APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

ABDUL HAKIM CHOWDHURY
v.
HEM CHANDRA DAS.*

1914
June 25.

Appeal—Practice—Filing of certified copy of decree appealed from after the prescribed period of limitation, without leave of the Court, effect of—Inherent power of High Court—Ex parte order in application for review of order of dismissal passed at preliminary hearing, setting aside of, at final hearing of appeal—Civil Procedure Code (Act V of 1908) s. 151, O. XLI, rr. 1, 11, O. XLVII, rr. 4, 7—Limitation Act (IX of 1908) s. 5.

Where a certified copy of the decree appealed from was filed in the High Court after the prescribed period of limitation without leave of the Court, in an analogous appeal, and where the main appeal had already been dismissed at the preliminary hearing under O. XLI, r. 11 of the Code of Civil Procedure, but was restored on review, without notice to the respondent, after the aforesaid analogous appeal had been admitted by another Divisional Bench; at the final hearing of both these appeals on objection being taken by the respondent :—

Held, that the respondent was entitled to invoke the inherent powers of that Court;

Tikait Ajant Singh v. *Christien* (1) followed.

Held, also, that non-compliance with r. 4 of O. XLVII of the Code rendered the granting of an (*ex parte*) application for review (by the appellant) a nullity, as it was prejudicial to the respondent, and previous notice was necessary.

Held, further, that under r. 1, O. XLI, of the Code, filing of the decree of the Appellate Court was imperative, and an appeal could not be said to have been preferred until that decree was filed.

*Appeals from Appellate Decree, Nos. 790 and 2024 of 1912, against the decree of Jagan Mohan Sarkar, Subordinate Judge of Chittagong, dated Dec. 20, 1911, reversing the decree of Rasik Mohan Bhattacherjee, Munsif of Chittagong, dated Sept. 26, 1910.

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SECOND APPEALS by Abdul Hakim Chowdhury and another, the defendants.

These appeals arose out of two rent suits in which there was no decision as to the rate of rent, though the defendants asked for reduction of rent. The decree of the lower Appellate Court was signed on the 22nd December 1911. Both appeals were filed in the High Court on the 10th April 1912. The main appeal No. 790 was filed on the last day with a certified copy of the judgment, which covered both the cases, and also of the decree which differed from the decree in the other suit. The analagous appeal No. 2024 was filed without certified copies of either judgment or decree. On the 17th June 1912, the memorandum of appeal in No. 2024 was returned to the appellant with a note under Order XLI, rule 1, stating that there was no copy of the decree appealed from. A copy had in the meantime been obtained on the 1st May 1912, but it was not filed till the 5th July 1912, before Sharfuddin and Richardson JJ. with a petition, without any affidavit or prayer for extension of time, and the appeal was registered on the 19th July 1912. It was admitted at the hearing under O. XLI, r. 11, of the Code before Stephen and D. Chatterjee JJ. on 2nd January 1913. Meanwhile the main appeal No. 790 had come up before Carnduff and Chapman JJ. under O. XLI, r. 11 of the Code, on the 24th June 1912 and had been summarily dismissed, and on the 13th February 1913, without notice to the other side the application for review of the aforesaid summary order of dismissal was granted by Carnduff and Champman JJ. At the final hearing of both these appeals, the respondent took objection to all these proceedings.

Babu Ram Doyal Dey, for the respondent. I have three preliminary objections: (*i*) the application

for review in S. A. No. 790 of 1912 was allowed out of time and without notice to the respondent; (*ii*) S. A. No. 2024 was filed and registered out of time; and (*iii*) no second appeal lies under section 153 (*b*) of the Bengal Tenancy Act, the value of the suits being less than Rs. 50 each. On the 1st February 1913, about a month after the analogous appeal 2024 had been admitted by Stephen and D. Chatterjee JJ. an application was made for review of the order of dismissal in S. A. No. 790, and was allowed on 13th February 1913 by Carnduff and Chapman JJ. without any notice to the respondents to whom a substantial right had already accrued under the previous order of dismissal.

[HOLMWOOD J. But the Court allowed the application].

It is open to me to object to it now under O. XLVII, r. 7, (*b*) and (*c*) of the Code. Though no appeal lies from an order of the High Court, still I can take this objection in this appeal, which is an appeal from the final decree in the suit. The order granting the review is to this effect:—"Having regard to the fact that an analogous appeal has been admitted by two learned Judges, who, we are informed, were told that we had summarily rejected the appeal, we think this latter also should be admitted." This application was not supported by any affidavit explaining the delay of one month since the other appeal was admittted. I ought to mention that there was a note at the end of the application as follows:—"Petitioner prays for extension of time under sections 5 and 14 of the Limitation Act."

As regards S. A. No. 2024, I submit that no appeal was filed on 10th April 1912, only a memorandum of appeal without the necessary copies required by Order XLI, r. 1 of the Civil Procedure Code having been filed.

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Even the memorandum was filed out of time by about 20 days. The application filing the copy of the decree was not supported by any affidavit and did not contain any prayer for extension of time under s. 5 of the Limitation Act. It merely says that the copy was not filed through mistake. The copy actually filed, took only 9 days to obtain, and even that period cannot be deducted. Had the copy been filed as soon as it was received, both the appeals would have been dismissed together on 24th June 1912. It is not explained why there was a delay of more than one month in filing it, nor did the Court excuse this delay or the previous delay in filing the memorandum of appeal out of time.

