

## APPELLATE CIVIL.

Before Mr. Justice Scot'-Smith and Mr. Justice Harrison.

1922

MUHAMMAD DIN AND OTHERS (PLAINTIFFS) —

Appellants,

versus

Mst. ZEP-UN-NISA, Vendor, }  
 GHULAM NABI, ETC., Vendees } (DEFENDANTS)  
 AND ANOTHER, Respondents.

Jan. 3.

Civil Appeal No. 986 of 1919.

*Res-judicata—two appeals filed from one decision—two separate decrees drawn up—in second appeal only copy of one decree filed—whether it was a proper presentation of the appeal and whether time should be extended—Indian Limitation Act, IX of 1908, section 5.*

Plaintiff-appellants sued Mst. Z. N., widow of A. D., and G. N. and R. B., vendees from her, for possession of their share in two houses by partition. The first Court held that plaintiffs were entitled to possession of the share claimed and gave them a decree subject to the payment of Rs. 316 to Mst. Z. N. From this decree two appeals were filed in the Court of the District Judge, (1) appeal No. 19 by G. N. and R. B., the vendees; they made the plaintiffs and Mst. Z. N. respondents and (2) appeal No. 20 by Mst. Z. N. in which she made the plaintiffs sole respondents and did not implead the vendees. The District Judge disposed of both appeals by a judgment in Civil Appeal No. 20 and wrote a short judgment in the other appeal in which he referred to his judgment in Civil Appeal No. 20. Two separate decrees were drawn up, one in each appeal. The District Judge accepted the appeals and dismissed the plaintiffs' suit. The plaintiffs then presented a second appeal to the High Court but filed copies of the judgment and decree in Civil Appeal No. 20 only, and no copy of the decree in Civil Appeal No. 19 to which G. N. and R. B., the vendees, were parties.

*Held*, that the appeal had not been properly filed within the provisions of Order XLI, rule 1 of the Code of Civil Procedure, as the memorandum of appeal was not accompanied by a copy of the decree in favour of the vendees G. N. and R. B.

If the High Court were to hear the present appeal and set aside the decree, there would still be subsisting the decree in favour of G. N. and R. B., which would operate as *res-judicata* and the plaintiffs' suit would still stand dismissed as against them.

1922

MUHAMMAD DIN  
v.  
Mst. ZEB-UN-  
NISA.

*Held further*, that no sufficient cause had been shown within the meaning of section 5 of the Limitation Act for extending time to enable the appellants to file copies of the judgment and decree in Civil Appeal No. 19. Counsel who filed the present appeal must have seen from the copy of the decree that the vendees, G. N. and R. B., were no parties to it. A valuable right had accrued to the latter and it would not be fair to them to extend the time.

*Second appeal from the decree of N. H. Prenter, Esquire, District Judge, Lahore, dated the 14th March 1919, reversing that of Sayad Muhammad Shah, Mashadi, Subordinate Judge, 1st Class, Lahore, dated the 19th December 1918, and dismissing plaintiffs' suit.*

AZIM ULLAH, for Appellants.

OBEDULLAH, HAZARA SINGH, and MAHESH DAS,  
for Respondents.

The judgment of the Court was delivered by—

SCOTT-SMITH J.—The plaintiffs-appellants sued *Mussammat Zeb-un-Nisa*, widow of Allah Din, and Ghulam Nabi and Rahim Bakhsh, alienees from her of two houses, for possession of their  $\frac{1}{16}$ th share therein by partition. The first Court held that according to the Muhammadan Law the plaintiffs were entitled to possession of the share claimed and gave them a decree therefor subject to the payment of Rs. 316 to *Mussammat Zeb-un-Nisa*. From this order two appeals were filed in the Court of the District Judge, (1) Civil Appeal No. 19 by Ghulam Nabi and Rahim Bakhsh, the vendees. They made the plaintiffs respondents and also *Mussammat Zeb-un-Nisa* and *Mussammat Imam Bibi*; (2) Appeal No. 20 by *Mussammat Zeb-un-Nisa* in which she made the plaintiffs only respondents and did not implead the vendees. The District Judge disposed of the appeals by judgment in Civil Appeal No. 20 (*Mussammat Zeb-un-Nisa's* appeal) and wrote a short judgment in the other appeal in which he referred to his judgment in Civil Appeal No. 20. Two separate decrees were drawn up, one in each appeal. The District Judge accepted the appeals and dismissed the plaintiffs' suit. The plaintiffs have filed a second appeal to this Court, but they have only filed copies of the judgment and the decree in Civil Appeal No. 20.

namely, that of *Mussammal Zeb-un-Nisa*. They have filed no copy of the decree in Civil Appeal No. 19 to which Ghulam Nabi and Rahim Bakhsh were parties.

Mr. Obedulla on behalf of the respondents raises a preliminary objection that it was necessary for the plaintiffs to file two appeals, or at all events to file copies of both judgments and both decrees. In our opinion, this objection has force. Under Order XLI, rule 1, Civil Procedure Code, it is laid down that the memorandum of appeal should be accompanied by a copy of the decree appealed from and of the judgment on which it is founded. Now, there is no copy of the decree in favour of Ghulam Nabi and Rahim Bakhsh along with the memorandum of appeal in this case. Therefore, it is clear that the appeal has not been properly filed. If, for the sake of argument, we were to hear the present appeal and set aside the decree, there would still be subsisting the decree in favour of Ghulam Nabi and Rahim Bakhsh which would operate as *res-judicata* and the plaintiffs' suit would still stand dismissed as against them. Mr. Azim Ullah, appellants' *Vakil*, in the end said that he was prepared to file the copies of the judgment and the decree in Civil Appeal No. 19 of the District Judge's Court, if time were allowed to him. In our opinion, however, no sufficient cause has been shown within the meaning of section 5 of the Indian Limitation Act for extending time. The appeal by the time the additional copies are filed will be obviously long time-barred. Counsel who filed the present appeal must have seen from the copy of the decree that Ghulam Nabi and Rahim Bakhsh were no party to it. This fact should have been sufficient to put him on his guard and he should have applied then for a copy of the decree to which they were parties. A valuable right has now accrued to Ghulam Nabi and Rahim Bakhsh, and we do not consider it would be fair to them to extend the time under section 5 of the Limitation Act.

We accordingly dismiss the appeal with costs.

A. N. C.

*Appeal dismissed.*

1922

MUHAMMAD DIN  
v.  
Mst. ZEB-UN-  
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