

CASE NO.:
Appeal (civil) 1376-77 of 2003

PETITIONER:
BANARSI AND ORS.

RESPONDENT:
RAM PHAL

DATE OF JUDGMENT: 17/02/2003

BENCH:
R.C. LAHOTI & BRIJESH KUMAR

JUDGMENT:
JUDGMENT

2003(2) SCR 22

The Judgment of the Court was delivered by

R.C. LAHOTI, J. Leave granted in both the SLPs.

A suit for specific performance of an agreement to sell entered into between the parties on 03.11.1988 and later on novated by an agreement dated 15.7.1991, was filed by the respondent herein. According to the latter agreement, the consideration for sale was appointed at Rs. 2,90,000 out of which an amount of Rs. 2,40,000 was acknowledged by the vendor to have been received, leaving a balance of Rs. 50,000 to be received at the time of execution and registration of the sale deed. The appellants had also filed their own suit seeking cancellation of the agreement dated 03.11.1988 on the ground that the nature of transaction between the parties was one of loan; that the amount of loan taken by the appellants was only Rs. 60,000 but the respondent had added advance interest and capitalized the same; and that the amount of loan with interest was returned and yet the respondent had failed to deliver back as fully discharged the agreements dated 03.11.1988 and 15.7.1991. The two suits were consolidated and tried together by the learned Civil Judge. Vide the judgment and decree dated 20.5.1994, disposing of both the suits, the Trial Court held that looking at the real nature of the transaction entered into between the parties and the evidence adduced to show the actual amount which passed from the respondent to the appellants it was just and proper that the appellants returned the amount of Rs. 2,40,000 with interest calculated at the rate of 1% per month with effect from 3.11.1988 on Rs. 1,80,000 and with effect from 15.7.1991 on Rs. 60,000. During the course of its judgment the Trial Court recorded a specific finding that the appellants were cultivating the land; that land in dispute was very necessary for the maintenance of their family; and that if execution of sale deed was directed they would suffer too much hardship. The operative part of the judgment, incorporated in the decree, reads as under:-

"The defendants Shri Banarsi etc. are hereby ordered that they should deposit the amount of Rs. 1,80,000 and Rs. 60,000 total Rs. 2,40,000 from 3.11.88 to 15.7.91 within two months for the plaintiff, in the court.

The plaintiff Shri Ramphal is directed that in case the above amount is deposited during the above mentioned period, he will return the original agreement after endorsing the receipt of the entire amount on the back of the original Agreement dated 15.7.91 and return this to the defendants or do the alienation at their expense in their favour and get it registered.

If the above defendants Shri Banarsi etc. fails to deposit the above mentioned entire amount in the court within a period of above two months time then thereafter the plaintiff Shri Ramphal shall have the right that he after depositing the amount of Rs. 50,000 in the court may get the sale

deed executed in respect of the land in dispute in his favour or in favour of the person nominated by him, from the defendants. Accordingly, the order is given to the defendants that they after executing the above sale deed in favour of the plaintiff give the same to the plaintiff.

In the land in dispute, all those lands are included which have been allotted to the defendants after modification in the consolidation.

Both the parties to bear their respective costs. Dated 20.5.94"

The appellants herein filed two appeals in the High Court. By an interim order dated 13.7.94 passed in one of the appeals, the High Court directed execution of decree under appeal to remain stayed subject to the appellants depositing an amount of Rs. 80,000 on or before 31st March, 1995. On 24.3.95, the appellants deposited the amount of Rs. 80,000 in the High Court. During the pendency of the first appeals, the pecuniary jurisdiction of the District Courts was enhanced consequent whereupon the first appeals came to be transferred from the High Court to the District Court. Both the appeals came to be heard and decided by the learned Additional District Judge vide his judgment dated 21.9.99. Both the appeals were dismissed. The respondent did not prefer any appeal of his own nor filed any cross-objection. While holding the appeals preferred by the appellants liable to be dismissed, the first appellate Court framed the operative part of the judgment as under-

"both the appeals are liable to be rejected with this modification that the suit of the plaintiff Ramphal is liable to be decreed for specific relief and the original suit no.63 of 1993 Banarsi Versus Ramphal is liable to be rejected.

