reference to the acquisition, improvement and enjoyment of property in co-parcenership?

1906.

FRANCIS GHOSAL v. GABRI GHOSAL.

The form of these issues is not intended to preclude the respondents from advancing any legal argument they may deem relevant.

The parties will be at liberty to adduce evidence, and if the 2nd issue be answered in the affirmative, then we must ask for a fresh finding on the 3rd, 5th and 6th issues.

Return in three months.

Issues sent down.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Aston and Mr. Justice Heaton.

BHIMRAO RAMRAO DESAI (ORIGINAL APPLICANT), APPELLANT, *v.* AYYAPPA YELLAPPA AND OTHERS (ORIGINAL OPPONENTS), RESPONDENTS.*

1906. *September* 18.

Limitation Act (XV of 1877), section 5—Appeal—Presentment of an appeal after the prescribed period—Delay—Excuse of delay—Discretion of the Court in not excusing the delay—Appeal against the exercise of the discretion.

An order in execution proceedings was passed on the 25th February 1899. An appeal lay against the order; but the aggrieved party notwithstanding filed a suit on the 24th February 1900 in a separate proceeding. It was decided in the first appeal in that suit on the 30th September 1903 by the District Judge that the suit was barred by section 244 of the Civil Procedure Code. The party concerned again waited till the 4th January 1904, when he filed in the District Court his appeal against the order dated the 25th February 1899. The District Judge decided that there was no sufficient reason for not presenting the appeal in time, and dismissed the appeal as being barred by limitation.

Held, that having regard to the delay which occurred in presenting the appeal between the 30th September 1903 to 4th January 1904, it was not open to the appellant to contend that the District Judge had exercised his discretion, under section 5 of the Limitation Act, in a capricious or arbitrary manner.

SECOND appeal from the decision of L. C. Crump, District Judge of Dhárwár.

* Second Appeal No. 171 of 1905.

1906.

BHIMRAO v. AYYAPPA.

An order in the course of execution proceedings was passed on the 25th February 1899. The party aggrieved should ordinarily have filed an appeal against the order: but instead of doing so, he filed a separate suit on the 24th February 1900. In this suit, in the first appeal, the District Judge held on the 30th September 1903 that the suit was barred by section 244 of the Civil Procedure Code.

The plaintiff again waited till the 4th January 1904, when he filed an appeal against the order dated the 25th February 1899. This appeal was dismissed by the District Judge, as he was of opinion that there was no sufficient reason to excuse the delay in presenting the appeal. The reasons were:—

The law relevant to such cases is contained in sections 5, 5A and 14 of the Indian Limitation Act. To this case in particular only section 5 can apply. Clearly there is no "order, practice or judgment of the High Court" which can be said to have misled the appellants, and section 5A need not be considered. Section 14 does not apply to appeals. The question, therefore, is whether the appellant has satisfied the Court that he had sufficient cause for not presenting the appeal within the period prescribed by law; and if so, whether in the circumstances of the case this appeal should be admitted.

The appellants say that owing to a mistake of law they pursued a wrong course. Authorities have been quoted on either side, but the main conclusion to which they lead is that it is impossible to lay down any rule and that each case must be decided on its own facts. In *Sitaram* v. *Nimba* (I. L. R. 12 Bom., p. 320), Mr. Justice West in a case almost identical to that now before me said: "The time spent in the actual proceedings in the suit to set aside the order in execution might properly be deducted in computing the delay that occurred before the present appeal was filed. Such a deduction would follow the analogy of the rule prescribed by section 14 of the Limitation Act for ordering suits, but a deduction of the time that passed before the suit was filed would not follow that analogy. Mere ignorance of the law cannot be recognized as a sufficient reason for delay under section 5 of the Act."

It is argued that this decision loses much of its force in consequence of the later case of *Dadabhai Jamsetji* v. *Manckshа Sorabji* (I. L. R. 21 Bom., p. 552), but all that is laid down there is that the dictum that mere ignorance of law cannot be recognized as a sufficient reason for delay must be held to have reference to the particular case. On the facts before them which were essentially different the High Court declined to limit the meaning of the words "sufficient cause" in the manner suggested by the earlier decision. Other authorities have been cited (I. L. R. 20 Bom., pp. 133, 736; 23 Bom., p. 692), but the facts are so different that they cannot serve as a guide. So far as authority goes, the case of *Sitaram* v. *Nimba* is almost identical in point of fact. The

only apparent difference is that there the appeal was filed *after* and not *before* the decision of the High Court, but the *ratio decidendi, viz.*, that the time occupied before filing the suit (and here appellants waited until the last day), could not be excluded. I think I am bound to follow this decision.

The plaintiff appealed to the High Court.

Branson, with *N. V. Gokhale*, for the appellant.

