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RAM RAJ
TEWARI
v.
RAM GUDH

*Nanavally,
and Smith
JJ.*

For the reasons given above we dismiss the cross-objections with costs, and we partially allow the appeal of the defendant-appellant, and modify the decree of the trial court by excluding therefrom $1\frac{1}{3}$ rd of a half pie share granted to plaintiff No. 1, and dismiss the plaintiff No. 1's suit *in toto*, leaving intact the two-thirds of a half pie share granted by the trial court to plaintiffs Nos. 2 and 3. In the circumstances of this case we direct that the parties should bear their own costs in respect of this appeal.

APPELLATE CIVIL

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

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September,
19

GOKUL PRASAD (PLAINTIFF-APPELLANT) v. KUNWAR
BAHADUR AND OTHERS (DEFENDANTS-RESPONDENTS)*

Limitation Act (IX of 1908), sections 5 and 12—Computing time to be excluded—Decree remaining unsigned for some time—"Time requisite for obtaining copy" of decree—Interval not to be excluded unless application for copies is made and applicant is actually delayed—Delay in filing appeal—Lower appellate court excusing delay—High Court not to interfere, if discretion exercised judicially—Second appeal—Finding of fact.

In computing the time to be excluded under section 12 of the Limitation Act from a period of limitation the 'time requisite for obtaining a copy' does not begin until an application for copies has been made. If therefore after judgment, the decree remains unsigned, such interval is not to be excluded from the period of limitation, unless an application for copies having been made, the applicant is actually and necessarily delayed, through the decree not having been signed. *Bechi v. Ahsanullah Khan* (1), followed. *Bani Madhub Mitter v. Matungini Dassi* (2), referred to.

Where after a consideration of all the circumstances, the lower appellate court is of opinion that the appellant before him should be excused under section 5 of the Limitation Act, the

*Second Civil Appeal No. 124 of 1933, against the decree of Pandit Shyam Manohar Nath Shargha, District Judge of Gonda, dated the 25th of March, 1933, reversing the decree of Babu Har Charan Dayal, Subordinate Judge of Bahraich, dated the 3rd of October, 1932.

(1) (1890) I.L.R., 12 All., 461

(2) (1886) I.L.R., 13 Cal., 104.

delay of a few days in filing the appeal, and it cannot be said that it did not exercise the discretion judicially, the High Court should not interfere with the discretion of the lower appellate court. *Mahabir Singh v. Radha* (1), referred to.

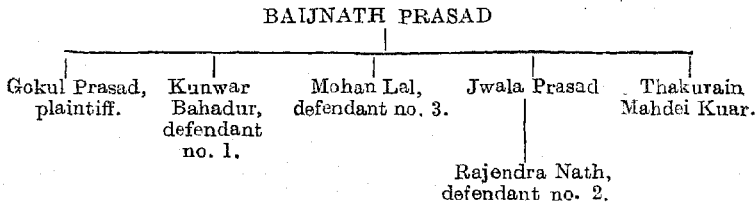
A finding of fact based upon admissible evidence cannot be attacked in second appeal.

Mr. *Ghulam Hasan*, for the appellant.

Messrs. *Radha Krishna Srivastava* and *M. H. Kidwai*, for the respondents.

SRIVASTAVA, A.C.J. and SMITH, J.:—This is a second appeal from a judgment and decree, dated the 25th of March, 1933, of the learned District Judge of Gonda, by which he allowed an appeal from a judgment and decree, dated the 3rd of October, 1932, of the learned Subordinate Judge of Bahraich.

The following genealogical table will be useful in explaining the nature of the suit:



Thakurain Mahdei Kuar married one Lala Kanhaya Lal, who had already a wife, Musammat Bhagwan Dei, but as he had no children by her, he married Thakurain Mahdei Kuar.

The plaintiff, Gokul Prasad, brought the present suit on the allegation that after the death of Lala Kanhaya Lal Musammat Bhagwan Dei granted the village in suit, Bahman Deha, in the Banraich District, to him and his brothers for their maintenance, the Government revenue in respect of it continuing to be paid by the estate of the deceased Kanhaya Lal. Thereafter, according to the plaintiff, disputes arose, and in 1927 a decree was passed in favour of the plaintiff, on the basis of a compromise, for the partition of the joint property of himself and his brothers. In that suit, however, the village now in dispute was not included, the plaintiff expressly reserving

(1) (1933) 10 O.W.N., 424.

