MISCELLANEOUS CIVIL.

Before Mr. Justice Bisheshwar Nath Srivastava, Acting Chief Judge and Mr. Justice G. H. Thomas

KALLOO AND ANOTHER (DEFENDANTS-APPELLANTS) *v.* NATHU SAH (PLAINTIFF-RESPONDENT)*

1934 *September 6*

Civil Procedure Code (Act V of 1908), Order XLVII, rule 4—Appeal dismissed by High Court with the remark that if view hitherto taken by it is over-ruled by Judicial Committee, appellant can apply for review—Judicial Committee subsequently over-ruling the view—Review, whether competent.

Where the High Court in dismissing an appeal remarked that it would be open to the appellant, in the event of the view hitherto taken by that court being over-ruled by their Lordships of the Judicial Committee to apply for a review of the judgment, if the contingency actually happens a review is competent because the ground on which the review is sought should be deemed to be a ground which was in contemplation at the date of the decree. Further the decision of the Judicial Committee passed subsequent to the decision of the appeal by the High Court should, in the special circumstances of the case, be treated as a sufficient reason *ejusdem generis* with the discovery of new and important matter within Order XLVII, rule 4 of the Code of Civil Procedure.

Lasadin v. *Gulab Kuar* (1), *Chhajju Ram* v. *Neki* (2), and *Kotagiri Venkata Subbamma Rao* v. *Vellanki Venkata Rama Rao* (3), referred to.

Mr. *Siraj Husain*, for the appellants.

Mr. *Ram Bharose Lal*, for the respondent.

SRIVASTAVA, A.C.J. and THOMAS, J.:—This is an appeal under order XLIII, rule 1(*w*) of the Code of Civil Procedure and section 12(1) of the Oudh Courts Act against the order of the Hon'ble Mr. Justice Kisch, dated the 19th of September, 1932, granting the plaintiff's application for an order of review of his judgment and decree, dated the 20th of February, 1932. A preliminary objection has been raised against the hearing of

*Miscellaneous Appeal No. 5 of 1933, against the order of the Hon'ble Mr. Justice B. S. Kisch, Judge of the Chief Court of Oudh, Lucknow, dated the 19th of September, 1932.

(1) (1929) 6 O.W.N., 925. (2) (1922) L.R., 49 I.A., 144.
(3) (1900) L.R., 27 I.A., 197.

1934

KALLOO v. NATHU SAH

Srivastava, A.C.J. and Thomas, J.

the appeal on the ground that it was barred by limitation. If the appeal were treated as one under section 12 clause (2) of the Oudh Courts Act, it would no doubt be barred by limitation, but the appeal does not purport and cannot in fact be treated as one under the second clause of section 12. This clause requires that the Judge who made the decree should declare that the case is a fit one for appeal. No such declaration was made in this case. After hearing the Counsel for the parties we are satisfied that the appeal is really one under clause (1) of section 12 under which it purports to have been made. This clause allows an appeal from any original decree or from any order against which an appeal is permitted by any law for the time being in force, made by a single Judge of the Chief Court, to a Bench consisting of two other Judges of the Chief Court. Order XLIII, rule 1, clause (*w*) shows that an appeal is permitted against orders under rule 4 of order XLVII granting an application for review. Thus the order of Mr. Justice Kisch granting the application for review was appealable under this clause. Section 12 clause (1) of the Oudh Courts Act provides that such an appeal shall lie to a Bench of two Judges. Treated as such the appeal is within time. We accordingly overrule the preliminary objection.

Next as regards merits, the facts of the case are that the plaintiff instituted a suit for foreclosure of a mortgage. The mortgage deed provided that the debt was to be repaid by monthly instalments and in case of default in payment of three consecutive instalments the mortgagee was given the option to recover the entire amount immediately. The only question for decision in the Courts below as well as in the second appeal before Mr. Justice Kisch was one of limitation. If limitation was to be computed from the date of the third consecutive default in payment of the monthly instalments the suit was barred by time. On the other hand if limitation was to be counted from the expiry of the four years period fixed in the mortgage the suit was within time. A Bench

1934

KALLOO v. NATHU SAH

of this Court in *Lasadin* v. *Gulab Kuar* (1) had held that the starting point of limitation in such a case was the date of default in payment which entitled the creditor to recover the entire amount. At the hearing of the appeal a request was made to Mr. Justice Kisch to adjourn the case until the decision of the appeal which was pending before their Lordships of the Judicial Committee against the decison of the Bench of this Court in the above mentioned case. The learned Judge did not consider it necessary to adjourn the case but in dismissing the appeal remarked that it would be open to the appellant, in the event of the view hitherto taken by this Court being overruled by their Lordships of the Judicial Committee, to apply for a review of his judgment. Accordingly when the decision in *Lasadin* v. *Gulab Kuar* (1) was reversed by their Lordships of the Judicial Committee the plaintiff made an application to Mr. Justice Kisch for review of his judgment and decree passed in the appeal. The learned Judge granted the application. He was of opinion that having made provision in his judgment for the plaintiff applying for review in the event of the decision of their Lordships of the Judicial Committee being contrary to the order passed in the case he was bound to implement his own decree.

