case, the decree in appeal was binding upon him and he could not get rid of that decree by merely trying to get rid of the decree of the court of first instance, which as between the parties to the appeal had merged in the decree of the court of appeal, The decision in the later case referred to by me is exactly in point and supports the view I am inclined to take.

15. The question again came up for decision in the case of *Brij Lal Singh v. Chowdhry Mahadeo Prasad* (1911) 17 C.W.N. 133. In that case defendants applicants were made parties respondents to the appeal of the other defendants, but no relief was claimed against them. Mukherjee and Carnduff, JJ., after a review of all the authorities, came to the conclusion that even in that case the application for a re-hearing was maintainable on the ground that "the scope of the appeal was consequently limited to the question which arose between the plaintiff and the sixth and seventh defendants. The questions in controversy between the plaintiff and the first five defendants were not raised in the appeal and never came under the judicial consideration of this Court."

16. It is not necessary for me to go so far as that, but the case is an authority

for holding that when they are not made parties to the appeal, they are not precluded from applying u/s 108 of the Code. The question again came up for consideration in the case of *Hedlot Khasia v. Karan Khasiani* (1912) 15 Cri .L.J. 241. The circumstances of that case closely resemble that of the present case. In that case also the contesting defendants alone had appealed and the other defendants against whom the decree had proceeded *ex parte* were not made parties to the appeal. Mukerjee, J., at page 244 of the report, observed as follows:

No doubt when a decree is attacked by way of appeal to a superior court, if the decision of the court of appeal affirms that of the court of first instance, the original decree becomes merged in the decree of the court of appeal. But the application of this general principle may be modified by special circumstances. Here, as we have explained, the decree of the primary court was challenged on behalf of the contesting defendants. They assailed the decree only in so far as they themselves were concerned and that is conclusively evidenced by the circumstances that they did not join the other defendants as parties to the appeal. When, therefore, the appeal was dismissed, and the decree of the court of first instance was affirmed, it must be taken that the decree of the primary court was merged in the decree of the appellate court, only in so far as the original decree affected the two contesting defendants. In so far as the decree affected the other defendants who had not entered appearance, the court of appeal was not invited to consider the matter and to pronounce any judicial opinion thereupon." His Lordship, therefore, held -that the application was maintainable. Mr. Justice Carnduff was a party to this judgment. These observations apply exactly to this case. I may here also refer to an earlier case decided" by a Bench of three Judges in the Calcutta High Court, *Manomohini Chawdhurani v. Nara Narayan Rai* (1900) 4 C.W.N. 456. In that case, the decree against the several defendants was not a joint decree, A disposal of the appeal of some of the defendants was regarded as not precluding the other defendants from applying for a re-hearing u/s 108 to the court of first instance.

17. I now come to the two cases decided by this Court. The first of these is the case of *Palakdhari Rai v. Mankaran Rai* (1910) 7 A.L.J. 598. In that case, as in the case now under appeal, the court of first instance decreed the claim for maintenance of possession against the defendants, some of whom had contested the suit, and others had not entered appearance. The contesting defendants preferred an appeal, making the non-contesting defendants parties respondent to their appeal. It was held by the Honourable the Chief Justice, Sir John Stanley, and Banerji, J., that the defendants respondents could not apply u/s 108, Civil Procedure Code, for a re-hearing. The decision upon the facts, is, it seems to me, the only decision possible in the case, but, it is no authority for holding that where they are not parties to the appeal or where no Order In their favour has been made in fact u/s 544, Civil Procedure Code, the decree of the first court still merges in that of the court of appeal.

18. The only other case in this Court is the case of Mathura Prasad v. Ram Charan Lal ILR (1915) All. 208. The case there was that of a suit for sale. The decree was made after contest against some of the defendants and ex parte against the others. One of these persons against whom the decree was made ex parte applied under Rule 13 of Order IX for a re-hearing. In the meantime, some of the other defendants who had contested the suit preferred an appeal. When the application for re-hearing came up for disposal it was found that the record of the case had gone up to the appellate court. The case was postponed from time to time and came up again after the return of the record from the court of appeal after the disposal of the appeal. The court below held that the decree of the first court in that case had merged in that of the court of appeal, and that the application was, therefore, not maintainable. This view was affirmed by this Court in appeal. In the course of the argument of the case as reported I noted that the learned vakil for the appellant in that case did not urge that his client was no party to the appeal in the High Court and hence the decree against him did not merge in the decree of the appellate court. I, therefore, examined the record of the appeal in this Court (First Appeal No. 424 of 1911, decided on the 24th of February, 1913). I find that Mathura Prasad, the applicant, under Rule 13 of Order IX, was made a party respondent to the appeal in the High Court. The decree of the High Court, therefore, was binding upon him. This case, therefore, goes no further than the case in 7 A. L. J., p. 598.

