CHOUDHARY SAHU (DEAD) BY LRS.

v.

STATE OF BIHAR

December 14, 1981

[S. MURTAZA FAZAL ALI AND R. B. MISRA, JJ.]

Code of Civil Procedure, Order XLI, Rules 22 and 33, scope of.

The appellant is a land-owner in terms of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961. While considering the objection of the appellant in response to the notice issued under section 10(2) of the Act, the Collector, by his order dated 23rd of February, 1975 ordered allotment of twelve units of lands.

By Rule 49 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Rules, 1963, Order XLI of the Civil Procedure Code has been made applicable in disposing of the appeals under the Act. The appellant, feeling aggrieved by the Collector's order went up in appeal before the Commissioner of the Division. The respondent-State submitted to the order, did not go in appeal and allowed the appeal to be decided ex-parte. The appellant, who challenged the order of the Collector on various grounds did not challenge the finding recorded by the Collector regarding the twelve units allotted to him as against fifteen prayed for. The Commissioner heard the appeal on 27th of April, 1976, allowed the appeal by its order dated 14th of May, 1976, set aside the Collector's order in toto and remanded the case to him for disposal according to law. The appellant filed a petition under Article 226 of the Constitution to challenge the order of the Commissioner but the High Court dismissed the petition and confirmed the order of the Commissioner on the basis of the provisions of Order XLI, Rule 22. Hence the appeals by special leave.

Allowing the appeals, the Court

HELD : 1. The first part of Rule 22 of Order XLI of the Civil Procedure Code authorises the respondent to support the decree not only on the grounds decided in his favour but also on any of the grounds decided against him in the court below. The first part thus authorises the respondent only to support the decree. It does not authorise him to challenge the decree. If he wants to challenge the decree, he has to take recourse to the second part, that is, he has to file a cross-objection if he has not filed an appeal against the decree. [181 G]

In the instant case, admittedly the State of Bihar had neither filed any appeal or cross-objection. Obviously, therefore, on the strength of the first part of sub-clause (1) of Rule 22 of Order XLI, the State of Bihar could only support the decree not only on the grounds decided in its favour but also on the grounds

decided against it. The Commissioner could not set aside the finding in favour of the appellant on the strength of Order XLI, Rule 22(1) C.P.C. [181 H-182A]

2:1. The facts and circumstances of these appeals are not such in which it would be appropriate to exercise the power under Order XLI, Rule 33. Rule 33 of Order XLI Civil Procedure Code is widely expressed and it must be applied with caution. The objects of this rule are : (i) to empower the Appellate Court to do complete justice between the parties. Under this rule the Court has power to make a proper decree notwithstanding that the appeal is as to part only of the decree and such power may be exercised in favour of all or any of the parties even though they may not have filed an appeal or objection; (ii) to avoid contradictory and inconsistent decisions on the same questions in the same suit. As the power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or cross-objection, it must be exercised with care and caution. [184 G, 182 G, 184 C]

2:2. The rule does not confer an unrestricted right to re-open decrees which have become final merely because the Appellate Court does not agree with the opinion of the court appealed from. Ordinarily, the power conferred by this rule will be confined to those cases where as a result of interference in favour of the appellant further interference with the decree of the lower court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. While exercising the power under this rule the Court should not lose sight of the other provisions of the Code itself nor the provisions of other laws, viz., the Law of Limitation or the Law of Court Fees etc. [184D-F]

Nirmala Bala Ghose & Anr. v. *Balai Chand Ghose & Ors.*, [1965] 3 SCR 550 and *Giani Ram & Ors.* v. *Ramji Lal & Ors.*, [1969] 3 SCR 944, followed.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 423 of 1979 & 2084 to 2090 of 1977.

Appeals by special leave from the judgment and order dated the 24th September, 1976 of the Patna High Court in C.W.J.C. Nos 1631, 1614, 1618, 1617, 1594, 1616, 1615 & 1593 of 1976 respectively.

P. R. Mridul, R. K. Jain, B. P. Singh and *Pankaj Kalra* for the Appellant in CA. 423/79.

Soli J. Sorabjee, R. P. Singh and *R.K. Jain* for the Appellant in CA. 2085 of 1977.

