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GAJADHAR v. MULCHAND

Chand v. *Kalian Das* (1). My brother Mahmood expressed his doubts in *Bhup Singh* v. *Gulab Rai* (2) as to the correctness of the rule laid down by Mr. Justice Turner. My view in regard to the conflict of authority when it is considered is that it is safer for us to follow the principle which my brothers Straight and Tyrrell laid down in the case of *Muhamad Sami-ud-din* v. *Man Singh* (3), particularly as that principle has been recognised and acted on by the High Court of Bombay, and is consistent, in my view, with the true principles of equity. It is also the principle which has been recognised in the Transfer of Property Act. Mr. *Amir-ud-din* contended for the respondents that nothing passed at the sale in 1877, and for that proposition he relied on the case of *Ramanath Dass* v. *Boloram Phookun* (4), and the case of *Naran Purshotam* v. *Dolatram Virchand* (5). The case in I. L. R., 7 Calc., 677, apparently assumed that what could be sold was the mortgagor's right at the date of the sale. The case in I. L. R., 6 Bom., 538 does not appear to me to be in support of Mr. *Amir-ud-din's* contention. I am of opinion that this action must fail in so far as it claims possession of the four groves, and that it must succeed so far as the possession of the two mills are claimed. We make a decree that the plaintiffs may redeem if they commence proper proceedings to ascertain the amount within six months. The appellants will succeed as to the four groves and the Rs. 20 damages for the mango trees and will fail as to their claim for the two mills. Under these circumstances I think the appeal should be allowed in part and dismissed in part without costs.

BRODHURST, J.—I concur.

Appeal dismissed.

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May, 7.

Before Mr. Justice Straight and Mr. Justice Mahmood.

JAG LAL (DEFENDANT), *v.* HAR NARAIN SINGH (PLAINTIFF).*

Act XV of 1877 *(Limitation Act), ss.* 5, 15—*Admission of appeal beyond time—"Sufficient cause"—Appeal filed in wrong Court*—Bona fide *proceedings—Jurisdiction—valuation of suit.*

Questions of jurisdiction, whether with reference to the nature of the suit or with reference to the pecuniary limits of the claim, are matters to be governed by the

* First Appeal No. 207 of 1886, from a decree of Rai Manmohan Lal, Subordinate Judge of Azamgarh, dated the 11th June, 1886.

(1) I. L. R., 1 All., 240.
(2) Weekly Notes, 1886, p. 70.
(3) I. L. R., 9 All., 125.
(4) I. L. R., 7 Calc., 677.
(5) I. L. R., 6 Bom., 538.

statements contained in the plaint in the cause. The valuation of the claim as preferred by the plaintiff, and not as set up by the plea in defence, would govern the action, not only for the purposes of the original Court, but also for the purposes of appeal, and indeed throughout the litigation.

Presentation of an appeal within the period of limitation prescribed therefor to a wrong Court in ignorance of the provision of law, is not a sufficient cause within the meaning of s. 5 of the Limitation Act for admitting the same appeal in the proper Court after the period of limitation prescribed therefor had expired.

To enable the Court to admit an appeal after the period of limitation prescribed therefor had expired on the ground that the same had in the first instance been preferred within the period of limitation provided therefor but to a wrong Court, the appellant must satisfy that he made his appeal to the wrong Court "*bonâ fide*," that is, under an honest though mistaken belief, formed with due care and attention, that he was appealing to the right Court.

THIS was a suit for possession of shares in certain revenue-paying mahâls.

The plaintiff in the suit, who owned the said shares, alleged in his plaint that the defendants had fraudulently caused him to execute a sale-deed of the same in their favour for the nominal consideration of Rs. 3,000, and obtained possession thereof. The plaintiff valued his claim and the subject-matter of the suit at Rs. 10,000, and the suit was instituted in the Court of the Subordinate Judge of Azamgarh.

The defendants in their written statement did not contest the valuation of the suit, but resisted it on other grounds.

On the 11th June, 1886, the Subordinate Judge decreed the plaintiff's claim and from that decree Jag Lal, one of the defendants, appealed to the District Judge at Azamgarh, who by his order of the 6th December, 1886, returned the memorandum of appeal filed in his Court to the defendant, finding that the value of the subject-matter of appeal exceeded Rs. 5,000, the pecuniary limits of his appellate jurisdiction.

