

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

1895.
December 12.

LA'LA (ORIGINAL PLAINTIFF), APPELLANT, v. NA'RA'YAN AND ANOTHER
(ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), Secs. 328 and 331—Execution of decree—Obstruction to the delivery of possession—Complaint made more than a month from the time of the obstruction—Claim numbered and registered as a suit—Objection with respect to limitation in appeal.

Although no appeal lies against an order passed under section 331 of the Civil Procedure Code (Act XIV of 1882) numbering and registering as a suit a complaint made at a time beyond a month from the time of the obstruction in an application under section 328, such order can be objected to when the final order which is appealable as having the force of a decree under section 331 is appealed against. The Judge in appeal is bound to entertain the objection that is then made, and to dismiss the application when he finds that it has been wrongly admitted.

SECOND appeal from the decision of Rāo Bahādur N. G. Phadake, First Class Subordinate Judge of Sholāpur with appellate powers, reversing the decree of Rāo Sāhob G. B. Laghāte, Subordinate Judge of Karmāla.

The plaintiff obtained a decree against one Rāvji for possession of certain land, and in execution he was obstructed by the defendants on the 3rd April, 1891. The Court executing the decree was closed on account of the summer vacation from the 14th April to the 1st June, 1891. On the 12th June, 1891, the plaintiff applied for the removal of the defendants' obstruction, and his application was numbered and registered as a suit under section 331 of the Civil Procedure Code (Act XIV of 1882).

The Subordinate Judge allowed the claim and directed removal of the defendants' obstruction.

On appeal by the defendants the Judge reversed the decree and dismissed the suit, on the ground that the application for the removal of the obstruction not having been made within thirty days from the date of the obstruction, it was time-barred under article 167, Schedule II, of the Limitation Act (XV of 1877).

The plaintiff preferred a second appeal.

Mahādeo B. Chaubal for the appellant (plaintiff):—The Judge was wrong in going behind the order of the first Court which

* Second Appeal, No. 746 of 1894.

numbered and registered our application for the removal of the defendants' obstruction as a suit—*Námdev v. Rámchandra*⁽¹⁾. Assuming that the application was barred on the date on which it was made, the Judge should not have raised the point of limitation of thirty days, as it was not raised by the defendants.

Purushottam P. Khare for the respondents (defendants):—Under article 167 of the Limitation Act the plaintiff was bound to make the application for the removal of our obstruction within thirty days from the date of the obstruction. In our appeal we had raised the point, and an issue in connection with it was raised in the appeal. The Judge was, therefore, right in deciding that the plaintiff's application was time-barred.

PARSONS, J.:—The appellant complained to the Court under section 328 of the Code of Civil Procedure (Act XIV of 1882) at a time beyond a month from the time of the obstruction; nevertheless the Subordinate Judge numbered and registered the claim as a suit under section 331, and passed an order in favour of the appellant. It does not appear that the respondent took the objection in that Court that the application had been presented beyond time. He did so, however, when he appealed from the order, and the Judge of the appellate Court finding that the application had been presented after the time allowed by law passed an order rejecting it. We are of opinion that the Judge was right. Although no appeal lay against the order admitting the application, that order could be objected to when the final order, which was appealable from as having the force of a decree under section 331, was appealed against (section 591). The Judge was bound to entertain the objection that was then made, and he was equally bound to dismiss the application when he found that it had been wrongly admitted. This is not a case in which an appellate Court takes an objection of limitation of its own motion to which the cases cited by Mr. Starling at page 12 of his work on Limitation would apply. In the case of *Námdev v. Rámchandra*⁽¹⁾ the application was made within time. We confirm the decree, dismissing the application with costs.

(1) I. L. R., 18 Bom., 37.