

ORIGINAL CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Tyabji.

1897.

JUMNABAI, PLAINTIFF, v. VISSONDAS RUTTONCHUND, DEFENDANT.*

January 22.

Appeal—Limitation—Memorandum of appeal—Non-payment of stamp in time—Petition to appeal in formâ pauperis—Security for costs of appeal—Extension of time for furnishing security—Exceptional circumstances—Civil Procedure Code (Act XIV of 1882), Sec. 549—Practice—Procedure.

The plaintiff's suit having been dismissed for non-appearance under section 98 of the Civil Procedure Code (Act XIV of 1882) she applied to have it restored to the list for hearing, but her application was refused on the 21st September, 1896. On the 17th October, 1896, she petitioned for leave to appeal in *formâ pauperis* against the order of the 21st September and annexed to her petition an unstamped memorandum of appeal. On the 4th December, 1896, her petition for leave to appeal in *formâ pauperis* was rejected, and she was directed by the Court to appeal in the ordinary way if she desired to appeal. On the 11th December, 1896, she applied for further time to pay the stamp fee on the memorandum of appeal and to deposit the usual security. The Court made no order as to the stamp fee, but gave her time to furnish security until the opening of the Court after the Christmas vacation. On the 21st December she tendered to the officer of the Court the proper stamp, asking to have it affixed to her memorandum of appeal, but he refused on the ground that it was too late. The plaintiff, therefore, now applied to the Court of appeal asking that the stamp should be affixed and the appeal filed.

Held, that the application should be granted. As the Court had made no order on the 11th December as to the day on which the stamp duty should be paid, the case should be considered as if the stamp had been affixed to the memorandum of appeal on the 21st December, *i.e.*, the day on which the officer of the Court refused to receive the stamp. That being so, the memorandum of appeal should be regarded as presented on the 17th October, 1896, and consequently within the time of limitation.

The appellant also applied for a further extension of the time for giving security for the costs of the appeal on the ground that in the exceptional state of things in Bombay caused by the prevalence of the plague she had been unable to raise the money required.

Held, that under the circumstances the application should be granted. Section 549 of the Civil Procedure Code (Act XIV of 1882) does not absolutely preclude such an order if the circumstances render it just to do so. The Court cannot lay down a hard and fast rule that in no case, after the time for giving security has expired, an appellant can be allowed further time.

THIS suit having been dismissed under section 98 of the Civil Procedure Code (Act XIV of 1882) the plaintiff applied to have the case restored to the list of causes for hearing. That application was rejected on the 21st September, 1896.

* Suit No. 423 of 1895.

On the 17th October, 1896, she presented a petition for leave to appeal in *formâ pauperis* from the order of the 21st September, annexing to her petition a memorandum of appeal, which, however, was not stamped.

On the 4th December, 1896, her application for leave to appeal in *formâ pauperis* was rejected, and the plaintiff was directed by the Court to proceed in the usual way if she still desired to appeal.

On the 11th December, 1896, the plaintiff applied to the Court to give her time to pay the stamp fee on the memorandum of appeal and to deposit the usual security. The Court made no order as to the stamp fee, but gave the plaintiff time to furnish security until the opening of the Court after the Christmas vacation.

On the 21st December, 1896, the plaintiff tendered to the officer of the Court the proper stamp, asking to have it affixed to her memorandum of appeal, but the officer refused to receive it on the ground that it was too late.

The plaintiff, therefore, applied to the Court of appeal, asking that the stamp should be received and that the appeal should be duly filed. She also asked that the time for giving security should be extended.

The plaintiff (appellant) in person.

Lang (Advocate General) for the defendant (respondent) opposed the application and referred to *Balkaran v. Gobind Nath* ⁽¹⁾; *Yakut-un-Nissa v. Kishoree* ⁽²⁾; *Patcha v. Sub-Collector of North Arcot* ⁽³⁾; *Skinner v. Orde* ⁽⁴⁾. As to the deposit of security, section 549 of the Civil Procedure Code (Act XIV of 1882); *Moshauallah v. Ahmedullah* ⁽⁵⁾.

FARRAN, C. J. :—The application of the plaintiff to have her case restored to the board for hearing was rejected on the 21st September, 1896. On the 17th of October following she presented a petition for leave to appeal from that order in *formâ pauperis*, annexing thereto a regularly drawn, but unstamped, memorandum

(1) I. L. R., 12 All., 129.

