

THE
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FULL BENCH.

Before Justice Sir George Knox, Acting Chief Justice, Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.

1917
July, 16.

NARSINGH SAHAI (DEFENDANT) v. SHEO PRASAD (PLAINTIFF).^{*}

*Civil Procedure Code (1908), section 122—Power of High Court to make rules—
Rules of Court of the 18th January, 1898, Chapter III, rule 2—Appeal—
Limitation—Act No. IX of 1908 (Indian Limitation Act), section 12.*

The High Court framed a rule, with reference to the presentation of appeals from appellate decrees, that "No memorandum of appeal from an appellate decree or from any order shall be presented, unless accompanied by a copy of the decree or order appealed against, and, *where it exists, a copy of the judgement of the court of first instance . . .*"

Held, on a construction of this rule, that it did not connote that the appellant had a right to exclude from the period of limitation for filing his appeal the time requisite for obtaining a copy of the judgement of the court of first instance.

Held, also, that having regard to section 122 of the Code of Civil Procedure, 1908, the rule in question was not *ultra viros*.

A SECOND APPEAL was filed in the High Court on the 15th of March, 1916, from an appellate decree, dated the 3rd of December, 1915. The memorandum of appeal was accompanied by a copy of the decree appealed from, a copy of the judgement of the lower appellate court and a copy of the judgement of the court of first instance. Application for the copies of the decree and of the judgement of the lower appellate court was made on the 7th of December, 1915; the copies were ready for delivery on the 18th of December, 1915, and were taken delivery of on the 21st of December, 1915. Application for the copy of the judgement of the court of first instance was made on the 19th of February, 1916; the copy was ready on the 29th

^{*} Second Appeal No. 420 of 1916, from a decree of G. C. Badhwar, Additional Judge of Farrukhabad, dated the 3rd of December, 1915, reversing a decree of Bhagwan Das Bhargava, Munsif of Fatehgarh, dated the 26th of June, 1915.

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of February, 1916, and was delivered on the 4th of March, 1916. At the hearing of the appeal a preliminary point was raised that the appeal was filed beyond time. The appellant contended that the time occupied in obtaining the copy of the judgement of the first court should also be excluded, and if that was done the appeal would be within time. The question whether the appeal was presented beyond time was referred to a Full Bench.

Babu *Piari Lal Banerji* (with Mr. S. A. *Haidar*) for the appellant, raised the question as to who should begin. He submitted that the appeal itself was not before the Full Bench; if that had been the case, and the respondent had a preliminary objection, then the respondent would be heard first. The sole point for determination by the Full Bench was whether or not the time occupied in obtaining the copy of the judgement of the first Court should be deducted in computing the period of limitation. On this point he who asserted the affirmative should begin.

The Court intimated that the party who raised the question itself should be first heard.

Dr. *Surenendra Nath Sen* (with him *Munshi Gulzari Lal*) for the respondent:—

The appeal is barred by time. There is no provision of law which entitles the appellant to a deduction of the time required to obtain the copy of the first court's judgement. The language of section 12 of the Limitation Act is very clear. Clause (2) excludes the time requisite for a copy of the *decree* appealed from; and clause (3) excludes the time requisite for a copy of the judgement on which "it," i.e., the decree appealed from, is founded. In the present case the decree appealed from being that of the lower appellate court, the judgement indicated by clause (3) is the judgement of the lower appellate court, upon which the said decree is founded. The judgement of the first court comes neither under clause (2) nor under clause (3). The judgement was in the appellant's favour, and is certainly not the "judgement complained of." The appellant may seek to invoke the aid of rule 2, chapter III, of the rules of Court, as it now stands after the amendment which was published in the local Gazette of the 24th

of July, 1915.* That rule, however, does not help the appellant; it does not say anything about limitation of the exclusion of any period of time. The important words of the Rule are "shall be presented," and its whole scope is confined to the question of the proper presentation of an appeal. It has nothing to do with any question of limitation. In the present case there is no question whether the appeal was or was not properly presented; admittedly it was, as the requirements of the rule were complied with. That being so, the function of the Rule comes to an end. But after that the question arises "was the appeal presented within time?" It cannot be seriously contended that the rule mentioned above was either intended or competent to graft an important addition to the provisions of section 12 of the Limitation Act. And the rule does not profess to do so. Order XLI, rule 1, read with section 108, Civil Procedure Code, says nothing about a copy of the judgement of the first court. The Rule was framed by the High Court, as a matter of procedure in the presenting of appeals, under the powers conferred by section 122, Civil Procedure Code. The Rule has not inaugurated any great novelty; so far back as in the Code of 1859, we find the rule incorporated in section 373 thereof. Turning now to decided cases, there are, no doubt, rulings under the Code of 1859 favouring the exclusion of the time required to obtain a copy of the judgement of the first court. But it must be remembered that no codified provision on the subject, like that of section 12 of the present Limitation Act, was contained in Act XIV of 1859, and so the courts could exercise greater latitude in dealing with the matter. The following cases have some bearing, more or less on the subject: *Pirathi Sing v. Venkatramanayyan* (1) and *Ohunnilal Jethabhai v. Barot Dahyabhai Amulakh* (2), where it was held that

