Ajudhia Prasad and ors. Vs. Balmukan and ors.

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Court : Allahabad

Decided On : Dec-31-1969

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Judge : Straight, Offg. C.J.; Oldfield,; Brodhurst,; Tyrrell and; Mahmood, JJ.

Appellant : Ajudhia Prasad and ors.

Respondent : Balmukan and ors.

Judgement :

Oldfield, J.

1. The question referred to us has arisen in a suit which Balmukand and others, plaintiffs, brought against Fateh Lal and others, on a hundi. The suit was decreed in the first Court against one of the drawers, but dismissed against Fateh Lal, the drawee, and one of the drawers. The plaintiffs appealed, and the first appellate Court gave judgment ex parte against Fateh Lal. He instituted a second appeal in the High Court, and the question referred is, whether a second appeal will lie on the part of Fateh Lal, a respondent against whom a judgment has been given by the first appellate Court ex-parte, inasmuch as Section 560 of the Civil Procedure Code gave him another remedy by applying for a re-hearing of the appeal by the first appellate Court.

2. It has been ruled by a majority of the Full Bench of this Court that a defendant against whom a decree has been passed ex parte by a Court of First Instance cannot appeal, but is confined to the remedy provided in Section 108, by applying to have an order to set aside the ex parte decree Lal Singh v. Kunjan I.L.R. 4 All. 387. I was one of the Judges who dissented from the view held by the majority, and I was of opinion that the remedy by appeal is not taken away by reason of a procedure being provided by application for setting aside the ex parte decree, and I am still of the same opinion for the reasons which I gave in that case.

3. I should, however, consider myself bound to follow the ruling in that case, if applicable to the case before us; but I think there is a distinction between the provisions in Section 108 and Section 560. In the latter the respondent would appear to have no right to insist upon re-hearing of the appeal, even when he satisfies the Court that the notice was not duly served, or that he was prevented by sufficient cause from attending when the appeal was called on for hearing; for the section provides that in that case 'the Court may re-hear the appeal,' thus allowing it a discretion to re-hear it or not. If this is so, the right of appeal cannot be taken away.

4. There is also a distinction between the case of a respondent who has succeeded in

the first Court, and against whom a decree has been given ex parte by the appellate Court, and the case of a defendant who sets up no defence and produces no evidence in the first Court. This distinction was pointed out in Ramshet Bachaset v. Balkishna Ababhat 6 Bom. H.C. Rep. 161 and also by Sir R. Stuart, Chief Justice of this Court, in the Full Bench case of Lal Singh v. Kunjan I.L.R. 4 All. 387 who while he concurred in holding that under Section 108 of the Civil Procedure Code, a defendant against whom a decree was passed ex parte could not appeal, drew a distinction between this case and that of a respondent against whom a decree has been given ex parte by an appellate Court, who, he held, would still have his remedy by appeal, notwithstanding that he might apply for a re-hearing under Section 560; and this was the effect of the ruling by a Division Bench of this Court in the case of Ramjas v. Baijnath I.L.R. 2 All. 567.

5. I would reply to the reference that a respondent against whom judgment is given by an appellate Court ex parte is not deprived of his right of second appeal by reason of anything in Section 560 of the Civil Procedure Code, which permits him to apply to the appellate Court for a re-hearing of the appeal, and return the case to the Division Bench for disposal.

Brodhurst, J.

6. A second appeal will, in my opinion, lie from an ex parte decree of a Lower Appellate Court. In my judgment in Lal Singh v. Kunjan I. L.R. 4 All. 387 I have given my reasons for holding that an appeal will lie by a defendant from a decree passed ex parte under the provisions of Chapter VII of the Civil Procedure Code, and the opinions I have expressed are in accordance with judgments of one or more Benches of every High Court in India.

7. On the analogous question now referred, I think it sufficient to say that I concur in the judgments of Stuart, C.J., and Spankie, J., in Ramjas v. Baijnath I.L.R. 2 All. 567 and in which those learned Judges ruled that an appeal will lie from an ex-parte decree of a Lower Appellate Court.

Mahmood, J.

