

(1971) 10 KAR CK 0005
In the Karnataka High Court
Case No : C.R.P. No's. 444 and 481 of 1970

The Official Receiver, Bangalore

APPELLANT

Vs

Sellamma and Others

RESPONDENT

Date of Decision : 15-10-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 92, 96

Citation : AIR 1973 Kar 154 : AIR 1971 Kar 154 : (1973) 1 MysLJ 20

Hon'ble Judges : E.S. Venkataramiah, J;C. Honniah, J

Bench : Division Bench

Advocate : H. Nanjunda Shastry, for the Appellant; P.N. Sripada Rao, for the Respondent

Final Decision : Allowed

Judgement

1. The above two Civil Revision Petitions are filed against a common order passed in Misc. Cases Nos. 187 and 189 of 1067 on the file of the Principal Civil Judge, Bangalore, on the two applications filed by the respondent in each of the above petitions under Order IX, Rule 13 of the Code of Civil Procedure, praying for the setting aside of the ex parte decree that had been passed in Original Suit No. 274 of 1964 on the file of the said Court. By its order dated 6-12-1969 the Lower Court allowed both the applications setting aside the preliminary decree and final decree passed in the said suit. The said suit was originally filed in the Court of the District Judge, Bangalore in Original Suit No. 58 of 1949-50, on the basis of a registered mortgage deed executed by defendants 1 and 2 therein for a recovery of sum of Rs. 31,725/- which was due on the mortgage deed by way of principal and interest thereon. The petitioner in Misc. Case No. 187 of 1967 is one B. N. Leelabai and she had been impleaded as the 12th defendant in the said suit. The petitioner in Misc. Case No. 189 of 1967 is one K. R. Varadaraia Iyengar and he had been impleaded as 15th defendant in the said suit. The said Leelabai and Varadaraia Iyengar had purchased some portions of the land which was the subject-matter of the mortgage on the basis of which the suit was filed

in Original Suit No. 58 of 1949-50 on the file of the District Judge Bangalore. The order sheet dated 28-2-1950 in the said suit states that defendants 12 and 15 among others had been served on residence as they were not in station. We do not find any specific order made by the trial Court either treating them ex parte or directing issue of fresh summons, but there is no reference to defendants 12 and 15 in the order sheet of that suit subsequent to 28-2-1950. It appears that some of the defendants in the said suit contested the suit and by his judgment dated 30-6-1960, the suit was decreed by the District Judge. Against the said decree, the plaintiff filed an appeal in Regular Appeal No. 66 of 1961 on the file of this Court regarding the rate of Interest only. This Court allowed the appeal modifying the decree passed by the trial Court by directing that the rate of interest from the date of suit upto the date fixed for payment, namely, 30-12-1960 should be calculated at nine per cent, instead of at four per cent, per annum. In the said appeal. Leelabai and Varadaraia Iyengar were again absent and not represented and there is no dispute that they had been placed ex parte by this Court in the appeal. Thereafter the case was sent back for passing the final decree to the Court of the Civil Judge, Bangalore City, which had acquired Jurisdiction on account of the re organization of the Civil Courts in the State of Mysore under the Mysore Civil Courts Act. 1964. The case was numbered as Original Suit 274 of 1964 on the file of the Civil Judge. Bangalore. The learned Civil Judge, proceeded to pass the final decree in accordance with the judgment and decree passed by this Court in appeal, on 13-4-1966. After the final decree was passed the property against which the said mortgage decree had been passed was brought to sale in Execution No. 53 of 1967 on the file of the Civil Judge, Bangalore. Pursuant to the order of sale made by the Civil Judge, a notification was published in "Prajavani" a local daily, on 11-7-1967 stating that the mortgaged property including the portions which Leelabai and Varadaraia Iyengar had purchased would be sold in public auction in order to realise the decree amount as per the final decree in the said suit. At that stage Leelabai and Varadaraia Iyengar filed Misc Cases Nos 187 and 189 of 1967 respectively on the file of the Civil Judge, Bangalore, praying that the ex parte preliminary decree and final decree passed against them in the suit might be set aside under Order 9, Rule 13 of the Code of Civil Procedure. It was alleged by them that they had no knowledge of the preliminary decree and final decree passed in the said suit until they saw "Prajavani" dated 11-7-1967, and therefore, the applications filed by them on 10-8-1967 were in time. The said applications were resisted by the plaintiff. It may be mentioned here that by that time, the plaintiff was dead and his estate was under the management of Sri C. L. Shivappa, Advocate and Official Receiver. Bangalore, by an order passed by the Competent Court. In the course of the statement of objections, it was stated by him inter alia, that it was not true that the applicants had no notice or knowledge of the preliminary decree or final decree till 11-7-1967 and that the applications were not maintainable in view of the fact that the preliminary decree had been modified by the High Court in appeal. It was urged that the trial Court had no jurisdiction to deal with the applications under Order 9, Rule 13 of the Code of Civil Procedure. After