(3) I. L. R., 15 Mad., 78.

(2) I. L. R., 19 Cal., 747.

(4) L. R., 6 Ind. Ap., 126.

(5) I. L. R., 13 Cal., 78.

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of appeal. The Court took the petition into consideration and on the 4th December rejected the application to appeal in *forma pauperis*, directing the applicant, if she still desired to appeal, to proceed in the usual way. This impliedly carried with it a direction to pay the stamp fee on the memorandum of appeal, and to deposit the security for costs required by the rules, within a reasonable time. On the 11th December the appellant petitioned the Court to give her time to pay the stamp fee on the memorandum of appeal and to deposit the usual security. The Court made no order as to the stamp on the memorandum of appeal, but gave the appellant time to furnish security until the opening of the Court after the Christmas recess.

On the 21st December the appellant tendered the stamp proper to be affixed to the memorandum of appeal to the officer of the Court, but he declined to receive it as being far too late.

The appellant now asks that the stamp may be received and that the appeal may be filed. The application is opposed by counsel for the respondent.

We think that as the Court made no order as to the day when the stamp fee should be paid, the officer ought to have received it and affixed the stamp to the memorandum of appeal, and that we must treat the case as though the stamp had been affixed to the memorandum of appeal on the 21st December. So treating it and the opposition of the Advocate General as an application to take the appeal off the file, we think, following the decisions in *Patcha v. Sub-Collector of North Arcot*⁽¹⁾ and of this Court in Suit No. 2 of 1892 (unreported) and the principle laid down in *Skinner v. Orde*⁽²⁾, we must regard the memorandum of appeal as presented on the 17th October, 1896, and consequently in time so far as the statute of limitation is concerned. The case *Keshav v. Krishnarao*⁽³⁾ is, we think, distinguishable. The proper stamp will, therefore, now be affixed to the memorandum of appeal.

The appellant also asks that the time for her giving security be further extended on the ground that in the exceptional state

(1) I. L. R., 15 Mad, 78.

(2) L. R., 6 Ind. Ap., 126.

(3) I. L. R., 20 Bom., 508.

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of affairs now prevailing in Bombay she has been unable to raise the requisite money to pay into Court as security for the respondent's costs. We think that section 549 of the Civil Procedure Code (Act XIV of 1882) does not absolutely preclude our making the order if the circumstances are such as to render it just that we should do so. We cannot lay down a hard and fast rule that the Court can in no case, after the time for giving security is passed, allow the appellant further time for giving security. The Allahabad High Court appears to have thought that it could not do so; and its ruling was followed in Calcutta and Madras—*Haidri Bai v. East Indian Railway Co.*⁽¹⁾; *Budri Narain v. Sheo Koer*⁽²⁾; *Shrajudin v. Krishna*⁽³⁾; but the ruling of Privy Council in *Balwant Singh v. Daulat Singh*⁽⁴⁾ is not quite consistent with these authorities. That was the case of restoring an appeal, but if the Court can restore an appeal after dismissing it under section 549 it can, we think, under similar circumstances attain the same result without a *pro forma* dismissal. Here the refusal of the Court officer to accept the stamp of the memorandum of appeal would naturally have the effect of preventing the appellant from lodging the security for costs. It is true that that is not the ground on which she now asks our indulgence, but still we think that she ought to have the same opportunity of giving security as if her appeal had been stamped when she tendered the stamp fee. She could not have applied for extension after that refusal earlier than she has done.

We do not, however, extend the time further than to put her in the same position as she would have been in had her memorandum of appeal been stamped when she tendered the fee.

The order on this part of the application will be that the time for appellant's furnishing security be extended until 4 P.M. on Thursday next the 4th February. If it is not then furnished, the appeal will be set down for dismissal on Friday the 5th February. Costs costs in the appeal.

Plaintiff (appellant) in person.

Attorneys for the defendant (respondent) :—Messrs. *Little & Co.*

(1) I. L. R., 1 All., 687.

(3) I. L. R., 11 Mad., 190.

(2) I. L. R., 11 Cal., 716.

(4) I. L. R., 8 All., 315.