

## MISCELLANEOUS CIVIL

Before Harbans Singh, C.J., and P. C. Jain, J.

HAKAM SINGH,—Petitioner.

versus

JASWANT SINGH, ETC.—Respondents.

C. Misc. No. 1963-C of 1971.

In

R.S.A. No. 1712 of 1968.

September 6, 1973.

Code of Civil Procedure (Act V of 1908)—Sections 151, 152 and 153 and Order 41 Rules 11 and 32—Order of High Court dismissing a regular second appeal in limine—Whether a decree—Application for amendment thereof—Whether lies to the High Court.

Held, that, from a bare perusal of the various relevant provisions of Order 41 of the Code of Civil Procedure, it is clear that two modes for the disposal of an appeal are provided. One mode conceives the expeditious disposal of cases which may be wholly frivolous, without giving notice to the respondents and causing them unnecessary trouble and expense while the other mode conceives a situation where the appeals which are arguable, are decided after giving notice to the respondents and giving them opportunity to support the decision of the trial court. In either case the appellate court applies its mind, considers the question of law and the evidence arising in the appeal, and in one case dismisses the appeal in limine as no case is made out to hear the respondent while in the other finds some arguable points of law which requires to be elucidated by the respondent. There is thus no difference in essence between a judgment dismissing an appeal under Order 41 rule 11 of the Code or that made under Order 41 rule 32. In both cases the rights of parties are finally adjudicated upon. A dismissal in limine of a regular second appeal is conclusive determination of the rights of the parties and is also a formal expression of an adjudication so far as the High Court is concerned. The non-framing of decree sheet in a case which is dismissed by High Court under Order 41 rule 11, is immaterial and that fact by itself would not warrant a finding that such an order is not a decree and that it would not merge in it the decree of the first appellate Court. The doctrine of merger will apply in such a case. Hence an order passed by the High Court dismissing a regular second appeal in limine under Order 41 rule 11 of the Code is a decree and an application for its amendment will lie to the High Court.

Case referred by Mr. Justice Prem Chand Jain on 3rd April, 1972 to a larger Bench for the decision of an important question of

Hakam Singh v. Jaswant Singh, etc. (Jain, J.)

law involved in the case. The Division Bench consisting of Hon'ble Justice Mr. Harbans Singh and Hon'ble Mr. Justice P. C. Jain decided on 6th September, 1973, the important question referred to and sent back the case to the Single Judge for deciding the case on merits.

Petition under Sections 151, 152 and 153 of the Code of Civil Procedure praying that the original file containing the plaint in the trial Court be called and the petitioners (Plaintiff-respondent) be permitted to correct the description of the land in the plaint and further praying that the said mistake be corrected in the judgment and decree also by including the land of rectangle No. 34 Killa No. 4, area measuring 8 Kanals.

(Original Suit No. 129/107/196 of 1965 decided by Shri M. L. Mirchia, Senior Sub-Judge, Ferozepore on 21st May, 1968.)

Balraj Bahl, Advocate, for the applicant respondent.

K. L. Sachdev, Advocate, for the appellant.

REFERRING ORDER

JAIN, J.—In order to appreciate the controversy raised before me, some salient features of the case may be noticed which are as follows:—

(2) Jaswant Singh and Pritam Singh, minors, through Harbans Singh, their uncle, filed a suit for possession of land measuring 125 Kanals and 14 Marlas, on the allegation that their mother Smt. Kartar Kaur, sold the disputed land without the permission of the Court, in favour of Hakam Singh. The suit was decreed by the trial Court and on appeal the judgment and decree of the trial Court were affirmed by the Additional District Judge, Ferozepur. Still dissatisfied, Hakam Singh, preferred R.S.A. No. 1712 of 1968 in this Court, which came up for preliminary hearing before me on 8th November, 1968. After hearing the learned counsel for the appellant, I sent for the records. The case was again put up for preliminary hearing before me on 10th December, 1968, but finding no merit in the appeal, I dismissed the same in *limine*, on that very day. It seems that at the time of execution it transpired that while giving details of Killa numbers which were sold to Hakam Singh, Killa No. 4 of rectangle No. 34, measuring 8 Kanals was omitted at the time of the filing of the suit in the plaint, though a decree for the entire land sold was prayed for. Due to this mistake, the decree that was prepared by the trial Court and affirmed on appeal by the learned Additional District Judge, did not contain the omitted Killa number.

(3) On the discovery of this fact, Jaswant Singh and Pritam Singh filed a fresh suit on 14th January, 1970, for possession of the said land measuring 8 Kanals. Hakam Singh filed written statement on 20th May, 1970. The plaintiffs were directed to file replication on 17th June, 1970. Instead of filing replication, the suit was got dismissed.