ORDER

Both the appeals, while rejecting this order passed by the Court below in the impugned judgment and decree dated 20.5.1984 that deposit the amount Rs. 2,40,000 with interest @ 1% within two months and after that make the endorsement of the receipt of the entire money on the back of the Agreement dated 15.7.1991 by the Defendant Ramphal and after confirming the remaining order, modifying the impugned order and decree to that extent, are hereby dismissed. In this manner the suit of the Plaintiff Ramphal for the specific relief is decreed with costs against the original Suit No. 38 of 1993 in the matter of the defendant Banarsi etc. and the Defendant Banarsi etc. are here by directed that they after receiving the balance amount of Rs. 50,000 as per the agreement dated 15.7.1991 within a period of one months execute the sale deed and hand over the possession otherwise the plaintiff shall be at liberty to get the above work done through Court. Original Suit no.63 of 1993 Banarsi etc. Versus Ram Phal is dismissed with costs. Copy of this order be kept in the concerned file. Both the parties would bear their respective costs of both the appeals."

[emphasis supplied]

The appellants preferred two second appeals before the High Court. By an interim order dated 20.12.99, the High Court directed the execution of the decrees appealed against to remain stayed subject to the appellants depositing an amount of Rs. 2,40,000, after adjusting the amount already deposited by them pursuant to the earlier order of the High Court, within a period of eight weeks, which amount along with the amount already deposited should be kept in fixed deposit. On 10.2.2000, the appellants deposited an amount of Rs. 1,60,000 in the Court of Civil Judge Senior Division, Kairana (M. Nagar). Both the amounts deposited by the appellants, i.e. Rs. 80,000 and Rs. 1,60,000, are now lying in fixed deposit. Vide the impugned common judgment (in the two appeals) dated 10.8.2001, the High Court has directed both the second appeals filed by the appellants to be dismissed as raising no substantial question of law. One of the pleas advanced on behalf of the appellants before the High Court was that the first Appellate Court could

not have, in the purported exercise of power under Order 41 Rule 33 of the CPC, reversed the decree in respect of the refund of money and directed the suit for specific performance to be decreed in favour of the respondent without there being any appeal or cross-objection preferred by the respondent. The High Court opined that it was open for the respondent not to file any appeal against the Trial Court's decree on the belief that he would either get his money back within the short time provided under the decree or would have the contract specifically performed. However, on account of the stay order obtained by the appellants, the payment of decretal amount was not made by the appellants to the respondent as per the terms of the decree and in such circumstances, the first Appellate Court committed no error of law in exercising power under Order 41 Rule 33 of the CPC and passing a decree for specific performance in favour of the respondent.

Feeling aggrieved by the judgment and decree of the High Court the appellants have filed these two appeals by special leave.

The appeals raise a short but interesting question of frequent recurrence as to the power of the appellate court to interfere with and reverse or modify the decree appealed against by the appellants in the absence of any cross-appeal or cross-objection by respondent under Order 41 Rule 22 of the CPC and the scope of power conferred on appellate court under Rule 33 of Order 41 of the CPC.

The first question is whether without cross objection by the respondent, could the Appellate Court have set aside the decree passed by the Trial Court and instead granted straightaway a decree for specific performance of contract? This would require reference to the principles underlying right to file an appeal and right to prefer cross objection or when does it become necessary to prefer cross objection without which decree under appeal cannot be altered or varied to the advantage of the respondent and/or to the disadvantage of the appellant. Rule 22 of Order 41, as amended by CPC Amendment Act 104 of 1976, with effect from 1.2.1977 is reproduced hereunder in juxtaposition with the text of the provision as it stood prior to the amendment.

Order 41 Rule 22

Text as amended by Act 104 of 1976(w.e.f. 1-2-1977)

Text pre-amendment

R.22. Upon hearing, respondent may object to decree as if he had preferred a separate appeal.-(1)

Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also 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.

[Explanation.-A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.]

R.22. Upon hearing, respondent may object to decree as if he had preferred

a separate appeal.-(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.

