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As a matter of fact it is in the forefront of the memorandum. Notwithstanding this point having been taken in the memorandum of appeal, the appeal has been strenuously resisted by the respondent. Mr. Peerbhoy says that it is a matter of indulgence that the appellants have been allowed to argue this point. That is not the correct position. This is not a case where an appellant comes to the appeal Court on a particular case set out in his memo. of appeal and then at the hearing of the appeal he springs a new point on the other side and succeeds on the other point. In those circumstances the Court of appeal ordinarily would not give the successful appellant the costs of the appeal. But this is a case where the appellant, after giving full notice to the other side, succeeds on a point which has been taken in the memo. of appeal. It is a question of law, it is a question of jurisdiction, and the party is entitled to take that point in appeal although it was not taken in the lower Court. Therefore, in our opinion the appellants are entitled to get the costs of the appeal. The appeal will, therefore, be allowed with costs.

Attorneys for appellants: *Thakordas & Co.*

Attorneys for respondent: *Crawford, Bayley & Co.*

Appeal allowed.

P. M. P.

APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice.

HUSSAIN SAB WALLAD HUSAN SAB GAIMA, (ORIGINAL DEFENDANT) PETITIONER *v.* SITARAM VIGHNESHWAR BHADTI (ORIGINAL PLAINTIFF), OPPPONENT.*

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Civil Procedure Code (Act V of 1908) s. 152—Application for amendment of decree—Appeal summarily dismissed by High Court—Whether application for amendment of decree lies to High Court—Decree of trial Court confirmed by District Court in appeal—Whether application for amendment of decree made to the District Court is competent.

A decree passed by the trial Court was confirmed in appeal by the District Court. A second appeal to the High Court was summarily dismissed under O. XLI, r. 11 of the Civil Procedure Code, 1908. On the question whether an application to the District Court for amendment of the decree was competent.

* Civil Revision Application No. 681 of 1951.

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Held, that when an appeal is summarily dismissed under the provisions of O. XLI r. 11 of the Civil Procedure Code, 1908, the original decree from which the appeal was preferred remains untouched and it is the original decree which is the substantive decree. If an application had to be made for amending the decree it had therefore to be made, to the Court which passed the substantive decree, and not to the High Court.

Bapu v. *Vajir*,[1] *Batuk Prasad Singh* v. *Ambika Prasad Singh*,[2] *Sheolal* v. *Md. Ismail*,[3] and *Mussamat Sheo Piari* v. *Pandit Tribeni Prasad Tewari*,[4] followed.

Subbamma v. *Madhavrao*,[5] dissented from.

Held, further that although the decree of the trial Court was confirmed in appeal by the District Court, the decree of the trial Court merged in the decree of the District Court and it was the decree of the appellate Court which was the substantive decree; if an amendment was sought in the decree, the application for such amendment should, therefore, be made to the District Court.

Civil Revision Application from the decision of N. S. Shrikhande, District Judge, N. Kanara.

The facts are stated in the judgment.

G. R. Madbhavi and *K. R. Bengeri*, for the applicant.

N. M. Hungund and *S. N. Alagadde*, for the opponent.

CHAGLA C. J. A suit was filed by the plaintiff to recover possession of a house which was described as bearing the No. 1372. The trial Court passed a decree in favour of the plaintiff. The defendant appealed, and the decree was confirmed by the District Judge. There was a second appeal to this Court, and it was summarily dismissed. On January 31, 1951, the plaintiff made an application under s. 152 of the Civil Procedure Code to the District Court for amendment of the decree, alleging that the house had been wrongly described as bearing the No. 1372 when in fact it bore the No. 1572. The District Court granted the application. It is from that order that this revisional application is preferred.

It is contended before me that, inasmuch as an appeal was preferred to this Court, the application for amendment should have been granted, if at all, not by the District Court, but by this Court, and therefore, the order of the District Judge was without jurisdiction. Now, the ordinary principle is that the decree of the trial Court is merged in the decree of the appellate Court if an appeal is preferred from that decree, and the

[1] (1896) 21 Bom. 548.
[2] (1931) 11 Pat. 409.
[3] [1932] A. I. R. Nag. 117.
[4] (1940) Luck. 697.
[5] [1946] A. I. R. Mad. 492.

decree that has got to be executed is the decree of the appellate Court; and if any amendment is sought of the decree, it must be of the decree of the appellate Court, and, therefore, an application for amendment should be made to the appellate Court. But the question is whether the position is different when an appeal is summarily dismissed by this Court under O. XLI, r. 11. Now, turning to that rule, it provides that the appellate Court may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader; and sub-cl. (*3*) provides that the dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred. It will be immediately noticed that there is considerable difference between the provisions of O. XLI, r. 11, and the provisions of O. XLI, r. 32. Under O. XLI, r. 32, when an appeal is heard after notice, the judgment of the appellate Court must be a judgment for 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. But under O. XLI, r. 11, no such decree is to be drawn up. The only provision in O. XLI, r. 11, is that the lower Court has to be notified of the fact that an appeal from its decree has been dismissed. Therefore, the view has been taken by this Court—and, in my opinion, rightly —that when an appeal is summarily dismissed under the provisions of O. XLI, r. 11, the original decree from which the appeal was preferred remains untouched and it is the original decree which is the substantive decree. Therefore, if an application has got to be made for amending the decree, it must be made, not to this Court which has exercised its powers under O. XLI, r. 11, but to the Court which passed the substantive decree.

