(1954) 06 P&H CK 0001

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Revision No. 164 of 1950

Mukandi Ram Chuhar Mal and others		APPELLANT
	Vs	
Asa Ram, Basant Singh and another		RESPONDENT

Date of Decision: June 3, 1954

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 115

Hon'ble Judges: Passey, C.J; Mehar Singh, J

Bench: Division Bench

Advocate: Bihari Lal, for the Appellant; Ram Niwas, for the Respondent

Judgement

Passey, C.J.

Three questions, namely, (i) whether the appeal could be regarded as one under O. 41, R. 4, C.P.C. (ii) whether in an appeal by one of the persons against whom the decree is passed, other persons who are aggrieved from the decree must necessarily be impleaded as parties to the appeal, and (Hi) whether the provisions of O. 34, R. 1 apply to an appeal preferred by one of the mortgagees against whom the suit is decreed by the trial court even though the appeal raised questions common to all the mortgagees, were on 30-4-1953 referred to a D.B. by the learned Chief Justice who had heard the revision as the authorities cited at the bar went to show that there was considerable conflict of judicial opinion upon them. The facts giving rise to the revision were these:

2. A house in village Khairpura had on 27-9-1962 Bk. been mortgaged for Rs. 170/- by its owners Sobha, Santokha and Asa Ram to Ramji Dass, Chuhra and Naurata. To redeem that mortgage the plaintiffs, successors-in-interest, of the original mortgagors brought a Suit on 11-5-2004 Bk. impleading Mukandi Ram, Sawan, Kishori Lal and Mst. Gaindi who then represented the mortgagees and were in possession. The trial court decreed the suit making, however, the plaintiffs liable to

pay Rs. 870/- which included Rs. 700/- for improvements before they could obtain possession of the house. Only one of the defendants Mukandi Lal went up in appeal to the District Judge and as he had failed to make the other mortgagees as parties to the appeal, the respondents (plaintiffs) raised the objection that the appeal was not only bad in form but that it could not proceed without those mortgagees being impleaded as the decree against the appealing and the non-appealing mortgagees was an indivisible one and had so far as the non-appealing mortgagees were concerned, become final.

The contention found favour with the lower appellate court with the result that the appeal was dismissed for that reason alone. Mukandi Ram then preferred this petition under S. 115, C.P.C. His counsel contends that the learned District Judge has failed to exercise jurisdiction vested in him by law inasmuch as he has lost sight of and failed to apply the appropriate rule of procedure. According to him as all the mortgagees had congested the suit with a common defence, and the same questions which were common to all the mortgagees had been raised in his appeal by Mukandi Lal, the appeal was protected by the provisions of O. 41, R. 4, C.P.C. The other side, to repel that argument, relies upon O. 34, R. 1, C.P.C. which says that subject to the other provisions of the Code all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

It is also urged on behalf of the respondents that assuming that O. 34, R. 1, C.P.C. is restricted in its application to suits only, under R. 4 of O. 41 one plaintiff in an action in which his other co-plaintiffs are also interested can appeal for the benefit of the other plaintiffs only if they are arrayed as parties to the appeal. The obvious J object of R. 1 of O. 34 is no doubt to avoid once I for all separate suits by persons having any interest whether as mortgagees or mortgagors in the property comprising the mortgage, but the rule by its very terms can apply only to suits and its provisions are subordinate to the other provisions of the Code.

Learned Counsel for the respondents has not been able to cite any authority in support of his argument that in an appeal arising out of a mortgage suit, it is imperative that all those persons who were parties in the suit must be impleaded as parties to the appeal. So far as appeals in such suits go the procedure to be followed is the one laid down in O. 41, C.P.C. As stated above O. 34, R. 1 by its very language leases no doubt that it is subordinate to the other provisions of the C.P.C. which evidently includes the procedure with regard to appeals also. Order 41 being the only order in the C.P.C. that prescribes the procedure for appeals, the appeal to the District Judge in this case was apparently one under that Order.