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* Chapter III, rule 2, of the rules of the High Court:—"No memorandum of appeal from an appellate decree or from any order shall be presented unless accompanied by a copy of the decree or order appealed against and, where it exists, a copy of the judgement of the court of first instance. In all cases in which either or both of the judgements above mentioned is or are not in English, the memorandum of appeal shall also be accompanied by a translation in the English language of such judgement or judgements made by a translator on the establishment of a Civil Court or certified as correct by an authorized translator of the High Court."

(1) (1882) I.L.R., 4 Mad., 419.

(2) (1907) I.L.R., 32 Bom., 14.

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the essential accompaniments of a memorandum of appeal were those prescribed by order XII, rule 1, and section 108, Civil Procedure Code; that the additional accompaniments required by the High Court rule were extraneous; and that the language of section 12 of the Limitation Act and the fact that it was framed with due regard to the said provisions of the Civil Procedure Code and that it applied equally to first appeals and second appeals gave rise to the necessary implication that deduction of the time taken to obtain a copy of the first court's judgement was not intended by the Legislature; *Ramchandra Sadashiv v. Laxman Sadashiv* (1) and *Sadashiva Raghunath v. Ramchandra Chintaman* (2) are contradictory cases. The case of *Fazal Muhammad v. Phul Kuar* (3) may also be mentioned by way of analogy.

Babu *Piari Lal Banerji* for the appellant:—

Tracing back the history of legislation on the subject it will be seen that the course of legislation has, from the beginning, run on two parallel lines, the first prescribing from time to time the necessary accompaniments of a memorandum of appeal and the second making corresponding provisions for exclusion of the time required to furnish those accompaniments. The two have always been correlative and commensurate. Section 373 of the Code of Civil Procedure of 1859 (Act VIII of 1859) required copies of judgements and decrees to be filed. There was no provision for exclusion of the time requisite for such copies in the corresponding Limitation Act, XIV of 1859, because the Code of Civil Procedure itself provided for the matter by section 333. That section, however, in terms allowed deduction of the time required for obtaining a copy only of the "decree"; it was silent about the "judgement." But the courts promptly stepped in to remove this defect and the consequent hardship, and ruled that the time taken to obtain a copy of the judgement should also be deducted; *Hossanee Begum v. Dumree Mahtoon* (4). Section 13 of the Limitation Act, IX of 1871, reproduced section 333 of Act VIII of 1859, and the subject of the exclusion of time requisite for copies was taken out of the domain of the Code of Civil

(1) (1906) I. L. R., 31 Bom., 162. (3) (1879) I. L. R., 2 All., 192.

(2) (1903) 5 Bom. L. R., 394.

(4) (1865) 2 W. R., (Mis. App.) 51.

Procedure and incorporated in the Limitation Act. But the decision in 2 W. R., 51, continued to be followed. In 1875, however, that case was overruled by the Full Bench case of *Juggunmath Singh v. Shewruttun Singh* (1). The divergence created by the Full Bench ruling between the two branches of legislation was soon remedied. In 1877 the Legislature stepped in, and by enacting section 541 of the Code of Civil Procedure (X of 1877) and the third paragraph of section 12 of the Limitation Act, XV of 1877, brought the two subjects into line again. Thus it appears that whenever in the past confusion and hardship have arisen in this matter, the courts or the Legislature have stepped in and taken measures to prevent injustice. It is submitted that this Bench may lay down that as a matter of general practice with reference to this rule the Court should in such cases give the appellant the benefit of section 5 of the Limitation Act. In the case in I. L. R., 32 Bom., 14, which has been cited by the respondent, the Bombay High Court was much impressed by the hardship which a similar rule of its own was likely to cause, and was led to declare the rule to be *ultra vires* rather than to allow it to cause hardship. It is submitted that the present rule is also *ultra vires*, because its effect is, in practice, to modify and cut down the period allowed by the Limitation Act. The rule imposes an additional hardship on the appellant over and above the requirements prescribed by the Legislature and may in many cases operate very seriously to encroach upon the period which is by law allowed for appeal and thereby to prejudice the rights and privileges of an appellant. Conceivably, it might take, say, 95 days to obtain the copy of the first court's judgement. The court could, no doubt, give relief under section 5 of the Limitation Act, but that would be reducing the appellant to sue for grace, which might or might not be given, for a matter to which he ought to be entitled as of right. There seems no reason why the appellant should be placed in a different position with respect to the copy of the first court's judgement from that in respect of the copy of the appellate judgement, if he is equally required to file both.

