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in the present case, however, is not dependent, I think, upon any suggestion as to inferiority in quality of the goods tendered under the contract. It appears to me upon the facts admitted in the affidavit of Giridhari Lall Chobay, which is the defendant's written statement in the suit, that the right, if any, to reject the goods as being of an inferior quality was not exercised by the defendant when the goods were tendered. On the contrary, the defendant by directing delivery of the goods to be given to K. G. Banerjee & Co. exercised a right of a proprietary character in respect of the goods. Moreover, the action of K. G. Banerjee & Co. in directing delivery of the same goods to Becker, Ross & Co. under their contract with that firm exercised a proprietary right of a still more unequivocal character, because in this case delivery was directed after a sample of the goods had been drawn and the quality thus tested. It appears to me then that these acts are evidence of an acceptance of the goods, and inasmuch as the goods remained in the possession of the plaintiff through his brokers, the plaintiff had a lien on the goods for the purchase-money which entitled them to resell the goods under section 107 of the Contract Act. It has been proved that the right to resell was exercised by the plaintiff after due notice given to the defendant, and I think that the plaintiff was justified in exercising that right.

Under these circumstances it is not necessary that I should make a final and formal adjudication as to the quality of the goods, though, I think, under all the circumstances that the truth as regards the quality of the goods is to be found in the evidence of Mr. A. C. John, who was called on the part of the plaintiff, who says that the inferiority was such as might be compensated by an allowance of 8 annas per bazar maund. I think the [654] evidence on the other side as regards the excessive inferiority of the goods, especially the evidence of Hem Chunder Bose, is very much exaggerated. However, the question in the case does not depend on the question of inferiority. The plaintiff being entitled to exercise the right of resale, he is entitled to recover from the defendant as damages the difference between the contract price of the goods and the price obtained upon the resale.

There will therefore be a decree for the amount so calculated as damages. Costs on scale No. 2 and interest on decree at six per cent.

Judgment for the plaintiff.

Attorneys for the plaintiff : *Manuel and Agarwalla.*

Attorney for the defendant : *C. C. Bose.*

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[655] APPELLATE CIVIL.

SHABIUDDIN v. DEOMOORAT KOER.* [6th and 11th May, 1903.]

Cross-objection—Civil Procedure Code (Act XIV of 1882) s. 561—Cross-objection against co-respondents—Limitation Act (XV of 1877) s. 5.

X brought a suit against A, B, C, D, E and others to recover a sum of money and to enforce a security bond given by E. The suit was decreed against E alone. On appeal by E, X preferred a cross-objection under s. 561 of the Civil Procedure Code against A, B, C and D, without giving them notice :— *

Held, that there was nothing in the suit which could be taken as an exception to the general rule that the right of a respondent to urge cross-objections

* Appeal from Original Decree No. 7 of 1901, and Cross-objection against the decree of Abdul Bari, Subordinate Judge of Patna, dated Sept. 11, 1900.

under s. 561 of the Code should be limited to his urging them against the appellants only.

Anwar Jan Bibee v. Asmat Ali (1) and *Bishun Churn Roy Chowdhry v. Jogendra Nath Roy* (2) followed; *Upendra Lal Mukerjee v. Girindra Nath Mukerjee* (3) referred to.

[Fol. 11 O. C. 93. Ref. 40 C. 536.]

APPEAL by Shah Shabiuddin, the defendant No. 5, and Cross-objection by the plaintiff.

The plaintiff, Musammat Deomoorat Koer, instituted a suit against Musammat Boodho, the defendant No. 1, her children, the defendants Nos. 2, 3 and 4, Shah Shabiuddin, the defendant No. 5, and defendants Nos. 6 and 7, to recover Rs. 5,320 and to enforce a security bond given by the defendant No. 5, dated the 26th August 1895. The defendants Nos. 6 and 7 were ticcadars of defendants No. 1 to 4.

The Subordinate Judge decreed the suit against the defendant No. 5 alone, except with regard to a small sum of Rs. 300 and odd, which was decreed against defendant No. 6.

[656] The defendant No. 5 preferred this appeal on the 8th of January 1901, notice of which was served on the plaintiff on the 5th March 1901; and the plaintiff preferred a cross-objection under s. 561 of the Code against the defendants Nos. 1 to 4, on the 10th of April 1901.