(2) xxxx xxxx xxxx

(2) xxxx xxxx xxxx

(3) xxxx xxxx xxxx

(3) xxxx xxxx xxxx

(4) Where, in any case in which any respondent has under this rule a filed a memorandum of objection, original appeal is withdrawn or dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(4) Where, in any case in which any respondent has under this rule filed memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

Sections 96 and 100 of the CPC make provision for an appeal being preferred from every original decree or from every decree passed in appeal respectively; none of the provisions enumerates the person who can file an appeal. However, it is settled by a long catena of decisions that to be entitled to file an appeal the person must be one aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree he is not entitled to file an appeal (See Phoolchand and Anr. v. Gopal Lal, [1967] 3 SCR 153; Smt. Jatan Kanwar Golcha v. M/s Golcha Properties (P) Ltd., [1970] 3 SCC 573; Smt. Ganga Bai v. Vijay Kumar and Ors., [1974] 2 SCC 393. No appeal lies against a mere finding. It is significant to note that both Sections 96 and 100 of the CPC provide for an appeal against decree and not against judgment.

Any respondent though he may not have filed an appeal from any part of the decree may still support the decree to the extent to which it is already in his favour by laying challenge to a finding recorded in the impugned judgment against him. Where a plaintiff seeks a decree against the defendant on grounds (A) and (B), any one of the two grounds being enough to entitle the plaintiff to a decree and the Court has passed a decree on ground (A) deciding it for the plaintiff while ground (B) has been decided against the plaintiff, in an appeal preferred by the defendant, in spite of the finding on ground (A) being reversed the plaintiff as a respondent can still seek to support the decree by challenging finding on ground (B) and persuade the appellate court to form an opinion that in spite of the finding on ground (A) being reversed to the benefit of defendant-appellant the decree could still be sustained by reversing the finding on ground (B) though the plaintiff-respondent has neither preferred an appeal of his own nor taken any cross objection. A right to file cross objection is the exercise of right to appeal though in a different form. It was observed in Sahadu Gangaram Bhagade v. Special Deputy Collector. Ahmednagar and Anr., [1971] 1 SCR 146 that the right given to a respondent in an appeal to file cross objection is a right given to the same extent as is a right of appeal to lay challenge to the impugned decree if he can be said to be aggrieved thereby. Taking any cross objection is the exercise of right of appeal and takes the place of cross-appeal though the form differs. Thus it is clear that just as an appeal is preferred by a person aggrieved by the decree so also a cross objection is preferred by one who can be said to be aggrieved by the decree. A party who has fully succeeded in the suit can and needs to neither prefer an appeal nor take any cross objection though certain finding may be against him. Appeal and cross-objection - both are filed against decree and not against judgment and certainly not against any

finding recorded in a judgment. This was well-settled position of law under the unamended CPC.

CPC Amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross objection. The amendment inserted by 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:-

(i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent;

(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent;

(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

In the type of case (i) it was necessary for the respondent to file an appeal or take cross objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross objection. The law remains so post amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross objection to & finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent.

The fact remains that to the extent to which the decree is against the respondent and he wishes to get rid of it he should have either filed an appeal of his own or taken cross objection failing which the decree to that extent cannot be insisted on by the respondent for being interfered, set aside or modified to his advantage. The law continues to remain so post-1976 amendment. In a suit seeking specific performance of an agreement to sell governed by the provisions of the Specific Relief Act, 1963 the Court has a discretion to decree specific performance of the agreement. The plaintiff may also claim compensation under Section 21 or any other relief to which he may be entitled including the refund of money or deposit paid or made by him in case his claim for specific performance is refused. No compensation or any other relief including the relief of refund shall be granted by the Court unless it has been specifically claimed in the plaint by the plaintiff. Certainly the relief of specific performance is a larger relief for the plaintiff and more onerous to the defendant compared with the relief for compensation or refund of money. The relief of compensation

