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The rule was obtained on the 3rd September, 1890, under section 5 of the Limitation Act (XV of 1877) and the plaintiffs assigned as "sufficient cause for not presenting the appeal" in time, that the mortgagee had filed an appeal against the decree and that they had filed cross-objection which would have been heard at the hearing of the appeal. The mortgagee, however, had subsequently withdrawn his appeal, and the plaintiffs, therefore, had lost the opportunity of supporting their cross-objection.

They now prayed leave to appeal.

The facts of the case are fully stated *supra*, page 244.

Latham (Advocate General) with *Shántárám Náráyan* (Government Pleader) and *Ganpat Saduáshiv Ráo*, in support of the rule.

We filed cross-objections to the decree three years before the withdrawal of the appeal by the defendant. After we had done so the appeal was, on several occasions, on the list for hearing, but it was not reached. Once or twice it was postponed by consent and finally the defendant withdrew it. There has been no negligence on the plaintiffs' part. They had no reason to suspect that the appeal would not be heard. There are, no doubt, decisions of the Courts in India to the effect that unless the appeal is heard the cross-objections must fail. In *Jaita* v. *Balu*[1] it was held that where an appeal abated, the respondent lost his opportunity for enquiring his cross-objection. That case was followed in *Surbhai* v. *Raghunathji*[2], where, however, there was only an intention to file cross-objection. A later case, *Dhondi* v. *The Collector of Salt Revenue*[3], has decided that if the hearing of an appeal is begun, the appeal cannot be withdrawn so as to prevent the respondent from urging his cross-objection. The case of *Jaita* v. *Balu*[4] was decided under Act VIII of 1859, which did not require objections to be filed in Court. They might be brought forward at the hearing. The later Code X of 1877, section 561, required them to be filed some days before the hearing. That section and section 561 of

(1) 3 Bom. H. C. Rep., A. C. J., 81.
(2) 10 Bom. H. C. Rep., 397.
(3) I. L. R., 9. Bom., 28.
(4) 3 Bom, H. C. Rep., A. C. J., 81.

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Act XIV of 1882 are similar to order LVIII, rule 6, of the English Jurisdiction Act. Under that rule it has recently been held that cross-objection should be treated as a cross-appeal and that even if the appeal be withdrawn the cross-objections should be heard—*The Beeswing*(1). We submit that the English rule should be followed rather than the Indian decisions under a former Code of Civil Procedure. There has been no negligence on the plaintiffs' part, and time for appeal should now be granted —*Collins* v. *The Vestry of Paddington*(2); *Anundmoyee Dossee* v. *Poornoo Chunder Roy*(3).

Branson (*Inverarity* and Ráo Sáheb *Vásudeo Jagannáth Kirtikar* with him) for the opponent:—The rule laid down by the Indian Courts is that, if a respondent wishes that his objections against the lower Court's decree should be heard he must file a cross-appeal and that the cross-objections will fail if the appeal be withdrawn by the appellant. The case of *Surbhai* v. *Ragunathji*(4) is exactly similar to the present one. The other rulings on which we rely in support of our contention are *Maktab Beg* v. *Husan Ali*(5) which follows *Dhondi* v. *The Collector of Salt Revenue*(6); *Ramjiwan Mal* v. *Chand Mal*(7); *Ram Pershad Ojha* v. *Bhurosa Koonwar*(8); *Shama Churn Ghose* v. *Radha Kristo Chaklanuvis*(9); *Buroda Kant Bhuttacharjee* v. *Peuree Mohun Mookerjee*(10); *Coomar Puresh Narain Roy* v. *Messrs. R. Watson and Co.*(11). It is only when the Court of appeal is seized of the appeal that the withdrawal of the appeal will not affect the respondent's cross-objections which he will then be entitled to urge—*Dhondi* v. *The Collector of Salt Revenue*(12).

In several cases it has been held that miscalculation of time for filing an appeal, or poverty, or mistake of law or of fact which could have been ascertained by reasonable diligence are not sufficient grounds for extending time—*Zaib-ul-Nissa Bibi* v.

(1) 10 Pro. Div., 18.
(2) 5 Q. B. D., 368.
(3) 9 Moore's Ind. App., 26.
(4) 10 Bom. H. C. Rep., 397, (A. C. J.)
(5) I. L. R., 8 All., 551.
(6) I. L. R., 9 Bom., 28.
(7) I. L. R., 10 All., 587.
(8) 9 W. R., 328, Civ. Rul.
(9) 14 W. R., 210, Civ. Rul.
(10) 23 W. R., 57, Civ. Rul.
(11) [illegible], 229, Civ. Rul.
(12) 10 [illegible], 9 Bom., 28.

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Kulsum Bibi[1]; *Husaini Begam* v. *Collector of Muzffarnagar*[2]; *Jaglal* v. *Har Narain Singh*[3]; *Ramjiwan Mal* v. *Chandmal*[4]; *Chajmal Das* v. *Jagdamba Prasad*[5]; *Sitaram Paraji* v. *Nimba Harshet*[6]; *Moshaullah* v. *Ahmedullah*[7] which follows *Husaini Begam* v. *Collector of Muzffarnagar*[8]; *Gopal Chandra Lahiri* v. *Solomon*[9]; and *Munro* v. *The Cawnpore Municipal Board*[10].

[SARGENT, C. J., referred to *Raghunath* v. *Nilu*[11].]

Inverarity, on the same side.

The ruling in *McHardy* v. *Liptrott*[12] is entirely against the theory that so long as you are engaged in litigation the time will be enlarged.