The defendant Jag Lal then on the 13th December, 1886, presented his appeal to the High Court, where it was admitted by order of a single Judge, subject to any objection that might be raised at the hearing on the ground that the appeal was not presented within the time allowed by law.

At the hearing of the appeal, counsel for the respondent contended, that the appeal had been preferred much beyond the period

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of limitation provided by law, and that no circumstances existed to justify the Court, as a Court of appeal, in admitting it after the period prescribed therefor had expired.

On behalf of the appellant it was urged in reply that under the peculiar circumstances of the case, the provisions of s. 5 of the Limitation Act were available to him and the Court in exercising its discretionary powers might resort to the analogy of the law contained in s. 14 of the Limitation Act. Appellant further urged that as he set up the plea that the value of the property was Rs. 3,000, which he paid as the sale consideration, he was justified in preferring his appeal to the district Court. It was not stated on his behalf that by reason of any mistake of fact he had been led to prefer this appeal in the first instance to the district Court.

The Hon'ble Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellant.

The Hon'ble *T. Conlan*, and Mr. *Simeon*, for the respondent.

MAHMOOD, J.—In this case a preliminary objection has been raised by Mr. *Conlan* on behalf of the plaintiff-respondent, to the effect that this appeal has been preferred to this Court and admitted beyond the period of limitation provided by law, without any such circumstances existing as would justify this Court, as a Court of appeal, in admitting the appeal beyond time, under the provisions of s. 5 of the Limitation Act. The plaint clearly shows that the plaintiff valued his claim and the subject-matter of the suit at a sum of Rs. 10,000, and in the litigation the defence set up by the defendant did not expressly dispute such valuation of the suit, but resisted the suit upon other grounds, which have no strict bearing upon the question of jurisdiction. The Court of first instance decreed the claim, holding that the property belonged to the plaintiff, and that the sale-deed set up by the defendant was fraudulent and fictitious.

This decree was passed on the 11th June, 1886, and from that decree the defendant preferred an appeal to the District Judge of Azamgarh, who by his order of the 6th December, 1886, returned the memorandum of appeal, finding that the subject-matter of litigation exceeded the sum of Rs. 5,000, which was the pecuniary

limit of his appellate jurisdiction. This having occurred, the present appeal was not presented to this Court before the 13th December, 1886, from the decree of the first Court dated the 11th June, 1886.

It is clear, and there is no contention, that this appeal calculated by the ordinary rules of computing the period of limitation is barred, and the only ground upon which Mr. *Kashi Prasad* has asked us to hear this appeal and to dispose of it upon the merits is that under the peculiar circumstances of this case the provisions of s. 5. of the Limitation Act are available to his client, and in exercising the discretionary powers conferred upon us as a Court of appeal we might resort to the analogy of the law contained in s. 14 of the Limitation Act.

This appeal has been already admitted by the order of a single Judge, subject to any objection that may be raised at the hearing of the case, and even if no such qualification had been made, the Full Bench ruling in the case of *Dubey Sahai* v. *Ganeshi Lal* (1) has laid down that the Bench which has to deal with the case finally is entitled to dispose of such questions.

The question then is,—Is this appeal within time, or rather has this appeal been preferred within such time as would entitle the appellant to the benefit of the discretionary power of s. 5 of the Limitation Act? I may say at once that s. 14 of the Limitation Act is not directly applicable to this case, because that section applies only to suits and applications, and has no reference to appeals such as the one now before us; because if it did apply to appeals, then s. 5 of the Limitation Law would, to that extent, amount to a surplusage, an interpretation which I am not willing to place upon the Limitation Act.

It has been contended on behalf of the appellant that the action of the defendant-appellant in preferring the appeal to the Court of the District Judge of Azamgarh was a *bonâ fide* proceeding. Mr. *Kashi Prasad* does not say that such proceeding was the result of any error of fact, and his argument does not suggest that it was an error other than that of law. The learned pleader argued that where a plaintiff values his claim at a particular sum of

(1) I. L. R., 1 All., 34.

