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bound by the rules of the Code that he invokes. For these reasons, in my opinion, the suit against Dhiren fails and must be dismissed with costs.

As regards the heirs of Naren, the plaintiff has undertaken to pay the costs of the guardian *ad litem*, and may add those costs to his claim against the estate of Naren.

Attorney for the plaintiff: *B. B. Newgie*

Attorneys for the defendants: *G. N. Dutt & Co. & A. D. Banerjee.*

B. M. S.

CRIMINAL REVISION.

Before Suhrawardy and Cammiade JJ

KISHEN DAYAL CHAUKIDAR

v.

DARJEELING MUNICIPALITY.*

1926

Dec. 21.

Criminal Rule—Practice—Limitation—Rule, ex parte issue of—Division Bench, High Court—Jurisdiction to re-open question—Final hearing—Preliminary objection—Darjeeling Municipal Act (Beng. I of 1900), s. 244 (S).

It is now well established by authorities that an application to the High Court against an order of a Criminal Court should be made within 60 days of the date of that order, excluding the time required for obtaining copies.

* Criminal Revision No. 848 of 1926, against the order of D. V. Stevens, Sessions Judge of Darjeeling, dated March 31, 1926, affirming the order of N. Sen, Deputy Magistrate of Darjeeling, dated Dec. 21, 1925.

In the matter of Khestra Mohun Giri (1) and *Raj Chandra Bhuiya* v. *Emperor* (2) referred to.

The fact, that one Division Bench of the High Court has issued a Rule *ex parte*, does not *per se* disentitle the Bench hearing that Rule to question the propriety of the order on the ground that the application was made too late, and that Bench can decide the point in the presence of the Opposite Party.

The consideration, that prevailed with their Lordships in coming to the conclusion in *Abdul Matlab's* case (3), that the High Court having issued a Rule it should be heard on the merits, was that it was simply a matter of mere procedure; for that matter had to be finally settled by the High Court—whether it was by way of reference by the Sessions Judge or on an application by a party to the High Court.

Abdul Matlab v. *Nandalal* (3) distinguished.

Where an application was made to the High Court nearly eight months after the Magistrate's order and five months after the Sessions Judge's order, and the petitioner averred that his application to the High Court could not be made in time owing to an oversight on the part of his legal adviser, who thought the High Court had to be moved within 60 days of the Sessions Judge's order, (on a preliminary objection taken by the Crown).

Held, that this was hardly a ground for departing from the settled practice of the High Court, and the Rule must therefore be discharged.

Rule obtained under section 439, Criminal Procedure Code, by one Kishen Dayal Chaukidar, Second Party.

The petitioner, Kishen Dayal, who was the chaukidar of a Tea Garden near Lebong, had a dwelling house (not a cooly shed) in Harison Hatha on the Rungeet Road situated on the outskirts of the Darjeeling Municipality. He had 2 or 3 ponies for hire, as well as a stable about 32 feet long behind his house. Kishen Dayal voluntarily applied to the Darjeeling Municipality for permission to repair his dwelling house and stable, though not required by law to obtain any such permission.

He, however, built new rooms without sanction of the Darjeeling Municipality and, after infructuously

(1) (1916) I. L. R. 43 Calc. 1029; 20 C. W. N. 1170.

(2) (1916) 25 C. L. J. 564.

(3) (1922) I. L. R. 50 Calc. 423.

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serving him with notices to demolish the unauthorized additions, their Secretary wrote to the Deputy Commissioner of Darjeeling (who is also the Chairman of that Municipality) stating that he was authorized by their Chairman to ask for a demolition order under section 244 (S) of the Darjeeling Municipal Act (I of 1900, B. C.). This section, however, provides that an application for demolition is to be made to the Magistrate by the Commissioners, and it further lays down that "the Magistrate shall not make any such "order (of demolition of unauthorized structures) "without giving the owner full opportunity of adduc- "ing evidence and being heard in defence".

The learned Deputy Magistrate of Darjeeling thereupon, without examining the complainant on oath or even receiving a formal stamped petition of complaint, issued notice on Kishen Dayal, as second party, to show cause why a demolition order should not be made and directed an Honorary Magistrate to examine the witnesses of both sides. The latter did so, held a local inspection also and then submitted his report to the said Deputy Magistrate, who, after hearing arguments, made an order for demolition of the alleged unauthorized structure on 21st December 1925.

The depositions had not been read over to the witnesses, nor had the accused been examined as required by section 342 of the Code of Criminal Procedure. Against this order Kishen Dayal filed a petition for revision before the learned Sessions Judge of Darjeeling, which was dismissed on the 31st March 1926.

During the pendency of this revision application the accused, on the 28th January 1926, obtained an order from the said Deputy Magistrate staying demolition, and in his petition therefor stated, "So

"the petitioner has filed a motion under sections "435 and 438, Criminal Procedure Code, before the "District Judge, and intends also to approach the "Chairman to sanction the house as it stands, *i.e.* "to save it anyhow".