3. The procedure laid in R. 4 and the power conferred by it would be exercisable even though the suit is one for redemption as by the terms of its provisions, the rule is vast enough to cover the appeals arising out of suits of all classes. It would be well to reproduce R. 4 of O. 41, C.P.C. here. It says that:

Where 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 to all the defendants, any one of the plaintiffs or of the 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.

This rule permits a decree being passed in favour of a non-appealing plaintiff or defendant even, provided the grounds on which the appeal by the appealing plaintiff or defendant is founded, are common to the appealing and non-appealing plaintiff or defendant. In such a case the non-appealing party gains the same benefit as if he has himself appealed although the memorandum of appeal did not contain his name. There is thus, no scope for doubt that in cases visualised by the Rule, the appeal by one appealing party is to all intents and purposes an appeal by all the unsuccessful plaintiffs or defendants as the case may be, the only indispensable condition being that the decree must have proceeded on grounds common to all of them. A decree can, therefore, in the circumstances and subject to the conditions stated in the Rule be passed in favour of though net against a person who has not appealed.

It is common ground that the mortgagees in the present case had opposed the suit not only collectively but for the same reasons. A decree for redemption was granted against all of them and that decree had proceeded on ground common to them all. One of the several defendants could, therefore, in the light of the provisions of O. 41, R. 4, C.P.C. obtain a reversal of the whole of the decree even though his co-defendants had not joined him in the appeal. A conflict does of course exist on the question whether a court can in the exercise of its powers under O. 41, R. 4 grant relief to a person who though he was a party to the suit is not made a party in the appeal.

As stated above usually and ordinarily a decree can on an appeal by a party be reversed or modified in favour of that party alone, but Rr. 4 and 33 of O. 41, C.P.C. read and used together would appear to confer ample powers upon a court to make an appropriate variation in a decree and in favour of a party who has not appealed where the interests of justice so require. The wide scope of the courts powers in such a case is evident from the language of the two Rules. Rule 4 has been repeated above in extenso and R. 33 says that

the appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to the part of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

The words although such respondents or parties may not have filed any appeal or objection are significant and appear to me to bear the import that the appellate court has jurisdiction to pass a decree even in favour of a party who has not been impleaded in the appeal. I may not be understood to be laying down widely that an appealing party seeking reversal or modification of a decree may not comply with the procedural requirements including the impleading of necessary parties, as despite R. 33 the normal rule is that a decree would not be touched by the appellate court so as to convert it to be of benefit to a party who has not appealed but there can be cases in which, from their very exceptional nature, interests of justice or the rules of good conscience or equity require that a decree should be passed or an alteration therein made even though the effect of it would be to give advantage to the party who has not appealed.

It is to that class of cases that R. 33 appears to me to have curative relevancy and as the power under the Rule is extraordinary, it should be exercised judicially with care and caution and only exceptionally in proper cases as distinguished from ordinarily. Shri Bihari Lal has referred us to some decided cases in particular to - Balaram Pal Vs. Kanysha (Kangsha) Majhi and Others, - Ambika Prasad and Another Vs. Jhinak Singh and Another, Balkaban Lal and Others Vs. Malik Namdar and Another, - '' AIR 1928 43 (Lahore) - ''Fazal Hussain Shah v. Ghulam Rasul'' (28) 110 Ind Cas 250 (Lah) (E) and - AIR 1946 399 (Lahore) (F). In AIR 1928 43 (Lahore) in which Ambika Prasad and Another Vs. Jhinak Singh and Another, : Balkaban Lal and Others Vs. Malik Namdar and Another, and Balaram Pal Vs. Kanysha (Kangsha) Majhi and Others, were mentioned and followed, it was held that R. 4 of O. 41 authorises one of the plaintiffs to an action in which other co-plaintiffs are also interested, to appeal for the benefit of the latter only if they are made parties to the appeal. All the same in the exercise of the powers conferred by O. 41, R. 20, C.P.C. the learned Judges allowed the appellant to implead the other persons in whose favour a decree was intended to be passed and that course was taken in spite of the time for impleading necessary parties had passed. The cases in which the opposite view had been taken were not cited and the learned Judges had thus before them one side of the picture only.