recording the evidence adduced by the parties and hearing them, the Lower Court passed a common order setting aside the preliminary decree and the final decree passed in the suit. The lower court while allowing the said applications found that it had been established that the applicants did not know about the preliminary decree and the final decree passed in the suit and the decree passed in the appeal till 11-7-1967 and that the applications were maintainable before the Lower Court even though the preliminary decree had been modified by the High Court in Regular Appeal No. 66 of 1961. Aggrieved by the common order passed on the two applications, these two revision petitions have been filed on behalf of the estate of the plaintiff by the Official Receiver.

2. When these two revision petitions came up before Datar, J., for disposal, he referred them for disposal by a Division Bench on the ground that they involved substantial questions of law and that there was divergence of opinion on the questions involved in these cases amongst the several High Courts in India, and that is how these two petitions are before us.

3. Sri H. Nanjunda Sastry, the learned counsel for the petitioner in these two cases, did not question, in the course of his argument, the findings of fact recorded by the court below that Leelabai and Varadaraia Iyengar, the respondents herein, had no knowledge of the passing of the ex parte preliminary and final decrees by the Lower Court and the decree passed in appeal until 11-7-1967. He has however raised two Questions of law, namely, (i) that the lower court had no jurisdiction to entertain the application under Order 9, Rule 13 of the CPC when the preliminary decree passed by the trial Court had been modified by the decree passed in appeal by this Court, and (ii) even if the said applications were maintainable before the lower court, the order passed by the Court below setting aside the preliminary decree and the final decree in the suit in their entirety was wrong.

4. In support of his first contention Sri Sastry relied upon a number of decisions. The first decision is one in *Brij Narain v. Tejbal Bikram Bahadur* ILR (1910) All 295 . The question for consideration in that case was whether a decree of the trial Court could be amended by it after the said decree had been modified in appeal by the appellate Court. We are of the opinion that this decision is beside the point which has arisen for consideration in the present cases. The next decision on which reliance was placed was one reported in *Mono Mohan Kundu Vs. Nripendra Nath Nandi and Others*, The facts of that case were these:-- A preliminary decree was passed in a suit after contest against defendants 2, 3, 4 and ex parte against defendants 1, 5, 6 and 7; the decree was made final on 26-3-1929. Thereafter defendants 2, 3 and 4 filed an appeal before the High Court on 23-5-1929. In June 1929 defendant 6 filed an application for setting aside "the ex parte decree passed against him under Order 9, Rule 14 of the CPC and on 27-7-1929 defendant 1 filed another application for setting aside the ex parte decree passed against him. The appeal filed before the High Court by defendants 2, 3 and 4 was disposed of on 7-6-1933 allowing the appeal of

defendant 4 and dismissing the suit as against him and confirming the decree of the trial Court in other respects. The applications of defendants 1 and 6 filed under Order 9, Rule 13 of the CPC came up for hearing before the trial Court on 25-9-1934 and by its order dated. 29-9-1934 it rejected the two applications on the ground that the decree passed against the defendants 1 and 6, though ex parte, having been affirmed in appeal by the High Court, there was no ex parte decree of the trial Court in existence which could be set aside by the trial Court under the Provisions of Order 9, Rule 13 of the Code of Civil Procedure. Against the orders of the trial Court rejecting those applications, defendants 1 and 6 filed two appeals before the High Court of Calcutta. In those two appeals, the High Court of Calcutta, observed as follows:--

