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February, 11.

PANNALAL

v.

STATE OF BOMBAY AND ORS.

(P. B. GAJENDRAGADKAR, K. N. WANCHOO, M. HIDAYATULLAH, K. C. DAS GUPTA and J. C. SHAH, JJ.)

Civil Procedure—Respondent seeking relief against a co-respondent by way of cross-objection—Power of Court of Appeal—Code of Civil Procedure, 1908 (Act 5 of 1908), O. 41, rr. 22, 33.

The appellant brought three suits claiming full payment with interest in respect of three hospitals constructed by him in execution of three separate contracts between him and the Deputy Commissioner. The trial Judge decreed the suits for part of his claim against the State of Madhya Pradesh and held that other defendants were not liable, and accordingly dismissed the suits against them. On appeals preferred by the State of Madhya Pradesh, the High Court set aside the decree against the State Government and allowed the appeals with costs. The plaintiff at that stage prayed for leave of the High Court to file a cross-objection and also for decrees to be passed against the Deputy Commissioner under O. 41, r. 33 of the Code of Civil Procedure, which was rejected and all the suits were dismissed. It was urged that (1) the State Government was liable in respect of all of these contracts and (2) the High Court ought to have granted relief against such of the other defendants as it thought fit under O. 41, r. 33 of the Code of Civil Procedure.

Held, that the State Government was not liable in respect of any of these contracts.

Held, further, that the wide wording of O. 41, r. 33 empowers the appellate court to make whatever order it thinks fit, not only as between the appellant and the respondent but also as between a respondent and a respondent. It could not be said that if a party who could have filed a cross-objection under O. 41, r. 22 did not do so, the appeal court could under no circumstances give him relief under the provision of O. 41, r. 33. Order 41, r. 22 permits as a general rule, a respondent to prefer an objection directed only against the appellant and

it is only in exceptional cases that an objection under O. 41, r. 22 can be directed against the other respondents. On the facts of these cases the High Court refused to exercise its powers under O. 41, r. 33 on an incorrect view of the law and so the appeal must be remanded to the High Court for decision what relief should be granted to plaintiff under O. 41 r. 33.

Burroda Soundree Dasee v. *Nobo Gopal Mullick*, (1864) W.R. 294, *Maharaja Tarucknath Roy* v. *Tuboorunissa Chowdhrain*, (1867) 7 W.R. 39, *Ganesh Pandurang Agte* v. *Gangadhar Ramakrishna*, (1869) 6 Bom. H.C.Rep. 2244, *Anwar Jan Bibee* v. *Azmut Ali*, (1870) 15 W.R. 26, *Tirmnama* v. *Lakshmanan*, (1883) 7 Mad. 215. *Venkateswarulu* v. *Rammama*, I.L.R. (1950) Mad. 874, *Jan Mohamed* v. *P. N. Razden*, A.I.R. (1944) Lah. 433 and *Chandiprasad* v. *Jugul Kishore*, A.I.R. (1948) Nag. 377, referred to.

Anath Nath v. *Dwarka Nath*, A.I.R. (1939) P. C. 86, held inapplicable.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 207 to 209 of 1961.

Appeals from the judgment and decree dated August 23, 1957, of the Bombay High Court at Nagpur in First Appeals Nos. 105 to 107 of 1952 from Original Decree.

S. T. Desai, J. B. Dadachanji, O. C. Mathur and *Ravinder Narain*, for the appellants.

C. K. Daphtary, Solicitor General of India, N. S. Bindra and *R. H. Dhebar* for *P. D. Menon*, for the respondent No. 1.

Girish Chandra for *Sardar Bahadur*, for respondents Nos. 3 and 8.

1963. February 11. The Judgment of the Court was delivered by

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DAS GUPTA, J.—The appellant is a building contractor. He constructed buildings for the Bai