D. A. Khare for the respondent.

ASTON, J.:—The order under appeal was passed on the 25th February 1899 in execution proceedings. The proper remedy of the party not satisfied with that order was to appeal to the District Court: *Gowri* v. *Vigneshvar* [1]. The period of limitation for such an appeal, as provided by the Limitation Act, is 30 days. The proceeding actually taken by the present appellant was however a suit filed on the 24th February 1900, and on the 30th September 1903 it was decided, in the first appeal in that suit, by the District Judge that the suit was barred by section 244, Civil Procedure Code, *i.e.*, it was pointed out to the appellant, in this very litigation, that he had gone to a wrong Court and taken wrong proceedings.

Nevertheless the appellant, instead of taking the right course and appealing at once from the order of 25th February 1899, waited until the 4th January 1904, when he filed in the District Judge's Court his appeal against that order. He also appealed to the High Court against the appellate decree of 30th September 1903 in his suit. The District Judge decided that there was no sufficient reason for not presenting the appeal in time, and dismissed the appeal with costs as being barred by limitation. Against this decision the present appeal is brought.

Mr. Branson has relied on section 5 of the Limitation Act, which provides that any appeal or application for review of judgment may be admitted after the period of limitation provided therefor, when the appellant satisfies the Court that he had sufficient cause for not presenting the appeal within the period prescribed. Mr. Branson's main contention was that although wrong proceedings were taken in the wrong Court through mistake of law, still those proceedings were prosecuted

(1) (1892) 17 Bom. 49.

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boná fide. The ground, however, upon which the District Judge has held that sufficient cause was not shown for not bringing the appeal within the proper period of limitation, is stated in the concluding portion of the judgment as follows :—.

"Assuming that ignorance of the law could be in these circumstances a sufficient excuse, was it not the duty of the appellants to file their appeal within the time allowed by law from the date of the decision of this Court, for, after that decision they must have known that there was considerable doubt as to the correctness of the course which they were following. I do not think that sufficient cause is shown."

There has been a delay from the 30th September 1903 to 4th January 1904 in presenting the appeal. After the decision of the 30th September 1903 the appellants must have known that there was considerable doubt about the correctness of the course they were following.

The present appeal being an appeal against the exercise of discretion, it is for the appellant to show that the lower Court has exercised its discretion capriciously or arbitrarily or without proper material to support its decision (*vide* the case of *Parvati* v. *Ganpati* (1)). In *Ranchodji* v. *Lallu* (2) it was held that "where the law leaves a matter within the discretion of a Court, and the Court, after proper enquiry and due consideration, has exercised the discretion in a sound and reasonable manner, the High Court will not interfere with the conclusion arrived at, even though it would itself have arrived at a different conclusion."

And in the case of *Karsondas* v. *Bai Gungabai* (3) it has been held that "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."

Having regard to the delay which occurred in presenting this appeal between 30th September 1903 to 4th January 1904, we do not think that it is open to the appellant to contend that the

(1) (1898) 23 Bom. 513. (2) (1882) 6 Bom. 304.

(3) (1905) 30 Bom. 329 at p. 330: 7 Bom. L. R. 965.

District Court has exercised its discretion under section 5, Limitation Act, in a capricious or arbitrary manner. We, accordingly, confirm the decree of the lower appellate Court with costs.

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Decree confirmed.

R. R.

APPELLATE CIVIL.

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

CHUNILAL MANEKLAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* KIRPASHANKAR BHAGVANJI (ORIGINAL DEFENDANT), RESPONDENT.*

1906. *September* 18.

Municipality—Election of Councillor—Bye-election—Officer appointed to receive nomination papers—Return by the officer of plaintiff's nomination papers—Suit for injunction and declaration—Malice.

The plaintiff, who was a councillor of Surat Municipality, disabled himself from continuing to be a councillor by virtue of clause (*b*) (*ii*) of sub-section (2) of section 15[1] of the District Municipal Act (Bom. Act III of 1901) for having acted as a councillor in a matter in which he had been professionally interested as a pleader on behalf of a client. On the plaintiff being thus unseated, a vacancy was created and a bye-election was ordered to be held. The defendant was the officer appointed by the Collector to receive nomination papers for the bye-election. The plaintiff, who was duly qualified by

* Second Appeal No. 68 of 1906.

(1) Clause (*b*) (*ii*) of sub-section (2) of section 15 of the District Municipal Act (Bom. Act III of 1901):

(2) If any councillor during the term for which he has been elected or appointed—

(*a*) * * * * *

(*b*) acts as a councillor in any matter

(*i*) * * * * *

(*ii*) in which he is professionally interested on behalf of a client, principal or other person, or

(*c*) * * * * *

(*d*) * * * * *

(*e*) * * * * *

he shall be disabled from continuing to be a councillor, and his office shall become vacant.