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money, and the defendant raises a plea disputing such valuation, reducing it to a sum lower than that named by the plaintiff, an unsuccessful defendant in such a litigation has got a right, in appealing from the decree of the first Court, to go not to the Court which would have jurisdiction with reference to the pecuniary valuation of the suit, but to the Court which with reference to the defence set up by the defendant as to the valuation of the suit would ordinarily have jurisdiction. And upon this argument the learned pleader argues that because the defendants in this case had set up a plea that Rs. 3,000 was the value of the property in suit, therefore they were perfectly justified in not preferring their appeal to this Court, but preferring it to the Court of the District Judge of Azamgarh.

I am opinion that this contention is entirely unsound. Questions of jurisdiction, whether with reference to the nature of the suit or with reference to the pecuniary limits of the claim, are matters to be governed by the statements contained in the plaint. A plaintiff may sue for a million pounds as damages either for a tort committed or as the value of certain moveable property which can no longer be recovered. The defendant may, in such an action, plead that the amount of damages claimed is excessive, and the value of the property is also exaggerated, and that in either case all that the plaintiff is entitled to is far less than the million pounds. The question is at which assessment the question of jurisdiction is to be settled? Is it the valuation of the claim as preferred by the plaintiff or the plea set up in defence? I have no hesitation in saying that it is the valuation of the plaint which would govern the action, not only for the purposes of the original Court, but also for the purposes of appeal, and indeed throughout the litigation. In support of this view I need only cite the Full Bench ruling of this Court in *Mahomed Hossein Khan* v. *Shib Dyal* (1) and the views expressed by my brother Straight in *Gobind Singh* v. *Kallu* (2) [see also *Chunder Koomar Mundul* v. *Bakur Ali Khan* (3)].

I hold that the present appellant in going to the Court of the District Judge of Azamgarh in appeal was acting in contravention of the law, which law it was his duty to know. *Ignorantia legis*

(1) N.-W. P. H. C. Rep., 1873, 108.
(2) I. L. R. 2 All., 778.
(3) 9, W. R., 598.

neminem excusat is a very good maxim of law, as much applicable to this country as to any other; and I hold that in this case, there being no satisfactory explanation why the present defendant-appellant went to the Court of the District Judge of Azamgarh in appeal instead of coming up to this Court, that the period which has elapsed has not been duly accounted for, so as to justify us in acting under the exceptional provisions of s. 5 of the Limitation law.

I am all the more inclined in this particular case to adopt this view, because throughout the litigation the defendant-appellant never denied that the Rs. 10,000 alleged by the plaintiff to have been the amount of the sale-consideration was the amount agreed upon at the consideration of the sale of the 8th March, 1874, which, indeed, was the main contention in this litigation.

Then, again, there is a period between the 6th December, 1886, the date upon which the memorandum of appeal was returned by the District Judge of Azamgarh, and the 13th December, 1886, the date upon which this appeal was presented to this Court. There has been no endeavour whatever to explain the reason why this delay took place. This appeal, indeed, so far as it has been presented beyond the period of limitation, is not supported either by affidavit or even by any explanation contained in the memorandum of appeal other than the facts which I have already stated.

It is perfectly conceivable that, in conditions of life such as they exist in India, an appellant in the condition of the present defendant-appellant might have felt himself entitled to try an experiment by going into the appellate Court of the District, and then taking his own time, after his memorandum has been returned, to come into this Court to file the same appeal. The statutes of limitation are intended to check such tendency of dilatoriness, and such statutes must have operation. These statutes have been called statutes of repose, but the moment they are allowed to be slackly dealt with, they cease to be statutes of repose, and frustrate the very object which they aim at. These views I expressed in *Husaini Begam* v. *the Collector of Muzaffarnagar* (1), in which I happened to differ with my honorable colleague in that case, but my judgment was upheld by the learned Chief Justice and my

(1) I. L. R., 9 All., 11.

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brothers Straight and Brodhurst on appeal under the Letters Patent (1). I hold therefore that this appeal was preferred to this Court beyond time and, as such, should be dismissed with costs. I order accordingly.