Latham in reply:—The dictum of Mahmood, J., in *Husaini Begam* v. *Collector of Muzffarnagar*[13] to the effect that a Statute of Limitation should be strictly construed has been relied upon. But all the Courts in India as well as in England have held that a Statute of Limitation should be liberally construed—*Parashrama Jethmal* v. *Rakhma*[14]. Under Section 5 of the Limitation Act (XV of 1877) the Court has the discretion to extend the time for appealing. The ruling in *McHardy* v. *Liptrott*[15] is not applicable to the present case. There is difference in the language of the provisions of the English Judicature Act of 1873 and those of the present Civil Procedure Code (Act XIV of 1882), but still the effect of both the provisions is the same.

SARGENT, C. J.:—In this case, a rule was granted to show cause why time for appealing should not be granted to the petitioners from a decree passed on the 1st March, 1886, in Suit No. 1107 of 1877, for the redemption of the village of Sháhápur in the Dhandhuka Táluka of the Ahmedabad District. By the above decree the petitioners were ordered to pay the defendant, the mortgagee, Rs. 649-11-0 for the redemption of the village. The

(1) I. L. R., 1 All., 250.
(2) I. L. R., 9 All., 11 & 655.
(3) I. L. R., 10 All., 524.
(4) I. L. R., 10 All., 587.
(5) I. L. R., 11 All., 408.
(6) I. L. R., 12 Bom., 320.
(7) I. L. R., 13 Calc., 78.
(8) I. L. R., 9 All., 11 & 655.
(9) I. L. R., 13 Calc., 62.
(10) I. L. R., 12 All., 57.
(11) P. J., 1885, p. 74.
(12) 19 Q. B. D., 151.
(13) I. L. R., 9 All., 11 & 655.
(14) I. L. R., 15 Bom., 299.

mortgagee appealed against this decree on the 19th April, 1886. The plaintiffs did not appeal, but filed cross-objections in December, 1886. On the 15th July, 1890, the mortgagee applied to withdraw his appeal, and an order was made allowing him to do so. The effect of this withdrawal by the mortgagee was that no appellate decree was passed which could give a fresh starting point for the period of three months within which the mortgage debt had to be paid by the mortgagors—*Patloji* v. *Ganu*[1].

The mortgagors now ask by their present application, dated the 3rd September, 1890, under section 5 of the Statute of Limitations (Act XV of 1877) for an extension of time for appealing against the decree of the 1st March, 1886, and have assigned as a sufficient cause for not presenting their appeal within time that they had reason to suppose that the mortgagee's appeal would have been brought to a hearing and that a decree would be passed by the appellate Court, from the date of which they would have had three months' time to pay the mortgage debt. It has been decided, as far back as *Surbhai* v. *Raghunathji*[2], that the withdrawal of the appeal, by which the respondent loses his opportunity of having his cross-objections heard, affords no sufficient reason for enlarging the time for the cross-appeal which he might have presented. This ruling was under section 348 of Act VIII of 1859; but the language of section 561 of the present Code, which gives the right to file cross-objections, is substantially the same as that of the Code of 1859. The circumstance in the present case that the mortgagors have lost not only their right to have their cross-objections heard, but also the power of paying the mortgage debt within three months from the date of the appellate decree, cannot affect the principle of the above ruling, which is that the respondent "must run the risk of the opportunity which he waits for never being presented to him." It is plain, moreover, that, in the present case, the mortgagors did not, as a fact, rely on the mortgagee's appeal for obtaining a fresh period for payment of their debt, as they actually paid it in October, 1886, and asked that it might be regarded as paid in time and that they might be put into possession of the mortgaged

(1) P. J. for 1890, p. 336.

(2) 10 Bom. H. C. Rep. 398.

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property, which was granted by the lower Court, but refused by this Court on the 20th June, 1888[1].

The mortgagors have also stated in their petition that the mortgage money was not paid in time, nor the appeal filed, owing to the negligence of their chief kárbhári, Ratilal, who had been instructed to attend to those matters and was possessed of the necessary funds, that they did not discover that the appeal had not been filed till August or September, 1886. But no reason is given why they did not then apply for an extension of the time for appealing, except that they, on the contrary, were advised to give up all idea of appealing and to rest satified with filing cross-objection.

It has been argued that the period of time since the filing of cross-objections might be excluded in applying section 5 of the Statute of Limitations by way of analogy to section 14, as was suggested might be done in *Sitaram* v. *Nimba*[2]. But here there was no question either of doubtful jurisdiction or procedure, but merely the choice of one of two courses, and the analogy does not, therefore, exist. We must, therefore, discharge the rule with costs.

Rule discharged.

(1) I. L. R., 13 Bom., 106. (2) I. L. R., 12 Bom., 321.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

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NA'RA'YEN JETHA', (PLAINTIFF), *v.* THE MUNICIPAL COMMISSIONER AND THE MUNICIPAL CORPORATION OF BOMBAY, (DEFENDANTS).*

Negligence—Death by negligence—Act XIII of 1855*—Suit for damages by parents of a child killed by negligence—Contributory negligence—Liability for negligence of servants—Damages—Deduction for maintenance of child—Funeral expenses.*

The plaintiff's unmarried daughter, a child of between five and six years old, fell into an open manhole of a sewer in a lane in Bombay on the 20th August, 1890, between 4½ and 5 o'clock P.M., and, when her body was recovered, life was extinct. The sewer was vested in the Municipality of Bombay and was under the control the Municipal Commissioner by virtue of sections 220 and 289 of the Bombay

* Suit No. 5103 of 1891.