

APPELLATE CIVIL

1953

Mar. 4

Before Mr. Justice Gajendragadkar, and Mr. Justice Vyas.

THE PHALTAN BANK LTD., (ORIGINAL PLAINTIFF), APPELLANT v.
BABURAO APPAJIRAO KHANVILKAR AND ANOTHER,
(ORIGINAL DEFENDANTS), RESPONDENTS.*

Indian Limitation Act (IX of 1908), art. 181—Application for final decree for sale in mortgage suit—Second appeal to High Court against preliminary decree—Notice of appeal to respondent—Appeal dismissed with costs for failure of appellant to pay adequate court fee—Whether order of rejection amounts to decree—Starting point of limitation for application—Whether time starts from date of High Court's order—Civil Procedure Code (Act V of 1908), ss. 2 (2), 107 (2); O. VII, r. 11; O. XLI, r. 3—Powers of appellate Court to reject memorandum of appeal for failure to pay requisite court fee.

Limitation for an application for a final decree for sale in a mortgage suit is three years under art. 181 of the Indian Limitation Act, 1908, and the starting point is the time when the right to apply accrues. Ordinarily, such a right accrues on the date when the preliminary decree is passed, and in the event of there being an appeal from it to the District Court, on the date of the District Court's decree. If a second appeal is preferred to the High Court from the decree passed in appeal by the District Court, the starting point would commence from the date the High Court disposes of the appeal on merits. Where, however, the High Court after issuing notice of the appeal to the respondent does not deal with the merits of the appeal but rejects it on the ground that the memorandum of appeal is written upon an insufficiently stamped paper, the rejection amounts in a sense to an order of dismissal for default, though in form it purports to be a decree dismissing the appeal with costs. In such a case, the decree of the District Court is not merged in the order passed by the High Court, and the cause of action to make an application for a final decree arises as on the date of the District Court's decree.

Jowad Hussain v. Genden Singh,⁽¹⁾ *Kashiram Senu v. Ranglal Motilalshet,*⁽²⁾ and *Hussain Asgar Ali v. Ramditta Mal,*⁽³⁾ referred to.

Mahapatrao v. Magata Patro,⁽⁴⁾ distinguished.

Although a decree as defined under s. 2 (2) of the Civil Procedure Code, 1908, is deemed to include the rejection of a plaint, an order rejecting a memorandum of appeal for failure of the appellant to pay adequate court fee does not amount to a decree. It is not open to the Court to add to the adjudication expressly included in the definition any other adjudication however similar.

* Second Appeal No. 849 of 1950.

⁽¹⁾ (1926) L. R. 53, I. A. 197.

⁽²⁾ (1940) 43 Bom. L. R. 475.

⁽³⁾ (1932) 60 Cal. 662.

⁽⁴⁾ (1932) 56 Mad. 520.

Kayambu Pillai, In re,⁽¹⁾ *Balaji Dhumnaji v. Mt. Mugtabai*,⁽²⁾ *Jnanadasundari Shaha v. Madhabachandra Mala*,⁽³⁾ *Jagadish Kumar v. Hari Kisan Das*,⁽⁴⁾ and *Lekha v. Bhauna*,⁽⁵⁾ followed.

Gour Charan v. Mohun Sahu,⁽⁶⁾ and *Abdul Majid v. Amina Khatun*,⁽⁷⁾ dissented from.

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The appellate Court's power to reject a memorandum of appeal is not confined to the cases falling within O. XLI, r. 3, of the Civil Procedure Code. Reading the provisions of s. 107 (2) and O. VII, r. 11 together, the Court of appeal is entitled to reject the memorandum for failure of the appellant to pay the requisite court-fee.

SECOND APPEAL from the decision of V. V. Albal, Esquire, District Judge, Satara north, confirming the decree passed by R. V. Apte, Esquire, First Class Subordinate Judge at Phaltan.

Application for final decree.

