

1912
May, 10.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.
 MUHAMMAD AKHTAR HUSAIN KHAN AND OTHERS (PLAINTIFFS) V.
 TASADDUQ HUSAIN (DEFENDANT).*

Partition—Appeal against preliminary decree—Final decree passed during pendency of appeal—Cross objections filed against final decree—Appeal against preliminary decree maintainable.

Where the plaintiffs in a suit for partition had preferred an appeal from the preliminary decree, and had also, in the defendant's appeal from the final decree, filed cross objections, it was held that there was no bar to the hearing of the plaintiffs' appeal against the preliminary decree. *Kuriya Mal v. Bishambhar Das* (1) and *Narain Das v. Balgobind* (2) distinguished.

This was an appeal under section 10 of the Letters Patent from a judgement of PIGGOTT, J. The facts of the case appear from the judgement under appeal, which was as follows :—

“The question raised by this second appeal is a somewhat curious one. In a suit for partition a preliminary decree was passed on the 19th of December, 1907. On the 1st of February the plaintiffs in the suit preferred an appeal against the said decree. They neglected, however, to ask the appellate court for any order staying proceedings in the court of first instance during the pendency of this appeal. The result was that the appeal was still pending when, on the 10th of March, 1908, the first court proceeded to pass a final decree. Against this decree the defendant appealed, while the plaintiffs later on put in a memorandum of cross objections under order XLI, rule 22, of the present Code of Civil Procedure. In this petition the plaintiffs did not raise any of the points which they had taken in their memorandum of appeal against the preliminary decree but merely objected to certain matters which had been determined by the final decree alone. I have just held in a connected appeal by the defendant that this appeal of the said defendant against the final decree was maintainable, and have remanded that case to the lower appellate court for a decision both on the appeal and on the cross objections. What I have now to decide is simply whether the plaintiffs' appeal against the preliminary decree of the 19th December, 1907, is maintainable, in view of the fact that these plaintiffs have not appealed against the final decree passed on the 10th of March, 1908. It is contended that the present case is distinguishable from that decided by this Court in *I. L. R., 32 All., 225*, because in the present case the appeal was filed before the final decree had been passed. I find myself unable to draw any distinction of principle on this ground. The reasons given in the above reported case for not entertaining an appeal against a preliminary decree unless the final decree is also challenged, do not seem to me to be affected by the circumstance that there was no final decree in existence at the moment when the appeal against the preliminary decree was filed. This view was taken by a Bench of this Court in *E. A. No. 3 of 1910*, decided on the 21st of March, 1911. I have pointed out that the plaintiffs could have protected themselves either by obtaining a stay order from the appellate court, or by repeating in their memorandum

* Appeal No. 97 of 1911 under section 10 of the Letters Patent. सुप्रीम कोर्ट
 (1) (1910) *I. L. R.*, 32 All., 225; (2) (1911) 8 *A. L. J.*, 604.

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of cross objections the grounds on which they had challenged the preliminary decree in their appeal against the same. Even now it is open to the lower appellate court, if it is satisfied that the plaintiffs have acted in good faith, to admit a further memorandum of cross objections, or to permit amendment of the memorandum already presented so as to meet the difficulty in which the plaintiffs find themselves. The appeal now before me must, in my opinion, fail. It is, accordingly, dismissed with costs."

The plaintiffs appealed.

The Hon'ble Dr. *Sundar Lal* and Mr. *S. A. Haidar*, for the appellants.

Dr. *Satish Chandra Banerji*, for the respondent.

RICHARDS, C. J.—This appeal arises under the following circumstances. The suit was one for partition. A preliminary decree was made on the 19th of December, 1907. The plaintiffs preferred an appeal within time against this preliminary decree. Before the appeal was decided, however, a final decree was made on the 10th of March, 1908. The defendant preferred an appeal against the final decree, and the plaintiffs filed cross objections under order XLI, rule 22. The two appeals then came before the lower appellate court. It dismissed the plaintiffs' appeal on the ground that they had not appealed from the final decree, and it dismissed the defendant's appeal upon the ground that he had not appealed against the preliminary decree. Both parties appealed to this Court, and our learned brother set aside the decree of the lower appellate court, dismissing the defendant's appeal and remanding the case to be heard on its merits. He, however, dismissed the plaintiffs' appeal on the ground that they ought to have appealed against the final decree. Reliance was placed upon the ruling of *Kuriya Mal v. Bishambhar Das* (1) and also on the case of *Narain Das v. Balgobind* (2). The facts in the present appeal are not identical with the facts in either of the two rulings relied on. The final decree never became final. The defendant had appealed against it, and the plaintiffs had filed cross objections. It was, therefore, *sub judice* when the appeal of the plaintiffs from the preliminary decree came on for hearing. The case of *Kuriya Mal v. Bishambhar Das* was like the present a case which arose before the present Code of Civil Procedure came into operation. The case of *Narain Das v. Balgobind* was one to which the provisions of the present Code were applicable. The decision in the latter

(1) (1910) I. L. R., 32 All., 225.

