

Hira Lal vs B. Firangi Lal And Anr. on 25 April, 1955

Equivalent citations: AIR1955ALL562, AIR 1955 ALLAHABAD 562

JUDGMENT

Sahai, J.

1. This is a reference by a learned Single Judge of this Court under Chapter V Rule 6 of the Rules of Court. The following question has been referred to us for answer:

"Whether the interpretation put by the Full Bench has the effect of cutting down the powers conferred by Order 41, Rule 33, and if so, to what extent"?

The Full Bench case to which reference has been made is the case of 'Rangam Lal v. Chandu' 34 All 32 (A).

2. The facts of the case are given in full in the judgment of the learned Single Judge dated 4-9-1953, disposing of the second appeal and in his order dated 1-2-1955 referring the question formulated above to a Bench of two Judges. Under the circumstances it is not necessary for us to give the facts of the case in detail.

3. Briefly stated, the facts of the case are, that the plaintiff filed a suit for removal of obstruction placed by the defendants over a rasta by constructing a wall over it, and for the issue of an injunction. His case was that he was using this rasta, which is an old one, all along. But in 1944 suddenly the defendants closed that rasta. He was allowed for some time to pass through another gate of the Dharamshala. But ultimately that gate too was closed, which necessitated the filing of the present suit.

4. The reliefs claimed, in substance, were as follows:

"(a) That a permanent injunction be issued to the defendants directing them to demolish that portion of the wall of the Ahata which the defendants have constructed on the land of Rasta (old No. 37) on the eastern side of the road and which was shown in the map by letters A and B, and the defendants may further be directed to put the rasta in its original condition and not to interfere with the passage of the plaintiff in any manner,

(b) In case it was held that the plaintiff was not entitled to get the wall of the Ahata demolished, the defendants may be directed to open the door 'X' through which the plaintiff used to have his passage previously and to restore it in its original condition.

(c) If the Court was of opinion that along with the above mentioned reliefs, the plaintiff was entitled to possession also, a decree for possession may also be passed."

5. The suit was contested by the defendants on a number of grounds. The trial court rejected the pleas taken in defence and decreed the plaintiff's suit in terms of relief B only claimed in the plaint. The plaintiffs did not file any appeal against the decree of the trial court but submitted to it.

6. One of the defendants filed an appeal to the lower appellate court. The lower appellate court modified the decree of the trial court by decreeing the plaintiff's suit by granting the plaintiff a decree in terms of the relief (a) claimed in the plaint instead of relief (b).

7. Thereupon, the aforesaid defendant filed a second appeal to this Court and one of the points urged before the learned Single Judge was -that relief (a) having been refused and the plaintiff-respondent not having appealed against it, it was not open to the lower appellate court to grant relief (a) which was a broader relief than the relief granted by the trial court. This plea was rejected by the learned Single Judge, on the ground that the lower appellate court had ample powers to grant that relief under the provisions of Order 41, Rule 33, C. P. C. In the result, none of the points raised by the learned counsel for the appellant found favour with the learned Judge who, by his judgment dated 4-9-1953 dismissed the appeal.

8. On 19-11-1953, an application for review of the judgment was filed by the defendant-appellant, on the ground that in view of the Full Bench decision of this Court in -- '34 All 32', (A) the lower appellate court had no jurisdiction to pass the decree that it did. Thereupon the learned Single Judge, before deciding the application for review on merits, referred the aforesaid question to a larger Bench for opinion.

9. Order 41, Rule 33, C. P. C. runs as follows:

"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 part only 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 an appeal or objection.

Provided that the appellate court shall not make any order under Section 35A in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order".

10. It would be manifest from a perusal of the provisions of Order 41 Rule 33, C. P. C., that powers given to an appellate court are very wide. The scope of the aforesaid rule as well as the effect of the Full Bench decision reported in - '34 All 32' (A), was considered by Iqbal Ahmad, J. in the case of -- "Secretary of State v. Basti Begam," 1937 All LJ 804 (B).

11. The facts of the aforesaid case were that one Basti Begum brought a suit in forma pauperis against the appellant for recovery of Rs. 5000/- as damages on the allegations, that due to -the gross negligence of the defendant her only son met his death. The suit was contested by the defendant on the only ground that the damages claimed were excessive and the plaintiff was entitled only to a sum of Rs. 500/-. The trial court decreed the plaintiff's claim for a sum of Rs. 2000/- but directed that court-fee payable on the plaint should be deducted out of the amount decreed.

The plaintiff submitted to the decree of the trial court but the defendant filed an appeal to the lower appellate court. The defendant's appeal was allowed in part by the lower appellate court which reduced the amount decreed to the plaintiff from Rs. 2000/- to Rs. 1020/-. As regards the court-fee payable on the plaint the lower appellate court modified the order of the trial court by directing that the plaintiff will be liable to pay court-fee on Rs. 1020/-.