On December 21, 1939, The Phaltan Bank Ltd. (plaintiff) obtained a preliminary decree for sale in a suit on a mortgage against one Baburao and his brother (defendants) in the Court of the First Class Subordinate Judge at Phaltan. The preliminary decree which was for Rs. 2,242-3-6 gave six months' time to the defendants to pay the mortgage amount. The defendants filed an appeal against that decree in the District Court at Phaltan but it was dismissed on July 27, 1942. The defendants then preferred a pauper appeal to the Phaltan High Court beyond 30 days but within 90 days of the District Court's decree. The High Court admitted the appeal to its file and issued notice of it to the respondent —Bank. When the Bank appeared before the Court it drew its attention to the fact that the pauper appeal was initially filed beyond time. Thereupon the High Court decided to treat the appeal as an ordinary appeal and called upon the defendants to pay the deficit court fee. As the defendants failed to pay the court fee in time, the appeal was dismissed with costs on November 9, 1944.

On September 11, 1947, that is within three years of the High Court's decree the plaintiff applied to the trial Court under O. XXXIV, r. 5 for making the preliminary decree final. The defendants opposed the application on the ground that it was barred by time inasmuch as the period of limitation for

⁽¹⁾ [1939] Mad. 954, F.B.

⁽²⁾ [1938] A. I. R. Nag. 122, F.B.

⁽³⁾ (1931) 59 Cal. 388.

⁽⁴⁾ [1942] A. I. R. Oudh. 362.

⁽⁵⁾ (1895) 18 All. 101.

⁽⁶⁾ (1944) 23 Pat. 635.

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it had commenced to run from July 27, 1942, when the District Court dismissed their appeal.

The trial Court upheld the defendants' contention and dismissed the application on March 19, 1949.

On appeal, the decree was confirmed by the District Judge on March 17, 1950.

The plaintiff appealed to the High Court

G. R. Madbhavi, for the appellant.

D. M. Parulekar, for the respondents.

Gajendragadkar J. This appeal raises a short question of limitation under art. 181 of the Limitation Act. The appellant, the Phaltan Bank Limited, had sued the respondents to recover the amount due on a mortgage executed in its favour (Civil Suit No. 174 of 1937). A preliminary decree was passed in favour of the Bank for Rs. 2,242-3-6 on December 21, 1939. The mortgagors preferred an appeal in the District Court of Phaltan as paupers (Appeal No. 6 of 1941). This appeal was dismissed with costs on July 27, 1942. Thereafter, the mortgagors preferred a pauper appeal in the High Court at Phaltan. This appeal was preferred beyond 30 days which is the period of limitation for a pauper appeal, but within 90 days which is the period of limitation for an ordinary appeal. It is clear that the fact that the pauper appeal was beyond time was not noticed by the High Court and notice was issued on the appeal. When the Bank appeared, it drew the attention of the High Court to the fact that the pauper appeal was initially filed beyond time. The High Court thereupon apparently decided to treat the appeal as an ordinary appeal and at the request of the appellants gave them time to pay the requisite court fee on the memorandum of appeal. The requisite court fee was not paid by the appellants with the result that the appeal was dismissed with costs on November 9, 1944. On September 11, 1947, the Phaltan Bank applied for making the preliminary decree final and this application is resisted by the mortgagors principally on the ground that it is barred by limitation under art. 181. If the starting point of limitation in respect of this application is the day on which the second appeal was dismissed by the Phaltan High Court on November 9, 1944, then the application is clearly within time. On the other hand, if the

starting point of limitation is the date on which the District Court dismissed the mortgagors' appeal on July 27, 1942, the present application is clearly beyond time. The question which, therefore, falls to be considered in the present appeal is: Which is the starting point of limitation for the application made by the appellant to have the preliminary decree made final?

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It is now clear that if an appeal has been preferred against a preliminary decree passed under the provisions of O. XXXIV, an application which is to be made to make the decree final is governed by the provisions of the residuary art. 181 of the Limitation Act. Under this article, limitation is three years and the starting point is the time when the right to apply accrues. Ordinarily, such a right would accrue to the party seeking to apply for the final decree on the date when the preliminary decree is passed. There is, however, no doubt that if an appeal is preferred against such a preliminary decree, the starting point for applying to make the decree final would commence from the date when the appellate Court disposes of the appeal on the merits. In other words, if an appeal is preferred from a preliminary decree, the decision of the appeal on the merits is substituted as the starting point of limitation under art. 181 of the Limitation Act. There was some doubt and confusion as to this position when the provisions with regard to the mortgage decrees were contained in the Transfer of Property Act. But since the said provisions have been incorporated in O. XXXIV of the Code of Civil Procedure, this position has been clarified beyond all doubt. It may be relevant in this connection to refer to the decision of the Privy Council in *Jowad Husain v. Gendan Singh*,⁽¹⁾ where their Lordships have held that in case there has been an appeal from a preliminary decree and the appellate court has not extended the time for payment, the period of three years within which under art. 181 an application for a final decree must be made runs from the date of the decree of the appellate Court, not from the expiry of the time for payment fixed by the preliminary decree. There would be no change in this position although the appeal was by the mortgagee and the questions which the Court of appeal had to consider was merely as to the amount for which the preliminary decree should be made.

