

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Ninabhai Haridis.

1883
November 19.

KIRANI AHMEDULA (ORIGINAL DEFENDANT), APPELLANT, v. SUBABHAT (ORIGINAL PLAINTIFF), RESPONDENT.*

** Practice—Judicial discretion—Appeal—Appellate Court's power to interfere with exercise of discretion.*

When an appeal against an order based on facts is given from a subordinate to a superior Court, the discretion vested in the former is absorbed in the latter and it is the duty of the superior Court to weigh the facts which form the basis upon which the subordinate Court proceeds and arrive at its own independent conclusion: and this is so notwithstanding that the subordinate Court exercised its discretion after a proper inquiry and due consideration of the facts put before it and not capriciously or with prejudice.

THIS was an appeal under section 588 of the Code of Civil Procedure (XIV of 1882) from an order made by Satyendranath Tagore, Judge of the District of Kánara, refusing to restore an appeal to the file of the District Court.

The plaintiff Subabhat sued the defendant Kirani Ahmedula in the Court of the Subordinate Judge of Kumta for rent, and obtained a decree. The defendant preferred an appeal against this decree, notice was given to the plaintiff, and the 1st of December, 1881, was fixed by the District Court of Kárwár as the day of hearing of the appeal. Mr. Bhaváni Shankar, Pleader of the District Court, was appointed by the defendant to conduct his appeal. Some time before the day of hearing, Mr. Bhaváni Shankar left Kárwár, the seat of the District Court for Kumta, a distance of forty miles, on private business. According to the practice of the District Court appeals are not heard on the day fixed in the notice for hearing, but come on some days later according to the convenience of the Court. A general board is prepared in which the approximate days of hearing are given, and a daily board is prepared and circulated to the practising pleaders one day previous. Kárwár and Kumta are connected by telegraphic wire and the distance between them can be travelled within twelve hours by special arrangement. Mr. Bhaváni Shankar, before he left Kárwár for Kumta, arranged

* Appeal from order No. 15 of 1882.

that a telegram should be sent to him communicating to him the day fixed for hearing; but his agent found the Telegraph Master at Kárwár unwell and the office closed for two consecutive days. The result was that the District Judge called on the appeal for hearing, and neither the appellant nor his pleader being present dismissed the appeal. The circumstances above set forth were sworn to in the affidavits made by the appellant and his pleader, and an application was made to the District Judge of Kárwár to restore the appeal to the file. The District Judge rejected the application, being of opinion that the appellant had not satisfactorily accounted for the absence of his pleader without leave of the Court.

The appellant appealed to the High Court.

Ghanashám Nilkanth Nádkarni for the appellant.—It is no doubt within the discretion of the District Judge to consider the reasons given for restoring the appeal to the file, but he has thought it proper to hold that they are unsatisfactory; and as an appeal lies to this Court against his order, I submit that this Court is at liberty to go into the facts and say on its own appreciation whether the Judge below has exercised his discretion soundly and correctly. The correctness of the decision in *Ranchodji v. Lallu*⁽¹⁾ has been doubted. In the case of *Shomacé Ali Saudágar v. Eusoof Khán Chodhry*⁽²⁾ the High Court of Calcutta remanded a case to the lower Court with a direction that it should see the reasons alleged for the readmission of an appeal which had been dismissed. The observations made by the Privy Council in *Sree Mutty. Bissnoosondery Debee and others v. Rajah Burroda Caunt Roy*⁽³⁾, *Rajah Deedar Hossein v. Raneé Zuhooroon Nissa*⁽⁴⁾, and *Anundmoyee Dossee and others v. Purnoo Chunder Roy*⁽⁵⁾ support the contention that the Court is bound to weigh the evidence and form its independent judgment notwithstanding a contrary exercise of discretion by the Judge below.

Naráyán Ganesh Ohandáwarkar for the respondent—The decision in *Ranchodji v. Lallu and others* has not been overruled

(1) I. L. R., 6 Bom., 304.