My last objection is that no second appeal lies under the provisions of s. 153(*b*) of the Bengal Tenancy Act, the learned Subordinate Judge having found against the plea of the defendants and decreed the suit for rent on the basis of the contract between the parties. No doubt an appeal lay from the decision of the Munsif as he allowed a smaller rate of rent than that claimed by the plaintiff, but there was no occasion for the Subordinate Judge to decide, nor did he in fact decide, any question as to amount of rent. I refer to your Lordship's decision in a recent Rule No. 644 of 1914 decided on 23rd June 1914.

Babu Prabodh Kumar Das, for the respondent. I submit that a second appeal lies, as the defendant claimed reduction of rent under section 52 of the Bengal Tenancy Act.

[HOLMWOOD J. We want to hear you first on the other objection, which is a serious one.]

I distinctly asked for extension of time and it was allowed. I even asked their Lordships for a notice on the other side when the review was allowed, but their Lordships thought it was unnecessary. I am

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told that as a matter of practice no notice is issued in such cases.

[*Babu Ram Doyal De.* No, that is not the practice.]

[HOLMWOOD J. It is not a question of practice, when the law lays down that notice must be given. What is the rule under which you can now dispute the order in. S. A. No. 2024? You have given us the rule which you rely on in the case of review in the other appeal.]

[*Babu Ram Doyal De.* There is no such rule, but there are two decisions of your Lordships holding that *ex parte* admission of applications may be disputed at the final hearing: *Tikait Ajant Singh* v. *F. T. Christien* (1) and *Bhismadeo Das* v. *Sita Nath Ray* (2).

HOLMWOOD J. These two appeals, Nos. 790 and 2024 of 1912, relate to a litigation for rent which has been going on since 1906. The proceedings by which they have now come before us illustrate in the most extraordinary way the ease with which questions of limitation and fatal irregularities may escape the notice of several Benches in succession unless facts are properly brought to the notice of the Judges at the time applications are made.

The history of this case is as follows. A suit was brought for rent in 1906 which was decided *exparte*. Towards the close of three years execution was taken out and the defendants applied for rehearing. The Munsif restored the suit. In the meantime another rent suit against the same defendants had been filed in the year 1910. The suits were consolidated and the Munsif decreed the suits with modifications. On appeal the lower Appellate Court reversed the decision of the Munsif and decreed the plaintiff's suit in full

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on the 20th December 1911. The decree was signed on the 22nd December 1911. The appeals were filed in this Court in the two cases on the 10th April 1912. Appeal No. 790 appears to have been filed on the last day with a copy of the judgment which covered both the cases, and of the decree in Appeal 790 which differed from the decree in the other suit. Appeal No. 2024 was filed without any copy of decree or judgment, and it is alleged that inasmuch as the copies might have taken less time in that case that it was not filed within the period of limitation. But, this of course we cannot now go into, as we cannot assume that it would have taken any different time to get copies in this case to what it did in the other. On the 17th June 1912, the memorandum of appeal in 2024 was returned to the appellant with a note under Order XLI, rule 1, that there was no copy of the decree appealed from. A copy had been obtained on the 1st May 1912 and it was filed by the appellant on the 5th July 1912. Appeal 790 came up before a Bench of this Court under Order XLI, rule 11, on the 24th June 1912 and was summarily dismissed.

The copy of the decree, which was filed on the 5th July 1912, was accepted. There was no prayer for extension of time, although it was mentioned in a note that the copy was out of time. But to avoid the law of limitation, section 5 of the limitation act would have to be applied, and we find that no order stating that the Court was satisfied, as is required by that section, was recorded. Curiously enough Appeal 2024, which was an analogous appeal filed at the same time as 790 did not come on for hearing under Order XLI, rule 11, until the 2nd January 1913 before another Bench. That Bench admitted it without being told that it was barred by limitation and without any adjudication upon that point. Thereupon a review of

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the order of dismissal in Appeal 790 was filed before another Bench, that is the fourth Bench before which these cases had come and was granted on the 1st February 1913 without notice to the other side.

Now whether, as speaking for myself, I am able to hold that Order XLVII, rule 7, enables the respondent to take objection before us now in this appeal from the final decree or order passed or made in the suit, or whether he is entitled to invoke the inherent power of this Court as both of us are prepared to hold and, as was held in the case of *Tikait Ajant Singh* v. *F. T. Christien* (1), it is clear that the non-compliance with rule 4 of Order XLVII renders the granting of this application for review, which was prejudicial to the respondent, a nullity and that such an application could not be granted without previous notice. We have already shown that under Order XLI, rule 1, filing of the decree of the Appellate Court is imperative, and that the appeal cannot be said to have been preferred until that decree is filed. Appeal 2024 is therefore clearly barred by limitation.

That being so, the preliminary objection must prevail and both the appeals must be dismissed. The question whether any second appeal lay on the matters found by the Subordinate Judge is one which we need not go into. The amounts are very small and in dismissing these appeals with costs, we think that a single hearing fee of one gold mohur is sufficient for both these appeals.

CHAPMAN J. concurred.

Appeals dismissed.

G. S.

(1) (1912) 17 C. W. N. 862.