

1876

Munshi Hanuman Parshad and Lala Ram Parshad,
spondent.

KABIR BAKSH

v.

BUDHA.

The judgment of the Court, so far as it is material to the contention, was as follows:—

If the road is a public thoroughfare, then, inasmuch as plaintiffs allege no special injury, the suit for the removal of encroachment cannot be maintained—*Baroda Prasad Mostafi Gora Chand Mostafi* (1); *Pyari Lal v. Rooke* (2); *Hira C. Banerjee v. Shama Charan Chatterjee* (3). There is, it is true, a decision to the contrary—*Jina Ranchod v. Jodha Ghella* (4), the weight of authority supports the view taken by the Judge which accords with the English law on the subject and is based on principles well understood. But it must be determined whether the road in suit is a public thoroughfare,

APPELLATE CIVIL

AS SPOKENT (DEFENDANT) v. KULSUM BIBI (PLAINTIFF)

Act IX of 1871, s. 5, b.—Appeal—Limitation—Sufficient Cause.

A certain suit was dismissed on the 26th July, 1875, on which day the plaintiff applied for a copy of the Court's decree. She obtained the copy on the 31st July and on the 31st August, or one day beyond the period allowed by law, she presented an appeal to the appellate Court. She did not assign in her petition any cause for not presenting it within such period, but alleged verbally that she had miscalculated the period. The appellate Court recorded that it should excuse the delay, and admitted the appeal.

* Special Appeal, No. 478 of 1876, against a decree of the Judge of Allahabad, dated the 17th July, 1876, reversing a decree of the Subordinate Judge, dated the 26th July, 1875.

(1) 3 B. L. R., A. C. 295; S. C., 12 W. R. 160, followed in *Raj Luckhee Debta v. Chunder Kant Chowdry* 14 W. R. 173; *Bhageerath Rishie v. Gokool Chunder Mandal*, 18 W. R. 58; *Bhageerath Dass v. Chundes Churn*, 22 W. R. 462; *Ramtarak Karali v. Dinanath*

Mandal, 7 B. L. R. 184; S. C., 24 W. R. 414; and *Parbati Charan v. Kali Nath*, 6 B. L. R. App. 73.

(2) 3 B. L. R., A. C. 305; 3 B. L. R., App. 43; S. C., 11 W. R. 434.

(3) 3 B. L. R., A. C. 351.

(4) 1 Bom. L. C. R., 1.

Held, that there was, under the circumstances, no sufficient cause for the delay (1).

1876

An appellate Court should not admit an appeal after the period of limitation prescribed therefor without recording its reasons for being satisfied that there was sufficient cause for not presenting it within such period.

ZAIRULNISSA
BIBI
v.
KULSUM BIBI.

This suit was dismissed by the Court of first instance on the 26th July, 1875. On that day the plaintiff applied for a copy of the Court's decree, which was furnished on the 31st July. On the 31st August she presented an appeal to the lower appellate Court, but did not assign in her petition any cause for not presenting it within the period of limitation prescribed therefor by art. 151, sch. ii, Act IX of 1871. It was alleged, however, in special appeal, that her excuse was that she had miscalculated the period. The lower appellate Court recorded simply that it should excuse the delay and admitted the appeal, and eventually gave the plaintiff a decree.

On special appeal by the defendant to the High Court it was objected that the lower appellate Court was not competent to admit the appeal after the period of limitation ordinarily allowed by law without finding that the plaintiff had sufficient cause for not presenting it within such period, and that the cause alleged was not sufficient.

The *Senior Government Pleader* (Lala *Juala Parshad*) and *Munshi Hanuman Parshad*, for the appellants.

Babu Oprokash Chandar and *Shah Assad Ali*, for the respondent.

The judgment of the Court, so far as it related to the above objections, was as follows:—

We admit the validity of these objections. Assuming the Judge considered the excuse now alleged for the delay in the presentation of the appeal in the Court below (of which there is no proof),

(1) For circumstances under which there was sufficient cause for delay in filing an appeal, see *The Secretary of State for India v. Mutu Sawmy*, 4 B. L. R., App. 84; S.C., 13 W. R. 245; and *Sarbhaj Dayalji v. Raghnathji Vasuji*, 10 Bom. H. C. R., 397. Where, on appeal to the High Court against an order rejecting an appeal as being presented after the period of limitation prescribed therefor, sickness was pleaded as a cause for the delay, the Court refused to direct the lower Court to take evidence in the matter.—*Petition of Mazum Ali Khan*, 1 W.R. Mis. 23.

1876

ZAIIBULNISSA
BIBI
v.
KULSUM BIBI.

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.

1876
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 *Eishambar 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.