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IN THE MATTER OF AN AGREEMENT BETWEEN THE UNIVERSAL LIFE ASSURANCE SOCIETY AND STERNDALE.

Company the sum of £1,200 payable at the current rate of exchange at the time of payment. There must be a decree accordingly. The parties will bear their own costs to be taxed on scale No. 2.

Attorneys for the Universal Life Assurance Society: Messrs. *Morgan & Co.*

Attorneys for M. C. Sterndale: Messrs. *Leslie & Sons.*

C. E. G.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

ARDHA CHANDRA RAI CHOWDHRY (PETITIONER) *v.* MATANGINI DASSI (OPPOSITE PARTY.)* 1895 *June* 27.

Limitation (Act XV of 1877), sections 5 and 14—Sufficient cause—Civil Procedure Code (Act XIV of 1882), sections 108 and 540—Ex-parte decree.

In a suit for possession of certain lands, after the defendants had filed their written statements, a Commissioner was appointed to hold a local enquiry. The Commissioner having completed his enquiry, a day was fixed for the hearing of the suit, and on that date the pleaders for some of the defendants, having informed the Court that they had no instructions from their clients, and the rest of the defendants having accepted the report of the Commissioner, the suit was decreed in accordance with it on the 13th April 1893. On the 10th May following, one of the defendants, who was not represented at the hearing of the suit, made an application under section 108 of the Code of Civil Procedure to have the decree set aside. The Subordinate Judge, on the 30th November 1893, rejected the application, holding that the petitioner had not only notice of the day of hearing, but he was actually present in Court on that day. The petitioner on the 24th February 1894 filed an appeal to the High Court against that order, and on the 18th January 1895 that appeal was dismissed on the merits. On the 30th March 1895 an appeal was presented against the original decree to the High Court, and it was contended that under section 5 of the Limitation Act sufficient cause was shown for not filing the appeal within time. It was also contended that the time during which the petitioner was prosecuting his application under section 108 of the Code of Civil Procedure should be excluded in computing the period of limitation under section 14 of the Limitation Act. *Held*, that section 14 of the Limitation Act did not apply to appeals. *Held*, also, that this was not a case in which an application could properly be made under section 108 of the Code of Civil Procedure. Even supposing that the decree could be called an *ex-parte* decree, the peti-

* Civil Rule No. 767 of 1895.

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tioner, having failed in that application on the merits, could not now be allowed to fall back upon the remedy, by way of an appeal, which was open to him at the time when the original decree was passed, and of which he did not choose to avail himself, and that this was not a sufficient cause for not presenting the appeal within time.

Balwant Singh v. *Gumani Ram* (1), and *Sital Hari Banerjee* v. *Hcera Lall Chatterjee* (2), referred to.

THE facts of this case appear sufficiently from the judgment of the High Court.

Babu *Nil Madhub Bose*, and Babu *Benode Behari Banerjee*, for the petitioner.

Babu *Taruck Nath Sen*, Babu *Hari Churn Sarkhel*, and Babu *Sarat Chunder Ghose*, for the opposite party.

The judgment of the High Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows :—

This is a rule for the admission of a first appeal after time under the following circumstances :—

The petitioner was one of nine principal defendants in a suit brought against them for possession of certain lands with mesne profits. In that suit he appeared and filed a written statement. It turned out to be a boundary dispute, and a Commissioner was appointed to make a local enquiry. The enquiry having been completed, the case came on for trial, and on the day of hearing the pleaders who represented the petitioner and three others stated that they had no instructions from their clients. The rest of the defendants having accepted the Commissioner's report, judgment was given for the plaintiff on 13th April 1893.

On the 10th May following the petitioner made an application under section 108 of the Code to have the decree set aside, but the Subordinate Judge, after taking evidence, found that the petitioner, not only had notice of the day of hearing, but was actually at the Court on that day, and he accordingly rejected the application. That was on 30th November 1893. On 24th February 1894 the petitioner appealed to this Court against that order, and a Divisional Bench of this Court, while pointing out that a question of law had been raised which it was not necessary to determine, held

(1) I. L. R., 5 All., 591. (2) I. L. R., 21 Calc., 269.

upon the facts that the appellant had failed to satisfy the Court that he was prevented from appearing on the day of hearing, and accordingly dismissed the appeal on the 18th January 1895.

An appeal against the original decree was then presented on 30th March last, and it is contended that under section 5 of the Limitation Act this Court should hold that the appellant had sufficient cause for not making his appeal within time. It is urged that the time during which the petitioner was prosecuting his application under section 108 of the Code should be excluded from consideration, and that if that be done the appeal was presented on the 89th day from the date of the decree.

We see no reason why the petitioner should be allowed a deduction of the time during which he was endeavouring to have the decree set aside. Section 14 of the Limitation Act does not apply to appeals, and, even supposing that the Court could apply the principle of that section in considering what was sufficient cause under section 5 [as was done by the Allahabad Court in *Balwant Singh* v. *Gumani Ram* (1)], it is clear that in the proceedings under section 108 relief was not refused for want of jurisdiction but on the merits. It may be that, as was ruled in the case of *Sital Hari Banerjee* v. *Heera Lal Chatterjee* (2), this was not a case in which an application could properly be made under section 108. But the petitioner elected to make it, instead of appealing as (even supposing that the decree could be called an *ex-parte* decree) he was entitled to do under section 540 of the Code, and having failed in that application on the merits, we think we cannot now allow him to fall back upon the remedy which was open to him at the time, and of which he did not choose to avail himself. The petitioner has not satisfied us that he had sufficient cause for not presenting the appeal within time, and we accordingly discharge this rule with costs.

S. C. G. *Rule discharged.*

(1) I. L. R., 5 All., 591.

(2) I. L. R., 21 Calc., 269.