The defendant was directed to pay the remaining court-fee. There was an appeal to this Court by the defendant and the point urged was that the order passed by the lower appellate court as regards the payment by the defendant of the court-fee on the amount of the claim dismissed was not in accordance with law, and that the plaintiff ought to have been ordered to pay the court-fee on the amount of claim, that was dismissed by the trial court.

12. Reliance was placed in support of this contention on the case of -- 'Ganga Dahal Rai v. Mst. Gaura', AIR 1916 All 327 (C). The plea raised by the defendant was accepted and given effect to and this Court directed that the plaintiff had to pay court-fee on the portion of the claim dismissed and the defendant had to pay court-fee on the portion of the claim decreed. The learned Judge observed as follows:

"The suit was brought in December 1932 when enhanced court-fee was payable and the court-fee payable on the entire amount of the claim was Rs. 357-8-0. The result of the order passed by me will be that out of the sum of Rs. 357-8-0 the defendant will have to pay Rs. 113-12-0 and the plaintiff will have to pay Rs. 243-12-0 on account of the court-fee payable on the plaint. But in accordance with the decree of the lower appellate court the plaintiff was liable to pay court-fee only to the extent of Rs. 113-12-0.

Therefore, as a result of the order passed by me the plaintiff will have to pay an additional sum of Rs. 130/- on account of court-fee. The question then arises whether in the absence of an appeal or a cross-objection by the plaintiff. I have jurisdiction to grant her relief with respect to Rs. 130/- if I consider it just to do so".

"A Full Bench of this Court in -- 'Rangam Lal v. Chandoo' (A), while pointing out that the words of the rule are very wide and that care and judicial discretion must be used by appellate courts in the exercise of the powers conferred by the rule, held that the object of rule 33 is manifestly to enable the court to do complete justice between the parties to the appeal.

It was further observed in that case that where it is essential in order to grant relief to an appellant that some relief should, at the same time, be granted to the respondent also, the court may grant a relief to the respondent although he has not assailed the decree appealed against either by means of an appeal or by cross-objection".

13. In the end relying upon the aforesaid principles of law laid down in the case of - 'Rangam Lal' (A), he increased the amount of damages by a sum of Rs. 130/-.

14. The same view was taken by their Lordships of the Privy Council in the case of -- 'Iswaraya v. Swarnam Iswarayya' AIR 1931 PC 234 (D).

15. The facts of the case were that a wife who had obtained a decree for judicial separation against her husband was allowed permanent alimony of Rs. 120/- for her life, and an order was also made for payment of a sum in every month in respect of the children of the marriage. Subsequently three years later two applications were made to the District Judge, one by the wife and other by the children. The District Judge ordered an increase in the amount of maintenance to the children, and further allowed a sum of Rs. 160/- per month to the wife, thus giving her an increase of Rs. 40/- a month.

The respondent appealed to the High Court but the wife did not. The High Court held that since the children had ceased to be minors, no provisions could be made for them; but holding that the District Judge could and should have fixed for the wife alimony at Rs. 260/- a month, allowed her alimony at the said rate in spite of the fact that the wife had not filed any appeal or cross objection.

16. The husband appealed against the decree of the High Court to His Majesty in Council and one of the points urged before their Lordships was that the High Court had no power under Order 41, Rule 33, C. P. C. to vary the amount (of Rs. 160/-) a month which the lower court had by its order of 8-3-1927 decreed in favour of the wife.

17. While rejecting this plea their Lordships observed:

"There was here no reason why the wife should appeal from the order which the District Judge had made; there was every reason why she should be satisfied therewith. On the other hand, once the appellate court felt constrained to cut out all payments to the wife for the maintenance and education of the children, it was open to that court to take the view that complete justice could not be done unless the amount ordered to be paid to the wife for alimony was increased.

The appellate court in fact took that view; and their Lordships are not prepared to say either that the view could not properly be taken or that effect could not be given thereto by exercising the powers conferred upon an appellate court under Order 41 Rule 33."

18. The same view was taken in the case of -- "Tarini Charan Sarkar v. Bishunchand", AIR 1917 PC 111 (E), wherein it was observed:

"Their Lordships think it would have been a matter for regret if the court of appeal has been thus hampered in making the order, which their Lordships regard as right in all the circumstances of the case But they think abundant power is given to the court by Ss. 107 and 151 of the Code of Civil Procedure 1908 and Order 41 Rule 33 of the same statute. Section 107 gives powers, if necessary, Intake additional evidence; and Rule 33 of Order 41 gives power to pass any decree and give any orders which ought to have been passed or made, and to pass or make ,such further or other decrees or orders as the case may require".