or refund of money is a relief smaller than the relief of specific performance. A plaintiff who files a suit for specific performance claiming compensation in lieu of or in addition to the relief of specific performance or any other relief including the refund of any money has a right to file an appeal against the original decree if the relief of specific performance is refused and other relief is granted. The plaintiff would be a person aggrieved by the decree in spite of one of the alternative reliefs having been allowed to him because what has been allowed to him is the smaller relief and the larger relief has been denied to him. A defendant against whom a suit for specific performance has been decreed may file an appeal seeking relief of specific performance being denied to the plaintiff and instead a decree of smaller relief such as that of compensation or refund of money or any other relief being granted to the plaintiff for the former is larger relief and the latter is smaller relief. The defendant would be the person aggrieved to that extent. It follows as a necessary corollary from the abovesaid statement of law that in an appeal filed by the defendant laying challenge to the relief of compensation or refund of money or any other relief while decree for specific performance was denied to the plaintiff, the plaintiff as a respondent cannot seek the relief of specific performance of contract or modification of the impugned decree except by filing an appeal of his own or by taking cross objection.

We are, therefore, of the opinion that in the absence of cross appeal preferred or cross objection taken by the plaintiff-respondent the First Appellate Court did not have jurisdiction to modify the decree in the manner in which it has done. Within the scope of appeals preferred by the appellants the First Appellate Court could have either allowed the appeals and dismissed the suit filed by the respondent in its entirety or could have deleted the latter part of the decree which granted the decree for specific performance conditional upon failure of the defendant to deposit the money in terms of the decree or could have maintained the decree as it was passed by dismissing the appeals. What the First Appellate Court has done is not only to set aside the decree to the extent to which it was in favour of the appellants but also granted an absolute and out and out decree for specific performance of agreement to sell which is to the prejudice of the appellants and to the advantage of the respondent who has neither filed an appeal nor taken any cross objection.

The learned counsel for the respondent forcefully argued that even in the absence of appeal preferred by the plaintiff or cross objection taken by the plaintiff-respondent the Appellate Court was not powerless to grant the decree which it has done in exercise of the power conferred by Rule 33 of Order 41 of the CPC. Rule 33 of Order 41 as also Rule 4 thereof, which have to be read necessarily together, are set out hereunder:

ORDER 41 Appeals from Original Decrees

"33. Power of Court of Appeal.-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 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 and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

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.

4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all.-Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33, that is, avoiding a situation of conflicting decrees coming into existence in the same suit. The abovesaid provisions confer power of widest amplitude on the appellate court so as to do complete justice between the parties and such power is unfettered by consideration of facts like what is the subject matter of appeal, who has filed the appeal and whether the appeal is being dismissed, allowed or disposed of by modifying the judgment appealed against. While dismissing an appeal and though confirming the impugned decree, the appellate court may still direct passing of such decree or making of such order which ought to have been passed or made by the court below in accordance with the findings of fact and law arrived at by the court below and which it would have done had it been conscious of the error committed by it and noticed by the Appellate Court. While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate court. The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the Court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 of Order 41.

Panna Lal v. State of Bombay and Ors., [1964] 1 SCR 980 so sets out the scope of Order 41 Rule 33 in the widest terms. "The wide wording of O.41 R.33 was intended to empower the appellate court to make whatever order it thinks fit, not only as between the appellant and the respondent but also as between a respondent and a respondent. It empowers the appellate court not only to give or refuse relief to the appellant by allowing or dismissing the appeal but also to give such other relief to any of the respondents as "the case may require". If there was no impediment in law the High Court in appeal could, therefore, though allowing the appeal of the defendant-appellant by dismissing the plaintiff's suit against it, give the plaintiff-respondent a decree against any or all the other defendants who were parties to the appeal as respondents. While the very words of the rule make this position abundantly clear the Illustration puts