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his right to sue separately for his share in it. He afterwards instituted, for that purpose, the suit out of which the present appeal arises, the prayer being that a decree be passed in favour of the plaintiff for the partition of his alleged four annas share in the village in dispute. The learned Subordinate Judge decreed the suit. The only contesting defendant was Kunwar Bahadur, defendant No. 1. He appealed against the decision of the learned Subordinate Judge, and the learned District Judge allowed the appeal, and dismissed the plaintiff's suit, with costs in both the courts in favour of the contesting defendant. The plaintiff has now instituted this second appeal against that decision.

The suit was decided by the learned Subordinate Judge on the 3rd of October, 1932, but the appeal was not instituted until the 22nd of November, 1932. It was argued before the learned District Judge that the appeal was beyond time, but that contention was not upheld by the learned court below, which held that the appeal was within time. On the merits, the learned District Judge held that it was not proved that the gift of the village in dispute was in favour of all the four brothers, but that it was made to Kunwar Bahadur alone. In arguments before us, the question of limitation has again been argued at considerable length, and the finding of the learned District Judge on the merits has also been attacked. We shall deal first with the question of limitation.

In this connection, it is necessary to set forth a number of dates. The case was decided by the learned Subordinate Judge, as has been mentioned already, on the 3rd of October, 1932. On the 17th of October, 1932, an application was made by the contesting defendant for copies of the judgment and the decree. He was given the copy of the judgment on the 19th of October, 1932, but the folios for the decree were returned to him as the decree had not up to that time been prepared. The decree was prepared on the 5th of November, 1932, and

the contesting defendant, on the 9th of November, 1932, made a second application for a copy of it. That application was accompanied by a general stamp of eight annas, which was insufficient, and on the 11th of November the application was returned with a direction to the applicant to put in a general stamp of Re.1. He complied with this direction on the 14th of November. The copy of the decree was ready on the 16th of November, and was delivered on the 17th November. The appeal was filed on the 22nd of November. The time that elapsed, therefore, between the dates of the judgment and the decree appealed against and the filing of the appeal was 50 days. Out of that period, it is contended for the plaintiff-appellant, only six days in all could be excluded under the provisions of section 12(2) and (3) of the Indian Limitation Act, that is to say, the three days from the 14th to the 16th November, and the three days from the 17th to the 19th October. In any view of the matter, it was contended, the delay between the 6th and the 14th November, and again from the 17th to the 22nd November, is not sufficiently accounted for. For the contesting respondent, Kunwar Bahadur, reference was made before us to a large number of rulings. We do not think it necessary to refer to all of them, but we shall mention one or two that seem to us to be outstanding. In *Bani Madhub Mitter v. Matungini Dassi and others* (and) *Kali Shunkar Dass v. Gopal Chunder Dutt* (1), it was held that where a suitor is unable to obtain a copy of a decree from which he desires to appeal, by reason of the decree being unsigned, he is entitled under section 12 of the Limitation Act to deduct the time between the delivery of the judgment and the signing of the decree in computing the time taken in presenting his appeal. The decree, under the provisions of Order XX, rule 7 of the Code of Civil Procedure, "shall bear date, the day on which the judgment was pronounced, and, when the judge has satisfied himself that the decree

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has been drawn up in accordance with the judgment, he shall sign the decree'. The period of limitation for an appeal under the Code of Civil Procedure to the Court of a District Judge is 30 days, and time begins to run from the date of the decree or order appealed from (*vide* article 152 of the 1st Schedule of the Limitation Act). Since the decree must bear the same date as the judgment, and since limitation begins to run from the date of the decree, it follows that the date from which the period of limitation begins to run is not affected by the date on which the decree is actually signed. If the Calcutta ruling to which reference is made, however, is accepted in its unqualified form, it can hardly be disputed that the effect will be to make the period of limitation run not from the date of the decree, which is the date of the pronouncing of the judgment, but from the date of the signing of the decree. This ruling of the Calcutta High Court has frequently been the subject of consideration in later cases, and it has been generally held to go too far. In *Bechi v. Ahsanullah Khan and others* (1), MAHMOOD J., said with reference to the Calcutta case in question, "Indeed, the rule as stated in the judgment of PETHERAM, C.J., goes the length of laying down that even in cases where the decree remains unsigned for a period beyond that allowed for appealing from that decree, the appellant, by a subsequent application for obtaining a copy and procuring it, might prefer an appeal by excluding the whole period during which the decree had remained unsigned and during which he had made no application for a copy at all. That this rule, in the unqualified form in which it has been expressed, taken with the facts and dates of the case before the Full Bench of the Calcutta High Court, has the effect of holding that the starting period of limitation for appeal is not the date of the decree, which under section 205 of the Code of Civil Procedure must 'bear date the day on which the judgment was pronounced.'

