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clear looking at the plaint that all that the plaintiff asks for is a declaratory decree and he does not ask for any consequential relief. The case of *Shrimant Sagajirao Khanderav Naik Nimbalkar v. Smith* (1) accords with this view.

The appeals must therefore be allowed. The court-fee paid was sufficient, and the plaintiff must be allowed to go on with the suits. The appellant is entitled to his costs in these appeals.

GEIDE, J. I concur.

Appeals allowed.

30 C. 790 (=8 C. W. N. 906.)

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SARAT CHANDRA DEY v. BROJESHWARI DASSI.* [4th June, 1903.]

Limitation—Limitation Act (XV of 1877) ss. 4, 5, 12 and Sch. II, Art. 170—“Appeal”—Leave to appeal in forma pauperis.

The word “appeal” in s. 5 of the Limitation Act (XV of 1887) does not include an application for leave to appeal in forma pauperis.

Lakshmi v. Ananta Shanbaga (2) and *Parbati v. Bhola* (3) referred to.

[Ref. 12 C. L. J. 173=15 C. W. N. 205=7 I. C. 118.]

APPEAL by the defendants, Sarat Chunder Dey and another.

This appeal arose out of an action brought by the plaintiff, Brojeshwari Dassi, against the defendants to enforce a mortgage bond. The bond was executed in favour of the plaintiff by the [791] defendants on the 21st Falgoun 1297 B. S. (4th March 1891) and was duly registered. The defence mainly was that the suit was not maintainable by the plaintiff, as she was only a *benamdar* for her deceased husband, and that the full consideration for the bond did not pass to them. The Court of first instance having overruled the said objection decreed the suit on the 20th July 1899.

The defendants not being able to prefer an appeal against the said decree on payment of proper court-fees, applied, on the 20th November 1899, to the High Court for leave to appeal *in forma pauperis*. This application was heard on the 27th November 1899, and the following order was passed:—“Subject to the enquiry to be made by the Lower Court in the pauperism of the appellants the petitioners will be allowed to prosecute the appeal as paupers.” The enquiry by the Lower Court having been made, the High Court, on the 2nd April 1900, made the following order in the presence of the vakils of both the appellants and the respondent: “By an order of this Court, dated the 27th November last, the applicants were, subject to the results of an enquiry by the Lower Court into their pauperism, allowed to appeal *in forma pauperis*. The enquiry has since been made, and the last report of the Court below is in favour of the applicants. That being so, we allow the petitioners to prosecute this appeal *in forma pauperis*, and we direct that the appeal be registered.”

On the appeal coming on for hearing.

Dr. *Ashutosh Mukherjee* (Babu *Sarat Chandra Khan* with him), for the respondent, took a preliminary objection to the hearing of the

* Appeal from Original Decree No. 109 of 1900, against the decree of *Prasanna Kumar Ghose*, Subordinate Judge of *Nadia*, dated July 20, 1899.

(1) (1895) I. L. R. 20 Bom. 736.

(3) (1889) I. L. R. 12 All. 79.

(2) (1879) I. L. R. 2 Mad. 230.

appeal on the ground that the application for leave to appeal *in forma pauperis* was not made in time under Art. 170 of the Second Schedule to the Limitation Act, and that the *ex-parte* order made allowing the appellants to appeal *in forma pauperis* could not properly have been made. The application was out of time, and under s. 4 of the Limitation Act it should have been rejected. The Court could not extend the time : see the cases of *Lakshmi v. Ananta Shanbaga* (1) and *Parbati v. Bhola* (2). S. 12 of the Act expressly mentions an application for leave to appeal as pauper, but s. 5, cl. (2) is silent as to such [792] application. S. 5 therefore was not intended to apply to such an application.

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Babu Golap Chunder Sarcar for the appellants. The order of the 2nd April 1900 was made in the presence of the *vakil* for the respondent, and no objection was then taken on the ground now urged. That order is an existing one, and the Court should not go behind that order. Besides, the word "appeal," in s. 5, cl. (2) of the Limitation Act should be taken to include an application for leave to appeal *in forma pauperis*, and the Court has power under that section to extend the time. The application was not made in time out of a *bona-fide* mistake, and the Court having admitted the appeal should not now re-open the question.