19. The same view was taken in the case of -- 'Mohsham All Khan v. Mullu', AIR 1927 All 37 (F), where it was held that it was open to the appellate court to vary the decree appealed against where there is a common defence in favour of persons who have not appealed but who were parties to the suit.

20. The same view was taken in the case of -- 'Tamizan v. Nanhey Lal', AIR 1929 All 334 (G), by a Single Judge of this Court, who held that an appellate court was entitled to grant relief to a defendant who could have appealed but had not appealed.

21. The same view was taken by a Bench of this Court in -- 'Maksud Ali v. Abdulla', AIR 1928 All 77 (H).

22. In the- case of -- 'Lankapara Tea Co. v. Gopalpur Tea Co. Ltd.', 63 Cal 1008 (I), a Division Bench of Calcutta High Court held that Order 41 Rule 33 of the Code of Civil Procedure empowers the appellate court to pass a decree for perpetual injunction in favour of the plaintiff in spite of his prayer for the same being refused by the lower court and also in spite of his omitting to ask for it in his memorandum of cross-objection to the appeal.

23. A similar view was taken by a Full Bench of the Madras High Court in the case of -- 'Subramanian v. Sinnammal', AIR 1930 Mad 801 (J). The learned Judges observed as follows:

(A) "The illustration to the rule is a type of one class of cases which calls for the exercise of the powers conferred by Rule 33, but it does not by any means exhaust the class of cases in which the powers of the appellate court under this rule may be invoked."

(B) "Where a plaintiff, being dissatisfied with a decree passed in his favour, prefers an appeal, the appellate court, in a proper case, has jurisdiction to exercise its powers in favour of the respondent by dismissing the plaintiff's case in toto, though the respondent did not prefer a cross-appeal or memorandum of objections challenging the decree passed by the first court." In the case of - 'Debendra Narayan Singh v. Narendra Narayan Singh', AIR 1920 Cal 428 (K), a Division Bench of the Calcutta

High Court recognised the extensive jurisdiction of the appellate Court under Order 41, Rule 33, C. P. C. The decision of the Calcutta High Court in -- 'Jogendra Kishore v. Nasimuddin Sardar', AIR 1920 Cal 990 (L), shows unmistakably the view of that Court on this matter. The facts of the case as given in the headnote are as follows:

"In a suit for the rent of a holding the first Court passed a decree in favour of the plaintiff for a proportionate amount of the rent payable in respect of the land included in the plaint, on the ground that the holding coveted more lands than were included in the plaint. There was no appeal or cross objection by the defendant, but on an appeal by the plaintiff the appellate court held that having regard to the manner in which the suit had been framed the plaintiff would be entitled to no relief and accordingly dismissed the entire suit of the plaintiff. The High Court held:

"That having regard to the very wide powers given to an appellate court under Order 41, Rule 33, Civil P. C., the decision of the appellate Court dismissing the whole of the plaintiff's suit, in the absence of a cross-appeal or cross-objection by the defendant, was not without jurisdiction."

24. The learned Judge hearing the aforesaid case observed as follows:

"There can be no doubt that the wording of Rule 33 is very general and in this respect gives very wide powers to the Court of appeal. But the learned Vakil for appellant however urged in reply that Rule 33 is controlled by Rule 22 and that the wide powers given by Rule 33 can only be exercised in case the whole matter is brought into controversy before the appellate Court by a cross-appeal or a cross-objection filed under Rule 22. I am not satisfied that this is a correct view of the scope of Rule 33."

25. Similar view has been taken by other High Courts in India and it is not necessary for us to notice all those cases, in view of the fact, that our own Court has consistently taken the view that the powers of the appellate court under the provisions of Order 41, Rule 33, C. P. C., are very wide.

26. In the Full Bench case of '34 All 32 (A)', which had necessitated this reference, the learned Judges constituting the Full Bench in considering the scope of Order 41, Rule 33, C. P. C., observed as follows:

"The words are no doubt very wide, but we think that care and judicial discretion must be used by appellate courts in the exercise of the powers conferred by the rule. In a proper case the court, of course, is quite entitled and should not hesitate to exercise them. It is not easy, nor perhaps expedient, to lay down any hard and fast rule."

27. It is no doubt true that in the aforesaid case this Court modified the decree of the District Judge dismissing the plaintiffs suit in its entirety by allowing him a decree for Rs. 96/11/11, that the

defendant had neither appealed nor filed any cross-objection in the lower appellate court against the decree of the trial court. - The decision in the aforesaid case was based on the particular facts of that very case and it cannot, by any show of reasoning, be urged that it has the effect of curtailing the powers given to an appellate court under the provisions of Order 41 Rule 33, C. P. C.

