[FULL BENCH.]

*1908.*
*April 15.*

*Present:* The Hon. Sir Joseph T. Hutchinson, Mr. Justice Wendt, and Mr. Justice Middleton.

PALINGU MENIKA *v.* MUDIYANSE BANDA.

*D. C., Kandy, 18,179.*

*Appeal, withdrawal of—Cross-objections—Right of respondent to be heard —Civil Procedure Code, ss. 406, 772.*

*Held* by Hutchinson C.J. and Wendt J., *dissentiente* Middleton J., that where, on an appeal being called on for hearing, counsel for the appellant withdraws the appeal, the respondent is nevertheless entitled to be heard on the cross-objections of which he has given notice, as provided by section 772 of the Civil Procedure Code.

APPEAL from a judgment of the District Judge of Kandy (J. H. Templer, Esq.).

The facts material to the report sufficiently appear in the judgments.

*H. A. Jayewardene*, for the defendant, appellant.

*Van Langenberg*, for the plaintiff, respondent.

*Cur. adv. vult.*

April 15, 1908. HUTCHINSON C.J.—

The defendant in this case filed his petition of appeal against the judgment of the District Court on July 29 last. When the appeal came on for hearing on December 19, the appellant's advocate said "I withdraw the appeal." Thereupon the respondent, who had not appealed, but had given notice to the appellant under section 772 of his intention to object to part of the judgment, applied that his objection might be heard. Section 772 says that the respondent's objection may be taken "upon the hearing," and the appellant says that there was no hearing, and therefore the objection cannot be taken.

There is no express provision in our law for the withdrawal of an appeal. In the ordinary course when an appeal has been, in the words of section 768 of the Civil Procedure Code, "entered for hearing" and "comes on for hearing," and the appellant says that he withdraws it, the Court makes an order dismissing the appeal. It was argued that the provisions of section 406 for the "withdrawal of an action" apply to an appeal, because an appeal is an "action" as defined in section 5. But I think those provisions were intended to refer to the whole of an action, and not to particular proceedings in the course of an action, and this is shown by the fact that it is only the plaintiff who can withdraw the action, whereas the appellant may be, as he is in the present case, the defendant.

There are decisions of Indian Courts on the provisions of the Indian Code which are similar to section 772, that under similar circumstances the respondent's objections cannot be heard. On the other hand, the English Court of Appeal in the "Beeswing" case [1] decided that the respondent under such circumstances may elect either to continue or to withdraw his objection; this was a decision on Order 58, rule 6, which says that it shall not under any circumstances be necessary for a respondent to bring a cross-appeal, but that he may, if he intends, "upon the hearing of the appeal," to contend that the judgment should be varied, give notice of his intention.

The only practical difference that I can see between the English rule on the one hand and our section 772 or the Indian section 561 on the other is that the former expressly says that no cross-appeal shall in any case be necessary, intending apparently that the notice under rule 6 shall have all the effect of a cross-appeal. In all the three enactments there is the same provision, that the respondent's objections are to be urged "upon the hearing" of the appeal. And in none of them is there any provision for withdrawal of an appeal, although the practice in the English Registry is to allow the withdrawal of an appeal by consent of the parties before it is listed for hearing; and it seems that in India, by reason of an enactment in

[1] *(1885) 10 P. D. 18.*

*1908.*
*April 15.*
HUTCHINSON C.J.

the Indian Code which does not appear in ours, the provisions for withdrawal of an action apply also to appeals. The English Court did not give any reasons for its decision, but, after consulting the other Judges of the Appeal Court, laid down what should be the practice. But it was bound by its rules, as we are bound by our Code, and had no power to alter them, and I think it must have been of opinion that when an appeal comes on for hearing, and the appellant says in effect that he will not argue it, and the Court thereupon dismissed it, that is a " hearing of the appeal."

My opinion is that when an appeal is listed and " comes on for hearing " under sections 768 and 769, and the appellant either does not appear or appears and says that he " withdraws " it or that he will not support it, it has been heard, and the respondent's objection under section 772 can then be heard.

WENDT J.—

The question which has been reserved by my Lord and my brother Middleton for the consideration of three Judges is whether, when an appeal comes on for hearing, the appellant is entitled to withdraw it, and whether if he does so, the respondent is nevertheless entitled to have the objections of which he has given notice under section 772 of the Procedure Code heard and determined by the Court.