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Gangabai Memorial Hospital, Gondia, Kunwar Tilaksingh Civil Hospital, Gondia, and also for the Twynam Hospital, Tumsar, all within the district of Bhandara in Madhya Pradesh, in execution of three separate contracts in respect of the three hospitals which were concluded between him and Deputy Commissioner of Bhandara. Though he received part payment in respect of each of these contracts he claims not to have received full payment of what was due to him. On April 1, 1948 he brought the three suits out of which these three appeals have arisen for obtaining payments which he claims was due to him. His averments in all the three plaints are similar, except that in respect of one of the suits, viz., the one in respect of the construction work done for the Bai Gangabai Memorial Hospital, he has also claimed the price of some furniture said to have been supplied by him at the request of the Deputy Commissioner. The common case of the plaintiff in these three suits was that the Deputy Commissioner entered into these contracts "as representative of the Provincial Government" after having obtained previous sanction of that Government. It was further his case that the Deputy Commissioner, Bhandara, as the administration head of the hospitals entered into these contracts and as such was liable to pay the amounts due on the contracts. The plaint also averred that the Gondia Municipal Committee, Gondia, in the suit in respect of Bai Gangabai Memorial Hospital and the Dispensary Funds Committee in the other two suits were liable to satisfy plaintiff's claim inasmuch as they had taken the benefit of the work done under the contract which was not intended to be done gratuitously. On these averments the plaintiff impleaded the Provincial Government of the Province of Central Provinces and Berar as the first defendant, and the Deputy Commissioner of the Bhandara District, as the second defendant, in all the three suits. The Gondia Municipal Committee was impleaded as the third defendant in

Suit No. 3-B of 1948, i. e., the suits in respect of Bai Gangabai Memorial Hospital. The Dispensary Funds Committee was impleaded as the third defendant in the other two suits. In both, the members of the Dispensary Funds Committee were also impleaded by name as defendants. Mr. G. K. Tiwari, who as Deputy Commissioner, Bhandara, signed the argument was impleaded in his personal capacity in all the three suits (Defendant No. 4 in Suit No. 3-B, Defendant No. 9 in Suit No. 2-B and defendant No. 14 in Suit No. 1-B). The State of Madhya Pradesh was later substituted for the Provincial Government of the Province of Central Provinces and Berar as the first defendant in all the three suits.

It was admitted in the plaint that the construction could not be completed within the time mentioned in the contracts but it was pleaded that the time was not the essence of the contract and further, that the delay was due to the Deputy Commissioner's failure to supply the necessary materials in time and inclemency of weather and also that time was extended by the Deputy Commissioner. In all the three suits the plaintiff made his claim at a higher rate than the contract rate on the plea that the Deputy Commissioner had sanctioned these higher rates. For the purpose of the present appeals in which we are concerned solely with a question of law it is unnecessary to mention the various other averments in the plaint.

It is necessary to mention however that in Suit No.3-B the plantiff asked for a decree of Rs. 21,281/- with costs and interest from the date of suit against defendants 1 to 3 and in the alternative, against defendant No. 4, i. e., Mr. G. K. Tiwari. In suit No. 1-B, the plaintiff claimed a decree for Rs. 12,000/- with full costs and future interest from the date of suit against defendants 1 to 3 and/or defendant No. 14, i. e., Mr. G. K. Tiwari. In Suit

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No. 2-B, the plaintiff asked for a decree for Rs. 32,208/- with costs and future interest against defendants 1 to 3 and/or defendant No. 9, i. e., Mr. G. K. Tiwari.

The main contention of the State of Madhya Pradesh in resisting the suits was that the agreement for the construction of the buildings was not made on behalf of the State Government and also that the hospital was not government hospital and therefore it had no liability. The same contentions were raised by the Deputy Commissioner, Bhandara and Mr. Tiwari, personally. All of them further contended that even on merits the plaintiff was not entitled to any relief, for, though time was essence of the contract the work was not finished within the time agreed upon. They also resisted the plantiff's claim to increased rates on the ground that the previous sanction of the Deputy Commissioner had not been obtained. Another contention raised in all the suits was that the plaintiff's claim was barred by time. The other defendants also contested the suits on grounds which it is unnecessary for the purpose of the present appeals to set out.

The Trial Judge held that the agreements in question were made for and on behalf of the State and further, that the constructions had "beyond doubt benefited the State" and so the State was liable. The learned Judge also rejected the various objections raised by the defendants to the plaintiff's claim on merits except that he disallowed part of the plaintiff's claim and gave the plaintiff a decree for part of his claim against the State of Madhya Pradesh in all the three suits. He also held that none of the other defendants were liable and dismissed the suits as against them.