MACLEAN, C. J. A preliminary objection has been taken to the hearing of this appeal, namely, that the order of this Court of the 27th November 1899, which was made *ex-parte*, giving the appellant leave to appeal *in forma pauperis* was out of time, and, consequently, that order could not properly have been made. The order runs in these terms:—"Subject to the enquiry to be made by the Lower Court in the pauperism of the appellant, the petitioner will be allowed to appeal as a pauper;" that is dated the 27th of November 1899. On the 2nd of April 1900, after the present respondent had been present at the enquiry as to pauperism, an order was made in his presence, allowing the petitioner to prosecute the appeal *in forma pauperis*. The contention of the respondent is that that order could not properly have been made, having regard to the dates of the proceedings. The decree of the Court below was made on the 20th of July 1899, and was signed on the 22nd July. Under Article 170 of the Second Schedule to the Indian Limitation Act, the period for applying for leave to appeal as a pauper is thirty days from the date of the decree appealed against. The period would, therefore, run from the 22nd of July and would expire on the 21st of August; but under section 12 of the Limitation Act, the applicant was entitled to certain allowances of time, and the last date for the application for leave to appeal *in forma pauperis* became the 29th of August. The application was not made until the 20th of November, and, as I have said, the *ex-parte* order was made on the 27th of November 1899.

[793] It is clear that, when the application was made, the applicant was out of time. But it is said that it is open to the Court to extend the time under paragraph 2 of section 5 of the Limitation Act. I do not think that is so. That section only applies to an appeal or application for review of judgment, either of which may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal

(1) (1879) I. L. R. 2 Mad. 230.

(2) (1889) I. L. R. 12 All. 79.

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or making the application within such period. We are asked to hold that the expression "appeal" includes an application for leave to appeal *in forma pauperis*. It would be straining the language of the section if we put that construction upon it. In section 12 an application for leave to appeal as a pauper is expressly included, whilst it is excluded from section 5. This view has been held in the case of *Lakshmi v. Ananta Shanbaga* (1) and of *Parbati v. Bhola* (2). In those cases no special application was made to discharge the order which had been made out of time.

It must be borne in mind that under section 4 of the Limitation Act, the Court is bound when an application is out of time to dismiss it, even although the point may not be raised by the other side. I think, however, that there ought to have been a special application made to set aside the orders admitting the application; and we only allow the preliminary objection upon the undertaking of the respondent to present a petition before Wednesday next, the 10th instant, asking for the discharge of these orders.

I do not, however, wish to exclude the appellant from appealing if he choose to proceed in the ordinary way, and not as a pauper, though he is much out of time. We can, however, extend the time for appealing; and if by Wednesday next he puts in the court-fee on the memorandum of appeal, we will hear the case on the merits.

GEIDT, J. I concur.

30 C. 794 (=7 C. W. N. 609).

[794] APPELLATE CIVIL.

UPENDRA CHANDRA MITTER *v.* TARA PROSANNA MUKERJEE.*

[20th May, 1903.]

Revenue Sale—Act XI of 1859, s. 9—Act I of 1845—Mortgagee—Part-proprietor—Mortgage lien—Transfer of Property Act (IV of 1882) s. 72—Cesses—Personal decree—Contract Act (IX of 1872) s. 70—Misjoinder—Civil Procedure Code (Act XIV of 1882) s. 578.

A mortgagee of a share of an estate, who was also a part-proprietor deposited in the Collectorate revenue and cesses payable by the defaulting mortgagor to save the property from being sold:—

Held, that on general principles of justice, equity and good conscience, the mortgagee is entitled to have the amount paid by him on account of revenue, added to the amount of the original lien.

Nugender Chunder Ghose v. Sreemutty Kaminee Dossee (3) relied upon, *Kinlu Ram Das v. Mozaffer Hosain Shaha* (4) distinguished.

Held, also, that the mortgagee is entitled to a personal decree against the mortgagor for the amount paid on account of cesses, regard being had to s. 70 of the Contract Act (IX of 1872).

Smith v. Dinonath Mookerjee (5) referred to.

[(1) Revenue sale law, s. 9. Foll. 31 Cal. 975. Ref. 23 I. C. 232=1 Pat. L. J. 589; 17 I. C. 45=16 C. L. J. 148; 12 C. L. J. 156=13 I. C. 144.

(2) C. P. C., s. 90. Ref. 2 C. L. J. 602.]

APPEAL by the defendant, Upendra Chandra Mitter.

The plaintiff, Tara Prosanna Mukerjee, sued the defendant on two mortgage bonds. The first bond was dated the 17th April 1894, by which the defendant borrowed from the plaintiff Rs. 7,000, on the

*Appeal from Original Decree No. 200 of 1899, against the decree of Kedar Nath Mozumdar, Subordinate Judge of Burdwan, dated Jan. 13, 1899.

(1) (1879) I. L. R. 2 Mad. 230.

(P. C.) 17.

(2) (1889) I. L. R. 12 All. 79.

(4) (1887) I. L. R. 14 Cal. 809.

(3) (1867) 11 Moo. I. A. 241; 8 W. R.

(5) (1885) I. L. R. 12 Cal. 218.