

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

1914.
January 6.

NARAYAN PURUSHOTTAM GARGOTE (ORIGINAL PLAINTIFF), APPLICANT,
v. LAXMIBAI HUSBAND DATTO BHAGWAN AND ANOTHER (ORIGINAL
DEFENDANTS), OPPONENTS.*

*Civil Procedure Code (Act V of 1908), Order XLVII, Rule 1—Review petition—
Subsequent filing of appeal—Jurisdiction of Court to hear review petition
is not taken away by appeal subsequently filed—Practice.*

An application for review of judgment was filed in a District Court and a rule *nisi* was granted. The party subsequently filed an appeal in the high Court. The District Court rejected the review application on the ground that it could not proceed with the application as an appeal was already filed. The applicant having applied to the High Court :—

Held, setting aside the order and directing the District Court to dispose of the application on the merits, that there was no express provision in the Civil Procedure Code which rendered the application for review incompetent on the mere presentation of an appeal by the same party at any subsequent time.

Chenna Reddi v. Peddaobi Reddi⁽¹⁾, followed.

THIS was an application under extraordinary jurisdiction from an order passed by E. Clements, District Judge of Satara.

The District Judge of Satara decided an appeal against the plaintiff in the case. The plaintiff filed an application for review on the 10th October 1912 and a rule *nisi* was granted on the 12th idem.

On the 14th October 1912, the plaintiff also filed an appeal in the High Court; but applied to keep the appeal pending till the review application was decided.

The District Judge holding that his jurisdiction to hear the application was taken away by the appeal subsequently filed dismissed it on the following grounds :—

A preliminary objection is urged that the appellant having preferred an appeal to the High Court, this Court cannot proceed with the application.

* Civil Application No. 92 of 1913 under extraordinary jurisdiction.

⁽¹⁾ (1909) 32 Mad. 416.

A second objection is urged that this application is bad for want of a certified copy of the decree.

The appellant relies upon the Madras Full Bench case of *Chenna Reddi v. Peddaobi Reddi*⁽¹⁾ in which the proposition is laid down that when in a suit a review application is presented by a party and an appeal is afterwards preferred, the Court to which the application for review was made is not thereby deprived of jurisdiction to entertain the application. I think that that case is distinguishable from the present because here the applicant for review has himself elected to appeal from the decree. It will be seen that in asking themselves whether the Code by necessary implication withdraw the jurisdiction to hear the review application, the High Court did not examine particularly the case in which the same party asks for a review and also appeals. I think that the wording of Order XLVII, Rule 1, sub-section 2, necessarily implies that a party should not be allowed to prosecute an application for review as well as an appeal. It would be an absurdity to allow the obvious intention of the rule to be defeated by the artifice of presenting the review application first and the appeal the day after. The 2nd sub-section to Rule 1 allows a party who is not appealing the privilege of applying for a review notwithstanding the pendency of an appeal by another party except where the ground of each appeal is common to him and the appellants, or where as respondent he can present to the appellate Court the case on which he applies for a review. The words "who is not appealing" would by ordinary usage mean "who has not taken any steps towards appealing"; such for an instance as applying for certified copies. By implication a party is not entitled to prosecute an appeal as well as an application for review.

The application was admitted provisionally without a copy of the decree on the strength of the ruling contained in I. L. R. 17 All. 213. It is however pointed out that that ruling goes no further than to support the practice of the Allahabad Court. In this Court the practice is to require a copy of the decree and that practice is inconsistent with both the Civil Procedure Code and the inference to be drawn from the wording of the Limitation Act, section 12. I think both objections taken to this application are valid and reject it with costs.

The plaintiff applied to the High Court.

Jayakar, with *S. Y. Abhyankar*, for the applicant.

P. D. Bhide, for opponent No. 1.

V. V. Bhadkamkar, for opponent No. 2.

Jayakar :—The Legislature intends in clause 1 to Rule 1 of Order XLVII to bar the review only when an

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appeal has already been preferred. The rule does not prevent a party who has applied for review from appealing against the decree: see *Bharat Chandra Mazumdar v. Ramgunga Sen*⁽¹⁾; *Nistarini. Dasi v. Kazim Ali*⁽²⁾; *Kanhaiya Lal v. Baldeo Prasad*⁽³⁾; *Chenna Reddi v. Peddaobi Reddi*⁽⁴⁾.

Bhide :—A party cannot seek to review a decree and at the same time appeal from it: see *Pandu v. Devji*⁽⁵⁾; *Ramanadhan Chetti v. Narayanan Chetty*⁽⁶⁾.

SHAH, J. :—This application arises under the following circumstances:—

The District Court of Satara having decided Appeals Nos. 67 and 70 of 1911 on its file against the plaintiff, he presented an application for review to that Court on the 10th October 1912. A rule *nisi* was granted on the 12th October; and on the 14th of October he filed a second appeal in this Court against the decree of the lower appellate Court. He also informed the Registrar, while filing the appeal, that he wanted the appeal to be kept pending until his review application to the lower appellate Court was disposed of.

