

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

1917.

December 18.

RAMCHANDRA GANGADHAR KARVE (ORIGINAL PLAINTIFF),* APPELLANT
v. MAHADEV MORESHVAR PHADNIS (ORIGINAL DEFENDANT), RES-
PONDENT^o.

Amended Letters Patent, clause 15—Appeal filed beyond time—Application for excuse of delay—Delay not excused by a single Judge—Appeal from the order—Order amounts to judgment under clause 15.

Where an appeal has been presented beyond the time allowed by law, and application to excuse the delay refused by a single Judge of the High Court, the order of refusal amounts to a judgment within the meaning of clause 15 of the Amended Letters Patent, and can be appealed from under that clause.

SECOND appeal from the decision of Balak Ram, Assistant Judge at Poona, confirming the order passed by R. B. Gupte, Joint Subordinate Judge at Poona.

Execution proceedings.

The plaintiff obtained a decree on the 7th April 1908 which declared that a *boi* or passage between the houses of the plaintiff and defendant was of their joint ownership, and restrained the latter from obstructing the plaintiff in using the same. On the 26th March 1909 this decree was confirmed on appeal. Somewhere about that time the defendant put up a pump in the passage.

On the 23rd January 1913, the plaintiff applied to execute the decree praying that the obstruction put up by the defendant in the passage be removed. The lower Court dismissed the application as time-barred, as the plaintiff took no steps to execute the decree for three years after the obstruction was put up.

The plaintiff appealed to the High Court. The appeal was presented beyond the period prescribed by law. He applied for excuse of delay; but a single Judge refused to excuse the delay. Against the order refusing

* Second Appeal No. 1236 of 1916.

to excuse the delay, the plaintiff appealed to a division branch of two Judges, who excused the delay and admitted the appeal.

The appellant in person.

D. C. Virkar, for the respondent.

HEATON, J:—Two points arise in this appeal, one of which is peculiar to the facts of this particular case, and the other is a more general question. I will deal with the latter first.

It happened that this appeal was presented beyond the time allowed by law and that an application was made by the appellant to a single Judge of this Court to excuse the delay. That Judge refused to excuse the delay. And here I pause to remark that this order had the effect of dismissing or rejecting the appeal and that it was an order of a final character, not of an interlocutory character. The appellant appealed to a Bench of this Court against that order and the Bench excused the delay, the result of which was that the appeal was admitted and has now come on for hearing.

It is argued that the order of a single Judge refusing to excuse the delay is not a judgment within the meaning of clause 15 of the Charter of this High Court and that therefore no further appeal lay. But seeing, as I have said, that the order had the very drastic effect of dismissing or rejecting the appeal, it seems to me it must be taken to fall within the meaning of the word judgment as used in clause 15, and I think therefore that there is no objection to our disposing of this appeal on its merits.

Turning to the merits we find that the present appellant who was the plaintiff in the suit out of which ultimately these proceedings have arisen, obtained a decree, a part of which runs as follows:—"The Bol (passage) between the houses of the parties is of their

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joint ownership. The plaintiff is entitled to discharge the water of the Moris on the ground floor of the plaintiff's house and of those on the second storey and rain water of the eaves of the plaintiff's house, into the said Bol and to carry it through the Mori (drain) passing beneath the Bol so as to join the public gutter on the North. An injunction is issued to the defendant restraining him from causing obstruction to the plaintiff in his enjoyment of his above right or to his going into the said Bol and making repairs to the Mori therein." Some years after obtaining this decree the plaintiff applied for execution of the decree on the ground, it appears, that an obstruction had been caused to his right of going into the said Bol and making repairs to the Mori. That application was rejected by the first Court and by the Court of first appeal on the ground that it was out of time.

If we consider the nature of the litigation in which the decree was obtained, and the terms of the decree, it seems to me that the application was not out of time. For the purpose of discussing this point we must assume, as was assumed in the lower Court, that there was an obstruction, and that the obstruction was caused more than three years before the application for execution was made. The obstruction takes the form of a pump which, we assume, blocks up the Bol and prevents the decree-holder from reaching the Mori so that he may make repairs to it. The question is whether the obstruction for the purpose of limitation dates from the time when the pump was erected, that is, more than three years before the application was made, or whether it dates for the purposes of limitation from the time when the decree-holder had occasion to enter the Bol and proceed along it for the purpose of making repairs to the Mori. Both the lower Courts have held that for the purposes of limitation the date

of the obstruction was the date of the putting up of the pump. To me it seems otherwise. I speak here not in any general terms, but with reference to the facts of this particular case and the terms of this particular decree. The right which the plaintiff-decree-holder is now seeking to exercise is the right to proceed along the Bol for the purpose of making repairs to the Mori, and that right arises when he finds occasion to enter the Bol and to proceed, or attempt to proceed, along it, either to make repairs or to ascertain whether repairs are necessary. It is not shown that so considered this right was obstructed more than three years before the application for execution was made. Seeing that the lower Courts have proceeded on the assumption that the right has been considered as dating back to the time when the pump was erected, I think that their orders are wrong, that they decided the matter wrongly on a preliminary point, and that it must be remanded to the lower Court to be determined according to law.

I am not at all sure that the same result might not be reached by applying the analogy of section 23 of the Limitation Act and by regarding the existence of the pump as a continuing wrong or a continuing obstruction. But I do not say anything definite on that point, because having regard to the particular facts of this case I feel clear in my mind that the decision can properly be based on the other ground.

The costs up to date in all the Courts must be paid by the respondent in this appeal.

SHAH, J. :—I am of the same opinion.

Order reversed.

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