

Lower Court and bear his own. The plaintiff should pay to defendants 3 to 6 one set of their costs in the Lower Court. No order as to defendants 3 to 6's costs in this Court.

Decree amended.

1903.

DAUDBHAI
v.
EMNABAI
EDULJI.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Jacob.

DAUDBHAI MUSABHAI (ORIGINAL OPPONENT), APPELLANT, v.
EMNABAI (ORIGINAL APPLICANT), RESPONDENT.*

1903.

September 29.

Limitation Act (XV of 1877), sections 5, 14—Appeal—Delay—Excuse—Time taken up in prosecuting an appeal in a wrong Court—Sufficient cause.

In a suit for partition, the High Court on regular appeal passed a decree on the 28th February, 1898. E. who was a party to the proceedings, applied to the Subordinate Judge on the 16th February, 1901, to execute the decree. D., who was also a party to the suit, opposed the application on the ground that it was time-barred. On the 4th March, 1902, the Subordinate Judge held the application to be presented within time. D. appealed to the District Court on the 20th March, 1902; but that Court on the 23rd January, 1903, upheld the order passed by the Subordinate Judge. Against this decision D. preferred a second appeal to the High Court on the 17th April, 1903, on the ground that the District Court should have held that it had no jurisdiction to entertain the appeal. On the 23rd June, 1903, the High Court held that the District Judge had no jurisdiction to entertain the appeal and directed him to return the appeal to D. for presentation to the proper Court. The appeal was accordingly returned on the 11th July, 1903, to D., who filed it in the High Court on the 17th July, 1903. At the hearing a preliminary objection was raised that the appeal was presented beyond time and that the delay could not be excused:—

Held, that, the appeal was presented beyond time; and that, no sufficient cause for not filing the appeal before April, 1903, having been shown, the delay in presenting it could not be excused under section 5 of the Limitation Act (XV of 1877).

APPEAL from the decision of B. S. Joshi, First Class Subordinate Judge at Surat.

One Ismail brought a suit for partition against several persons, of whom Daudbhai (the appellant) was defendant No. 8 and Emnabai (the respondent) was defendant No. 5. In this litigation a final decree was passed by the High Court (First Appeal No. 118 of 1896) on the 28th February, 1898.

* First Appeal No. 108 of 1903.

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Emnabai then, on the 16th February, 1901, applied to execute this decree in so far as it awarded her relief. This application was opposed by Daudbhai, who contended that it was time-barred; since Emnabai having only been joined as a *pro forma* respondent to the appeal in the High Court (F. A. No. 118 of 1896), she should have applied within three years of the date of the decree passed by the Subordinate Judge.

The Subordinate Judge held Emnabai's application to be presented within time, and on the 4th March, 1902, he granted the prayers contained in the application: and passed on the 21st March, 1902, an order as to costs.

On the 20th March, 1902, the opponent Daudbhai appealed to the District Court, for though the claim in the original suit was over Rs. 5,000, the value of the property to which the application for execution related was Rs. 25 only.

On the 28th January, 1903, the District Judge confirmed the order of the Subordinate Judge and dismissed the appeal with costs.

Against this decision the opponent appealed to the High Court on the 17th April, 1903 (S. A. No. 219 of 1903).

On the 23rd June, 1903, the High Court held that the District Judge had no jurisdiction to entertain the appeal, and directed him to return the appeal to the opponent for being presented to the proper Court.

The District Judge accordingly directed, on the 11th July, 1903, the return of petition of appeal to the appellant.

On the 17th July, 1903, the present appeal was filed in the High Court.

On the 14th August, 1903, Jacob, J., excused delay, "having regard to section 14 of the Limitation Act, subject to respondent's right to object."

When the appeal came on for hearing before Chandavarkar and Jacob, JJ., the respondent's pleader raised a preliminary objection that the appeal was time-barred and the delay could not be excused.

M. K. Mehta, for the respondent:—We submit that the appeal is beyond time. The appellant was a respondent in the High Court Appeal (F. A. No. 118 of 1896), and so he ought to have

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known that an appeal against an order in execution proceedings lay to the High Court and not to the District Court. He came to know that at least on the 17th April, 1903, when the memorandum of appeal in S. A. No. 219 of 1903 was filed in the High Court. He ought to have then filed a first appeal from the decree of the Subordinate Judge instead of waiting for the disposal of the second appeal, because the decree of the District Court having been passed without jurisdiction was a nullity.

Section 14 of the Limitation Act (XV of 1877) does not apply to appeals. Delay in filing an appeal can be excused under section 5 of the Act. We rely on *Balaram v. Sham Sunder*⁽¹⁾; *Jag Lal v. Har Narain Singh*,⁽²⁾ and *Ramjiwan Mal v. Chand Mal*⁽³⁾. If there is a *bonâ fide* mistake, delay can be excused. In this case the appellants came to know that the appeal lay direct to the High Court at least in April, 1903. Still he did not immediately file an appeal. He ought in no event to have waited till the disposal of the second appeal.

G. K. Parekh, for the respondent.—There was a *bonâ fide* mistake on the part of the appellants and so the delay ought to be excused. We could not file a first appeal to the High Court as long as the decree of the District Judge was not set aside, and the decree of the Subordinate Judge was merged in the decree of the District Court.

CHANDAVARKAR, J.—As regards the preliminary point, we must allow Mr. Mehta's contention that the appeal is beyond time. There has been no sufficient cause for not filing the appeal before April, 1903. The appeal lay direct to this Court and the appellants knew that at least in April, 1903. Nevertheless he filed a second appeal instead of at once appealing from the Subordinate Judge's decree to this Court and getting the delay excused. There is no sufficient cause under section 5 of the Limitation Act to justify us in excusing the delay.

We must, therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) (1896) 23 Cal. 526.

(2) (1888) 10 All. 524.

(3) (1888) 10 All. 587.