In 110 Ind Cas 250 (Lah) (E) Bhide J. simply followed AIR 1928 43 (Lahore) and held that one of the several plaintiffs can appeal for the benefit of all only if the latter are made parties. In AIR 1946 399 (Lahore) it was held that R. 4, o. 41 cannot be applied where the non-appealing plaintiff or defendants, as the case may be, has not been impleaded in the appeal at all and is not before the appellate court. The basis for that judgment was again the decision in AIR 1928 43 (Lahore) which had also been followed in - ''Kartar Singh v. Waryam Singh'', 40 Pun LR 6 (G). The observations of Achhru Ram J. who delivered the judgment, show that it was the rule of law on the subject that had beeji adopted in that High Court that had guided decision in the particulaf case before the Full Bench. The learned Judge said,

it is true that some of the other High Courts notably Calcutta have taken a different view and have held that the appellate court may, under O. 41, R. 4, reverse or vary the decree in favour of non-appealing plaintiff or defendant as the case may be, eveo though they have not been made parties to the appeal and axe not before the Court. There has, however, been no difference of opinion on the subject in this Court and on principle, the view taken in the above mentioned judgments seems to be the only correct view.

The cases containing the contrary view and referred to at the bar or the reasons on which they were based, were not mentioned, not even - ''Sunder Singh v. Krishna Mills Co. Ltd.'', AIR 1914 Lah 298 (H) or - ''Piyare Lal v. Chura Mani'', AIR 1918 Lah 227 (I), which were judgments of the Punjab Chief Court. The former was a case where a suit brought by several persons was dismissed and some of the plaintiffs had appealed and prayed foj reversal of the whole decree which had proceeded on ground common to all the plaintiffs, and it was objected that against the non-appealing plaintiff the decree had become final. It was held by Johnstone Mid Beadon JJ., that the appellate court was competent to set aside the whole decree in view of O. 41, R. 4 of the C.P.C. In AIR 1918 Lah 227 (I) during the pendency of an appeal one of the appellants died and no application was made to bring his legal representatives on the record till after the period of limitation had expired. It was contended that the appeal had abated in toto but it was held that the decree of the trial court having been passed on a ground common to all the defendants, the case was covered by O. 41, R. 4, C.P.C. and the appeal could therefore proceed.

4. All the other High Courts in India have taken the view that in a case to which O. 41, R. 4 applies a decree in favour of a person who was not a party to the appeal can be passed. In Gopalaswamy Iyengar and Others Vs. Nummachi Reddiar and Others, , it was held by a D.B. that where a joint decree was passed against defendants and only one of them appealed and it was found that the suit was barred against all, it must be dismissed even against the non-appealing defendants. The same view had been taken in - ''Artho Ram Pahu v. Artho Padhi'', 20 Ind Cas 952 (Mad) (K) by Sadasiva Aiyar and Tyabji JJ. who following - ''Chintaman v. Gangabai'', 27 Bom 234 (L) held that the policy of legislature in enacting R. 4 of O. 41 was that the appellate court should have full power to do justice to all parties, ''whether before it or not'', provided it goes into the whole case at the instance of parties who represent all the contentions necessary to be considered for the disposal or the case.

5. In Mohsham Ali Khan Vs. Mulu, it was held that it was open to an appellate court to vary the decree appealed against when there was a common defence even in favour of persons who had not appealed but who were parties to the suit. '' Maha Mangal Rai and Others Vs. Kishun Kandu is also an authority to the same effect. So far as the Calcutta High Court is concerned it is true that in Balaram Pal Vs. Kanysha (Kangsha) Majhi and Others, , Newbould and Duval JJ. laid down that where one of several plaintiffs prefers an appeal in which the other plaintiff''s are also interested,

R. 4 of O. 41 of the C.P.C. does not authorise him to proceed with the appeal without making the other plaintiffs parties thereto. In that particular case all the plaintiffs were necessary parties. The combined effect of Rr. 4 and 33 of o. 41 was not taken into account.

