

(1880) 03 AHC CK 0010

Allahabad High Court

Case No: None

Bikanu

APPELLANT

Vs

Moti Bibi

RESPONDENT

Date of Decision: March 15, 1880

Citation: (1880) ILR (All) 772

Hon'ble Judges: Robert Stuart, C.J; Spankie, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

1. The plaintiff-respondent sued Tara Kishore and Moti Bibi for Rs. 800, under a bond dated 19th March 1874, executed in favour of Tara Kishore, the plaintiff being the real creditor. Appellant Moti Bibi, defendant, denied that she had borrowed money from plaintiff under any agreement whatever, and also any execution of a bond in his favour: for a particular purpose she had borrowed money from defendant Tara Kishore, executing a bond in his favour, and preserving her property from sale: afterwards arrangements for the sale of the property which had been entered into, previous to the execution of the bond, with Tara Kishore fell through, and a sale was effected with one Ghazi, plaintiff's brother, but as a portion of the consideration was not paid a quarrel ensued which has led to the institution of the present suit by plaintiff upon the bond of the 19th March 1874. The Sub-ordinate Judge on the 27th April 1877, decreed in favour of plaintiff for the amount claimed, but dismissed the claim as against Moti Bibi, defendant. Tara Kishore, defendant, who had not appeared in the suit, applied for a review of judgment, and plaintiff also applied for the same as against Moti Bibi, defendant. The Subordinate Judge on the 16th July 1877, refused the plaintiff's application for review as against Moti Bibi previously exonerated. But on the 25th May he had already accepted the application of Tara Kishore for review. On the 29th June 1878, the Subordinate Judge reconsidered the case. He refers to his original judgment, observing that, as there had been no proof of contract between the plaintiff and Moti Bibi, he had dismissed

the claim as against her: but on the evidence of Badal and Kali, agents of Tara Kishore, that they had borrowed money from plaintiff on behalf of the said Tara Kishore, be decreed the claim against that defendant: but Tara Kishore now urged that the plaintiff had not claimed the money from him, hut from Moti Bibi, and that Badal and Kali were no agents of his, and had not acted upon his authority. The Subordinate Judge held that there was no proof that Badal and Kali were the agents of Tara Kishore or that he had authorised them to borrow the money or had promised to repay it. Tara Kishore had denied all knowledge of Moti Bibi, and plaintiff admitted that he was not personally acquainted with Tara Kishore. The lower Appellate Court, therefore, dismissed the claim as against Tara Kishore.

2. The plaintiff then appealed to the Judge, making both defendants respondents, and, referring to the previous decision of the 27th April 1877, it appeared that he was appealing from that decision as well as from that of the 29th June 1878. The Judge admits that, so far as the decision of the 27th April 1877, is concerned, the appeal is barred, but he nevertheless admitted it, as the proceedings of the Subordinate Judge, in granting one application for review and rejecting the other, were of a curious nature. It was, he considered, a case in which the parties might be misled as to the particular date on which the period allowed for appeal would begin to run against them : the appeal of plaintiff, was, in his opinion, made bond fide: the plaintiff had all along proceeded against Moti Bibi as the obligor, having made Tara Kishore defendant pro forma: he was merely the nominal obligee, plaintiff being the real creditor: Moti Bibi did not deny that she had received the money on the execution of the bond, pleading, according to the Judge, that Tara Kishore, and not plaintiff, was the party to sue her. The lower Appellate Court finds that the money was borrowed for Moti Bibi's use at the instigation of Tara Kishore, and also for his benefit, and he (the Judge) was not satisfied that Tara Kishore had not made himself liable for the money. But he decreed the claim on appeal against Moti Bibi and dismissed it as against Tara Kishore, who, however, would pay his own costs.

3. It is contended by Moti Bibi that the decision of the 27th April 1877, not having been appealed within the period prescribed by law, had become final; that the application of plaintiff respondent for review as against appellant had been rejected, and the order passed upon it was final; and that, as no sufficient reasons for the admission of the appeal after time had been assigned by respondent, the Judge had acted erroneously in admitting the appeal: moreover, the suit had been separated against each defendant and on different dates: there could not be a single appeal against the two decrees; and appellant further contends that there was no contract between herself and plaintiff, nor had she executed the deed of the 19th March 1874.

4. There can be no doubt that, if the appeal heard by the Judge is one from the decision of the Subordinate Judge, dated 27th April 1877, it is after time, and that the proper course for respondent, after that decision had been delivered and a

decree had passed against him, was to have appealed from the decree. The memorandum of appeal presented to the Judge refers to the decision of the 27th April 1877, and to the intermediate miscellaneous proceedings with reference to the application of Tara Kishore for review, and that of the plaintiff for the same purpose as against Moti Bibi. But there can be no doubt that it was the decree passed by the Subordinate Judge on the 29th June 1878, that had brought plaintiff before the Judge as an appellant. The appeal from that decree was admittedly within time. The question arises whether the Judge was at liberty in this appeal to reconsider the merits of the case as against Moti Bibi. It is true that she appeared as respondent and defended the appeal. But in doing so she only acted in obedience to the notice of the Court served upon her; and because she did so we do not think that it can be successfully contended that she should not be allowed to plead now that appeal as against her was barred by lapse of time. The decree of the 29th June 1878, was not passed against her, but as against Tara Kishore; she was not a party to the review. If the plaintiff was desirous of appealing as against her from the decree of the 27th April 1877, he might have done so within the time allowed by law, or if under any misapprehension he had allowed that period to run by, he should have presented his memorandum of appeal and assigned reasons for not presenting his appeal within such period. The Court, had he done so, might then, u/s 5 of Act XV of 1877, have admitted the appeal after time, if satisfied that the appellant had sufficient cause for not making his application within time. This course the plaintiff did not adopt, but waited until the decree of the 29th June 1878, after the admission of Tara Kishore's application for review had been made, dismissing the suit as against the said Tara Kishore. It seems to us that the appeal before the Judge was an appeal against the decree of the 29th June 1878, under cover of which the plaintiff desired to reopen the claim as against Moti Bibi, which had been dismissed on the 27th April 1877. We do not think that this course was legal, and we hold that the Judge has acted erroneously in assuming that the appeal was one against the decree of the 27th April 1877, and that he was at liberty to admit it under s. 5 of the Limitation Act. It seems clear to us that the decrees of the 27th April 1877, and of the 29th June 1878, are separate and distinct, and that they could not be appealed in one memorandum of appeal from the decree of the 29th June 1878. We, therefore, decree the appeal and reverse the judgment of the lower Appellate Court with costs.