KNOX, A. C. J., and BANERJI and TUDBALL, JJ.:— The question that has been referred to this Full Bench for decision is

(1) (1875) 24 W. R., 105.

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whether the appeal, out of which the question arises, is barred by limitation or not?

In order to decide this point it is necessary to consider first the date on which the judgement of the lower appellate court was passed and the days that it took the appellant to obtain copies of the judgement and decree complained of. The judgement was pronounced on the 3rd of December, 1915. We find from the record that an application for the copy both of the judgement and decree was made on the 7th of December, 1915, and that that copy could have been obtained on the 18th of December, 1915. The appellant therefore had at his disposal the ninety days prescribed for the appeal plus a period of twelve days, the time requisite to obtain copies of the judgement and decree complained of. The appeal was filed in this Court on the 15th of March, 1916, and was thus one day beyond the time allowed by the Indian Limitation Act. *Prima facie*, therefore, it appears that the appeal at the time when it was presented to this Court was barred. But the appellant seeks to call to his aid a period of another eleven days, more or less, and the ground on which he seeks the addition of this period is that under rule 2, chapter III, this Court has made a rule that "no memorandum of appeal from an appellate decree or from any order shall be presented unless accompanied by a copy of the decree or order appealed against and, where it exists, a copy of the judgement of the court of first instance." His contention is that, as he could not present his memorandum of appeal unless it was accompanied by the copy of the judgement of the court of first instance, he can claim the additional period which was requisite for the obtaining of the copy of the said judgement. In the present case that period was a period of eleven days. When the memorandum of appeal was presented to this Court it was as a matter of fact accompanied by the documents which the Code of Civil Procedure and the rule of this Court required should accompany it. But, as we have already stated above, the date of presentation was one day beyond the period of time allowed by the Indian Limitation Act. Now section 12 of the Indian Limitation Act is perfectly clear and its language in no way ambiguous. It lays down in clause (3) of section 12 of the Act that "where a decree is appealed from or sought to be

reviewed, the time requisite for obtaining a copy of the judgement on which it is founded shall also be excluded." Nothing further is said, and we are unanimous in holding that this Court has no power by any rule that it may make to alter the period of limitation prescribed by the Indian Limitation Act. We would further say that the rule as it stands was never intended to and can in no way be construed as altering in any way the Indian Limitation Act. This Court has power to alter, amend and add to rules of procedure laid down by the Code of Civil Procedure, vide section 122, but nowhere has any power been given to it to touch the Limitation Act. Our answer then to the question which has been sent to us is that the present appeal is barred by limitation.

We have not got to determine whether this is a case in which the provisions of section 5 of the Limitation Act are to be applied. That is a matter for the Bench hearing the appeal.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

AFZAL SHAH AND ANOTHER (PLAINTIFFS) v. LACHMI NARAIN AND
OTHERS (DEFENDANTS).*

*Civil Procedure Code (1908), o. der I, rule 3; o. der XXIII, rule 1—Procedure—
Suit dismissed for misjoinder of parties and of causes of action—Plaintiff
permitted to withdraw suit on terms with liberty to bring fresh suits.*

Where it was found on second appeal to the High Court that the suit out of which the appeal had arisen was bad for misjoinder of parties and of causes of action, in that there was no community of interest between the various defendants, whose sole connection with each other was that they were purchasers of different portions of property, the whole of which was claimed by the plaintiff, the High Court permitted the suit to be withdrawn on terms as to costs, with liberty to the plaintiff to bring separate suits against each of the defendants.

THE facts of this case were as follows:—

The plaintiffs purchased certain items of immovable property in one lot at a sale held in execution of a decree. Somehow the same property again came to be sold, as belonging to the former

* Second Appeal No. 373 of 1916, from a decree of Durga Dat Joshi, First Additional Judge of Aligarh, dated the 4th of December, 1915, modifying a decree of Banke Behari Lal, Additional Subordinate Judge of Aligarh, dated the 14th of March, 1913.

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