It was argued by the respondent that our Civil Procedure Code contains no provision for the withdrawal of appeals, and I think that that is so. It is one distinguishing characteristic of the procedure enacted by that Code that once a proceeding is commenced, the continuance of it is compulsory until its final determination; the Court is itself to see that the next step at each stage shall be taken by the party from whom it is due. Where withdrawal from an action is recognized at all, it is subject to the cognizance and control of the Court according to the principles laid down in chapter XXVI. That chapter has been held to apply to the Appellate Court to this extent, viz., that that Court may give the plaintiff leave to withdraw from the action and to bring a fresh action. This construction is justified by the opening words of section 406, " at any time after the institution of the action." But that construction does not enlarge the powers conferred by the section. The leave is given to the plaintiff, and it is to put an end to the whole action. It does not contemplate the withdrawal from a mere step in the action, such as an appeal, with liberty to re-take that step, while the action still remains undisposed of. The appellant might be the defendant, who could not withdraw from the action even if he wished. Counsel for the appellant sought to make chapter XXVI. applicable by a resort to the definition in section 6 of " action " as an " application to a Court for relief or remedy obtainable through the exercise of the Court's power or authority."

An appeal, it was said, was an application to the Appellate Court for relief against the judgment of the Court below. But, in may opinion, the context shows that the Court intended by the definition is a Court of first instance. " Actions " are divided into those of *regular* and those of *summary* procedure (section 7), and, except where otherwise specially provided, they must be of regular procedure (section 8). Every regular action begins with a " plaint " (section 39), and every summary action with a petition supported by affidavits (sections 373-76). That excludes appeals.

It is true that sometimes in practice an appellant's counsel, when his case is called, rises and says " I withdraw the appeal;" but that is always treated as equivalent to " I have nothing to say in support of the appeal," and the order accordingly is " appeal dismissed with costs."

Several cases were cited to us in which the Indian Courts had decided in favour of the appellant the very question now before us, and held that the appellant *could* withdraw his appeal, and that if he did so without opening his case, there was no " hearing of the appeal," and respondent's objections could therefore not be brought forward. But these decisions, which extend in a long series back to the case of *R. P. Ojah and others v. B. B. Bhoonuar and others*,[1] are inapplicable owing to a material difference between the Indian Code of Civil Procedure and our own. Act XXIII of 1861, section 37, enacted that, " unless when otherwise provided, the Appellate Court shall have the same powers in cases of appeal which are vested in the Courts of original jurisdiction in respect of original suits." And the High Court of Calcutta, in the case just cited, in dealing with the argument that while the law provided for the withdrawal of suits, it nowhere provided for withdrawal of appeals, expressly relied upon that section as giving them the power to allow an appeal to be withdrawn. We have no provision in our Code similar to that section 37. Our Legislature, in adapting the Indian Code to our wants, appears advisedly to have left out section 582 of the Indian Code of 1882, which had eventually replaced the section of the Act of 1861. We must take that ommission to have been advisedly made.

In my opinion, therefore, an appellant cannot claim to " withdraw his appeal in the same way that a plaintiff can " withdraw " his action. I think also that respondent is entitled to have his objections to the decree heard. To hold so does not necessarily involve the consequence that a respondent need never present an appeal of his own. It may happen that the appeal abates (*e.g.*, in consequence of security for costs not having been given in time) and never comes on. In that case I should hold there could be no " hearing " of the appeal, and the objections of the respondent would lapse.

[1] *(1868) 9 W. R. 328.*

*1908.*
*April 15.*

MIDDLETON J.—

This was an action to recover certain movables deposited with the defendant for safe keeping, or their value. The District Judge gave judgment for some of the articles in question. The defendant appealed, after which the plaintiff, without entering a cross-appeal, gave notice under section 772 of the Civil Procedure Code that he objected to the decree, as not including the value of those articles which the District Judge had disallowed.

Upon the appeal being called on by the Registrar, the appellant's counsel stated that he withdrew his appeal. The respondent's counsel then desired to press his objections under section 772, but this was demurred to by counsel for the appellant, who quoted *Jafer Horsan v. Rangit Singh*,[1] where Sir John Edge C.J., following the cases reported in *9 Weekly Reporter 328*, *14 Weekly Reporter 210*, *I. L. R. 9 Bombay 281*, and *I. L. R. Allahabad 551*, held that where an appeal was withdrawn before it was argued, or opened objections under section 581 of the Indian Civil Procedure Code, could not be heard, the ground apparently being that there was no hearing of the appeal.