the position beyond argument." The suit was filed by the plaintiff impleading the State government and the Deputy Commissioner seeking recovery of compensation for the work done under a contract and the price of the goods supplied. The Trial Court held that the State was liable as it had beyond doubt benefited by the performance of the plaintiff. The suit was decreed against the State. The State preferred an appeal in the High Court. The plaintiff and other defendants including the Deputy Commissioner were impleaded as respondents. Disagreeing with the Trial Court, the High Court held that the contract entered into by the Deputy Commissioner was not binding on the State government; that the Deputy Commissioner signed the contract at his own discretion; and further, that the contract not having been entered into in the form as required under Section 175(3) of the Government of India Act, 1935, was not enforceable against the State government. The High Court also held that the government could not be held to have ratified the action of the contract entered into by the Deputy Commissioner. The State was held also not to have benefited by the performance of the plaintiff. On this finding, the High Court set aside the Trial Court's decree passed against the State government. In an appeal to this Court, the Constitution Bench held that it was a fit case for the exercise of jurisdiction under Order 41 Rule 33 of the CPC. On the findings arrived at by the High Court, while setting aside the decree against the State, the High Court should have passed a decree against the Deputy Commissioner. It was not necessary for the plaintiff to have filed any cross-objection and the illustration appended to Order 41 Rule 33 was enough to find solution.

In *Rameshwar Prasad and Ors. v. Shambhari Lal Jagannath and Anr.*, [1964] 3 SCR 549, the three-Judge Bench speaking through Raghubar Dayal, J. observed that Rule 33 really provides as to what the Appellate Court can find the appellant entitled to and empowers the Appellate Court to pass any decree and make any order which ought to have been passed or made in the proceedings before it and thus could have reference only to the nature of the decree or order in so far as it affects the rights of the appellant. If further empowers the Appellate Court to pass or make such further or other, decree or order, as the case may require. The Court is thus given wide discretion to pass such decrees and orders as the interests of justice demand. Such a power is to be exercised in exceptional cases when its non-exercise will lead to difficulties in the adjustment of rights of the various parties, (vide Para 17, emphasis supplied)

In *Harihar Prasad Singh and Ors. v. Balmiki Prasad Singh and Ors.*, [1975] 1 SCC 212, the following statement of law made by Venkatarama Aiyar, J. (as His Lordship then was) in the Division Bench decision in *Krishna Reddy v. Ramireddi*, AIR (1954) Madras 848 was cited with approval which clearly brings out the wide scope of power contained in Rule 33 and the illustration appended thereto, as also the limitations on such power:

"Though Order 41, Rule 33 confers wide and unlimited jurisdiction on Courts to pass a decree in favour of a party who has not preferred any appeal, there are, however, certain well-defined principles in accordance with which that jurisdiction should be exercised. Normally, a party who is aggrieved by a decree should, if he seeks to escape from its operation, appeal against it within the time allowed after complying with the requirements of law. Where he fails to do so, no relief should ordinarily be given to him under Order 41, Rule 33.

But there are well-recognised exceptions to this rule. One is where as a result of interference in favour of the appellant it becomes necessary to readjust the rights of other parties. A second class of cases based on the same principle is where the question is one of settling mutual rights and obligations between the same parties. A third class of cases is when the relief prayed for is single and indivisible but is claimed against a number of defendants. In such cases, if the suit is decreed and there is an appeal only by some of the defendants and if the relief is granted only to the appellants there is the possibility that there might come into operation at

the same time and with reference to the same subject-matter two decrees which are inconsistent and contradictory. This, however, is not an exhaustive enumeration of the class of cases in which courts could interfere under Order 41, Rule 33. Such an enumeration would neither be possible nor even desirable."

In the words of J.C. Shah, J. speaking for a three-Judge Bench of this Court in *Nirmala Bala Ghose and Anr. v. Balai Chand Ghose and Anr.*, [1965] 3 SCR 550, the limitation on discretion operating as bounds of the width of power conferred by Rule 33 can be so formulated -

"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." (Para 22)