Srivastava, A.C.J. and Thomas, J.

The only contention urged by the appellants is that Mr. Justice Kisch had contravened the provisions of order XLVII, rule 4 in granting the application for review. It is argued that none of the grounds for review laid down in order XLVII, rule 4 of the Code of Civil Procedure existed in the case and that the order granting the application for review was therefore without jurisdiction. Order XLVII, rule 4 allows a review on the ground of:

> (1) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge, or could not be produced by him at the time when the decree was passed or order made,

(1) (1929) 6 O.W.N., 925.

1934

KALLOO v. NATHU SAH

(2) some mistake or error apparent on the face of the record, and

(3) for any other sufficient reason.

Srivastava, A.C.J. and Thomas, J.

In *Chhajju Ram* v. *Neki and others* (1) it was held by their Lordships of the Judicial Committee that the words "any other sufficient reason" mean a reason sufficient on grounds at least analogous to those specified immediately previously. In *Rajah Kotagiri Venkata Subbamma Rao* v. *Rajah Vellanki Venkata Rama Rao* (2) their Lordships of the Judicial Committee, discussing the meaning of the words "any other sufficient reason" as used in section 623 of the old Code of Civil Procedure which corresponds to order XLVII, rule 1 of the present Code, remarked that the ground of amendment must at any rate be something which existed at the date of the decree. In view of the reservation expressly made by Mr. Justice Kisch in his original judgment that it would be open to the appellant to apply for review in the contingency which has actually happened, we think that the ground on which he was asked to review his judgment should be deemed to be a ground which was in contemplation at the date of the decree. We are further of opinion that the decision of their Lordships of the Judicial Committee in *Lasadin* v. *Gulab Kuar* (3) which was passed subsequent to the decision of the appeal by Mr. Justice Kisch, should, in the special circumstances of the case, be treated as a sufficient reason *ejusdem generis* with the discovery of new and important matter.

The defendants persuaded Mr. Justice Kisch to disallow the plaintiff's request for adjournment of the hearing of the appeal. There is no doubt that the request was refused on the clear understanding that if the plaintiff thereby suffered any injustice he could get his grievance redressed by means of a review application. The defendants now seek to go behind the aforesaid understanding and to retain the advantage which they have secured by the refusal of the plaintiffs' request for

(1) (1922) L.R., 49 I.A., 144. (2) (1900) L.R., 27 I.A., 197
(3) (1932) I.L.R., 7 Luck., 442.

an adjournment by taking their stand on a technical interpretation of the provisions of order XLVII, rule 1 of the Code of Civil Procedure. We have no sympathy with the appellants' contentions, which are altogether without merit. We accordingly dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan

EHSAN BEG AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* RAHMAT ALI AND OTHERS (DEFENDANTS-RESPONDENTS)*

1934
October, 9

Mohammedan Law—Waqf—Cypress, doctrine of—Cemetery closed for burial—Private individual constructing house on it and making waqf *of it—Waqf, whether valid—Material of house, whether constitutes* waqf*—Person not owning property, whether can make a* waqf *of it—Specific Relief Act (I of 1877), section 56—Injunction—Suit for injunction to stay proceedings in a Court not subordinate to the Court from which injunction is sought, maintainability of.*

A person who is not owner of any particular property cannot make a *waqf* of it.

A person has no right whatever to build a house on a portion of a public cemetery. *Abdul Ghafoor* v. *Rahmat Ali* (1), referred to.

Where a person builds a house on a portion of a public graveyard which had been closed by order of the Municipal Board and then makes a *waqf* of it and appoints *mutawallis*, the materials of the house only will constitute a *waqf* and can be made use of for the purposes of the *waqf* as the *mutawallis* think best, but the house, having been built on *waqf* property without any right or power, cannot be allowed to remain standing even as a source of income for the cemetery *waqf* as in the first place, it is quite within the range of possibility that the cemetery may at some future time be again used for purposes of burial, and in the second, a construction which is in its inception illegal cannot be allowed to remain standing in contravention of the original purposes of the *waqf*.

*Second Civil Appeal No. 249 of 1933, against the decree of Dr. Ch. Abdul Azim Siddiqi, Additional Subordinate Judge of Lucknow, dated the 31st of July, 1933, confirming the decree of Babu Gulab Chand Srimal, Munsif (South), Lucknow, dated the 31st of March, 1933.

(1) (1930) 7 O.W.N., 382.