M. C. Bhandare and *R. P. Singh* for the Appellant in CA. 2086/77.

D. P. Singh, R. K. Jain and *R. P. Singh* for the Appellant in CA. Nos. 2089-2090/77.

D. Goburdhan and *R. N. Poddar* for the Respondent.

A The Judgment of the Court was delivered by

MISRA, J. These eight appeals by special leave raise a common question of law regarding the scope of Order 41, rule 22 and Order 41, rule 33 of the Code of Civil Procedure. We, therefore, propose to dispose of these appeals by a common judgment. Since these B appeals raise similar questions, we will refer to the facts of civil appeal No. 2084 of 1977 only.

The appellant in this appeal is a land holder in terms of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as the Act). A C notice under section 8(1) of the Act was issued to the petitioner calling upon him to submit return with all the particulars of the lands held by him. The petitioner in response to the said notice filed his return. On the basis of the verification report the Additional Collector came to the conclusion that the petitioner was D entitled to five units and accordingly ordered for the publication of the draft statement under section 10 of the Act. The petitioner was again served with a notice under section 10(2) of the Act. In response thereto he filed an objection laying *inter alia* a claim for fifteen units for reasons enumerated therein. The Collector considered the objections filed by the petitioner and by his order dated 23rd of February, 1975 ordered allotment of twelve units to the E petitioner. The petitioner feeling aggrieved went up in appeal before the Commissioner of the Division. The State of Bihar submitted to the order and did not go up in appeal. Notices were issued to the respondents who, however, failed to appear on the date fixed. The appeal was heard on 27th of April, 1976 and a final order was passed by the Commissioner on 14th of May, 1976. F He allowed the appeal and set aside the order of the Collector and remanded the case to him for disposal according to law.

It may be pointed out that the appellant had challenged the order of the Collector on various grounds. He, however, did not challenge the finding recorded by the Collector regarding the units G allowed to him. The Commissioner, however, set aside the finding of the Collector even regarding the units allotted to the appellant in spite of the fact that no appeal had been filed by the State of Bihar before the Commissioner. The appellant filed a petition under Article 226 of the Constitution to challenge the order of the H Commissioner but the High Court dismissed the petition and confirmed the order of the Commissioner on the basis of the provisions of Order 41 rule 22.

The sole contention raised on behalf of the appellants in the various appeals is that in the absence of any appeal or cross-objection filed by the State of Bihar the Commissioner was not justified in reversing the finding in favour of the appellant's namely, the finding on the question of allotment of units or regarding the classification of land. This contention, as observed earlier, was raised before the High Court in the writ petition as well. The High Court, however, repelled the contention by applying the provisions of Order 41, rule 22. Reliance has also been placed by the State of Bihar on the provisions of Order 41, rule 33 C.P.C. in support of the order of the Commissioner. The High Court, however, did not rely upon Order 41, rule 33 and rest content by relying on provision of Order 41, rule 22,

By rule 49 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Rules, 1963, Order 41 of the Civil Procedure Code has been made applicable in disposing of the appeals under the Act.

We will first refer to the provisions of Order 41, rule 22 Insofar as it is material for the purposes of this case, it reads :

> "22(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow."

The first part of this rule authorises the respondent to support the decree not only on the grounds decided in his favour but also on any of the grounds decided against him in the court below. The first part thus authorises the respondent only to support the decree. It does not authorise him to challenge the decree. If he wants to challenge the decree, he has to take recourse to the second part, that is, he has to file a cross-objection if he has not already filed an appeal against the decree. Admittedly, the State of Bihar had neither filed any appeal nor cross-objection. Obviously, therefore, on the strength of the first part of sub-clause (1) of rule 22 of Order 41 the State of Bihar could only support the decree not only

A on the grounds decided in its favour but also on the grounds decided against it. The Commissioner however, has not aside the finding in favour of the appellant on the strength of Order 41, rule 22(1). In our opinion this he could not do.