(4) Thereafter the present application was filed on behalf of Jaswant Singh and Pritam Singh, minors under sections 151, 152 and 153 of the Code of Civil Procedure, praying for the amendment of the decree passed in his favour in which Killa No. 4 of rectangle 34 was omitted.

(5) Notice of this application was given by me on 21st August, 1970. Hakam Singh, contests this application and has also filed a reply. Mr. Sachdev, learned counsel for Hakam Singh has raised a preliminary objection to the effect that this Court has no jurisdiction to amend the decree. In substance the contention of the learned counsel is that where the appeals are dismissed under the provisions of Order 41, rule 11 of the Code of Civil Procedure, it is the trial Court or the first Appellate Court, which have jurisdiction to amend the decree and not this Court. In support of his contention, the learned counsel has placed reliance on a Division Bench decision of the Patna High Court in *Batuk Prasad Singh v. Ambica Prasad Singh* (1), a Division Bench decision of the Oudh High Court in *Pt. Tribeni Prasad Tewari v. Mt. Rukmid Devi and others* (2), a Single Bench decision of the Bombay High Court in *Hussain Sab v. Sitaram Vighneshwar* (3) and a Single Bench decision of this Court in *Smt. Murti Devi and others v. Bishan Singh and others* (4). On the other hand it is contended by Mr. Bahl, learned counsel for the applicants that it is immaterial whether the appeal is dismissed *in limine* under the provisions of Order 41, rule 11 of the Code of Civil Procedure or after hearing the Parties and following the procedure laid down in rules 30 to 37 of Order 41. The learned counsel, in support of his contention, referred to a Division Bench decision of the Andhra Pradesh High Court in *Annapu Ramanna v. Ponduri Sreeramulu and others* (5), a Division Bench decision of the

(1) A.I.R. 1932 Patna 238.

(2) A.I.R. 1941 Oudh 251.

(3) A.I.R. 1953 Bom. 122.

(4) 1966 C.L.J. (Pb.) 195.

(5) A.I.R. 1958 A.P. 768.

Hakam Singh v. Jaswant Singh, etc. (Jain, J.)

Madhya Pradesh High Court in *Komalchand Beniprasad v. Pooranchand Moolchand* (6), a Division Bench decision of the Allahabad High Court in *Durga Singh v. Wahid Raza and others* (7), a Single Bench decision of the Madras High Court in *Devalraju Subbamma v. Devalraju Madhavarao and others* (8) and a Single Bench decision of the Calcutta High Court in *Altap Ali v. Jamsur Ali* (9).

(6) After hearing the learned counsel for the parties, and after going through the various judicial pronouncements of the various High Courts, I find that the respective contentions of the learned counsel for the parties are supported by the decisions cited by them and on both sides weighty reasons are given for forming that particular view. However, Mr. Sachdev, learned counsel for Hakam Singh has an edge over the other side because of a Single Bench decision of this Court in *Smt. Murti Devi's case* (supra); in that decision, without discussing any authority, I. D. Dua, J., as his Lordship then was observed thus:—

“It is common case before me that against the decree and judgment of the learned Senior Subordinate Judge, an appeal was preferred in this Court but the same was dismissed *in limine*. Now, if that be so, then there is no question of this Court's decree superseding or replacing that of the Court of first appeal. The result, therefore, is that the Court below must be considered to have declined to exercise the jurisdiction vested in it on wholly erroneous and illegal grounds because the petition, if meritorious, could only be disposed of by that Court and not by High Court.”

In the presence of this decision even if I am inclined to take a different view, I find it advisable to refer the case for decision to a larger Bench; otherwise also in view of the conflicting decisions of the various High Courts referred to above, I feel that it would be proper if authoritative pronouncement is given by this Court on this point. Accordingly I direct that the papers of this case be laid before my Lord, the Chief Justice, for appropriate orders. As I am referring the case on the preliminary objection for decision to a larger Bench,

(6) A.I.R. 1970 M.P. 199.

(7) A.I.R. 195 All. 226.

(8) A.I.R. 1946 Mad. 492.

(9) A.I.R. 1926 Cal. 638.

the question whether, in the circumstances of the case, amendment of the decree should be allowed or not, may also be decided by the Bench.

#### JUDGMENT OF DIVISION BENCH

(7) This judgment and order of ours would be read in continuation of the referring order, dated April 3, 1972.

(8) On the admitted facts, the important question of law that requires determination, is whether an order passed by this Court dismissing a regular second appeal *in limine*, is a decree or not and whether in such cases, an application for the amendment of the decree would lie to this Court or before the trial Court or the first appellate Court, as the case may be? The answer to the question would depend upon determining the nature of the dismissal of an appeal under Order 41 rule 11 of the Code of Civil Procedure, that is, whether the order of dismissal is a decree or is an order as distinguished from a decree.