⁽¹⁾ (1926) L. R. 53 I. A. 197.

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The Courts below have held that the starting point of limitation in the present case is the date of the decision of the first appeal in the District Court and not the date on which the second appeal was dismissed with costs. Mr. Madbhavi contends that this view is wrong because according to him a decree has been formally drawn by the Phaltan High Court and according to this decree it appears that the second appeal preferred by the mortgagors has been dismissed with costs. Mr. Madbhavi's argument is that this decree must be treated as a decree passed by the second appellate Court on the merits; and if that is so there should be no difficulty in holding that the time for making an application under art. 181 can start only from the date when the order was passed by the High Court in the second appeal. In dealing with this question, it must be remembered that the High Court at Phaltan did not deal with the merits of the second appeal at all. In fact, it is clear that when dealing with this appeal an initial irregularity was committed in that the appeal was admitted as a pauper appeal without realising that it had been filed beyond the narrow limitation prescribed for pauper appeals. When this mistake was pointed out to the Phaltan High Court, the appeal was treated as an ordinary appeal and indulgence was shown to the appellants by giving them further time to pay adequate court fee on the memorandum of appeal and when the requisite court fee thus ordered to be paid was not paid by the appellants, the appeal was dismissed with costs. In the context, the order passed by the Phaltan High Court dismissing the appeal with costs must mean that the memorandum of appeal was rejected on the ground that it did not bear proper court fee.

It is true that under O. XLI, r. 3 an appellate Court is expressly empowered to reject a memorandum of appeal if it is satisfied that the memorandum is not drawn up in the manner as prescribed. But this does not mean that the appellate Court's power to reject the memorandum of appeal is confined only to the cases falling within r. 3 of O. XLI. It is well-settled that reading the provisions of s. 107, sub-s. (2) and O. VII, r. 11 together, the Court of appeal would be entitled to reject the memorandum of appeal on any of the grounds mentioned in O. VII, r. 11. Amongst the grounds on which a memorandum of appeal can thus be rejected under O. VII, r. 11, failure of the appellant to pay the requisite court fee is included. O. VII, r. 11 authorises the trial

Court to reject a plaint for the grounds mentioned in four sub-sections under the said rule and by reason of the provisions contained in s. 107, sub-s. (2), these powers can be exercised by the court of appeal in respect of the appeals filed before it. Therefore, in our opinion, the Phaltan High Court had jurisdiction to reject the memorandum of appeal on the ground that it was written upon an insufficiently stamped paper and the order which was passed while rejecting this memorandum must be constructed as an order of rejection in spite of the fact that in form it purported to be an order of dismissing the appeal and though a formal decree including the said decision has been drawn. It is quite clear that the High Court at Phaltan was never possessed of the second appeal as such. Unfortunately, the appeal was ordered to be numbered without calling upon the appellant to pay the adequate court fee, but that mistake was subsequently rectified by calling upon the appellants to pay the necessary court fees; and unless the proper court fee was paid, the stage to hear the appeal on the merits did not arise and could not have arisen. The question as to the proper order which should be passed by an appellate Court in such a case has been considered by this Court in *Kashiram Senu Chaudhari v. Ranglal Motilalshet Marwadi*.⁽¹⁾ At the first hearing of the appeal which had been filed in this Court, an objection was raised by the respondents's pleader that proper court fee had not been paid. The said objection was upheld and the appellant was called upon to pay the deficit court fee within three weeks' time. The appellant failed to pay the court fee as ordered. When the appeal came up before the Bench for final disposal on these facts, Beaumont C. J. considered the question as to whether the appellant could be ordered to pay the costs of the respondent. He observed that logically it was somewhat difficult to reject an appeal and then proceed to make an order for costs in the appeal, but he added that in practice such orders were made and he came to the conclusion that this practice on the whole was just and fair. In making an order directing the appellant to pay the costs of the respondent the learned Chief Justice, however, took the precaution of making it clear that the costs which were ordered to be paid were the costs of the hearing of the preliminary objection. It would thus be noticed that if we read the order passed by the High Court at Phaltan in