"By Rule 13 of Order 9. Civil P. C., the Court which passes an ex parte decree has authority to set aside the ex parte decree. The exercise of this power presupposes the existence of an ex parte decree. If an appeal is preferred against the ex parte decree, the ex parte decree continues till the appellate Court has determined the rights of the parties in controversy. After such determination by the Court of Appeal, the decree of the trial Court ceases to exist. If the decree of the trial Court is affirmed in appeal, it merges in the decree of the Court of appeal and consequently ceases to have any existence: See the case in 19101 37 Ind App 70 (PC) There cannot be any doubt therefore that the entire subject-matter of the suit, as well as of the decree of the trial Judge, came under the judicial consideration of the Court of appeal and the Court of appeal dealt with the entire subject-matter of the decree. The learned Judge was therefore right in holding that the decree of the trial Judge became merged in the decree of the Court of appeal and ceased to subsist any longer and that there was no ex parte decree of the trial Court subsisting which he could set aside under the provisions of Order 9. Rule 13 of the Code."

5. A similar view has been taken by the High Court of Madhya Bharat in Balbhim Rao v. Alkh Murarilal AIR 1954 MP 4 . In that case the point for consideration was whether after the appeal against an ex parte decree had been dismissed, it was open to the trial court to pass an order on a Petition to set it aside. In that case the ex parte decree was passed against the respondent on 26-10-1950. He then applied on 6-11-1950 for setting aside the ex parte decree. While this application, was pending, the plaintiff filed an appeal before the District Judge against a portion of the decree of the trial Court rejecting the plaintiff's claim in so far as it concerned the plaintiff's right to receive rent at an enhanced rate. In the plaintiff's appeal the defendant was made a party and the said appeal was dismissed by the District Judge on 26-3-1951. Thereafter the trial Court before - which the application for setting aside the ex parte decree was pending, dismissed that application on the ground that after the decision of the appellate Court in the plaintiff's appeal, the trial Court had no jurisdiction to set aside the ex parte decree passed by it. The defendant then appealed to the District Judge who allowed the appeal following a decision of the Madras High Court in Abdul Kadi Rowther and Another Vs. Uthumansa Rowther, Against that order a revision

petition was filed before the High Court of Madhya Bharat. In that revision petition that High Court took the view that the trial Court had no longer any power to dispose of the application under Order 9. Rule 13 of the CPC after the decree had merged in the decree of, the appellate Court. To the same effect is the decision of the Nagpur High Court in AIR 1937 381 (Nagpur) In that case an ex parte decree had been passed against the defendants on 30-1-1933. The defendants made two applications one on 19-4-1933 and another on 28-4-1933 under Order 9, Rule 13 of the CPC for setting aside the ex parte decree and at the same time, they preferred an appeal to the Court of the Judicial Commissioner against the ex parte decree. The appeal was dismissed on 6-11-1933 under Order 41. Rule 11 of the Code of Civil Procedure. On 5-3-1934 the trial Court dismissed the defendants applications under Order 9, Rule 13 of the CPC on the ground that the ex parte decree after it was confirmed by the Court of the Judicial Commissioner became extinct. The appeal filed by the defendants against that order was dismissed by the Nagpur High Court holding that after the dismissal of the appeal filed by the defendants against the ex parte order, they could not agitate the applications under Order 9. Rule 13 of the Code of Civil Procedure. The view expressed by the High Court of Kantilal Khodabhai Patel Vs. Chiba Bava Bhandari, is similar to the view expressed by the High Court of Nagpur in the case cited above. Here again the question for consideration was whether after the dismissal of an appeal filed by a defendant against whom an ex parte decree had been passed, under Order 41. Rule 11 of the Code of Civil Procedure, an application made by him under Order 9. Rule 13 of the CPC before the trial Court for setting aside the very same ex parte decree could be considered by the trial Court or not. This case is again distinguishable from the present case. At this stage we may refer to a decision of the High Court of Abdul Kadi Rowther and Another Vs. Uthumansa Rowther, in which it was held that the application filed under Order 9. Rule 13 of the CPC for setting aside an ex parte decree could be considered by the trial Court even when an appeal filed against it u/s 96 of the Code of Civil Procedure, had been already dismissed under Order 41, Rule 11 of the CPC by the appellate Court. As in all the above three decisions the defendants against whom the ex parte decrees had been passed had filed the appeals u/s 92 of the CPC which were later on dismissed, it may be reasonable to hold that later on they should not be permitted to resort to the alternative remedy under Order 9, Rule 13 of the Code of Civil Procedure. But the facts of the cases before us are different.