(9) It was contended by Mr. Behl. learned counsel for the petitioner, that the order passed under the provisions of Order 41 rule 11, is a decree, that there is no difference in principle between the dismissal of the appeal *in limine* and the disposal of the appeal after notice that even when an appeal is dismissed *in limine*, the dismissal entails confirmation of the decree of the lower appellate Court, and that it is this Court alone which has jurisdiction to amend the decree. On the other hand, it was sought to be argued by Mr. Sachdeva, learned counsel for the respondents that when an order is passed under the provisions of Order 41 rule 11, then no decree is drawn up unlike the case decided under the provisions of Order 41 rules 32 to 37, as under those provisions the judgment of the appellate Court must be a judgment confirming, varying or reversing the decree from which the appeal is preferred and the decree that is drawn up is a decree confirming or varying or reversing the decree of the lower Court. Our attention was also drawn by the learned counsel to rule 9 of Chapter 4H of Volume 5 of the Rules and Orders of this Court where it is provided that no decree shall be drawn up in cases in which the decision of the lower Court is confirmed under Order 41 rule 11 of the Code of Civil Procedure. It was also contended that the Legislature did not intend to treat the order of dismissal as a decree and that is why the amendment was made in section 551 (now

## Hakam Singh v. Jaswant Singh, etc. (Jain, J.)

equivalent to Order 41 rule 11 of the Code of Civil Procedure), by section 47 of Act VII of 1888, by introducing the words 'may dismiss the appeal' in place of the words confirm the decision, of the Court against whose decree the appeal is made."

(10) As is evident from the referring order, there is a conflict of opinion so far as the judicial pronouncements of the various High Courts are concerned. The decisions of the Calcutta, Madras, Allahabad and Andhra Pradesh High Courts, support the proposition enunciated by the learned counsel for the petitioner while the decisions of the Bombay, Patna and Oudh High Courts, and, in addition, a Single Bench decision of this Court, support the contention raised by the learned counsel for the respondents.

(11) After giving my thoughtful consideration to the entire matter, in the light of the judicial pronouncements referred to before us, I am of the view that the contention raised by the learned counsel for the petitioner, has considerable force and for the reasons to be recorded, I find myself in full agreement with the view taken by the learned Judges of the Calcutta, Madras, Allahabad and Andhra Pradesh High Courts.

(12) From the bare perusal of the various relevant provisions of Order 41, I find that two modes for the disposal of an appeal are provided. The one mode conceives the expeditious disposal of cases which may be wholly frivolous, without giving notice to the respondents and causing them unnecessary trouble and expense while the other mode conceives a situation where the appeals which are arguable, are decided after giving notice to the respondents and giving them opportunity to support the decision of the trial Court. There is no gain saying that in either case the appellate Court applies its mind, considers the question of law and the evidence arising in the appeal, and in one case dismisses the appeal *in limine* as no case is made out to hear the respondent while in the other finds some arguable point of law which requires to be elucidated by the respondent. In this situation, I hardly see any justification for holding that there is difference in essence between a judgment dismissing an appeal under Order 41 rule 11 of the Code of Civil Procedure or that made under Order 41 rule 32 of the Code of Civil Procedure. In both the cases the rights of parties are finally adjudicated upon.

(13) This Court, while dealing with appeals under the provisions of Order 41 rule 11, as earlier observed, applies its mind fully to

the legal points as well as to the evidence, if referred to, at the time of arguments, and finding that the case is frivolous and without any merit, dismisses the same. Such dismissal results in conclusive determination of the rights of the parties and is also a formal expression of an adjudication so far as this Court is concerned. If the appeal is dismissed *in limine*, after considering the merits, it does not mean that such a dismissal does not result in the confirmation of the decree appealed against. Moreover, this argument also does not appeal to me that a dismissal under Order 41 rule 11 is not an adjudication of the rights of the parties, and amounts to nothing more than a refusal to entertain the appeal. It is correct that the Court acting under Order 41 rule 11 does not make any alteration in the judgment or decree appealed against. Nevertheless, it is the final determination of the controversy as it adjudicates upon the questions raised by the appellants so far as it is necessary to adjudicate upon them for the purposes of the appeal.

(14) Further under rule 9 of Chapter 14-B of Volume I of the Rules and Orders of this Court, it is provided that confirmation of a decision by the appellate Court in exercise of the powers under Order 41 rule 11, falls within the definition of 'decree' as given in section 2(2) of the Code. This rule, though applicable to the subordinate Courts, further strengthens the view that an order passed under Order 41 rule 11 is to be construed as a decree. It is correct that under rule 9 of Chapter 14-B of Volume I, decree is required to be framed when an appeal is dismissed under Order 41 rule 11 while in the case of this Court, no decree is required to be framed as is mentioned in rule 9 of Chapter 4-H of Volume 5. However, this difference is of no essence as the order passed under Order 41 rule 11 satisfies all the ingredients of a decree. In my view, the non-framing of decree-sheet in a case which is dismissed by this Court under Order 41 rule 11, is immaterial and that fact by itself would not warrant a finding that such an order is not a decree and that it would not merge in it the decree of the first appellate Court, or in other words, the doctrine of merger would not apply.