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the light of this decision we would not be doing violence to the form in which the order has been ultimately drawn up if we hold that this order was really intended to be and in law does amount to an order rejecting the memorandum of appeal as being insufficiently stamped coupled with the direction that the appellants should pay the respondent's costs of the hearing of the preliminary objection. If that be so, it would be difficult to hold that in the order passed by the High Court at Phaltan the decree of the lower appellate Court is merged and so the cause of action to make an application for a final decree arises as on the date of the order passed by the High Court.

Mr. Madbhavi, however, contends that even if we treat this order as an order rejecting the memorandum of appeal passed under s. 107, sub-s. (2), read with Order VII, rule 11, sub-r. (c), such an order amounts to a decree; and if this order is a decree, it must follow that the decree of the lower appellate Court is merged in this decree. Mr. Madbhavi's argument is that a decree as defined under s. 2 sub-s. (2) is deemed to include the rejection of a plaint and he suggests that rejection of a memorandum of appeal must also partake of the character of a decree because it has been passed by the appellate Court in exercise of the powers under which a plaint is rejected by the trial Court. If the rejection of a plaint under the provisions of O. VII, r. 11 amounts to a decree, there is no reason why the rejection of a memorandum of appeal ordered under the same provisions by the Court of appeal should not amount to a decree. That in short is Mr. Madbhavi's contention. We are unable to accept this contention. Section 2, sub-s. (2) defines a decree and in doing so it provides that the rejection of a plaint and the determination of any question within s. 47 or s. 144 shall be deemed to be a decree; and it further provides that it shall not include any adjudication from which an appeal lies as an appeal from an order or any order of dismissal for default. It seems difficult to accept Mr. Madbhavi's contention because we do not think we can add to this definition other orders of adjudication on the ground that they are similar to the orders which are included in the definition itself. If Legislature had intended that an order rejecting a memorandum of appeal should be included in the decree, it would have been so easy for the Legislature to make appropriate additions in the definition of the decree itself. It seems to

us that it would not be open for the Court to add to this definition any other kind of adjudications however similar they may appear to be, to the adjudication which are expressly included in the definition. Besides, the order rejecting a memorandum of appeal would in a sense amount to an order of dismissal for default. It is possible to take the view that default which is mentioned in s. 2 sub-s. 2 (b) of the Code need not necessarily be the default of the appellant. If the appellant is ordered to pay the deficit court fee within a certain time and if he commits a default in complying with this order and takes the consequence of having his memorandum of appeal rejected, it may perhaps be treated as an order of rejection consequent upon the appellant's default. If that be so, it would be an order of dismissal of the appeal for the appellant's default and would be expressly excluded from the definition of the word 'decree'.⁶ However that may be, it is clear that the rejection of a plaint would not have been included in the definition of the word 'decree' if its inclusion had not been specifically provided for. The Legislature has included the rejection of a plaint, but has not included the rejection of a memorandum of appeal which the Legislature knew could be ordered by an appellate Court in circumstances similar to those in which the trial Court could order the rejection of a plaint. It is matter of a definition and as I have already mentioned it would not be open to the Court to add to this definition on any ground whatever. In this connection, some assistance may be obtained from the judgment of Beaumont C. J. in *Kashiram's* case to which I have already referred. The Division Bench, while dismissing the appeal for failure of the appellant to pay the requisite court fee, had in that case to consider the further question as to whether the cross-objections filed by the respondent could be heard and they held that since the appeal was rejected there can be no respondent and no cross-objections. In other words, the view that was accepted by this Court was that the rejection of the appeal must be deemed to have been done at the initial stage without the respondent on the record and so there would be no occasion for the respondent to make any cross-objection against the decree under appeal. If the order rejecting the memorandum of appeal amounts to a decree, then it would be a decree passed by the appellate Court, the decree of the lower appellate Court would merge in such a decree and it would not be competent to the appellate Court

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to refuse to hear the cross-objection of the respondent. The fact that the cross-objection were treated as incompetent supports the conclusion that the learned Judge took the view by inference that it was not a decree at all.