The plaintiff in her cross-objection impeached the correctness of the judgment of the Subordinate Judge on his finding that the suit was barred by limitation against the defendants Nos. 1 to 4.

Babu Umakali Mukerjee (Maulvi Mahomed Yusuff and Babu Surendra Nath Roy with him), for the plaintiff-respondent, raised cross-objections under s. 561 of the Civil Procedure Code against four of the respondents (defendants Nos. 1 to 4) and in support of his contention cited the following cases:—*Bishun Churn Roy Chowdhry v. Jogendra Nath Roy* (2), *Timmayya Mada v. Lakshmana Bhakta* (4), *Moneerooddeen Mojoomdar v. Parbutty Churn Ghose* (5) and *Caspersz v. Kishori Lal Roy Chowdhry* (6).

Maulvi Serajul Islam (Maulvi Swagul Ali with him) for the defendants-respondents Nos. 1 to 4, contended that no cross-objections could be raised by a respondent against his co-respondents and cited the following cases: *Muhboob Ali v. Zur Banco Bibee* (7), *Bishun Churn Roy Chowdhry v. Jogendra Nath Roy* (2), *Sharoda Soonduree Debee v. Gobind Monee* (8). And that inasmuch as the cross-objections were not filed within the time allowed under s. 561 of the Code, they could not now be received. The Court has no discretion under s. 5 of the Limitation Act to extend the time for filing a memorandum of cross-objections: *Degamber Mozumdar v. Kallynath Roy* (9), *Rughu Nath Singh Manku v. Parshram Mahata* (10), and *Sulleman Ebrahimji v. Joosub Jan Mahomed* (11) referred to.

GHOSE AND PRATT, JJ. (Having disposed of the appeal of the defendant No. 5, their Lordships continued:—) We come to [657] notice a cross-objection which has been preferred by the plaintiff-respondent under s. 561, Civil Procedure Code, on the 10th April 1901. We

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| (1) (1871) 15 W. R. 26. | (7) (1868) 9 W. R. 78. |
| (2) (1898) I. L. R. 26 Cal. 114. | (8) (1875) 24 W. R. 179. |
| (3) (1898) I. L. R. 25 Cal. 565. | (9) (1881) I. L. R. 7 Cal. 654. |
| (4) (1883) I. L. R. 7 Mad 215. | (10) (1882) I. L. R. 9 Cal. 635. |
| (5) (1871) 15 W. R. 121. | (11) (1890) I. L. R. 14 Bom. 111. |
| (6) (1896) 1 C. W. N. 12. | |

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ought here to mention that the Subordinate Judge was of opinion that the claim of the plaintiff as against the defendants Nos. 1 to 4 was barred by the law of limitation, and the cross-objection preferred by the plaintiff seeks to impeach the correctness of the judgment of the Subordinate Judge on this head. The decree of the Subordinate Judge in this case was pronounced on the 11th September 1900. The appeal of the defendant No. 5, which is the appeal with which we are mainly concerned, was preferred on the 8th of January 1901. The notice of this appeal was served upon the plaintiff on the 5th March 1901, but the cross-objection was not put in until the 10th April 1901, that is to say, more than one month after the date when notice of the appeal was served on the plaintiffs, and thus the cross-objection is really out of time, having regard to the provisions of s. 561 of the Code. But beyond this, if it was the intention of the plaintiff to obtain any relief as against the defendants Nos. 1 to 4 in spite of the judgment of the Subordinate Judge, it was her duty to serve the said cross-objection upon the said defendants, but this was not done. It will further be observed that the cross-objection is sought to be pressed not against the appellant (defendant No. 5), but against the plaintiffs co-respondents, the defendants Nos. 1 to 4 and it has been argued on behalf of the plaintiff that she is entitled to press it because the wording of s. 561 is very general so as to admit of a cross-objection being pressed not only against the appellant, but also against a co-respondent. We are, however, unable to accept that view as correct. This question seems to have been considered many a time in this Court under the old Civil Procedure Code, as also under the new Civil Procedure Code. In the case of *Anwar Jan Bibee v. Azmut Ali* (1), in which the facts were very similar to those with which we are concerned in the present case, the learned Judges, in disallowing the cross-objection that was presented by one of the respondents, observed as follows: "It has been held in a long series of decisions that the cross-appeal cannot reopen any questions which have been decided between the co-respondents, but must have reference to the appellant and the [658] points which are in dispute between the respondent who takes the cross-appeal and the appellant. It is quite possible that there may be cases in which, when an appellant succeeds in his appeal, questions will be opened up as between the co-respondents which would otherwise have been decided; and it is also possible when interests are indential that a respondent succeeding in his cross-appeal may open up questions as between himself and his co-respondent. But that is not the case in this litigation." The same view was adopted in a comparatively recent case under the Code of 1882, and that is the case of *Bishun Churn Roy Chowdhry v. Jogendra Nath Roy* (2). The learned Judges in that case, after referring to various cases on the point, made the following observations:—"As a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellants; and it is only by way of exception to this general rule that one respondent may urge cross-objections as against the other respondents, the exception holding good (we do not attempt to lay down any definite exhaustive rule on the point) among other cases in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents. One instance of this kind is to be found in cases of the class considered in *Upendra Lal Mukerjee v.*