The English Court of Appeal, however, in the "Beeswing"[2] case held under order 58, rule 6, that when a respondent has given notice that he will on the hearing of an appeal contend that the decision of the Court below should be varied, and the appellant subsequently withdraws his appeal, such notice entitles the respondent to elect whether to continue or withdraw the cross-appeal. If he continues his cross-appeal, the appellant has the right of giving a cross-notice that he will bring forward his original contention on the hearing of the respondent's appeal.

The difference between our procedure and that in England is that in the latter, under rule 6, order 58, "it is not under any circumstances necessary for a respondent to give notice of motion by way of cross-appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the Court below should be varied," he shall give an eight days' notice in the case of a final judgment and a two days' notice in the case of an interlocutory order of such intention to any parties who may be affected by such contention.

Under our procedure a party in the position of a respondent, if dissatisfied with the decree in his favour, ought properly to appeal, but on failure to do so he has further privileges accorded to him under section 772. If a mainly successful party in our Courts does not appeal within the statutory period, it is clear in most cases that he is not greatly dissatisfied with the decree in his favour, and has waived the right to do so; but on an appeal against him, he may with due notice exercise his privileges under section 772 upon the hearing

[1] *I. L. R. Allahabad 518.*

[2] *(1885) 10 P. D. 18.*

of the appeal. The privilege under section 772 is given, in my opinion, to enable a satisfied respondent to defend himself on all points from the attack on appeal.

In the case of the " Beeswing " (*ubi supra*), the Court allowed the notice to be treated as a cross-appeal, a character which in fact it possesses under English procedure to the extent that on the original notice of appeal being withdrawn by the appellant, the Court allowed the respondent to elect whether to persevere with or withdraw the cross-appeal. The Court further accorded the appellant the privilege of reinstatement of his withdrawn appeal on the hearing of the respondent's appeal. The Court gave the respondent this privilege, although there was no hearing of the appeal either in fact or constructively, I think (1) because it is not necessary under English procedure to enter a cross-appeal, and (2) it is not specifically laid down that the right may be exercised upon the hearing of the appeal, and thus inferentially is not to be exercised if there is no hearing of the appeal.

The wording of rule 6 is, " If a respondent intends upon the hearing of the appeal to contend that the decision of the Court below should be varied," &c. Our section 772 enacts that " he may upon the hearing support the decree, or take any objection," &c.

The power given to the respondent " to support the decree on any of the grounds decided against him in the Court below " can only be exercised on an actual hearing of the appeal, and the " objections " I think are assumed to be such as the respondent would not have raised had there been no appeal, and therefore were not intended to be heard if no actual hearing of the appeal took place. I am inclined to think, therefore that the decision in the " Beeswing " (*ubi supra*) does not apply to the circumstances of this case and the cases decided by the Indian Courts.

The question here and in some of those cases was whether what has happened amounts to a hearing of the appeal within the contemplation of section 772. Taking into consideration the power of appeal permitted to a person in the position of a respondent here, I am disposed to agree in the reasoning of Mahamood J.[1] that the hearing of the objections is subject to the condition of the appellant proceeding to an actual hearing. The respondent is not really dissatisfied with the decree, or he would have appealed; but either fearing his position may be deteriorated by the appellant's appeal, or, by way of counter move, he puts forward his objections or supports his judgment on grounds decided against him in the Court below, which can only be considered upon the actual hearing of the appeal. The case is called on for hearing, and the appeal is announced to be withdrawn by counsel for the appellant, and is not heard, and I think the right to have the objections heard vanishes thereupon.

[1] *I. L. R. 8 All. 552.*

*1908.*
*April 15.*
MIDDLETON J.

The appellant can, if he chooses, inform the Registrar that he does not support the appeal, and neither appear in person or by counsel, in which case, under section 769, the appeal upon being called on, but not heard, is dismissed.

There are no provisions in our Code for the withdrawal of an appeal, but if an appeal is not supported or stated by the appellant or his counsel to be withdrawn, the Court dismisses it as of course (section 769).

The announcement of the withdrawal of the appeal imposes that duty upon us without hearing it, and I would hold, therefore, that the appeal must stand dismissed with costs, and that the respondent's objections cannot be heard.

*Objection to the cross-objections being heard over-ruled.*