(1918) 01 BOM CK 0045

Bombay High Court

Case No: None

Bai Nematbu		APPELLANT
	Vs	
Bai Nematullabu		RESPONDENT

Date of Decision: Jan. 9, 1918

Acts Referred:

- Limitation Act, 1908 - Section 14, 5

Citation: 46 Ind. Cas. 14

Hon'ble Judges: Stanley Batchelor, Acting C.J.; Kemp, J

Bench: Division Bench

Judgement

Stanley Batchelor, Acting, C.J.
This is an appeal brought by the original 1st defendant against an order made by the learned First ClaSS Subordinate Judge granting to the plaintiff a review of the Subordinate Judge''s judgment. I am of opinion that the learned Judge below was perfectly right in allowing this application for review of judgment, and indeed I think that he was compelled ex debito justitice to make such an order in the circumstances of this case. The plaintiff, who was the applicant for the review, was a Muhammadan female, belonging, therefore, to that category of persons, who, according to a well-known description by a Chief Justice of this Court, are barely to be described as sui juris. It is plain on the record, and indeed it has formed part of Mr. Setalvad''s argument for the appellant, that this Muhammadan lady''s legal interests were not prosecuted by her advisers with all the carefulness which the circumstances demanded. It is that want of carefulness which has caused the delays upon which the appellant now mainly founds. When those delays are examined, I think it will be seen that all that we have here is, not any actual delay in fact, but a kind of constructive delay imputed to the appellant by reason that certain applications made from time to time by her legal advisers were not applications valid and efficient under the law. For instance, the plaintiff''s appeal was dismissed by the Appellate Court on the 8th October 1915. One reason, perhaps one of the

main reasons, upon which the order of dismissal was made, was the appearance of a certain map relied upon by the present appellant, for that map showed a continuous double line, which, if it had existed in the original survey map of about 1870, would have gone far to disprove the plaintiff''s claim to an easement. But, on the 16th October 1915, the plaintiff began correspondence with the Revenue Authorities in order to procure documents with a view to test the accuracy of the appellant''s map, Exhibit 129. These copies were received by her on the 4th January 1916, and on the very next day she applied for review of judgment to the District Judge. Unfortunately through no fault of the Muhammadan lady, but through some want of attention on the part of her legal advisers, this application was irregular, seeing that there was then still pending before the Court the second appeal which had been lodged on behalf of the plaintiff on the 10th of November 1915. That is an instance of the kind of delay which, as I say, is imputed against the plaintiff in these proceedings. Assuming, therefore, that in strictness the application for review was out of time, it appears to me clearly to be a case which calls for the concession allowed by Section 5 and Section 14 of the Indian Limitation Act, Upon this point, it seems to me relevant also to say-that when all argument is exhausted, the real object of this application is, as the learned trial Judge pointed out, not so much to improve the plaintiff''s case by the addition of fresh evidence, but to ensure that the judgment of the Court shall proceed upon true materials and not upon false.

2. Then it was urged by Mr. Setalvad that the lower Court was wrong in allowing the application because the condition prescribed by Order XLVII, Rule 4, Sub-rule (2)(b), is not satisfied in this case. That condition is expressed in the following words: "No such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation". The learned Counsel contends that if the evidence tendered upon this point by the applicant in the Court below be subjected to examination in this Court of Appeal, it will be found that such evidence ought not to have satisfied the Court of that absence of negligence which the Code requires. This argument, however, runs counter to the decision of the Calcutta High Court in Abed Khondkar v. Mahendra Lal De 29 Ind. Cas. 282; 42 C. 830 : 19 C.W.N. 804, where the provisions of Section 626 of the Code of 1882, which correspond with the provisions of the Order now under consideration, were examined and discussed by Sir Lawrence Jenkins, C.J., and Mr. Justice Woodroffe. Sir Lawrence Jenkins there says: The view taken by Mr. Justice Chatterjea in affirming the lower Appellate Court is that ''strict proof means proof that convinced the lower Appellate Court, and it is on that ground, and on that ground alone, that the result can be affirmed. In my opinion, this is not the true view of the provisions of this chapter relating to review of judgments. The word proof ordinarily has one of two meanings: either the conviction of the judicial mind on a certain fact, or the means which may help towards arriving at that conviction. The use of the word ''strict'' seems to me to

point to the second of these two meanings, and strict proof,'' in my opinion, means anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the requirements of the law of evidence. It is formality which is prescribed and not the result that is described. This, I think, is apparent from the whole scheme of this chapter on review''; and Mr. Justice Woodroffe''s judgment was to the same effect. No doubt that decision is not strictly binding upon us and equally without doubt it is a decision which is entitled to the highest respect. Speaking for myself, I entirely concur in the construction which has been placed upon these provisions by the decision of the Calcutta High Court, and that construction appears to me to be probable in itself, when it is remembered that the order in question is merely a discretionary order where large powers would naturally be confined by the Legislature to the Judge of first instance. Then, I think that the use of the somewhat curious words "strict proof" also confirms the construction which was adopted. The words are, not that the absence of negligence shall be "conclusively established" or even "satisfactorily proved." What is required, as I understand it, is that there be strict proof of this absence of negligence on the record and the phrase "strict proof" refers, I think, to the formal correctness of the evidence offered, not to its effect or result. I can see nothing repugnant in supposing that if the record does contain such strict proof, that is to say, such formal admissible evidence, it shall be for the trial Court only to assess its sufficiency. At first sight no doubt it might seem that the word strict" is tautologous inasmuch as all proof must be strict proof. But it seems to me that there was good reason for the insertion of the epithet, and that the desire of the Legislature was to deter Subordinate Courts from acting upon loose information or inadmissible evidence upon which they are at times disposed to act in these matters. There is no question but that on the record in this case there is strict proof which, if it be believed, is sufficient to discharge the burden which lay upon the applicant of showing that she was not guilty of negligence in not collecting earlier the evidence upon which she now wishes to rely.

3. On these grounds it seems to me that the order made by the lower Court is right and I would affirm it, dismissing this appeal with costs.

Kemp, J.

4. I agree with my Lord the Chief Justice as to the point of limitation. I think sufficient cause has been shown by the respondent for the delay in making her application for review.

5. With regard to the question as to what the scope of the enquiry which the Appellate Court should enter upon is, I am of opinion, that we are entitled to satisfy ourselves under Order XLVII, Rule 4 (2)(6), as to whether there was sufficient evidence before the lower Court, and whether such evidence has been properly appreciated by it when it granted the application. If Abed Khondkar v. Mahendra Lal De 29 Ind. Cas. 282. 42 C. 830 : 19 C.W.N. 804 lays down that the duty of the

Appellate Court is restricted to ascertaining whether the evidence adduced before the Subordinate Judge is properly admissible or not, only I must respectfully beg leave to doubt its correctness. The Subordinate Judge might grant such an application on evidence on the weight and sufficiency of which no Appellate Court would agree with him. Nevertheless, the evidence which the plaintiff-respondent now seeks to adduce is not for the purpose of adding to her evidence in the Court below but for the purpose of correcting a misapprehension into which the Judge was led by a material error in Exhibit 129. I, therefore, think that under these circumstances justice requires its admission and that this appeal should be dismissed with costs.