On the question as to whether the rejection of a memorandum of appeal for failure of the appellant to pay adequate court fee amounts to a decree or not, there is a conflict of judicial opinion. But, on the whole, it appears that the majority of the High Courts have taken the view that a rejection of the memorandum of appeal does not amount to a decree. It is unnecessary to refer to these decisions in detail.

It may be enough to state that the Full Benches of the Madras High Court *Kayambu Pillai*, In re⁽¹⁾ and the Nagpur High Court *Balaji Dhamnaji v. Mt. Muktabai*⁽²⁾ and the Division Benches of the Calcutta High Court *Janadasundari Shah v. Madhavachandra Mala*⁽³⁾ and Oudh High Court *Jagdishkumar v. Hari Kishen Das*⁽⁴⁾ are in favour of the view which we have expressed *Lekha v. Bhauna*⁽⁵⁾ can also be treated as supporting this view because it has been held in this case an order rejecting the appeal on the ground that a proper security was not furnished by the appellant as he was called upon to do does not amount to a decree. On the other hand, *Gourcharan v. Mohan Sahu*⁽⁶⁾ and a single Judge of the Calcutta High Court in *Abdul Majid Mridha v. Amina Khatum*⁽⁷⁾ have held that an order rejecting the memorandum of appeal on the ground that it has not been properly stamped amounts to a decree. With respect, we do not agree with this later view.

There is another aspect of the matter which it is necessary to consider because Mr. Madbhavi has put his argument in another form. Mr. Madbhavi says that whether or not the order passed by the High Court at Phaltan amounts to a decree, it should still be deemed to be a decision by the Phaltan High Court on the merits of the appeal and in support of this contention Mr. Madbhavi has referred us to a decision of the Madras High Court in *Mahapatrao v. Magata Patro*⁽⁸⁾. In this case, the learned Judges of the Madras High Court were dealing with the question of limitation in respect of an application for a final decree which was made within three years from the date of the order passed by the appellate Court by which the appeal before the appellate Court was allowed to be withdrawn

⁽¹⁾ [1941] Mad. 954, F. B.

⁽³⁾ (1931) 59 Cal. 388.

⁽⁵⁾ (1895) 18 All. 101, F. B.

⁽⁷⁾ [1944] 2 Cal. 253.

⁽²⁾ [1938] A. I. R. Nag. 122.

⁽⁴⁾ [1942] A. I. R. Oudh 362.

⁽⁶⁾ (1944) 23 Pat. 635.

⁽⁸⁾ (1932) 56 Mad. 520.

and was then dismissed with costs. The learned Judges held that the order allowing the withdrawal of the appeal and then dismissing it with costs amounted to an order passed by the Court of appeal on the appeal itself and as such limitation should start from the date of the appellate order. Now, in dealing with this question, two decisions of the Privy Council were considered by the learned Judges. They are the decisions in *Abdul Majid v. Jawahir Lal*⁽¹⁾ and in *Batuk Nath v. Muni Dei*.⁽²⁾ In both these appeals, the agents of the appellants had not taken proper steps to prosecute the appeals and they were ultimately dismissed for non-prosecution. It was held that such a dismissal did not give a fresh starting point for an application to make the decree final and the view thus expressed was considered by the learned Judges of the Madras High Court in dealing with the point of limitation which arose before them. It was pointed out by Madhavan Nair J. who delivered the principal judgment of the Bench that the observations made by the Privy Council should be read in the context that the appeals in question had formally not reached the forum of the Privy Council at all. The appellant had failed to take preliminary steps to prosecute the appeals and in consequence the Privy Council had no occasion to deal with the appeals on the merits at all. It was held that the position in regard to an appeal which was admitted, which became ripe for hearing and which in the presence of the respondent was allowed to be withdrawn and was then dismissed with costs is materially different from the appeals with which the Privy Council were dealing. That is why the Madras High Court held that the order allowing the appeal to be withdrawn and then dismissing the appeal with costs amounted to such an order passed by the appellate Court as would give a fresh starting point of limitation to the party applying for a final decree under art. 181 of the Limitation Act. It is unnecessary for us to consider whether we would take the same view about the effect of an order allowing the appeal to be withdrawn. It would be enough for the present purpose to state that the order with which we are dealing is not at all analogous to the order allowing the withdrawal of the appeal. In the present case, the appeal could not technically have been numbered and should not have been admitted until the court fees were paid. It was because through oversight it was admitted that the respondent was called upon to appear

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⁽¹⁾ (1914) 36 All. 350.

