

1880

EMPEROR OF
INDIA
BY SIR SINGH.

should be called on, first, to certify that the charge is one which should be inquired into in British India, and, if his reply be in the affirmative, that a new trial be had, or if, as the accused has not apparently been prejudiced in his defence, and the Political Agent now certifies, as above, judgment can be given on the evidence recorded."

STRAIGHT, J.—It appears to me that the Judge has adopted an unusual and very inconvenient course, in suspending the conclusion of the trial of Bhup Singh for the purpose of making a reference to the Court on a question of law that has arisen in the course of it. I do not think it ever was intended that s. 296 should be so used. The Sessions Judge has the whole case fully before him, and is in possession of all the materials necessary for him to give his judgment. If he decides wrongly, there is ample power in the Local Government on the one hand, or the accused on the other, to appeal to this Court and have the matter set right, and I certainly do not think that, at this stage, I am called upon to advise the Sessions Judge as to the view he should take. Upon his own responsibility and in the exercise of his discretion he must dispose of the case, and, if he feels there is substantial force in the point that has arisen in reference to the charge under s. 363, Penal Code, he must not hesitate to acquit. I would point out to him that as yet he has passed no decision upon the charge under s. 420, Penal Code, though he took the opinions of the assessors upon it. Probably in respect of this he will find that no difficulty of jurisdiction arises. The record will be returned and he will dispose of the case.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spinkie.

MOTI BIBI (DEPONDANT) v. BIKANU (PLAINTIF)*

Appeal—Limitation.

B sued *M* and *T* for money due on a bond, and on the 27th April, 1877, obtained a decree against *T*; the suit against *M* being dismissed. *T* applied for a

* Second Appeal, No. 719 of 1879, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 12th February, 1879, modifying a decree of Rai Makhau Lal, Subordinate Judge of Allahabad, dated the 29th June, 1878.

1880

March 15.

review of judgment, and *B* also made a similar application. On the 25th May, 1877, *T*'s application was granted, and on the 16th July, 1877, *B*'s was rejected. On the 29th June, 1878, the Court re-heard the suit against *T*, and dismissed it. *B* appealed, making *T* and *M* respondents, and impugning in his memorandum of appeal the decree of the 27th April, 1877, as well as that of the 29th June, 1878. The appellate Court, assuming that the appeal was one from the decree of the 27th April, 1877, preferred beyond time, admitted it after time, and after hearing the case on its merits gave a decree against *M*, and dismissed the suit as regards *T*. *Held* that the appellate Court erred in assuming that the appeal was from the decree of the 27th April, 1877, and that it was at liberty to admit it beyond time, the appeal being from the decree of the 29th June, 1878, that decree being the one which had brought *B* before that Court as an appellant, and that the appellate Court was not competent on an appeal from the decree of the 29th June, 1878, to reconsider the merits of the case against *M*, the appeal from the decree of the 27th April, 1877, being barred by limitation, and that decree and the decree of the 29th June, 1878, being separate and distinct, and not appealable in one memorandum of appeal from the latter decree.

1880

MOTI BIBI
v.
BIKANU.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Munshi *Hanuman Prasad* and *Lala Ram Prasad*, for the appellant.

Pandit *Ajudhia Nath* and *Babu Sital Prasad Chattarji*, for the respondent.

The High Court (STUART, C. J., and SPANKIE, J.,) delivered the following

JUDGMENT.—The plaintiff-respondent sued *Tara Kishore* and *Moti Bibi* for Rs. 800, under a bond dated 19th March, 1874, executed in favour of *Tara Kishore*, the plaintiff being the real creditor. Appellant *Moti Bibi*, defendant, denied that she had borrowed money from plaintiff under any agreement whatever, and also any execution of a bond in his favour: for a particular purpose she had borrowed money from defendant *Tara Kishore*, executing a bond in his favour, and preserving her property from sale: afterwards arrangements for the sale of the property which had been entered into, previous to the execution of the bond, with *Tara Kishore* fell through, and a sale was effected with one *Ghazi*, plaintiff's brother, but as a portion of the consideration was not paid a quarrel ensued which has led to the institution of the present suit by plaintiff upon the bond of the 19th March, 1874. The Sub-

1880

MOTI BIBI
v.
TARA KISHORE.

ordinate Judge on the 27th April, 1877, decreed in favour of plaintiff for the amount claimed, but dismissed the claim as against Moti Bibi, defendant. Tara Kishore, defendant, who had not appeared in the suit, applied for a review of judgment, and plaintiff also applied for the same as against Moti Bibi, defendant. The Subordinate Judge on the 10th July, 1877, refused the plaintiff's application for review as against Moti Bibi previously exonerated. But on the 25th May he had already accepted the application of Tara Kishore for review. On the 29th June, 1878, the Subordinate Judge reconsidered the case. He refers to his original judgment, observing that, as there had been no proof of contract between the plaintiff and Moti Bibi, he had dismissed the claim as against her: but on the evidence of Badal and Kali, agents of Tara Kishore, that they had borrowed money from plaintiff on behalf of the said Tara Kishore, he decreed the claim against that defendant: but Tara Kishore now urged that the plaintiff had not claimed the money from him, but from Moti Bibi, and that Badal and Kali were no agents of his, and had not acted upon his authority. The Subordinate Judge held that there was no proof that Badal and Kali were the agents of Tara Kishore or that he had authorised them to borrow the money or had promised to repay it: Tara Kishore had denied all knowledge of Moti Bibi, and plaintiff admitted that he was not personally acquainted with Tara Kishore. The lower appellate Court, therefore, dismissed the claim as against Tara Kishore.