8. I have arrived at the same conclusions as my learned brothers Oldfield and Brodhurst, but as at the hearing of the appeal the case appeared to me somewhat distinguishable from that decided by the majority of the Full Bench in Lal Singh v. Kunjan I.L.R. 4 All. 387 I think it necessary to state my reasons fully, with the object of showing that now I hold that no real distinction in principle exists. What was ruled in that case was this that because by Section 108 of the Civil Procedure Code there is provided a special procedure for the case of non-appearance by a defendant against whom a decree is passed, therefore the general provisions of Section 540, conferring the right of appeal, do not apply to such a case. My own view is that the right of appeal being a special remedy, apart from the ordinary application of the maxim ubi jus ibi remedium, can only be created by specific enactment. In this country, with regard to appeals, no rule of the common law exists, but there is a specific provision in the Civil Procedure Code. When I say that the right of appeal must be expressly granted by statute, I think I am within the authority of cases decided by the highest tribunals in England.

9. The question therefore is whether the appellant Fateh Lal could have maintained

an appeal to the Lower Appellate Court. This is not the specific question to which this reference relates, but the answer to it must in principle be the same as the answer to the question which has been referred to the Full Bench. In the present case the plaintiff sued certain persons--Fateh Lal, Ajudhia Prasad, and Juala Prasad. Among these defendants Juala Prasad admitted the claim. Ajudhia Prasad said that he could not be held liable in law to the claim. Fateh Lal did not appear at all. The Munsif's decree was, that the claim, as against Juala Prasad, should be decreed because it was admitted; that as against Ajudhia Prasad it should be dismissed, because he had succeeded in proving his non-liability; and with regard to Fateh Lal, that it should be dismissed for reasons that do not clearly appear. The plaintiff appealed to the Judge from that portion of the Munsif's decree which exempted Ajudhia Prasad and Fateh Lal from liability, and the District Judge heard the appeal in the presence of Ajudhia Prasad, and ex-parte so far as concerned Fateh Lal; but in consequence of the view which the learned Judge took of the law, he passed a decree against both. In the present case, Ajudhia Prasad and Fateh Lal have joined with Juala Prasad in appealing to this Court against the whole of the Judge's decree, and this has given rise to the present reference.

10. It is an admitted proposition relating to the construction of statutes, that whenever the common law is varied by statute, it is one of the elements of what has been called 'the golden rule' of construction, that, in case of any difficulty arising, the Court will look to the common law to see how it stood before it was altered by the Legislature; and, in giving effect to the new law, will place a beneficial construction so as to suppress the mischief and advance the remedy,' the mischief being mainly indicated by what has been repealed or abolished. This was laid down by Lord Coke in Heydon's Case, and has ever since, I believe, been acted upon by the Courts in England. In this country, I believe, it is not going too far to say that, just as a Court is bound to take notice of alterations of the common law effected by statute, so also, for similar reasons, it is bound to take notice of changes of the law by statutes which alter the specific provisions of earlier enactments in pari materia. Under the old Code, Act VIII of 1859, such matters were dealt with by Section 119. That section began with the following words: 'No appeal shall lie from a judgment passed ex-parte against a defendant who has not appeared, or from a judgment against a plaintiff by default for non-appearance.' This clearly shows that decrees of this kind were not, under the Code of 1859, open to appeal. This provision stood when Act XXIII of 1861 was passed. That Act dealt with the question of appeal; and in a section (Section 23) substituted for Section 332 of the old Code, we find these words: 'Except when otherwise expressly provided in this or any other Regulation or Act for the time being in force, an appeal shall lie from the decrees of the Courts of original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts.' So that under Act XXIII of 1861, the law stood that, by an express provision, ex-parte decrees were not open to appeal.

11. But it must be remembered that, even under that law, the Lords of the Privy Council in Zain-ul-ab-din Khan v. Ahmad Raza Khan I.L.R. 2 All. 67 : L.R. 5 Ind. Ap. 233 placed a very strict construction upon Section 119 of the old Code upon the ground that 'a defendant ought not to be deprived of the right of appeal, except by express words or necessary implication' and they held that a defendant who had once appeared was excluded from the prohibition, and could appeal, even though the case was heard in his absence, and a decree was passed against him ex-parte. Then came Act X of 1877, in which the first sentence of Section 119 (already quoted) of the old Code was omitted. In Sections 103 and 108 of that Act, it was not laid down as in the