19. Again, where a person has not been made party to the appeal, it is only when the court exercises its powers under Rule 4 or Rule 33 of Order XLI (Section 544, Civil Procedure Code) in favour of the party not appealing on the appeal of his co-defendants and reverses or modifies the decree in favour of the non-appealing defendant under either of the Rules 4 or 33 of Order XLI of the Code that it can be said that the decree of the first court as against him has merged in that of the appellate court. The fact that the court has power to deal with the case of a non-appealing defendant in certain cases, is not sufficient to effect a merger, unless the power has been actually exercised by the appellate court in favour of the said party. It must be shown that the court of appeal did in fact exercise the power so vested in it and adjudicated upon the case of the non-appealing defendant. It is upon the action taken by the appellate court, that the question whether the decree of the first court merged in that of the appellate court, really turns. If the appellate court expressly refused to deal with the case of non-appealing defendants, it cannot be said that the merger alleged has taken place. If that court for some reason or other overlooked to consider their case, I think it cannot be said that the decree in that case effects the merger if pleaded. In this case, the decree of the High Court does not say a word about Musammat Gajraj Mati or her rights, and it does not refer even to the fact of her being a party to the suit. It gives the right to redeem to the defendants appellants alone. They alone are directed to pay the mortgage money, and it is in case of default of payment by them alone that the sale is ordered to take place. If this is the only decree in the case which can be said to be in existence, Musammat Gajraj

Mati has no authority under it to pay the decretal amount and to redeem the property. She is treated as if she were no party to the suit (although the fact of her being a party to the suit is noted in the opening of the judgment), nor has she been treated as a mortgagor who must be permitted to redeem or whose equity of redemption must be foreclosed. If the decree of the first court has ceased to exist against her, there is no decree of the court of appeal against her. No copy of the order absolute has been laid before us. But upon this decree no order absolute for sale can be made against her as she is not ordered or permitted to pay the decretal amount.

20. The result of the case law, therefore, stands as follows:

(1) The Madras High Court in a case for review of judgment held that the presentation of an appeal by the applicant for review of judgment put an end to the application for review and the court of first instance had, therefore, no jurisdiction left to hear the application for review (a point upon which there is express legislation supporting the view taken by that Court).

(2) That in a later case, the said High Court upon the strength of some general observations made in the preceding case and upon Section 582, Civil Procedure Code, held that the mere institution of an appeal took away the jurisdiction of the munsif to adjudicate upon the application u/s 108, Civil Procedure Code. It may be noted that in this case it is not evident that the applicant for re-hearing was not made party to the appeal. He was most probably a party to it, as he also applied u/s 560, Civil Procedure Code, to re-open the appeal.

(3) That this view of the Madras High Court has been dissented from in a series of cases decided by the Calcutta High Court and is obviously erroneous.

(4) That where the applicant for re-hearing was not made a respondent to the appeal, it has been held in a series of cases that such person can apply u/s 108, CPC (order IX, Rule 13), and in one case it was held that he can apply even if he were made a party to the appeal, if the scope of the appeal was limited to the consideration of the rights of the appellants only. It is not necessary to go so far in this case. The Calcutta High Court probably went too far in the case last referred to.

(5) That in this Court it has been held that, where the applicant under Order 9, Rule XIII, has been made a party to the appeal as a respondent and the appeal has been decided against him, he can no longer maintain his application under Rule 13 of Order IX, after the disposal of the appeal against him by the appellate court.

21. There is no decision of this Court holding that where he is not made a party respondent to the appeal, and where the appellate court has not, therefore, dealt with his case at all, he is precluded from applying under this rule to the court of first instance. The language of the Code is in favour of the view taken by the Calcutta High Court. The matter is *res integra* so far as this Court is concerned. I

am inclined to think that where the applicant is no party to the appeal either as appellant or respondent, and the appellate court has not adjudicated upon his case, the decree of the court of first instance does not merge in that of the court of appeal. Whether the decree of the court of first instance has merged into that of the court of appeal will largely depend upon the facts of each case.

22. I think on a consideration of all the facts in this case it must be held that the decree of the court of first instance against Musammat Gajraj Mati stood unmerged in that of the court of appeal, and that the application for re-hearing was rightly made in this case to the court of first instance. I would decree the appeal, set aside the order of the court below, and direct that the application be restored to the file of pending applications and disposed of according to law by the court below. Costs here and hitherto shall abide the result.

Walsh, J.

23. I have had an opportunity of reading the judgment of my brother Mr. Justice Sundae Lal, and I agree with it.

24. It is quite clear that a decree, if appealed in part, may remain, as to the other part, in the court which passed it. To that extent it becomes final. Similarly, it may become final in the court which passed it, as against one of several unsuccessful parties who does not appeal, though as against others it may, through an appeal, become a decree of the appellate court.

25. The necessity for granting the express powers conferred upon appellate courts by Rules 4 and 33, Order XLI, indicates that this is the correct view. Moreover, I think that an appellate court in a proper case might under Rule 33 secure the attendance of a party who is not before it as an appellant or respondent, by adjourning the hearing and requiring the other party to give the necessary notices. Clearly it could not make an order against a party not before it in appeal without taking that step, though it could make an Order in his favour.

26. I agree with the observations cited from the judgment of Mukerji, J., in 15 C. L. J., at page 244. Apart altogether from authority, however, I think that the practical consequences of adopting any other view which are pointed out in Mr. Justice Sundab Lal's judgment, are in themselves sufficient to justify us in allowing this appeal.

27. By the Court.-We decree the appeal, set aside the order of the court below, and direct that the application be restored to the file of pending applications and disposed of according to law by the court below. Costs here and hitherto shall abide the result.