Against the Trial Court's decision in these suits the State of Madhya Pradesh preferred appeals to

the High Court of Judicature at Nagpur. During the pendency of these appeals the State of Madhya Pradesh was substituted by the State of Bombay. In all these appeals the plaintiff Pannalal was impleaded as the first respondent; and all the other defendants were also impleaded as respondents. Disagreeing with the Trial Court the High Court held that the contract entered into by the Deputy Commissioner was not binding on the State Government; that the Deputy Commissioner signed the contract at his own discretion; and further, the contracts not having been entered into in the form as required under s. 175(3) of the Government of India Act, 1935, were not enforceable against the State Government. The High Court also held that the Government could not be held to have ratified the action of the contracts entered into by the Deputy Commissioner. The High Court also rejected the argument that the Government having received the benefit of the works must pay for them, on their finding that the hospitals were not government hospitals and Government "can in no sense be regarded as having benefited by anything done with respect to them". On these findings the High Court set aside the decree passed by the Trial Court against the State Government and allowed the appeals with costs.

It appears that a prayer was made on behalf of the plaintiff-respondent that the High Court should pass decrees against the Deputy Commissioner, Bhandara, under Or. 41, r. 33 of the Code of Civil Procedure. That prayer was rejected by the High Court in these words :—

> "Shri Phadke then prayed that under Order 41, rule 33 of the Code of Civil Procedure we should pass decrees against the Deputy Commissioner, Bhandara, who was indubitably, a party to the contracts. Though the provisions of Order 41,

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rule 33 are wide enough to permit this we do not see any reason why we should exercise our power when it was open to the respondent No. 1 to prefer a cross-objection against the dismissal of his suits against those defendants, as well as against some other defendants."

The High Court also rejected the Counsel's prayer to grant him leave to file a cross-objection at that stage. In the result, all the three suits were dismissed by the High Court in their entirety. The High Court however granted a certificate under Art. 133(1)(c) of the Constitution. On the basis of that certificate these three appeals have been preferred by the plaintiff.

Two grounds were urged in support of the appeals. The first was that the High Court was wrong in holding that the State Government was not liable. The second ground urged was that, in any case, the High Court ought to have granted relief to the plaintiff against such of the other defendants as it thought fit under the provisions of Order 41, rule 33 of the Code of Civil Procedure.

There is, in our opinion, no substance in the appellant's contention that the State Government was liable. On the materials on the record, it appears clear to us that the Deputy Commissioner did not act on behalf of the State Government in signing the contracts. Nor can it be said that the State Government derived benefit from the work done by the plaintiff. In our opinion, the High Court was right in its conclusion that the State Government was not liable in respect of any of these contracts and rightly dismissed the suits as against the defendant No. 1. This position was not seriously disputed before us.

There is however much force in the appellant's contention that the High Court ought to have exercised its jurisdiction under Or. 41, r. 33 of the Code

of Civil Procedure in favour of the plaintiff. The operative portion of that rule, which was for the first time introduced in the Civil Procedure Code in 1908, is in these words :—

> "33. 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 any appeal or objection."

A proviso was added to this by Act 9 of 1922 which, however, does not concern us. It is necessary however to set out the illustration to the rule which runs thus :

> "A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The appellate court decides in favour of X. It has power to pass a decree against Y."

Even a bare reading of Order 41, rule 33 is sufficient to convince any one that the wide wording was intended to empower the appellate court to make whatever order it thinks fit, not only as between the appellant and the respondent but also as between a respondent and a respondent. It empowers the appellate court not only to give or refuse relief to the appellant by allowing or dismissing the appeal but also to give such other relief to any of the respondent as "the case may require." In the present case, if there was no impediment in law the High Court could

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therefore, though allowing the appeal of the State by dismissing the plaintiff's suits against it, give the plaintiff a decree against any or all the other defendants who were parties to the appeal as respondents. While the very words of the section make this position abundantly clear the illustration puts the position beyond argument.

The High Court appears to have been in no doubt about its power to give the plaintiff relief by decreeing the suits against one or more of the other defendants. But say the learned Judges, "we do not think it proper to do so as the plaintiff could have asked for this relief by filing a cross-objection under Or. 41, r. 22, C. P. C., but has not done so." The logic behind this seems to be that the cross-objection under Or. 41, r. 22 could be filed only within the time as indicated therein and if a respondent who could have filed a cross-objection did not do so, is given relief under Or. 41, r. 33, Or. 41, r. 22 is likely to become a dead letter.

The whole argument is based on the assumption that the plaintiff could, by filing a cross-objection under Or. 41, r. 22, Civil Procedure Code, have challenged the Trial Court's decree in so far as it dismissed the suits against the defendants other than the State. We are not, at present advised, prepared to agree that if a party who could have filed a cross-objection under Or. 41, r. 22 of the Code of Civil Procedure has not done so, the appeal Court can under no circumstances give him relief under the provisions of Or. 41, r. 33 of the Code. It is, however, not necessary for us to discuss the question further as, in our opinion, the assumption made by the High Court that the plaintiff could have filed a cross-objection is not justified.