(15) During the course of arguments, much stress was laid by Mr. Sachdeva, learned counsel for the respondents, on the fact that the dismissal of an appeal under Order 41 rule 11, leaves the decree of the lower Court untouched, neither confirmed nor varied nor reversed, and it remains the decree of the lower Court which has to be amended and in such circumstances the order of this Court dismissing the appeal *in limine* is simpliciter an order and not a

Hakam Singh v. Jaswant Singh, etc. (Jain, J.)

decree. Support was also sought from the amendment that was made in section 551 of the old Code (now Order 41, rule 11) by section 47 of Act VII of 1888, by introducing the words 'may dismiss the appeal' in place of the words of confirm decision of the Court against whose decree the appeal is made'. These arguments of the learned counsel have been advanced on the strength of the decision of the Bombay High Court in *Bapu and others v. Vajir and others* (10), and the judicial pronouncement of the Patna and Oudh High Courts to which reference has been made in the referring order. After giving my thoughtful consideration, I do not find much substance in the argument of the learned counsel for the respondents and with utmost respect to the learned Judges, I find myself unable to agree with the view taken in those judicial pronouncements. The change in the language which was brought about in section 551 by section 47 of Act VII of 1888, is hardly of any consequence. It would be pertinent to observe at this stage that in *Bapu's case*, the learned Judges have themselves conceded that the dismissal under section 551 is a decree as is apparent from the following observations:—

"Mr. Goverdhanram argues that the dismissal of the appeal under section 551 is a decree and appealable under section 584. That may be conceded. Still it is clearly not one confirming the decree of the lower Court".

If I accept the contention of the learned counsel for the respondents, then it would result in the existence of two decrees in one and the same case at one and the same time, that is, (a) the decree of the Court below which remains untouched, and (b) the decree of the Court which dismisses the appeal *in limine*. This situation was even envisaged by the learned Judges of the Patna High Court in *Batuk Prasad Singh v. Ambica Prasad Singh* (1), as is evident from the following observations:—

"The only flaw that may be found in the view taken by the Bombay High Court is that the dismissal of the appeal being conceded to be a decree within the meaning of section 2, Civil Procedure Code, there would be two decrees in existence, one of the lower Court and the other of the Court dismissing the appeal under Order 41 rule 11(1)."

In my opinion, it could not be envisaged nor could it be the intention of the Legislature that two decrees should remain in existence.

(10) I.L.R. 21 Bom. 548.



Further I am of the view that the whole case is being looked at from a perspective which is not tenable. Once we concede that the order dismissing the appeal under Order 41, rule 11 is a decree, then it automatically results in the merger of the decree of the Court below, and as a result thereof it is this Court which can amend the decree. Moreover, the question of jurisdiction cannot be decided on the premises that the decree of the Court below remains untouched; rather it has to be decided keeping in view the fact that it is the judgment or order of this Court which has finally determined the rights of the parties. It is beyond my comprehension that after the final adjudication by this Court, the jurisdiction to amend the decree of the lower Court which has been affirmed as a result of the dismissal of the appeal would vest in the inferior Court. If such a course is permitted, then the result that would follow, would be that the lower Court would be in a position to again reopen the matter between the parties which had been finally adjudicated upon and settled between the parties by this Court. This course certainly is neither permissible nor warranted by any law. As earlier observed, I am in full agreement with the view taken by the High Courts of Andhra Pradesh, Allahabad, Madras and Calcutta and with respect, am unable to concur with the view taken by the learned Judges of the High Courts of Patna, Bombay and Oudh and a learned Single Judge of this Court in *Shmt. Murti Devi and others v. Bishan Singh and others* (4).

(16) In the light of the discussion above, I hold that the order passed by this Court dismissing the appeal *in limine* under Order 41, rule 11, is a decree and that an application for the amendment of the decree lies to this Court. The case now shall go back to the learned Single Judge for deciding the same on merits.

HARBANS SINGH, C.J.—I agree.

APPELLATE CIVIL

Before Man Mohan Singh Gairah and D. S. Tewaria, JJ.

UNION OF INDIA,—Appellant.

versus

M/S. AMIN CHAND PYARE LAL,—Respondent.

R.F.A. No. 120 of 1962

September 10, 1973.

Indian Railways Act (IX of 1890)—Section 77—Claim for compensation for short delivery of goods under section 77—Whether