The later authorities of that High Court reported as Satulal Bhattacharjee and Others Vs. Asiruddi Sheikh, and Kamalakanta Debnath and Others Vs. Tamijaddin and Others, laid down the opposite rule. Satulal Bhattacharjee and Others Vs. Asiruddi Sheikh, , had the following facts. A suit was brought by the plaintiffs for a declaration of their title to certain lands and for recovery of khas possession in respect of the same. The first court granted a declaration of the plaintiff''s title to a fractional share in the lands in suit but dismissed the plaintiff''s suit for khas possession. On appeal the lower appellate court set aside that decision and decreed the plaintiff''s suit in full. Defendant 1 died during the pendency of the appeal in the lower appellate court and his two sons were substituted as his heirs in the record of the appeal. A second appeal was filed on behalf of both the sons.

One of the sons died during the pendency of the second appeal and his heirs were not brought on the record within the time allowed by law. It was held by Mitter and Mcnair JJ. that O. 41, R. 4 enabled one of the two heirs of the defendant to maintain the appeal from the whole decree, and it was competent to the appellate court to reverse or vary the decree in favour of all the plaintiffs or all the defendants as the case may be, although one of the defendants or one of the defendants heirs did not join in the appeal.

The same view was adopted in more express terms in Kamalakanta Debnath and Others Vs. Tamijaddin and Others, . It was held that reading Rr. 4 and 33 of O. 41 together, there could be no doubt that one of the defendants could file an appeal without impleading the other defendants as respondents, if the decree appealed from proceeded on a ground common to all of them and that the appellate court might therefore exercise the power of varying the decree in favour of the non-appealing defendants, although they had not been made parties to the appeal.

6. The Bombay High Court has held in the same strain as has been done by the High Courts of Madras, Allahabad and Calcutta referred to above. In that connection 27 Bom 284 (L) and - Gurunath Khandappagouda Patil Vs. Venkatesh Lingo Patil, may be referred to. In the last case ''Gurunath Knandappa v. Venkatesh (Q)'' a decree with costs was made against A, B and C in the trial court. The decree for- costs was executed against A. On appeal by B and C to which A was not party the decree was reversed. A applied for restoration. It was held that A was entitled to restoration though he was not party 10 the appeal as the appeal in effect and substance was in his favour.

Referring to O. 41, R. 4 Rangnekar J. observed that if there is an appeal from a decree, even though that appeal is made by one party, in which some other party

equally interested is not joined, but if the appeal is on a ground common to both of them, then the reversal on the variation in the decree in favour of the appellant would operate for the benefit of the other party and in that way therefore he would be entitled to contend that he was a party to the suit entitled to benefit by way of restitution. ''Misrilal Nayak v. Mt. Surji'', AIR 1950 PC 28 (R) is another authority in point. I would only repeat what their Lordships held:

One other point was raised by Mr. Parikh for respondents 1 to 4 namely that the appeal to the Board was not properly constituted. At the time when the appeal to the High Court was lodged respondent 1 was Santi Nayak, but he died before the hearing of the appeal and his heirs, who seem to have been his grandsons were brought on record. The present appellant is the eldest of such heirs. Very probably he is the Karta of the joint family but apart from this point upon which there is no evidence, all the heirs of Santa Nayak have exactly the same interest and one of them can appeal under O. 41. R. 4. Their Lordships think there is no force in this contention.

There is thus preponderant authority favouring the view that one defendant can file appeal without impleading the other defendants and that the appellate court can vary the decree although the other defendants had not been made parties to the appeal. The only condition in such cases is that the appeal must proceed on grounds common to the appealing and non-appealing defendants.

7. Following these authorities and for the reasons stated above, I would answer questions 1 and 3 in the affirmative and 2 in the negative. As the revision itself is also before us for decision, I would accept it and remand the case to the learned District Judge for disposing of the appeal on merits. Cost to abide by the result in that Court.

Mehar Singh J.

8. I agree.