Whether or not a respondent can seek relief against any other respondent by a cross-objection

under Or. 41, r. 22. Civil Procedure Code, was a vexed question in Indian courts for a long time. The present Order 41, r. 22 has taken the place of the former s. 561 of the Code of 1882. Indeed, the provision as regards raising an objection by a respondent without a separate appeal appears even in the Code of 1859 as s. 348. The same provision in a little more detailed form was enacted in the Code of 1877 as s. 561. It was reproduced in the Code of 1882 also as s. 561 with slight amendments in these words :—

> "Any respondent though he may not have appealed against any part of the decree, may upon the hearing not only support the decree on any of the grounds decided against him in the court below, but take any objection to the decree which he could have taken by the way of appeal, provided he has filed a notice of such objection not less than seven days before the date fixed for the hearing of the appeal. Such objection shall be in the form of a memorandum, and the provisions of s. 541, so far as they relate to the form and contents of the memorandum of appeal shall apply thereto.
>
> Unless the respondent files with objection a written acknowledgement from the appellant or his pleader of having received a copy thereof, the Appellate Court shall cause such a copy to be served, as soon as may be after the filing of the objection, on the appellant or his pleader, at the expense of the respondent."

The question whether a respondent could by way of cross-objection seek relief against another respondent under these provisions was first raised before the courts almost a century ago. Both the Calcutta and the Bombay High Courts held in a number of cases that ordinarily it was not open to a respondent

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to seek relief as against a co-respondent by way of objection, though in exceptional cases this could be done. (Vide *Burroda Soundree Dossee* v. *Nobo Gopal Mullick* (1), *Maharaja Tarucknath Roy* v. *Tuboornnissa Chowdhrain* (2), *Ganesh Pandurang Agte* v. *Gangadhar Ramkrishna* (3), *Anwar Jan Bibi* v. *Azmut Ali* (4). These decisions it is proper to mention were given under the Code of 1859 where s. 348 provided that "Upon hearing of the appeal, the respondent may take any objection to the decision of the lower court which he might have taken if he had preferred a separate appeal from such decision." After this section was replaced by s. 561 in the Code of 1877 and the Code of 1882 the question whether a respondent can file an objection against another respondent came up before the courts several times and the decision remained the same. The Patna and the Allahabad High Courts also took the view that as a general rule the right of a respondent to urge cross-objections should be limited to asking relief against the appellant only and it is only where the appeal opens up questions which cannot be disposed of properly except by opening up matters as between co-respondents that relief against respondents can also be sought by way of objections. The Madras High Court took a different view in *Timmayya* v. *Lakshmanan* (5), and held that the words of the section were wide enough to cover all objections to any part of the decree and it was open to a respondent t seek relief under this section even against another respondent, and this view was reiterated by that Court even after the Code of 1908 made an important change in the provision by using the word "cross-objection" in place of "objection". Ultimately however in 1950 a Full Bench of the Madras High Court in *Venkateswarlu* v. *Rammama* (6), considered the question again and decided overruling all previous decisions that on a proper construction of the language, Or. 41, r. 22 confers only a restricted

(1) (1864) W.R. 294. (2) (1867) 7 W.R. 39.
(3) (1869) 6 Bom. H.C. Rep. 244. (4) (1870) 15 W.R. 26.
(5) (1883) 7 Mad. 215. (6) I.L.R. (1950) Mad. 874.

right on the respondent to prefer objection to the decree without filing a separate appeal; that such objection should, as a general rule, be primarily against the appellant, though in exceptional cases it may incidentally be also directed against the other respondents. The Lahore High Court which had earlier followed the former view of the Madras High Court also decided in *Jan Mohamed* v. *P. N. Razden* (1), to adopt the other view held by the High Courts of Allahabad, Bombay, Calcutta and Patna. The Nagpur High Court has also adopted the same view. (Vide *Chandiprasad* v. *Jugul Kishore*) (2).