28. The effect of the decision of 'Rangam Lal's case (A)', was considered by a Bench of this Court in the case of -- 'Mahmud Hasan v. Lauti Ram', AIR 1927 All 453 (M).

29. Briefly, the facts of the case were that on 28-5-1897 five properties were usufructuarly mortgaged in favour of two ladies Aminat-un-nissa and Ghafur-un-uissa. The money agreed to be advanced by the first-named lady was Rs. 27, 500/-, and by the second Rs. 1500/-. The way in which the detail of the consideration money was made up was that one sum of Rs. 13,000/- was left for payment in respect of two mortgages: dated 21-7-1893, a sum of Rs. 4,200/- under a mortgage of 19-9-1892; another sum of Rs. 4,000/- under a subsequent mortgage and a final payment of Rs. 6,300/- by the promissory note of the mortgagees.

The plaintiff asked for a declaration that the property Ibrahimpur was not subject to any charge created under the mortgage-deeds and 'there was an alternative prayer that if there was any charge it was limited to Rs. 987/1/9 and there was a prayer, in its nature formal, that any other relief which can be granted to the plaintiff may also be granted to him.

30. The trial court came to the conclusion, that no redemption decree could be granted, but he found in favour of the plaintiff that the particular property had been freed from any charge upon it. The plaintiff did not appeal, and when the matter came before the District Judge he disagreed with the lower court that the sum of Rs. 6,800/- had never been paid by the mortgagees. He went on to consider whether the mortgage as regards this particular property had been redeemed and he came to the conclusion that the mortgagees had been paid back the loan of Rs. 6800/- and was satisfied that nothing was due to the mortgagees.

He further held that the suit for declaration was barred by limitation. The case, therefore, was in this position that the plaintiff, having asked for a declaration' which the lower appellate court found was barred by limitation, and it having been found in his favour that there was no encumbrances on the property, the question arose as to what in the circumstances was the proper thing to do. The plaintiff had partially succeeded in the lower court but he had neither filed any cross-objection nor had he appealed on the matter decided adversely to him, namely redemption.

The lower appellate court being of opinion that he could proceed under Order 34 Rule 9 and that he could direct the defendants to retransfer to the plaintiff that part of the mortgaged property which was the subject of the action, and he did accordingly.

31. The defendant came up in appeal to this Court and one of the points raised before this Court was that the lower appellate court had no jurisdiction to do so. In repelling this contention the learned Judges observed as follows:

"It is said that that cannot be done because, having regard to the language of Order 41 Rule 33 and the caution as to the application of that section which is contained in the case of -- 'Rangam Lal v. Chandu', (A)', we must not in this case allow the relief which the District Judge has granted the plaintiff because if we did so we would be acting in contravention of the provisions of Order 41, Rule 22. There are, however, passages in that judgment which show that the circumstances of each particular case must be borne in mind, and at p. 35, the following observations are to be found:

"The object of Rule 33 is manifestly to enable the court to do complete justice between the parties to the appeal. Where, for example, it is essential in order to grant relief to an appellant that some relief should at the same time be granted to the respondent also, the court may grant relief to the respondent, although he has not filed an appeal or preferred an objection, Of such cases the illustration to the rule is a type." They further observed:

"In our opinion the language of Order 41 Rule 33 is wide enough to support the decision of the District Judge. He very wisely chose what, in our opinion, was the proper course. He could, had he been extremely technical, have said that as the respondent had filed no cross-objection and had not independently appealed that, therefore, he could not grant the relief to which, in his opinion, the respondent was most justly, entitled. Had he done that it is possible that on a strict construction of Order 41, Rule 33 we might have upheld that, but we should have held that grudgingly arid taken the view that it was an unfortunate decision. This decision is in consonance with justice, equity and good conscience and if is, in our opinion, one which must be upheld."

32. In my opinion the interpretation put by the Full Bench case of ' 34 All 32 (A)', has not the effect of cutting down the powers conferred by Order 41 Rule 33, C. P. C., upon an appellate court. In the view I have taken the question of extent does not arise.

33. In view of what I have said above my answer to the question is in the negative.

Agarwala, J.

34. I agree to the answer proposed by my learned brother. If I may respectfully say so, the question referred by the learned Single Judge was too wide in its scope. It would have been better if the learned Judge had referred the question of the interpretation and of the applicability of Order 41, Rule 33, C. P. C., to the facts of the case before him. The portion of the question "if so to what extent" if properly answered might include matters that may not strictly be necessary for the decision of the case itself.

BY THE COURT

35. Let our answer be sent to the learned Single Judge who made the reference.