

(1919) 09 MAD CK 0035
In the Madras High Court

Venkata Perumalla Pillai and Others

APPELLANT

Vs

Marapudi Venkataswami Naidu

RESPONDENT

Date of Decision : 03-09-1919

Acts Referred:

Citation : 54 Ind. Cas. 506 : (1919) 10 LW 605

Hon'ble Judges : Moore, J;Bakewell, J

Bench : Division Bench

Judgement

1. Vakil for appellants admits that the appeal is incompetent since it is based on a matter not before the lower Appellate Court. The second appeal is dismissed with costs.

Memorandum of Objections.

2. Upon the appeal being called on for hearing, the appellants' Vakil stated that the appeal did not lie because the matter to which it relates was not the subject of appeal to the lower Appellate Court, and he has argued that the respondent cannot proceed with his memorandum of objections because the appeal has not been withdrawn or dismissed for default within the meaning of Order XLI, Rule 22(4), Civil procedure Code. Rule 22 is contained in the rules grouped under the subheading "procedure on hearing," and sub-rule (1) applies to the hearing before the Court, as is shown by the expressions "any respondent may not only support the decree...but take any cross-objections to the decree." The latter privilege depends upon his having adopted a certain procedure before the case comes on for hearing.

3. Sub-rule (4) applies to cases in which through some action or negligence of the appellant, the case does not come before the Court for hearing and the respondent might, therefore, without some express provision be deprived of his right to take cross-objections.

4. The decision in Alagappa Chettiar v. Chockalingam Chetty 48 Ind. Cas. 203 : 35 M.L.J. 236 : 41 M.P 904 : 8 L.W. 240 : 24 M.L.T. 137 : (1918) M.W.N. 688

deals with the case of an appeal barred by limitation, which, therefore, never comes before the Court for hearing. In the present case the appellants' Vakil in effect wishes to withdraw from the appeal because it is incompetent.

5. We think that since the case is before us for hearing, the respondent has the right to take his cross-objections under Rule 22(1).

6. The District Judge has based his decision on a case which was not raised by the issues or included in the grounds of appeal. The decree of the lower Appellate Court is set aside and the decree of the District Munsif is restored with costs throughout.