former Act that decrees of this kind were not appealable. Moreover, if it had been intended to maintain the former rule restricting the right of appeal, Section 540 of the new Act--which was word for word the same as Section 540 of the present Code--should have contained a proviso that the right of appeal should not exist where the plaintiff failed to appear, and the suit Was dismissed on that ground; or where, in consequence of the defendant's failure to appear and set up a defence, the suit was decreed. Section 540, however, contained no such proviso. It was expressed in the following terms: 'Unless, when otherwise expressly provided in this Code, or by any other law for the time being in force, an appeal shall lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction, to the Courts authorised to hear appeals from the decisions of those Courts.' I need say nothing as to the word' shall, 'but I must here point out that the section does not say 'expressly provided for,' but only 'expressly provided,'--two phrases which, as I understand the English language, mean two different things, and the difference of meaning is in favour of the opinion which I shall presently express. In the present case, there can be no doubt that the Judge was authorised to hear the appeal; and the question is, whether the word 'decree' in Section 540 means to exclude the ex-parte decrees contemplated by Section 108. I take it to be an undoubted proposition of law that, in the interpretation of general words in a statute, the Courts are bound to give those words the broadest possible effect, unless there is some specific reason for limiting their meaning. Further, there can be no doubt that if those words operate in derogation of the rights of the subject, the strictest interpretation must be placed upon them; and by analogy to the rule of criminal law that an accused person is entitled to the benefit of every doubt, every ambiguity (if any) must be construed in favour of the subject. The question then is, what reason is there for holding that the word 'decree' in Section 540 means only decrees passed in contested suits? I see no reason for so holding. The only argument is that, in another part of the Code, Section 108, the Legislature has provided one form of procedure for setting aside ex-parte decrees; but I have already said that 'provided' as used in Section 540 must not be read as if meant that the contingency is 'provided for.' Then the question is, where two procedures or two remedies have been provided can one of them be taken as operating in derogation of the other? Of course, where a statute itself creates a substantive right, obligation, or duty, and, as it were in the same breath, provides a special and exclusive remedy, such remedy would be the only one available for that purpose (Maxwell on the Interpretation of Statutes, pp. 495-500). But those principles are not applicable to the enactment now under consideration, and, as I observed during the argument, I see no more reason for holding that the right of appeal conferred by Section 540 is subject to the provisions of Section 108, than for holding that Section 108 must be read subject to the provisions of Section 540. Again, it must be remembered that a statute, though the expression of the will of the Legislature, is after all a document, and must be interpreted according to the broad and fundamental principles applicable to the construction of documents in general. This being so, I am within the authorities when I say that, in the construction of documents, a later covenant or provision governs those preceding it, on the theory that the later clause represents the later intention; but the preceding covenants or provisions never govern the subsequent ones; and it is also a rule that every attempt should be made to avoid inconsistency of meaning. These rules, however, are applicable only in cases of real conflict; but with due deference to the majority of the Full Bench in Lal Singh v. Kunjan I.L.R. 4 All. 387 no such conflict exists, for, as I shall presently show, Section 108 and Section 540 aim at two different ends. Section 108 says that the defendant against whom an ex-parte decree has been passed, 'may' apply to the Court which has passed it to set it aside for certain specific reasons. It

gives a choice to the party aggrieved, and does not compel him to adopt the remedy which it provides, or make other remedies impossible. If there is no conflict between the two rules, Section 540 obviously enables, not only a defendant, but a plaintiff, who does not appear, to appeal under the general provisions relating to appeals. In the case of the plaintiff's default, it is said that one who has taken no care to prosecute his claim in the Court of First Instance, should not be allowed to appeal in the same way as if he had taken all proper care. There appears to me to be nothing in this argument, because, supposing that the plaintiff does not appear, and the defendant does appear, the Court is bound to give the latter a decree, unless he admits the claim or part thereof; while, supposing the plaintiff does not appear, because he, in good faith, expects the defendant to be honest enough to admit the claim, and supposing the Court, in violation of the rule contained in Section 102 of the Code, which, in these circumstances, imperatively requires it to decree so much of the claim as is admitted, dismisses the suit in toto, in such a case the plaintiff, even though in default, would be entitled to appeal. It has never been contended in such circumstances that when a suit has been taken up in the absence of the plaintiff, and the Court, instead of decreeing the suit, dismisses it, the plaintiff could not appeal under the provisions of Section 540. It follows that, to this extent at all events, decrees passed in the absence of one of the parties are among the decrees to which Section 540 relates. What reason, then, is there for holding that a defendant who is in default has not the same right

12. I have already said that the mere granting of one form of remedy cannot be regarded as taking away another. If we applied a different rule, it may be said that because Section 523 or Section 525 as to arbitration provides one form of remedy, therefore in those cases the ordinary remedy by a regular suit is barred; or that because Section 623 gives the power to apply for a review of judgment, the party entitled to make such application is thereby 'deprived of his right of appeal. I believe that the latest authorities on the subject in England justify the proposition that anything, broadly speaking, which may be made the subject of an application for a new trial, may also be made the subject of appeal under the Judicature Acts; and I do not think our own law is radically different on this point.