STRAIGHT, J.—I concur with my brother Mahmood and in the conclusion at which he has arrived with regard to the disposal of this appeal. It is not denied now by Mr. *Kashi Prasad* that the appeal has been properly preferred to this Court, and that being so, it must be conceded that it was improperly preferred to the Court of the District Judge. That being so, it undoubtedly rests upon the appellant, who asks us to extend to him the indulgence of s. 5 of the Limitation Act, to satisfy us that he made his appeal to the Court of the District Judge "*bonâ fide*," that is to say, under an honest though mistaken belief, formed with due care and attention, that he was appealing to the right Court. Looking to the circumstance that in the plaint the property was alleged by the plaintiff to be of the value of Rs. 10,000, that upon the basis of that valuation he came into Court and sought to recover possession of it, and to the fact that the defendant never traversed that allegation, but allowed the suit to be tried by the Subordinate Judge upon that footing, I do not think it can be reasonably said on his behalf that he honestly believed the suit one in which the appeal lay to the District Judge. The appellant has filed no affidavit, and we have no sworn assurance of his to the effect of what his learned pleader has now said as to an erroneous impression prevailing in his mind when he filed his appeal in the Court of the District Judge. There are no materials whatever to satisfy me that at the time he filed his appeal in the Court of the District Judge he was acting under an honest though mistaken belief that the appeal lay to that Court. Even, therefore, if analogically I import the sort of indulgence into s. 5 of the Limitation Act which is mentioned in s. 14, the appellant has not shown me that he is entitled to it.

Moreover, apart from the delay that took place in the Court of the District Judge, we have the additional circumstance that for the delay from the 6th December, 1886, when the memorandum of appeal was returned to the appellant by the Judge, to the 13th

(1) I. L. R., 9 All., 655.

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December, 1886, when that memorandum was filed in this Court, no explanation is offered on behalf of the appellant. I say most emphatically that when the memorandum of appeal was returned, on the 6th December, 1886, to the appellant, it was his bounden duty to hasten with all alacrity to this Court for the purpose of presenting his appeal, and that not having done so, we have no right to exercise in his favour the discretion conferred upon us. I agree with my brother Mahmood that Mr. *Conlan's* objection must prevail, and this appeal must be and it is dismissed with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell.

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May 8.

GOPAL SINGH (DEFENDANT) *v.* BHAWANI PRASAD (PLAINTIFF).*

Lease—Guarantee for rent—Indemnity—Continuing guarantee—Death of surety—Act IX of 1872 (*Contract Act*), *ss.* 124, 125, *clause* (2), 126, 129, 131.

One *B* proposed to take a lease of zamíndári property from *M* for the period of eight years at a rental of Rs. 3,900 per annum. *M* declined to grant the lease until the payment of rent during the term of eight years was guaranteed by one *S*, the father of the plaintiff. *S* on his part required a guarantee or indemnity against any rent which might not be paid by *B*, and which he might under his proposed guarantee become liable to pay. The defendant's father, *G*, accordingly gave a guarantee to *S* in the following terms: "And for your satisfaction, I write that if any money remains due from *B* on account of the lease for any year or harvest, and if you have to pay the same on account of the suretyship, I am responsible to you to pay that amount to you. Rest assured." *S* then gave his guarantee to *M*, and he granted the lease to *B*. *G* died on 22nd May, 1880. *B* failed to pay the rent due for the year 1883. *M* having died, his representatives sued *S* on his guarantee and recovered from him the rent due and certain costs and expenses. *S* then died, and the plaintiff, as his representative, brought this action against defendant, the legal representative of *G*, to recover the amount of the decree and costs which *S* had to pay. The Court of first instance decreed the whole claim with costs to be recovered from the estate of *G*, and this decree was confirmed in appeal by the District Judge.

On second appeal it was contended that under s. 131 of the Indian Contract Act, the death of *G* was a complete answer to the claim.

Held, that assuming that the case was that of a continuing guarantee within the meaning of s. 131 of the Indian Contract Act, still, having regard to the object for which the two guarantees were given, it must be concluded that the parties intended in the one case that the lessor should be guaranteed for all rent which might become due during the currency of the lease, and that *S* should be guaranteed for any of that rent which by reason of his contract of guarantee he should be made to pay, and

* Second Appeal No. 2282 of 1886, from the decree of T. R. Wyer, Esq., Officiating District Judge of Meerut, dated 21st September, 1886, confirming the decree of Babu Brij Pal Das, Officiating Subordinate Judge of Meerut, dated the 9th September, 1886.