(3) 2 Moo. I. A., 127.

(2) 15 Cal. W. R., Civ. Rul. 80.

(4) 2 Moo. I. A., 441.

(5) 9 Moo. I. A., 26.

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and is in my favour. It is supported by the decision of the Calcutta Court in *Noimollah Pramanick v. Grish Narain Moonshee*⁽¹⁾. It is not contended that the Judge made no inquiry or exercised his discretion perversely and without a due consideration of the reasons alleged. It must be taken that the Judge disbelieved the statements made.

WEST, J. :—In the exercise of the judicial discretion undoubtedly vested in the District Court by the law, the District Judge, after going into such evidence as was produced before him, came to the conclusion that the absence of the pleader on the day the appeal was called on for hearing at Kárwár had not been satisfactorily accounted for, and he, therefore, refused to restore the dismissed appeal to the file. The question which we have to consider is, whether we, as an Appellate Court, can rectify the exercise of that discretion where it has not been “used in a sound and reasonable manner.” We are of opinion that, when an appeal against an order based on facts is given from a subordinate to a superior Court, the discretion vested in the former is absorbed in the latter, and that it is the duty of the superior Court to weigh the facts which formed the basis upon which the subordinate Court proceeded, and to arrive at its own independent conclusion. To hold otherwise would be to deny to the appellant the usual benefits of an appeal. If the opinion of the Appellate Court is hesitating, it would, of course, not be justified in interfering with the exercise of the discretion by the Court below; but the mere circumstance that the lower Court is vested by law with judicial discretion does not by itself debar the Court to which a first appeal lies from reviewing the facts and judging for itself: albeit that the lower Court acted as it did after a proper inquiry and on due consideration of the facts put before it, and not capriciously or with prejudice.

Then, as regards the second point, we think that, under the circumstances of this case, we ought to order the restoration of the appeal to the file of the District Court. The Judge does not say he disbelieves the statement made in the affidavits that the pleader’s agent was prevented from communicating with the

(1) I. L.R., 8 Cal., 674.

pleader because of the telegraph signaller's illness and the consequent sudden closing of the Kárwár Telegraph Office for two days. Such a statement as the last, if false, would scarcely be made, and could easily be disproved. Looking to the unusual interruption and the ordinary regularity of the working of the telegraph, we think the District Judge ought to have accepted the reason given by the appellant as sufficient. For the reasons which we have given, we accept the reason which, we think, the Judge ought to have accepted, and we order that, if no other good and sufficient reasons exist, the District Judge do restore the appeal to his file, and dispose of it according to law.

The respondent to bear the costs of the appeal in the High Court.

Order reversed.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánabhái Haridás.

LAKSHMAN BHA'TKAR (ORIGINAL PLAINTIFF), APPELLANT, v. BA'BA'JI BHA'TKAR AND ANOTHER (ORIGINAL DEFENDANT), RESPONDENTS.*

November 20.

Jurisdiction—Valuation of claims—Subject-matter—Act XIV of 1869, Section 25—Partition.

What *prima facie* determines the jurisdiction of a Court is the claim, or subject-matter of the claim, as estimated by the plaintiff, and the determination having given the jurisdiction, the jurisdiction itself continues, whatever the event of the suit. And this is so notwithstanding a *bond fide* error in the estimate made by the plaintiff. But the plaintiff cannot oust the Court of its jurisdiction by making unwarrantable additions to the claim which cannot be sustained and which there is no reasonable ground for expecting to sustain.

The subject-matter of a claim, within the meaning of section 25 of Act XIV of 1869, is the specific thing sought by the plaintiff. In a partition suit, where the plaintiff seeks for a division and separate possession of his share in joint property, it is the share so claimed which is the subject-matter of the claim, and not the whole of the joint property which is sought to be divided.

THIS was an appeal from an order made by L. G. Fernandez, Subordinate Judge, (First Class,) Ratnágiri, returning the plaint on the ground that he had no jurisdiction.

* Appeal No. 12 of 1883 from order.

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