The plaintiff then appealed to the Judge, making both defendants respondents, and, referring to the previous decision of the 27th April, 1877, it appeared that he was appealing from that decision as well as from that of the 29th June, 1878. The Judge admits that, so far as the decision of the 27th April, 1877, is concerned, the appeal is barred, but he nevertheless admitted it, as the proceedings of the Subordinate Judge, in granting one application for review and rejecting the other, were of a curious nature. It was, he considered, a case in which the parties might be misled as to the particular date on which the period allowed for appeal would begin to run against them: the appeal of plaintiff was, in his opinion, made *bonâ fide*: the plaintiff had all along proceeded

against Moti Bibi as the obligor, having made Tara Kishore defendant *pro forma*: he was merely the nominal obligee, plaintiff being the real creditor: Moti Bibi did not deny that she had received the money on the execution of the bond, pleading, according to the Judge, that Tara Kishore, and not plaintiff, was the party to sue her. The lower appellate Court finds that the money was borrowed for Moti Bibi's use at the instigation of Tara Kishore, and also for his benefit, and he (the Judge) was not satisfied that Tara Kishore had not made himself liable for the money. But he decreed the claim on appeal against Moti Bibi and dismissed it as against Tara Kishore, who, however, would pay his own costs.

It is contended by Moti Bibi that the decision of the 27th April, 1877, not having been appealed within the period prescribed by law, had become final; that the application of plaintiff-respondent for review as against appellant had been rejected, and the order passed upon it was final; and that, as no sufficient reasons for the admission of the appeal after time had been assigned by respondent, the Judge had acted erroneously in admitting the appeal: moreover, the suit had been separated against each defendant and on different dates: there could not be a single appeal against the two decrees; and appellant further contends that there was no contract between herself and plaintiff, nor had she executed the deed of the 19th March, 1874.

There can be no doubt that, if the appeal heard by the Judge is one from the decision of the Subordinate Judge dated 27th April, 1877, it is after time, and that the proper course for respondent, after that decision had been delivered and a decree had passed against him, was to have appealed the decree. The memorandum of appeal presented to the Judge refers to the decision of the 27th April, 1877, and to the intermediate miscellaneous proceedings with reference to the application of Tara Kishore for review, and that of the plaintiff for the same purpose as against Moti Bibi. But there can be no doubt that it was the decree passed by the Subordinate Judge on the 29th June, 1878, that had brought plaintiff before the Judge as an appellant. The appeal from that

1880

MOTI BIBI
v.
TARA KISHORE

1880

MOTI BIBI
c.
BIRANG.

deeree was admittedly within time. The question arises whether the Judge was at liberty in this appeal to reconsider the merits of the case as against Moti Bibi. It is true that she appeared as respondent and defended the appeal. But in doing so she only acted in obedience to the notice of the Court served upon her; and because she did so we do not think that it can be successfully contended that she should not be allowed to plead now that appeal as against her was barred by lapse of time. The decree of the 29th June, 1878, was not passed against her, but as against Tara Kishore; she was not a party to the review. If the plaintiff was desirous of appealing as against her from the decree of the 27th April, 1877, he might have done so within the time allowed by law, or if under any misapprehension he had allowed that period to run by, he should have presented his memorandum of appeal and assigned reasons for not presenting his appeal within such period. The Court, had he done so, might then, under s. 5 of Act XV of 1877, have admitted the appeal after time, if satisfied that the appellant had sufficient cause for not making his application within time. This course the plaintiff did not adopt, but waited until the decree of the 29th June, 1878, after the admission of Tara Kishore's application for review, had been made, dismissing the suit as against the said Tara Kishore. It seems to us that the appeal before the Judge was an appeal against the decree of the 29th June, 1878, under cover of which the plaintiff desired to re-open the claim as against Moti Bibi, which had been dismissed on the 27th April, 1877. We do not think that this course was legal, and we hold that the Judge has acted erroneously in assuming that the appeal was one against the decree of the 29th April, 1877, and that he was at liberty to admit it under s. 5 of the Limitation Act. It seems clear to us that the decrees of the 27th April, 1877, and of the 29th June, 1878, are separate and distinct, and that they could not be appealed in one memorandum of appeal from the decree of the 29th June, 1878. We, therefore, decree the appeal and reverse the judgment of the lower appellate Court with costs.

Appeal allowed.