In our opinion, the view that has now been accepted by all the High Courts that Order 41, r. 22 permits as a general rule, a respondent to prefer an objection directed only against the appellant and it is only in exceptional cases, such as where the relief sought against the appellant in such an objection is intermixed with the relief granted to the other respondents, so that the relief against the appellant cannot be granted without the question being re-opened between the objecting respondent and other respondents, that an objection under Or. 41, r. 22 can be directed against the other respondents, is correct. Whatever may have been the position under the old s. 561, the use of the word "cross-objection" in Or. 41 r. 22 expresses unmistakably the intention of the legislature that the objection has to be directed against the appellant. As Rajammannar C. J., said in *Venkataswarlu* v. *Ramamma* (3). "The legislature by describing the objection which could be taken by the respondent as a "cross-objection" must have deliberately adopted the view of the other High Courts. One cannot treat an objection by a respondent in which the appellant has no interest as a cross-objection. The appeal is by the appellant against a respondent, the cross-objection must be an objection by a respondent against the appellant". We think, with respect, that these observations put

(1) A.I.R. 1944 Lah. 433. (2) A.I.R. 1948 Nag. 377.
(3) I.L.R. (1950) Mad. 874.

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the matter clearly and correctly. That the legislature also wanted to give effect to the views held by the different High Courts that in exceptional cases as mentioned above an objection can be preferred by a respondent against a correspondent is indicated by the substitution of the word "appellant" in the third paragraph by the words "the party who may be affected by such objection."

On the facts of the present case, we have come to the conclusion that it was not open to the plaintiff-appellant before the High Court to file any cross-objection directed against the other defendants who were-correspondents. The High Court was therefore wrong in refusing to consider what relief, if any, could be granted to the plaintiff under the provisions of Or. 41, r. 33, Civil Procedure Code.

Learned Counsel who appeared for the Gondia Municipality in Civil Appeal No. 209 of 1961, relied on the decision of the Privy Council in *Anath Nath* v. *Dwarka Nath* (1), for his contention that rule 33 could not be rightly used in the present case. In that case the plaintiff challenged a revenue sale as wholly void for want of jurisdiction and bad for irregularities and further contended that the respondent had been guilty of fraud or improper conduct to the prejudice of his co owners in the estate. The Trial Court rejected the plaintiff's case that the sale was void for want of jurisdiction and bad for irregularities but accepted the other contention and gave the plaintiff a decree. On appeal, the High Court held that no fraud or improper conduct towards co-owners in respect of the revenue sale had been proved against respondent No. 1. The High Court refused to grant any relief to the plaintiff on the other ground which had been rejected by the Trial Court in the view that it was no longer open to the plaintiff who had not filed any cross objections to the decree of the Trial Court to maintain that the revenue

(1) A.I.R. 1939 P.C. 86.

sale should be set aside for want of jurisdiction or irregularity. In accepting this view of the High Court the Privy Council observed :—

> "In their Lordships view the case came clearly within the condition imposed by the concluding words of sub-r. (1) of R. 22, "provided he has filed such objections in the Appellate Court, etc., etc.". It was contended however that the language of R. 33 of the same Order was wide enough to cover the case. Even if their Lordships assume that the High Court was not wholly without power to entertain this ground of appeal—an assumption to which they do not commit themselves—they are clearly of opinion that Rule 33 could not rightly be used in the present case so as to abrogate the important condition which prevents an independent appeal from being in effect brought without any notice of the grounds of appeal being given to the parties who succeeded in the courts below."

This decision is of no assistance to the respondents. For the question which we have considered here, viz., how far it is open to a respondent to seek relief against a co-respondent by way of cross-objection did not fall for consideration by the Privy Council. The Privy Council based its decision on the view that it was open to the respondent before the High Court to file a cross-objection under Or. 41, r. 22 against the appellant and had not to consider the question now before us. We think it proper also to point out that the decision of the Privy Council in *Anath Nath's case* (1), should not be considered as an authority for the proposition that the failure to file a cross-objection—where such objection could be filed under the law—invariably and necessarily excludes the application of Or. 41, r. 33. There their Lordships assumed, without deciding, that the

(1) A.I.R. 1939 P. C. 86.

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High Court was not wholly without power to entertain the other ground of appeal but in the special circumstances of the case they thought that it would not have been right to give relief under the provisions of Rule 33 to the appellant.

As the High Court has refused to exercise its powers under Or. 41, r. 33 of the Code of Civil Procedure on an incorrect view of the law the matter has to go back to the High Court. We maintain the High Court's order in so far as it dismisses the suits against the State of Bombay but set aside the order in so far as it dismisses the suits against the other defendants and send the case back to the High Court in order that it may decide, on an examination of the merits of the case, whether relief should be granted to the plaintiff under the provisions of Or. 41, r. 33, Civil Procedure Code. Costs incurred in this Court will abide the final result in the appeals before the High Court at Bombay.

Appeals allowed in part.
Case remanded.