

1876

ZAIIBULNISSA
BIBI
v.
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we cannot hold that an error in the calculation of the time allowed was, under the circumstances, sufficient cause for the delay. We decree the appeal, and, reversing the order of the lower appellate Court, reject the appeal presented to the Judge on the ground that it was barred by limitation. The appellant will recover costs in this and the lower appellate Court from the respondent.

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June 26.

APPELLATE CIVIL.

(*Mr. Justice Turner and Mr. Justice Spinkie*).

TULSI RAM AND OTHERS (DEFENDANTS) v. GANGA RAM (PLAINTIFF).
Act VIII of 1859, s. 7.

The fact that, at the time when the purchaser of certain lands sued, with a view of confirming his title to the lands under his purchase, for a decree declaring such title, he was in a position to have sued for possession of the lands, was no bar under the provisions of s. 7, Act VIII of 1859, to his subsequently suing for possession of the same.

THIS was a suit for the possession of certain lands and for the mesne profits of the same for three years. The suit was based on a deed of sale executed in the plaintiff's favour by Baldeo, the father of the defendants, on the 23rd of December, 1862. The plaintiff had sued Baldeo on the 2nd of June, 1864, for a declaration of his rights under the sale, on the ground that Baldeo had failed to fulfil his promise of putting him into possession of the lands, and had obtained a decree on a confession of judgment.

The Court of first instance dismissed the present suit on the ground that it was barred by s. 7, Act VIII of 1859. The lower appellate Court was of a different opinion, and reversing the decree of the first Court, remanded the suit for a decision on the merits.

On special appeal by the defendants to the High Court it was again contended that the suit was barred by the provisions of that section.

Pandit *Bishambar Nath* and Munshi *Sukh Ram*, for the appellants.

The *Senior Government Pleader (Lala Juala Parshad)* and Pandit *Ajudhia Nath*, for the respondent.

* Special Appeal, No. 572 of 1876, from a decree of the Subordinate Judge of Agra, dated the 29th May, 1875, reversing a decree of the Munsif, dated the 20th March, 1875.

The judgment of the Court was as follows :—

The plaintiff sued to obtain possession of 4 bigahs, 12 biswas of land out of 92 bigahs, 12 biswas, and one-fourth of 1 bigah, 11 biswas (jureebi), situate in Thoke Mahoor, Mauza Rahtori, together with mesne profits for three years.

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TULSI RAM
v.
GANGA RAM.

It appears that, on December the 23rd, 1862, Baldeo, the father of the defendants, sold the lands in suit with other lands to the plaintiff, and with a view, it is said, of confirming his title, he in 1864 sued for and obtained a decree declaring his rights under the sale. It is admitted that he had not at the time of the institution of the declaratory suit and that he has not up to the present time obtained possession.

The defendants pleaded *inter alia* that the suit was barred by the provisions of s. 7, Civil Procedure Code. The Munsif allowed the plea and dismissed the suit without trial on the merits. The lower appellate Court held that the suit was not barred and remanded it for trial under s. 351, Civil Procedure Code. The lower appellate Court considered that s. 7 applies to cases in which the plaintiff omits to seek relief in respect of a portion of his claim, and not to cases in which, although he may be entitled to claim more than one kind of relief, he seeks for the time one remedy only.

In our judgment the lower appellate Court has properly interpreted the provisions of the section referred to. We have not now to consider whether the plaintiff ought to have obtained a declaratory decree, seeing that he might have obtained that relief in an ordinary suit for possession. We have to determine whether, in seeking a declaratory decree to establish his purchase-deed, and omitting to sue for possession, he can be held to have omitted any portion of the claim arising out of the cause of action he then put in suit. The cause of action he then put in suit did not necessarily involve any breach of the contract to deliver possession. The plaintiff might have obtained a declaratory decree without entering on the question of possession. For these reasons we hold that s. 7 is inapplicable, and we consequently affirm the order of the lower appellate Court and dismiss the appeal with ~~costs~~.