6. In support of the case of the respondents. Sri P. N Sripada Rao, the learned counsel for the respondents, relied upon a decision of the High Court of Madras in Palaniappa v. Subramania AIR 1922 Mad 33. The facts of that case are these: A suit out of which the above case arose had been filed against three defendants. The second and third defendants remained ex parte. The first defendant filed an appeal against the decree that was passed against him as well as defendants 2 and 3 impleading defendants 2 and 3 as respondents along with the plaintiff. While the appeal was pending, defendant 2 applied to the appellate Court to set

aside the ex parte decree. That petition was considered along with the appeal and was dismissed by the High Court on the ground that an application to set aside an ex parte decree of the first court could not be filed in the appellate Court, but ought to be filed in the first Court. Thereafter, defendant 2 renewed the application again before the High Court. The plaintiff raised two objections to the said application, (i) the application did not lie before the appellate Court, and (ii) that it was barred by limitation. Dealing with the first question, the High Court of Madras observed as follows:--

"Taking the first point, the several possible cases that may arise may be considered in order: (1) When the defendant who did not appear in the first Court is not impleaded in appeal. Obviously, this is a case where the appellate Court has no jurisdiction to deal with an application to set aside the ex parte decree (Vide Ramachandra Mallya Vs. Narayana Hegade and Another, Indu Meah v. Darbaksh Bhuiyan (1911) 14 Cal LJ 42 and Hedlot v. Karam (1912) 15 Cal LJ 241. (2) When he is made a party to the appeal and the application is made while the appeal is pending. In this case too the first court seems to me the proper court in which the application has to be made. I agree with the reasoning of Wallis, C.J., and my learned brother in the order already referred to. Of the cases now mentioned by the petitioner. Sadavakonan v. Annamalai Udayan (1915) 2 Mad LW 529 : Sadaya Konan and Another Vs. Annamalai Udayan, and (1917) 7 Mad LW 10 : Ramachandra Mallya Vs. Narayana Hegade and Another, were not then cited and Mathura Prasad Vs. Ram Charan Lal, was cited and considered. I am unable to agree with the two former decisions. The decisions in Kumud Nath v. Jatindra Nath ILR (1911) Gal 394 cited in the former order and Sarat Chandra v. Damodar Manna. (1908) 12 Cal WN 885 affirmed in L.P.A in Damodar Manna v. Sarat Chandra (1909) 13 Cal WN 846 also support this view. (3) Where he is made a party to the appeal but the application is filed after the appeal is disposed of. Even in such a case, the language of Order IX. Order 13 would point to the first Court as the proper court for making the application -- a consideration adverted to, but to which I think with due deference, sufficient weight has not been given in (1915) 2 Mad LW 529 - Sadaya Konan and Another Vs. Annamalai Udayan, The weight of the decisions in Sankara Bhatta v. Subraya Bhatta ILR (1907) Mad 535, and Dhanai Saradar v. Tarak Nath (1910) 12 Cal LJ 53 , has been considerably weakened by the criticism of the former in the prior order by Wallis C. J. and my learned brother. We must remember that in the discussion of this question it must be assumed that the defendant who was absent in the first court appeared in the appellate Court for if he was absent in the appellate Court also under Order XLI, Rule 17 (2) an application to set aside the appellate ex parte decree would lie under Order XLI Rule 21 and Article 169 (not Art. 164) of the Limitation Act would apply. On this assumption, it is difficult to describe the appellate decree as an ex parte decree of the appellate court except by a straining of language which is not justified; and if it can be so described, the petitioner would have a second period of limitation under Article 164 sterling from the appellate decree -- an anomalous result which could hardly