(1) (1890) I.L.R., 12 All., 461 (468.)

but the day on which it is signed, cannot be doubted." According to the Allahabad view, "In computing the time to be excluded under section 12 of the Limitation Act from a period of limitation, the 'time requisite for obtaining a copy' does not begin until an application for copies has been made. If therefore after judgment, the decree remains unsigned, such interval is not to be excluded from the period of limitation, unless an application for copies having been made, the applicant is actually and necessarily delayed, through the decree not having been signed." This appears to be now the accepted view (*vide* Mitra's Indian Limitation Act, 10th Edition, page 104, and Rustomji's Law of Limitation, 4th Edition, page 120). It is contended for the contesting respondent that according to this principle, he was entitled for purposes of limitation to deduct the whole period between the 17th of October, 1932, the date on which he first applied for a copy of the decree, and the 17th of November, 1932, on which date the copy was actually delivered to him. This contention appears to have been acceded to by the learned District Judge, since he said that the appellant before him, (Kunwar Bahadur) "must be given the benefit of" his application of the 17th of October, 1932.

We do not think it necessary definitely to decide for the purposes of this appeal, the period which the appellant before the learned court below was entitled to exclude under the provisions of section 12(2) and (3) of the Limitation Act, since we think that the matter can be disposed of on other grounds. As has been mentioned already, the decree was not signed until the 5th November, 1932, and as a copy of it had to accompany the appeal, under the provisions of Order XLI, rule 1(1), of the Code of Civil Procedure, the appeal could not be presented along with all the necessary papers before that date. Allowing the three days spent in obtaining the copy of the judgment (the 17th to the 19th October, 1932), which period on any showing was entitled to be

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excluded under the provisions of section 12(3) of the Limitation Act, the appeal was within time up till the 5th of November, 1932. The periods between the 6th November and the 14th November, and between the 17th November and the 22nd November, were attacked before the learned court below as being insufficiently accounted for, and as has been mentioned already, these are the periods which are particularly attacked before us. The period from the 14th to the 17th November, 1932, was on any showing entitled to be excluded under the provisions of section 12(2) of the Limitation Act. It is at least arguable that the whole period between the 9th November and the 17th November was entitled to be so excluded, but the learned District Judge applied his mind to the question whether the periods from the 6th to the 14th November, and from the 17th to the 22nd November, were to be "condoned", as he put it, under section 5 of the Limitation Act. After a consideration of all the circumstances, the learned District Judge was of opinion that the appellant before him should be excused, under section 5 of the Limitation Act, the delay of seven days from the 7th to the 13th November, 1932. (the 6th November, 1932, was a Sunday, and so, of course, was the 13th November). As regards the time between the 17th November and the 22nd November, he thought that that time was reasonably necessary to enable the appeal to be prepared. He made reference in that connection to a Bench decision of this Court reported in *Mahabir Singh and others v. Radha and others* (1). The delay between the 17th November and the actual filing of the appeal on the 22nd of November was accordingly also excused by the learned court below under section 5 of the Limitation Act. The learned District Judge had a discretion under that section to excuse the delay that took place during the two periods in question, and it cannot be said that he did not exercise that discretion judicially. In the circumstances, we hold

(1) (1933) 10 O.W.N., 424.

that he was not wrong in holding that the appeal before him was within time.

Coming now to the merits, we have mentioned already that when the plaintiff instituted his previous suit for partition against his brothers, he expressly excluded from the scope of that suit the village now in dispute, saying that he reserved his right to sue separately for his share in that village. It is contended before us that the contesting defendant, Kunwar Bahadur, in the present suit, did not then assert that Gokul Prasad, the plaintiff in that suit, was not entitled to a share in the village now in question. It is not shown to us that Kunwar Bahadur on that occasion was bound to deny the plaintiff's right to a share in the village now in dispute, nor are we shown that he said anything that constituted an admission of Gokul Prasad's right to a share in that village. This contention, therefore, on behalf of the plaintiff-appellant has no force.

As to the question whether the village now in suit was given to Kunwar Bahadur alone, or to him and his brothers jointly, we think that the finding of the learned District Judge that it was given to Kunwar Bahadur alone must be regarded as a finding of fact, based upon admissible evidence, which cannot be attacked in second appeal. It was contended before us that the evidence produced on that point on behalf of Kunwar Bahadur was inadequate, but, as was pointed out by the learned Counsel for the contesting respondent, the learned District Judge rightly placed on the plaintiff, Gokul Prasad, the burden of proving that the gift was in favour of all the four brothers. That burden, the learned District Judge held, Gokul Prasad absolutely failed to discharge, and we hold his finding as to the nature of the gift to be a finding which cannot be assailed before us. The result is that this appeal fails, and is dismissed, with costs in favour of the contesting respondent, Kunwar Bahadur.

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Appeal dismissed.