The District Court has rejected the review application on two preliminary grounds without going into the merits of the application. One of the grounds is that certain copies which ought to have been filed with the application were not filed, and that the application could not, therefore, be entertained. Without expressing any opinion as to whether it was necessary to file those certified copies with the application, I am clearly of opinion that when the Court admitted the application on the 12th of October with full knowledge of the fact that the copies were not filed along with the application

(1) (1866) Ben. L. R. F. B. 362.

(2) (1910) 12 Cal. L. J. 65.

(3) (1905) 28 All. 240.

(4) (1909) 32 Mad. 416.

(5) (1883) 7 Bom. 287 at p. 288.

(6) (1904) 27 Mad. 602.

the omission was sufficiently condoned. It would not therefore be right to disallow the application on that ground.

The second ground, which has been the main contention between the parties on this application, is that the applicant having preferred an appeal to this Court, the lower Court had no jurisdiction to proceed with the application for review. This point has been fully argued before us and several cases have been cited. I do not propose, however, to discuss the cases in detail. It is common ground that at the date of the presentation the application was in order and that the lower Court had jurisdiction to entertain it. It is argued, however, that that jurisdiction came to an end as soon as the plaintiff preferred a second appeal to this Court. The only decision which covers this point is the case of *Chenna Reddi v. Peddaobi Reddi*⁽¹⁾. On a full consideration of the arguments on either side of the question, I have come to the conclusion that this Full Bench decision should be followed. Accepting that view it is clear that the learned District Judge was not right in rejecting the application on the preliminary ground raised by the defendants. There is no decision cited to us except the case of *Ramanadhan Chetti v. Narayanan Chetty*⁽²⁾ (which in terms has been overruled by the decision in *Chenna Reddi's* case) that can be said to be in any way inconsistent with the view taken by the Madras High Court. In a matter of this kind, I think, it is desirable that the practice of different High Courts should be uniform as far as possible, and I see no reason whatever to think that the practice in this Presidency has been in fact different or that it ought to be different. Apart from the decided cases I think on a fair reading of the provisions of the Civil Procedure Code relating to this

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⁽²⁾ (1904) 27 Mad. 602.

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point, it is clear that an application for review can be made before any appeal is filed by the party and I know of no reason why an application, which was perfectly competent at the date of the presentation, should not be disposed of on the merits. There certainly is no express provision in the Code which renders the application incompetent on the mere presentation of an appeal by the same party at any subsequent time. In my opinion there is no practical inconvenience so long as the appeal is not prosecuted during the pendency of the review application. The present case fairly illustrates that it is only by following the practice, which has been sanctioned by the Madras High Court, that the remedy by way of review can be secured to the aggrieved party in an appropriate case, without requiring him to jeopardize his right of second appeal.

On these grounds the rule should be made absolute and the lower Court directed to dispose of the application on the merits.

Costs throughout to be costs in the application.

HEATON, J. :—I concur in the order proposed. It does not seem to me that this matter involves any really important legal principle or that for practical purposes it is anything more than a matter of practice. The practice, which, as I understand, at present is followed, is that which was followed by the applicant in this case. He applied for a review first and afterwards he appealed. Regarding this, as a matter of practice, I can see nothing in it to object to, nothing that is in any way inconvenient to, or inconsistent with, the proper, ordinary administration of justice. Therefore I see no reason to press my own view of the meaning of Rule 1 of Order XLVII.

I should only like to add this : that I think there is great force in the reasoning of the District Judge. Personally also I am not at all satisfied that the conclu-

sion reached by the Full Bench of the Madras High Court in the case of *Chenna Reddi v. Peddaobi Reddi*⁽¹⁾ is really correct. But for the reasons I have stated, I consider my own personal opinion in these matters as of no particular importance. Therefore I concur in the order which my learned colleague has proposed.

Rule made absolute.

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(1) (1909) 32 Mad. 416.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

GANGAPPA REVANSHIDAPPA HUNDEKAR, APPLICANT, *v.* GANGAPPA MALLESHAPPA HUNDEKAR AND OTHERS, OPPONENTS.^o

Leave to appeal to Privy Council—Final order—Interlocutory order—Order rejecting an application for bringing on record the legal representatives of a deceased party to a pending appeal—Amended Letters Patent, clause 39—Civil Procedure Code (Act V of 1908), sections 109, 110.

The applicant, claiming to be the legal representative of a deceased party to a pending appeal, applied to have his name brought on the record. The High Court disallowed the application and ordered the names of the heirs of the deceased to be substituted. The applicant applied for leave to appeal to His Majesty in Council from the order rejecting the application :—

Held, that the order having been passed on an application in a pending appeal, was not a final, but an interlocutory, order; and that no appeal lay from it to His Majesty in Council under the provisions of clause 39 of the Amended Letters Patent.

THIS was an application for leave to appeal to His Majesty in Council.

One Gangappa Rudrappa obtained a decree against Chanbasawa on the 12th February 1909, declaring that he was the adopted son of Rudrappa, the deceased husband of Chanbasawa. She appealed to the High Court; and adopted one Virupakshappa on the 12th May 1909. Virupakshappa applied to the High Court on the 7th

^o Civil Application No. 545 of 1913.

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