Turning to the authorities, this view was taken as far back as in 1896, in *Bapu* v. *Vajir*.[1] Sir Charles Farran, Chief Justice, who delivered the judgment of the Court, pointed out that there is a change of language made in 1888 by the Legislature in s. 551 of the Code of Civil Procedure of 1882, which corresponded to O. XLI, r. 11, of the new Code of 1908, and from that the learned Chief Justice infers that it was intended that there should be a difference between the results of a dismissal under s. 551 and of a confirmation under s. 577, which corresponds to

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O. XLI, r. 32. The learned Chief Justice further points out as follows (p. 551):—

" . . . Dismissing an appeal is, we think, refusing to entertain it as in the case of an appeal dismissed as being time-barred. Where an appeal is dismissed under s. 551, there is no decree of the High Court which can be executed, and the reasoning in the cases to which we have been referred does not apply."

Mr. Madbhavi has attempted to distinguish this case by pointing out that in this case the District Judge had reversed the decree of the trial Court and that reversal was confirmed by the High Court summarily dismissing the second appeal. Mr. Madbhavi says that, in the present case, the District Court has confirmed the decree of the trial Court, and that has been further confirmed by the High Court by summarily dismissing the second appeal. I do not see any distinction in principle between the two cases. In both the cases, the appeal was dismissed under O. XLI, r. 11, and the same argument must apply whether the dismissal was of a decree which confirmed the decree of the trial Court or a decree which reversed the decree of the trial Court. Mr. Madbhavi has drawn my attention to a recent decision of the Madras High Court reported in *Subbamma* v. *Madhavarav*[1]. In that case, a single Judge, Mr. Justice Horwill, took the view that a decree under O. XLI, r. 11, supersedes the decree of the lower Court in the same way as if notice had been issued to the respondent, and, therefore, an application for an amendment of the decree lies to the appellate Court and not to the lower Court. Mr. Justice Horwill considered the judgment of the Patna High Court reported in *Batuk Prasad Singh* v. *Ambika Prasad Singh*,[2] which was to the contrary effect, and the learned Judge did concede that a great deal was to be said for the argument contained in the Patna case. But what influenced the learned Judge was that he could not depart from the procedure consistently adopted by the Madras High Court. Apart from Patna, the Nagpur High Court has taken the same view (see Sheolal v. Md. Ismail)[3] and so also has the Chief Court of Lucknow (see *Musammat Sheo Piari* v. *Pandit Tribeni Prasad Tewari*.[4] In my opinion I am bound by the decision in *Bapu* v. *Vajir*, and apart from being bound, with respect, I entirely agree with the reasoning of the learned Judges in that case. I am further fortified in my view by the fact that the Patna, Nagpur and Lucknow High Courts have taken the same view as the view taken by this High Court.

[1] [1946] A. I. R. Mad. 492.
[2] (1931) 11 Pat. 409.
[3] [1933] A. I. R. Nag. 117.
[4] (1940) 16 Luck. 697.

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It is then urged, in the alternative, by Mr. Madbhavi that the proper Court to which the application should have been made was the trial Court, and not the District Court. Mr. Madbhavi says that the decree of the trial Court was confirmed by the District Court, the appellate Court did not vary or reverse the decree, the decree remained unaffected, and therefore the plaintiff should have gone to the trial Court. Now, I know that some High Courts have taken the view that unless the decree of the trial Court is superseded by the appellate Court, the application for an amendment of the decree must be made to the trial Court. I am unable to agree with that view. If a decree of confirmation is passed by the appellate Court, the decree of the trial Court merges in the decree of the appellate Court, and it is impossible to say that the decree of the trial Court is still in existence and it could be amended. The decree which is in existence and which can be executed is the decree of the appellate Court, and not the decree of the trial Court. The fact that the appellate Court does not vary the decree of the trial Court does not make any difference to the legal position that ultimately it is the decree of the appellate Court which is the substantive decree and which must be amended if an amendment is sought.

The application, therefore, fails. The rule is discharged with costs.

Rule discharged.

K. B. S.

APPELLATE CIVIL

Before the Hon'ble Mr. M. C. Chagla, Chief Justice.

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NABI BAVADIN NADAF (ORIGINAL DEBTOR), APPLICANT *v.* MURIGEPPA DHULAPPA BULLI AND OTHERS (ORIGINAL CREDITORS), OPPONENTS.*

Bombay Agricultural Debtors Relief Act (Bom. XXVIII of 1947), s. 2 (5) (a) (iv)—Application for adjustment of debts—Non-agricultural income of applicant less than Rs. 500 but exceeding 33 per cent of his total annual income—Applicant whether a debtor.

An individual whose non-agricultural income does not exceed Rs. 500 is a debtor within the meaning of s. 2 (5) (*a*) (*iv*) of the Bombay Agricultural Debtors Relief Act, 1947, even though such non-agricultural income exceeds 33 per cent. of his total annual income.

*Civil Revision Application No. 761 of 1951.