⁽²⁾ (1914) 36 All. 284.

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before the appellate Court and on his preliminary objection the Court directed the appellant to pay proper court fees. Strictly and legally the appeal was not before the Court on the merits. The appeal did not come before the Court for disposal on the merits at all and so the order with which we are concerned is very much similar to the orders with which the Privy Council were dealing in the two cases to which I have just referred. Their Lordships of the Privy Council had themselves occasion to consider the observations made by them in the said two cases in a subsequent decision in *Hussain Asghar Ali v. Ramditta Mal*⁽¹⁾. In this latter case, Sir George Lowndes delivering the judgment of the Board pointed out that in the two earlier cases the appellate Court had no occasion to deal judicially with the matters before it at all and he cited the observation of Sir John Edge in one of the said cases where it was stated that (p. 667):

“there was...no order of His Majesty in Council dismissing the appeal nor was it necessary that any such order should be made in the appeal. Under r. 5 of the Order in Council of June 13, 1853, the appellant or his agent not having taken effectual steps for the prosecution of the appeal, the appeal stood dismissed without further order.”

It would thus be noticed that the authority of the Privy Council is in support of the view that if an order has been made by the Court of appeal rejecting the appeal on the ground that proper court fees have not been paid, the appeal virtually has not come before the Court of appeal for disposal on the merits, but it has faded out for the reason that the preliminary steps to present the appeal before the appellate Court properly and effectively were not taken by the appellant. It is true that in *Hussain Asghar Ali's* case⁽¹⁾ the Privy Council held that if an appeal is admitted and notice on the respondent is served but it is ultimately found that it has abated, the order regarding the abatement of the appeal is a final order and it would give a new starting point of limitation for three years prescribed for an application to execute the decree. This decision was in reference to art. 182 (2) of the Limitation Act where different consideration would come into operation. Therefore, in our opinion, the decision of the Madras High Court on which Mr. Madbhavi relies does not assist his contention. On the other hand, the decisions of the Privy Council just cited, with respect, lend support to the conclusion to which we have arrived. In our opinion, therefore, the lower appellate Court

⁽¹⁾ (1932) 60 Cal. 662.

was right in holding that the application made by the Phaltan Bank is barred by limitation under art. 181. Mr. Madbhavi has strenuously contended that this view would be inequitable and would work hardship against the creditor. Mr. Madbhavi points out that if an appellant files an appeal and obtains time for paying court fees and ultimately fails to pay the court fees, the respondent is sometimes tempted not to make an application for a final decree and the default of the appellant ultimately works out to the prejudice of the respondent. In the present case, there is no doubt that the irregular manner in which this appeal has been dealt with by the High Court at Phaltan has resulted in prejudice to the appellant. But these considerations, in our opinion, have no relevance when we are dealing with a question of limitation. Besides, it was perfectly open to the appellant to have applied for a final decree in spite of the fact that the mortgagors had preferred an appeal. That is a step which any mortgagee-decree-holder should and can adopt to save his interest. If the appellant did not adopt this course, he cannot wholly blame the respondents for the present unfortunate result.

The appeal, therefore, fails and must be dismissed with costs.

Appeal dismissed.

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

RATILAL PANACHAND GANDHI v. STATE OF BOMBAY.*

Bombay Public Trusts Act (XXIX of 1950), ss. 6A, 6B, 18, 31, 32, 34, 35, 36, 37, 44, 47, 48, 50 (e), (g), 55, 56, 57, 58, 59 and 62 to 66—Bombay Public Trusts Rules, rr. 32 and 42†—Whether provisions of Act contravene any fundamental rights—Constitution of India, arts. 25,

* Civil Application No. 880 of 1952 with Mis. Application No. 212 of 1952.

† The relevant provisions of Rules 32 and 42 of the Bombay Public Trusts Rules are as follows:

32. (1) Every Public Trust shall pay annually to the Public Trusts Administration Fund on or before June 30, out of its property or funds a contribution at the rate of 2 per cent. of its gross annual income....

42. Charity commissioner shall not accept—

(i) any trust for religious purposes which involves the exercise by him as trustee of any religious observance or ceremony or the decision of any question as to the religious merit or character of any individual or institution....

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