have been intended by the legislature. It may be urged by the petitioner that, it is equally anomalous if the first Court has jurisdiction to set aside an ex parte decree after it is affirmed by the appellate Court. But, in reply to this apparent anomaly. I would urge two considerations (1) an application after the disposal of the appeal, to set aside the ex parte decree of the first Court can hardly be in time and can arise very rarely. The legislature might well have been content not to anticipate and provide for a case which is most unlikely, and (2) in such cases, the proper course of the applicant would be not to wait till the disposal of the appeal but to get an adjournment of hearing of the appeal to enable him to apply before the first court to set aside the ex parte decree. Such an application for adjournment might well be granted if he is in time (which is not the case with the former petition, Palaniappa Chetty Vs. Subrahmanya Chetty and Others,

7. Rule 13 of Order 9 of the CPC reads as follows :--

"13. Setting aside decree ex parte against defendant:--

"In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also."

8. A reading of the above provision would show that an application to set aside an ex parte decree passed by the trial Court should be made to the Court which has passed the same and to no other Court. The question for consideration, therefore, is whether that right which a defendant has under the said provision is lost when an appeal is filed against the said ex parte decree, and the same is confirmed or modified by the appellate Court. It was contended by Sri Sastry that such an application could be made before the appellate Court itself. Acceptance of the said argument would be doing violence to the express provision of Order 9, Rule 13 of the CPC which requires an application to be made to the trial Court. It was alternatively argued that it was open to the person against whom the ex parte decree had been passed and confirmed or modified in appeal to make an application under Order 41, Rule 21 of the CPC before the appellate Court to rehear the appeal and after the decree passed in the appeal is set aside under that provision and the appeal is posted for hearing, to make an application before the trial Court under Order 9, Rule 13 of the CPC and request the appellate Court not to dispose of the appeal until the application made before the trial Court under Order 9, Rule 13, Civil P. C. is disposed of. We find there is no warrant for adopting such a procedure. The grounds on which an application under Order 41

Rule 21 of the CPC can be made are entirely different from those with which we are now concerned. Under that Rule the appellate Court is concerned with the question whether the respondent had sufficient cause for not appearing before the Court when the appeal was heard. But there may also be cases where he may not have any reasonable ground to maintain the application Under Order 41. Rule 21 of the Code of Civil Procedure, and yet he may still have a valid ground for setting aside the ex parte decree passed by the trial Court.

9. The argument of the petitioner is based on the principle that when once a decree of the trial Court is confirmed or modified by the decree of the appellate Court, the decree of the trial Court gets merged with the decree of the appellate Court and thereafter the decree of the trial Court ceases to exist. On that basis it is contended that the trial Court would have no jurisdiction to set aside the ex parte decree. The principle of merger of the decree passed by a lower Court, in the decree passed by the appellate Court has been dealt with by the Supreme Court in *State of U.P. v. Mohammed Nooh*, AIR 1958 SC 86 at P. 95 :--