13. For these reasons I am of opinion that Section 540 applies to ex-parte decrees, by which a suit is either decreed or dismissed, and enables a defaulting plaintiff to come up in appeal; and he would succeed if he showed that the Court below should not have dismissed his suit. It appears to me that there is no reason to regard Section 540 as limited in its scope to decrees passed in contested suits only. And if this is so, a defendant against whom a decree is passed ex-parte would, a fortiori, have a right of appeal. Nor is the reason far to seek. He may satisfy the Appellate Court that upon the case as presented by the plaintiff himself in the plaint or upon the evidence as produced by him, the suit should not have been decreed, either because it was barred by some positive rule of law, (such as limitation, res judicata, etc.), or because the plaintiff's own evidence contradicted the case set up by him. And I must add that this view does not imply that, in the absence of adequate materials on the record, the Appellate Court would be bound to entertain any such grounds for setting aside the lower Court's decree as are contemplated by Section 108 of the Code. Ordinarily an appellant is confined to the facts and materials upon the record.

14. The truth is that Section 560 of the Code is a reproduction, mutatis mutandis, of the rule stated in Section 108 in the earlier part of the Code with reference to suits. The section provides that 'when an appeal is heard ex-parte, in the absence of the

respondent, and judgment is given against him, he may apply to the Appellate Court to re-hear the appeal; and if he satisfies the Court that the notice was not duly served, or that he was prevented by sufficient cause from attending when the appeal was called on for hearing, the Court may re-hear the appeal on such terms as to costs or otherwise as the Court thinks fit to impose upon him.' This is exactly the same rule as is stated in Section 108, though I also feel that much might be said upon the distinction between the words 'may' and 'shall' which my brother Oldfield has pointed out. And I may add that Section 560 of the Code is only a further illustration of the dissentient opinion which I expressed in Jamaitunnissa v. Lutfunnissa I.L.R. 7 All. 606 in interpreting Section 582, that the Code throughout preserves the analogy, ad litis ordinationem, between the-defendant in a suit and the respondent in an appeal. Section 584 of the Code, relating to the ground upon which second appeals may be preferred, is analogous in its provisions to Section 540, and the expression used in both sections is 'unless when otherwise provided by' by this Code, and the expression' otherwise provided for 'is not adopted. And to what I have already said upon the point I may add that the distinction is a very wide one. The word 'for' would imply that a remedy was elsewhere provided to meet the contingency; the word 'by' without the word 'for' means that the statute itself says there shall be no appeal. Again, Section 522 provides that where a decree has been passed on an arbitration award, and is co-extensive therewith, 'no appeal shall lie.' This is an illustration of what the Legislature means by the words 'provided by' in Sections 540 and 584. Then again, another illustration is to be found in Section 586, which provides that 'no second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes,' where the value is less than Rs. 500. So that there it is 'otherwise provided by' the Code, that no appeal is to lie. There is no corresponding provision laying down that no appeal shall lie from an ex-parte decree.

15. With reference to the case-law on the subject, I may refer to Ashruffunnissa v. Lehareaux I.L.R. 8 Cal. 272; Luckmidas Vithaldas v. Ebrahim Oosman I.L.R. 2 Bom. 644 and Anantharama v. Madhava Paniker I.L.R. 3 Mad. 264 which all support my view. There is also a ruling of this Court in Ramjas v. Baijnath I.L.R. 2 All. 567 and another of the Madras Court in Modalatha's case I.L.R. 2 Mad. 75, laying down the rule that, in second appeals, at all events, an appeal will lie from an ex-parte decree of the Lower Appellate Court. Further, even under the old law, there is a case--Ramshet Bachaset v. Balkrishna Ababhat 6 Bom. H.C. Rep. 161 in which a distinguished Judge, Couch, C.J., draws a marked distinction between the case of a defendant and that of a respondent not appearing. I accept this distinction, but it is in my humble opinion one of detail only, and not of juridical principle as representing a fundamental doctrine.

16. For these reasons I hold that our answer to the question referred must be that a second appeal lies, under Section 584 of the Code, from a decree of the Lower Appellate Court passed in the absence of the respondent, whether the respondent were plaintiff or defendant in the suit.

Straight, Offg. C.J., and Tyrrell, J.

17. Upon consideration of the question referred to the Full Bench, we are of opinion that, as an amendment of the law on this subject is in contemplation by the Legislature, and will in all probability be shortly carried into effect, any remarks by us on the present occasion would, under the circumstances, be undesirable.