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variation necessitated by the introduction of the undertakings I have mentioned.

I would add one word of explanation: though many English authorities were cited to us, I have mentioned none. It is not that I have omitted to consider them, but in this Presidency the Law of Easements is defined by the Indian Easement Act, 1882, and it therefore seemed to me, in the language of Bowen L. J., a wiser policy to go back in a humble spirit to the words of the Act by which our decision must be governed.

*Decree confirmed.*

Attorneys for appellants: *Messrs. Bicknell, Merwanji and Romer.*

Attorneys for the respondent: *Messrs. Payne & Co.*

B. N. L.

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## ORIGINAL CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.*

KARSONDAS DHARAMSEY (ORIGINAL DEFENDANT No. 8), APPELLANT, *v.* BAI GUNGABAI AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS), RESPONDENTS.*

1905. *November 6.*

*Limitation Act (XV of 1877), section 5—Admission of appeal after prescribed time—Application for excuse of delay—Practice.*

To entitle a person to succeed on an application to excuse delay in presenting an appeal, he must satisfy the Court that he had sufficient cause for not presenting an appeal within the prescribed period. When the time for appealing is once passed a very valuable right is secured to the successful litigant; and the Court must therefore be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of the time for attacking the decree, and thus perhaps depriving the successful litigant of the advantages which he has obtained.

THIS was a motion on behalf of Karsondas Dharamsey (original defendant No. 8) for leave to file an appeal against a decree passed on the 10th April 1901 by Russell, J., in O. C. J. suit No. 573 of 1899.

* Motion to appeal from the decision of Russell, J., in O. C. J. suit No 573 of 1899.

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To that suit Karsondas was a party as the 8th defendant. At the date of the institution of the suit (August 1899) as well as the date of the decree, he was a minor and was represented in the suit by guardians *ad litem* properly appointed. He attained majority on the 21st July 1905.

*Setalvad*, for the applicant.

*Scott* (Advocate-General) and *Raikes*, for respondents 1—4.

*Strangman*, for respondents 5—7.

JENKINS, C. J.—This is an application for the admission of an appeal after the prescribed period of limitation.

The decree was passed as far back as April 1901 in a suit brought by one Gordhandas, who is now dead, for a declaration that a trust-deed executed by his father Sunderdas and his grandfather Mulji Jetha was inoperative, and that the property remained in the settlors notwithstanding the execution of the deed of settlement.

The case was heard by Mr. Justice Russell and he passed a decree in favour of the plaintiff holding that the trust-deed was inoperative and that the property passed under the will of Mulji Jetha.

The party who now desires to appeal is Karsondas, the nephew of Gordhandas and the son of Dharamsey, who was Gordhandas' brother. He was, at the commencement of the suit and during the whole of its pendency, a minor and was represented by guardians. His complaint is that though the Judge did not, as he should have, decide in his favour, no appeal was presented.

To entitle him to succeed on this application he must satisfy the Court that he had sufficient cause for not presenting an appeal within the prescribed period. For a decree is as binding on infant party as on adult.

When the time for appealing is once passed a very valuable right is secured to the successful litigant: and the Court must therefore be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of the time for attacking the decree, and thus perhaps depriving the successful litigant of the advantages which he has obtained.

Now in this case it is true that it was an infant against whom the decree was passed, but, as I have said, that infant was

represented as the law requires by duly appointed guardians, and there is no fraud on the part of those guardians suggested, no reckless abandonment of the interests of the infant, nor can it be said with any fairness that there was neglect on their part. The guardians had for the purposes of the trial secured the assistance of eminent Counsel going indeed to the length of briefing for the purpose of the hearing Counsel from Calcutta, and I find it difficult to suppose that the Counsel employed and the solicitors engaged on the part of those guardians did not put forward and press every point that could be advantageously made on behalf of the infant.

Then the guardians considered whether or not an appeal should be presented. They sought the advice of two Counsel on the point.

To one Counsel they addressed the question which appears to me to have been a most proper question for them to address, "whether in Counsel's opinion if an appeal is filed in this case it will be successful?"