"In the next place while it is true that a decree of a Court of first instance may be said to merge in the decree passed on appeal therefrom or even in the order passed in revision, it does so only for certain purposes, namely, for the purposes of computing the period of limitation for execution of the decree as in AIR 1914 65 (Privy Council) or for computing the period of limitation for an application for final decree in a mortgage suit as in *Jowad Hussain v. Gendan Singh* AIR 1926 PC 93. But as pointed out by Sir Lawrence Jenkins in delivering the judgment of the Privy Council in *Juscurn Boid v. Pirthichand Lal* AIR 1918 PC 151 at p. 152-153), whatever be the theory under other systems of law, under the Indian Law and procedure an original decree is not suspended by the presentation of an appeal nor is its operation interrupted where the decree on appeal is merely one of dismissal. There is nothing in the Indian Law to warrant the suggestion that the decree or order of the Court or tribunal of the first instance becomes final only on the termination of all proceedings by way of appeal or revision. The filing of the appeal or revision may put the decree or order in jeopardy but until it is reversed or modified it remains effective-In that view of the matter the original order of dismissal passed on April 20, 1948 was not suspended by the presentation of appeal, by the respondent nor was its operation interrupted when the Deputy Inspector General of Police simply dismissed the appeal from that order or the Inspector General simply dismissed the application for revision. The original order of dismissal if there were no inherent infirmities in it was operative on its own strength and it did not gain any greater efficacy from the subsequent orders of dismissal of the appeal or the revision except for the specific purposes hereinbefore mentioned." The said question was again considered by the Supreme Court in another case reported in *Collector of Customs, Calcutta Vs. East India Commercial Co. Ltd.*, in which it was observed as follows:--

"The question therefore turns on whether the order of the original authority becomes merged in the order of the appellate authority even where the appellate

authority merely dismisses the appeal without any modification of the order of the original authority. It is obvious that when an appeal is made, the appellate authority can do one of three things, namely, (i) it may reverse the order under appeal, (ii) it may modify that order, and (iii) it may merely dismiss the appeal and thus confirm the order without any modification. It is not disputed that in the first, two cases where the order of the original authority is either reversed or modified it is the order of the appellate authority which is the operative order and if the High Court has no jurisdiction to issue a writ to the appellate authority it cannot issue a writ to the original authority. The question therefore is whether there is any difference between these two cases and the third case where the appellate authority dismisses the appeal and thus confirms the order of the original authority. It seems to us that on principle it is difficult to draw a distinction between the first two kinds of orders passed by the appellate authority and the third kind of order passed by it. In all these three cases after the appellate authority had disposed of the appeal, the operative order is the order of the appellate authority whether it has reversed the original order or modified it or confirmed it. In law, the appellate order of confirmation is quite as efficacious as an operative order as an appellate order of reversal or modification."

10. The observations of the Supreme Court in the two decisions referred to above no doubt lend support to the contention of the petitioner that when there is a modification of the decree of the trial Court by a decree passed by the appellate Court, the decree of the trial Court gets merged in the decree of the appellate Court. The said view is based on the juristic principle that a decree of a lower Court always merges in a decree of the appellate Court. But the question for decision in these cases is whether even though when the statute specifically provides that an application for setting aside an ex parte decree shall be made to the Court which made the ex parte decree, an application made pursuant to the same can be dismissed on the basis of a juristic principle, namely, that the order of the trial Court gets merged in the order of the appellate Court. It cannot be denied that the provision of a statute prevails upon any legal principle unless the said principle also has its source in a statute. The acceptance of the view canvassed on behalf of the petitioner would place a defendant against whom an ex parte decree has been made in a helpless situation. According to that view, an application cannot be made to the trial Court because the decree has been confirmed or modified by the appellate Court and an application cannot be made to the appellate Court, because there is no provision in the CPC providing for such an application to be made before the appellate Court. We, therefore, feel that such a construction would be disastrous to innocent persons who might have been impleaded as defendants and against whom ex parte decrees may have been passed. We rest our Judgment on a higher principle which is fundamental to administration of Justice that no person shall be prejudiced by a decision which is given without due notice of the proceedings in which such a decision is rendered and without sufficient opportunity to defend himself in those proceedings. It is no