B The only other Order on which the State of Bihar could rely upon is Order 41, rule 33 C.P.C. The High Court did not consider the provisions of Order 41, rule 33 as in its opinion the order of the Commissioner could be supported on the strength of Order 41, rule 22. In the view that we have taken regarding the applicability of Order 41, rule 22 it becomes pertinent to consider the applicability of Order 41, rule 33 of the Code of Civil Procedure. Insofar as
G material, it reads :

> "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
D 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.
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> E *Illustration* : 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."

F This rule is widely expressed and it must be applied with great caution. The object of this rule is to empower the Appellate Court to do complete justice between the parties. Under this rule the Court has power to make a proper decree notwithstaading that the appeal is as to part only of the decree and such power may be
G exercised in favour of all or any of the parties even though they may not have filed an appeal or objection.

Reliance has been placed on *Nirmala Balai Ghosh & Anr.* v. *Balai Chand Ghose & Ors.*[1] This Court dealing with the scope
H of Order 41, rule 33, observed as follows :

(1) [1965] 3 SCR 550.

"The rule is undoubtedly expressed in terms which are wide, but it has to be applied with discretion, and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. Where in an appeal the Court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by O. 41, r. 33 may properly be invoked. The rule, however, does not confer an unrestricted right to re-open decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from."

In the case cited above, there were two sets of defendants in the suit and in substance two decrees, though co-related, were passed. One of the decrees could stand apart from the other. One set of defendants were two deities. The suit was decreed against them. They did not go up in appeal nor did they take part in the proceedings either before the High Court or before the Supreme Court, although they were impleded as respondents. The other set of defendants, Nirmala, sought to invoke the powers of the Appellate Court under Order 41, rule 33 to pass a decree in favour of a party not appealing so as to give the latter a benefit which she had not claimed. In such a situation this Court observed :

When a party allows a decree of the Court of First Instance to become final, by not appealing against the decree, it would not be open to another party to the litigation, whose rights are otherwise not affected by the decree, to invoke the powers of the appellate court under O. 41, r. 33, to pass a decree in favour of the party not appealing so as to give the latter a benefit which he has not claimed. Order 41, r. 33 is primarily intended to confer power upon the appellate court to do justice by granting relief to a party who has not appealed, when refusing to do so, would result in making inconsistent, contradictory or unworkable orders."

A Counsel for the State of Bihar, on the other hand, referred to *Giani Ram & Ors.* v. *Ramiji Lal & Ors.*(1) While construing the provisions of Order 41, rule 33, this Court observed :

> "...the expression 'which ought to have been passed' means 'what ought in law to have been passed'. If the Appellate Court is of the view that any decree which ought in law to have been passed was in fact not passed by the subordinate court, if may pass or make such further or other decree or order as the justice of the case may require."

C The object of this rule is to avoid contradictory and inconsistent decisions on the same questions in the same suit. As the power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or cross-objection, it must be exercised with care and caution. The D rule does not confer an unrestricted right to re-open decrees which have become final merely because the Appellate Court does not agree with the opinion of the court appealed from.

Ordinarily, the power conferred by this rule will be confined to those cases where as a result of interference in favour of the E appellant further interference with the decree of the lower court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. While exercising the power under this rule the Court should not lose sight of the other provisions of the Code itself nor the provisions of other laws, viz., the Law of the Limitation or the Law of Court Fees etc.

F In these appeals the Collector on the basis of the material placed before him allowed certain units to the various appellants. In the absence of any appeal by the State of Bihar, there was no justification for the Commissioner to have interfered with that finding in favour of the appellants. The facts and circumstances of G these appeals are not such in which it would be appropriate to exercise the power under Order 41, rule 33. The Commissioner as well as the High Court committed a manifest error in reversing the finding regarding allotment of units to the various appellants in the absence of any appeal by the State of Bihar when the same had H become final and rights of the State of Bihar had come to an end

(1) [1969] 3 SCR 944.

to that extent by not filing any appeal or cross-objection within the period of limitation. A

For the reasons given above, all the appeals are allowed and the order of the High Court and that of the Commissioner is set aside insofar as it relates to finding of the Collector in favour of the appellants. The remand order will, however, remain intact insofar as other points are concerned. In the circumstances of the case, the parties shall bear their own costs. B

S.R. *Appeals allowed.*