(2) (1911) 8 A. L. J., 604.

case seems to me to have rested entirely upon the ruling in *Kuriya Mal v. Bishambhar Das*. Section 97 of the Code of Civil Procedure provides as follows:—

“Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.” It seems to me that this section shows that the proper mode of challenging the correctness of the preliminary decree is an appeal against that decree. I can see no reason why a party should be called upon to appeal against the final decree and to incur the expense of so doing merely to keep the other appeal alive. It may well be that the party has no objection to the final decree in itself and that his sole objection is to the preliminary decree. In many cases the party would admit that if the preliminary decree is confirmed, the final decree is correct. It seems to me also, that the final decree depends upon the preliminary decree, and that if an appeal is duly taken to the preliminary decree and succeeds the final decree necessarily falls with the reversal of the preliminary decree upon which it depends. I would allow this appeal.

BANERJI, J.—I have also arrived at the same conclusion. The ground upon which the appeal of the plaintiffs was dismissed by the lower appellate court was that they had not appealed from the final decree passed by the court of first instance. That court overlooked the fact that at the time when the appeal of the plaintiffs came on for hearing, there was pending in that court an appeal preferred by the defendant in which objections had been taken by the plaintiffs, so that at the time of the hearing of the appeal of the plaintiffs from the preliminary decree, the final decree was *sub judice* and had not become final. That circumstance distinguishes this case from the two rulings on which the learned Judge of this Court has relied and which have been referred to by the learned Chief Justice. In the first of those cases no appeal had been preferred from the final decree, and in the latter of them the period of appealing from that decree is said to have expired when the appeal from the preliminary decree was filed. That is not the case here. Therefore, there was no reason for not entertaining the appeal preferred by the plaintiffs from the preliminary decree passed by the court of first instance. I also would allow the appeal.

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BY THE COURT.—The order of the Court is that the decrees of the court below and of this Court are set aside, and the case is remanded to the lower appellate court with directions to readmit it under its original number in the register and to hear and decide it on its merits. Costs here and heretofore will be the costs in the cause. The record may be sent back, as soon as possible, to enable the lower appellate court to dispose of the appeals of both parties at an early date.

Appeal allowed.

FULL BENCH.

1912
May, 1911.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Karamat Husain and Mr. Justice Chamier.

DROPADI (PETITIONER) v. HIRA LAL (OPPOSITE PARTY).^{*}
Act No. III of 1907 (Provincial Insolvency Act), section 46 (4)—Appeal—Limitation—Application of general provisions of the law of limitation—Act No. IX of 1908 (Indian Limitation Act), sections 12, 29.

The Provincial Insolvency Act is a special law within the meaning of section 29 of the Indian Limitation Act, but, inasmuch as it is not in itself a complete Code, there is nothing to prevent the application thereto of the general provisions of the Indian Limitation Act. Such general provisions do not "affect or alter" the period prescribed by a special law, but only the manner in which that period is to be computed. *Jugal Kishore v. Gur Narain* (1) overruled. *Beni Prasad Kuari v. Dharaka Rai* (2), *Joti Sarup v. Ram Chandar Singh* (3) and *Veeramma v. Abbiah* (4) followed. *Poulson v. Mudhoosoodun Paul Chowdhry* (5), *Ummoda Persaud Mookerjee v. Kristo Coomar Moitro* (6), *Nagendro Nath Mullick v. Mathura Mohun Parhi* (7), *Girija Nath Roy Bahadur v. Patani Bibee* (8), *Bihari Loll Mookerjee v. Mungolanath Mookerjee* (9), *Golap Chand Nowluckha v. Krishto Ghunder Dass Biswas* (10), *Nijabutoola v. Wazir Ali* (11), *Khetter Mohun Chuckerbuly v. Dinabashy Shaha* (12), *Guracharya v. The President of the Belgaum Town Municipalities* (13), *Kullayappa v. Lakshmiipathi* (14), *Abdul Hakim v. Latif-un-nessa Khatun* (15) and *Suraj Bali Prasad v. Thomas* (16) referred to.

The facts of this case appear sufficiently from the following order of reference made by KARAMAT HUSAIN and CHAMIER, JJ. :—

"The question for decision in this and the connected appeal is whether a person filing an appeal under section 46 of the Provincial Insolvency Act is entitled

^{*} First Appeal No. 154 of 1911 from an order of Austin Kendall, District Judge of Cawnpore, dated the 24th of July, 1911.

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| (1) (1911) I. L. R., 33 All., 738. | (9) (1879) I. L. R., 5 Calc., 110. |
| (2) (1901) I. L. R., 23 All., 277. | (10) (1879) I. L. R., 5 Calc., 314. |
| (3) Weekly Notes, 1902, p. 34. | (11) (1882) I. L. R., 8 Calc., 910. |
| (4) (1893) I. L. R., 18 Mad., 99. | (12) (1884) I. L. R., 10 Calc., 265. |
| (5) (1865) 2 W. R., Act X Rulings, 21. | (13) (1884) I. L. R., 8 Bom., 529. |
| (6) (1872) 15 B. L. R., 60, note. | (14) (1889) I. L. R., 12 Mad., 467. |
| (7) (1891) I. L. R., 18 Calc., 368. | (15) (1903) I. L. R., 30 Calc., 532. |
| (8) (1889) I. L. R., 17 Calc., 263. | (16) (1906) I. L. R., 28 All., 48. |