doubt true that it may look anomalous if the trial Court is allowed to set aside an ex parte decree passed by it when the same has been confirmed or modified by a higher Court. But it is not as if there is no parallel to it in our Civil Law. A decree made by a higher court in the land can be got set aside by a lower Court in a suit filed on the ground of fraud or collusion, even when the person who files such a suit may have been a party to the proceedings in the higher Court. Both the decrees, namely, a decree which is passed ex parte and a decree obtained by fraud or collusion, are voidable ones and in principle they stand on the same footing. An aggrieved party should have an opportunity to approach the competent court for redress and when the CPC has specifically made a provision in that regard authorising an application for setting aside an ex parte decree before the Court by which the ex parte decree was passed, we cannot hold that such an application would not be maintainable on the basis of the principle of merger which has no statutory basis. If the ex parte decree passed by the trial Court is liable to be set aside on a ground which can be urged under Order 9, Rule 13 of the Code of Civil Procedure, then any decree passed on appeal or revision on the basis of such ex parte decree, would have to give way.

11. We may at this stage refer to a decision in *Leary v. National Union of Vehicle Builders*. 1970 3 WLR 434. The question for decision in that case was posed by Megarry, J. In the course of this judgment as follows:--

"Secondly, there is the question on which there appears to be no English authority; and I put it in general terms. Can a deficiency of natural justice before a trial Tribunal be cured by a sufficiency of natural justice before an appellate tribunal? In the present case, the decision of the branch committee admittedly contravenes the rules of natural justice; but Mr. Pain contends that this defect has been cured by the subsequent hearings by the N. E. C. and by the appeals council. The latter admittedly complied with the rules of natural justice, and the former was at all events a perfectly proper administrative enquiry."

After discussing some of the cases which were cited before him, the learned Judge observed that acceptance of the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, would have the result of depriving the aggrieved party of his right of appeal from the trial body. He was therefore of the opinion that the decision of the trial tribunal could not be cured by the decision of the appellate tribunal. While doing so he relied upon the essential distinction that lies between a proceeding in a court of first instance and in a court of appeal, the scope of enquiry and the method of investigation in one being different from the scope of enquiry in the other. As we are all aware in the trial Court the defendant would have opportunity to file his written statement and to adduce evidence in support of his case. Such a thing is not possible in an appellate Court. We are aware of the fact that the view that we take on this question is different from the view expressed by some other High Courts but we are persuaded to take the said view for the reasons mentioned above.

12. We, therefore, hold that the order of the trial Court in these cases holding that the application under Order 9, Rule 13 of the CPC is maintainable, is sound and is in accordance with Order 9. Rule 13 of the Code of Civil Procedure.

13. We next proceed to the other contention urged on behalf of the petitioner. The proviso to Rule 13 of the Order 9 of the CPC no doubt authorises the Court also to set aside the decree made against defendants other than the applicant if circumstances warrant such action. In these cases, as already stated, the applicants under Order 9, Rule 13 of the CPC were alienees of two portions of a large piece of land from the mortgagor and a decree had been passed against the whole of the mortgaged property by the trial Court and by the High Court in appeal. But the circumstances of the cases, however, did not necessitate the setting aside of the preliminary decree and the final decree passed in the suit as against other defendants. The lower court while allowing the applications, therefore, should have set aside the ex parte preliminary decree and the final decree only as against the applicants and in respect of portions of land that they had purchased from the mortgagor reserving liberty for the petitioner to proceed against the remaining property for recovery of the mortgage money. Such a procedure would not have resulted in any illegality. We, therefore, allow these two revision petitions in part. The order of the lower Court is modified by confining it only to the respondents and to the portions of land purchased by them from the mortgagor. In other respects the decree already passed would stand. It is open to the petitioner to proceed against the remaining extent of land for realising the mortgage amount, if necessary. The trial Court will now proceed to dispose of the suit as against the respondents in accordance with law.

14. There will be no order as to costs in these petitions.