What is the answer? "The case is fraught with so many difficulties and intricate questions of law that it is impossible to say with any certainty that the appeal will be successful."

Then the learned Counsel goes on to say "In my opinion this is a case in which there should be an appeal. There are many points in the case in which, in my opinion, the learned Judge has been in error deciding in the way he has done."

Another learned Counsel was consulted and he was of opinion that there should be no appeal and he went on to point out, as the Judge himself had remarked, that an appeal by the guardians if unsuccessful would probably result in an adverse order as to costs.

Under the circumstances it appears to me that the guardians acted with every propriety, and I fail to see how it can be in any way suggested that there was in their conduct anything that would render the decree open to attack.

But then it has been urged before us that there was a point which was not made out, but should have been made on behalf of the minor: and that point is, that it should have been pressed upon the Judge that though the deed of settlement was inopera-

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tive, still it could not in the circumstances legitimately be held that the property passed under the will of Mulji Jetha, for it was obvious that the property was joint.

But the minor or those acting on behalf of the minor claimed the entirety of the property, and this was inconsistent with the suggestion that is now made of its being joint. While on the other hand so far as it concerns the property in suit it would have been as advantageous to Karsondas to contend that it was joint as that it passed under the will of Mulji Jetha, and, if the point was not advanced, as to which I do not feel in a position to express any definite opinion on the materials before us, I am clear that under these circumstances there would not be sufficient to justify us in conceding to the applicant the right of appeal beyond the prescribed period. In this connection it is impossible to overlook the grave hardship that it would be on Gordhandas' representatives, if we were to allow this extended right of appeal.

Had the decision of Mr. Justice Russell been that the property was joint, then Gordhandas, had he so wished, could at once have made such disposition as would have secured to him by partition a separate interest. Now that is impossible, for he is dead. If it now were held that the property was joint then those who claim under Gordhandas would be deprived of what has devolved on them, because the operation of the doctrine of survivorship would carry the whole of the property to the young man Karsondas. Would it be just to make any concession in the circumstances of this case which would lead to such a result? Clearly not.

But there are other matters referred to in the very full and careful affidavit of Mr. Jamsetji which tends in the same direction.

Thus it may very well be questioned whether having regard to the agreement that was sanctioned by the Court it could with any fairness now be permitted to the applicant to have the right of extended appeal which he seeks.

I notice too that Mr. Justice Russell in dealing with the application made an order as to costs more favourable to Karsondas than would otherwise have been the case in the hopes that thereby the litigation would cease.

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I do not place much stress upon that circumstance, but I find that in the case of *Monypenny* v. *Dering* (1) an order as to costs, on the understanding that it was made for the purpose of preventing further litigation, was regarded as a circumstance to be taken into consideration in determining whether or not a decree adverse to an infant should be attacked subsequently.

The conclusion, therefore, to which I come is that in the exercise of our discretion under section 5 of the Limitation Act, we ought not to permit this appeal after the prescribed period, and we accordingly dismiss this application with costs.

Costs of both the respondents must be paid by the applicant.

*Application dismissed.*

R. R.

(1) (1859) 4 De G. & J. 175.

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## APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Russell.*

KRISHNAI KOM MARTAND (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHRIPATI BIN PANDU AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1905 *December* 1.

*Mitakshara—Co-widows—Deceased co-widow—Stridhan property of the deceased—Surviving co-widow entitled to succeed—Nearest surviving Sapinda of the husband.*

According to the Mitakshara a surviving co-widow is entitled to succeed to the *Stridhan* property of her deceased co-widow as the nearest surviving *Sapinda* of the husband.

SECOND appeal from the decision of A. Lucas, District Judge of Sátára, reversing the decree of S. N. Sathaye, Joint Subordinate Judge of Karád.

One Mahadu had two sons, namely, Bhika and Kusha, who were divided in interest and in separate enjoyment of their properties. Bhika had a son Martand, who pre-deceased his father, leaving behind two widows, Kasai and Krishnai, the plaintiff. After Bhika's death, his widowed daughter-in-law

* Second Appeal No. 326 of 1905.