A Division Bench decision of Calcutta High Court in *Jadunath Basak v. Mritunjoy Sett and Ors.*, AIR (1986) Calcutta 416 may be cited as an illustration. The plaintiff filed a suit for declaration that the defendant had no right or authority to run the workshop with machines in the suit premises and for permanent injunction restraining the defendant from running the workshop. The Trial Court granted a decree consisting of two reliefs: (i) the declaration as prayed for, and (ii) an injunction permanently restraining the defendant from running the workshop except with the terms of a valid permission and licence under Sections 436 and 437 of Calcutta Municipal Act, 1951 from the Municipal Corporation. The defendant filed an appeal. The Division Bench held that in an appeal filed by the defendant, the plaintiff cannot challenge that part of the decree which granted conditional injunction without filing the cross-objection. The Division Bench drew a distinction between the respondent's right to challenge an adverse finding without filing any appeal or cross-objection and the respondent seeking to challenge a part of the decree itself without filing the cross-objection. The Division Bench held that the latter was not permissible. We find ourselves in agreement with the view taken by the High Court of Calcutta.

In the case before us, the Trial Court found the plaintiff (in his suit) not entitled to decree for specific performance and found him entitled only for money decree. In addition, a conditional decree was also passed directing execution of sale deed if only the defendant defaulted any paying or depositing the money within two months. Thus to the extent of specific performance, it was not a decree outright; it was a conditional decree. Rather, the latter part of the decree was a direction in terrorem so as to secure compliance by the appellant of the money part of the decree in the scheduled time frame. In the event of the appellant having made the payment within a period of two months, the respondent would not be, and would never have been, entitled to the relief of specific performance. The latter decree is not inseparably connected with the former decree. The two reliefs are surely separable from each other and one can exist without the other. Nothing prevented the respondent from filing his own appeal or taking cross-objection against that part of the decree which refused straightaway a decree for specific performance in his favour based on the finding of comparative hardship recorded earlier in the judgment. The dismissal of appeals filed by the appellant was not resulting in any inconsistent, iniquitous, contradictory or unworkable decree coming into existence so as to warrant exercise of power under Rule 33 of Order 41. It was not a case of interference with decree having been so interfered with as to call for

adjustment of equities between respondents inter se. By his failure to prefer an appeal or to take cross-objection the respondent has allowed the part of the Trial Court's decree to achieve a finality which was adverse to him.

For the foregoing reasons we are of the opinion that the first Appellate Court ought not to have, while dismissing the appeals filed by the defendant-appellants before it, modified the decree in favour of the respondent before it in the absence of cross-appeal or cross-objection. The interference by the first Appellate Court has reduced the appellants to a situation worse than in what they would have been if they had not appealed. The High Court ought to have noticed this position of law and should have interfered to correct the error of law committed by the first Appellate Court.

During the course of hearing, the learned counsel for the appellants made a statement under instructions, that the appellants have a large family to support which is entirely dependent on the suit land for maintaining itself and they have no other means of livelihood. (This statement finds support from the finding arrived at by the Trial Court) He further stated that, in any case, to get rid of the onerous part of the decree, the appellants volunteer to pay a further amount of Rs. 1,20,000 by way of compensation to the respondent over and above the amount of Rs. 2,40,000 already deposited by them in the Court pursuant to interim orders alongwith the bank interest accrued thereon. That statement is taken on record and being a very fair voluntary offer deserves to be accepted and incorporated in the decree.

The appeals are allowed. The judgment and decree of the first Appellate Court are set aside and instead those of the Trial Court restored. In view of the appellants having deposited the money due and payable under the money part of the decree, it is held that they are relieved from specifically performing the agreement and executing sale deed in pursuance thereof. The delay in deposit, if any, deserves to be condoned in view of the interim orders passed by the High Court and is hereby condoned. The time for deposit, as appointed by the Trial Court, shall be deemed to have been extended upto the dates of actual deposits made by the appellants. The amount of Rs. 2,40,000 lying deposited in the Court and invested in fixed deposits shall, along with the interest earned, be released to the respondents. In addition the appellants shall, as offered by them, deposit with the executing court for payment to the respondent another amount of Rs. 1,20,000 within a period of eight weeks from today. On that being done, the decree passed by the Trial Court shall be deemed to have been fully satisfied. The respondent shall deliver the agreements dated 03.11.1988 and 15.7.1991 to the appellants endorsing upon the agreements the amount of money received and that the agreements stand discharged and need not be performed. The costs shall be borne by the parties as incurred throughout.