(1) (1871) 15 W. R. 26.

(2) (1898) I. L. R. 26 Cal. 114.

Girindra Nath Mukerjee (1), (which, we might here mention, was a case of contribution). The view we take is in accordance with that taken in the case of *Anwar Jan Bibee v. Azmut Ali* (2)," to which we have already referred. Is there anything in this case which may be taken as an exception to the general rule that the right of a respondent to urge cross-objections should be limited to his urging them against the appellants, and could it be said that the appeal preferred by the defendant No. 5 opens out questions which cannot be disposed of completely without the matters decided against the plaintiff by the Court below being opened up as between the plaintiff on one hand and the defendants Nos. 1 to 4 on the other? We think not. For these considerations, we are unable to give any effect to the cross-objection that was preferred out of time by the plaintiff-respondent.

[659] The learned vakils for the plaintiff-respondent, however, have presented a petition to us, asking permission to file an appeal against the decree of the Subordinate Judge in this case so far as that decree disallows her claim as against the defendants Nos. 1 to 4; and they have urged that, having regard to the fact that the real plaintiffs are minors and that they were advised that it was not necessary to prefer an appeal against the decree of the Subordinate Judge, but that it would serve all purposes if a cross-objection were directed against the defendants Nos. 1 to 4, we should now receive the appeal, though considerably beyond time. We have considered this matter carefully, but we are bound to say that we do not see our way to grant such a prayer of the respondent. No doubt section 5 of the Limitation Act (XV of 1877) does not give any illustration as to what may or may not be a sufficient cause for extending the time of limitation, within which a suit or an appeal ought to be preferred, but is there really anything in the circumstances of this case which would justify us in relaxing the rule of limitation and in holding that there was sufficient cause within the meaning of section 5 for the plaintiff-respondent not preferring her appeal against the decree of the Court below within such a long time as has elapsed between the 11th September 1900 and the present date? We might here mention that this application to prefer an appeal against the decree of the Subordinate Judge was not thought of until the arguments in the case had been practically closed. The learned vakils for the plaintiff-respondent have been throughout urging upon us that we should treat the cross-objections preferred on the 10th April 1901 as objection which could rightly be preferred not only against the appellant, but also against the defendants Nos. 1 to 4, and it was not until the arguments came to a close that a petition was presented to us asking that the plaintiff should be allowed now to file an appeal, though so much out of time, against the decree of the Subordinate Judge. We accordingly refuse this application. The petition of appeal with the annexures which were placed before us will be returned.

We observe that the petition of appeal is engrossed on a stamp of Rs. 295. That clearly is due to a misapprehension of what fell from the Court the other day at the close of the arguments in this appeal.

[660] The result is that the appeal is decreed and the cross-objection disallowed. The appellant is entitled to recover his costs of this Court as well as that of the Lower Court from the plaintiff-respondent.

Appeal allowed. Cross-objection dismissed.

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(1) (1898) I. L. R. 25 Cal. 565.

(2) (1871) 15 W. R. 26.