On the 19th April 1926 Kishen Dayal applied for a certified copy of the Sessions Judge's order, and obtained it on the 29th April 1926. But he applied for a certified copy of the trial Court's order only on the 16th August 1926, got it on the 17th August 1926 and filed it on the 24th August 1926 in the High Court, where he had already obtained a Rule *ex parte* from Rankin and Mukerji JJ. on 11th August 1926, *disclosing no dates in his petition*, but merely stating in paragraph 9, thereof that "he would and could have moved the "Court earlier but for an oversight on the part of his "legal adviser".

Paragraph 8 of this High Court petition set out that "the petitioner believed he had substantial "grounds for relief, and that the said grounds raised "questions of public importance in the application "of Municipal Law". In paragraph 10 the petitioner invoked the power of the High Court to allow him to be heard by his counsel, despite the fact, that according to the *practice* of that Court, he was out of time.

Although Mr. B. M. Chatterjee, one of the leading Vakils of Darjeeling, was petitioner's lawyer there, t' petition was supported by an affidavit sworn by a Barrister, Mr. P. K. Mazumdar, in the middle of July 1926 in Darjeeling, to the effect that he did not know that the High Court had to be moved within 60 days of the Magistrate's (and not Sessions Judge's) order, and he also testified to the accused's poverty.

On this Rule coming on for final hearing before Suhrawardy and Cammiade JJ. on the 21st December 1926:

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Mr. G. Sircar, Advocate, for the Crown, took a preliminary objection regarding limitation, and pointed out that this application was very stale and hopelessly out of time, having been made nearly 8 months after the trial Court's order (21st December 1925) and almost 5 months after the Appeal Court's order (31st March 1926). The accused, as appeared from his stay application, was pursuing an administrative remedy before the Chairman of the Darjeeling Municipality, and it was apparent that, only when he failed there, he fell back on this judicial remedy in the High Court after 5 months' delay.

Mr. N. Barwell, for the petitioner, said he had no notice of this objection and wanted time to look up the law on the matter. (So the hearing of this preliminary objection taken by the Crown was adjourned to the next day.)

Mr. N. Barwell (with him *Babu Hem Chandra Dhar*), for the petitioner. It is most unusual for such a preliminary objection to be taken. I shall be able to show that I have a very good case on the merits both as to law and facts, if your Lordships will only allow me to go into the matter. After hearing my arguments as to my clients' grievances and all the irregularities committed in this case your Lordships can still discharge this Rule on the ground of limitation, and I ask you not to shut me out altogether.

In *Abdul Matlab* v. *Nanda Lal Khatel* (1), although the Bench hearing the Rule was in favour of a technical objection, which had not been considered by the Bench issuing the Rule, it held that "*a Rule once issued must be heard on its merits*," and cannot be discharged on a technical objection only. While in *Raj Chandra Bhuiya* v. *Emperor* (2) the second

(1) (1922) I. L. R. 50 Calc. 423, 425. (2) (1916) 25 C. L. J. 564.

Bench, though considering the delay unreasonable, heard the Rule on the merits nevertheless.

[SUHRAWARDY J. *Abdul Matlab's* case (1) has no bearing whatever. There the High Court alone had power to interfere, so it did not matter whether the question came before it on a reference by the Sessions Judge or on motion by the party direct to the High Court.]

Raj Chandra Bhuiya's case (2) merely laid down that according to *practice* the period of limitation was 60 days from the trial Court's order [so did *In the matter of Khestra Mohan Giri* (3)], and not from the date of the Sessions Judge's order. There is no period of limitation prescribed for motions under the Limitation Act.

[SUHRAWARDY J. This practice of going first to the Sessions Judge is of very long standing. See the Judgment of Prinsep J. in *Queen Empress* v. *Reolah* (4).]

In the previous cases, in spite of this defect of limitation the second Bench heard those cases on the merits and decided them thereon. In the present case the petitioner is in a stronger position, for here the question, whether he had or had not come in reasonable time, had come up before the first Bench and had been already decided in his favour. Further *In the matter of Khetra Mohan Giri* (3) Sanderson C. J. after stating the rule of *practice* said that it was "no inflexible rule" and in proper circumstances "might be departed from".

Your Lordships are not a Court of Appeal empowered to review the wisdom of a discretionary act

(1) (1922) I. L. R. 50 Calc. 423, 425.
(2) (1916) 25 C. L. J. 564.
(3) (1916) I. L. R. 43 Calc. 1029 : 20 C. W. N. 1170.
(4) (1887) I. L. R. 14 Calc. 887.

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by another Bench, nor is there any new material touching on the point now before you to set aside that order.

Mr. G. Sircar, for the Crown, submitted that the terms of the Rule did not show that any order was made excusing this motion for being made out of time, nor was there any prayer for that relief in the petition to the High Court to enable it to make such an order, nor were the dates of the two lower Courts' orders explicitly stated in that petition.

Further, even if such an order had expressly been made by Rankin and Mukerji JJ., being *ex parte* the Opposite Party would be entitled to challenge this extension of time and ask their Lordships to set it aside after hearing his submissions, and if their Lordships were to do so they would not be sitting as a Court of Appeal over the decision of the Bench issuing this Rule, as learned counsel for petitioner argued, but merely exercising their Lordships' ordinary jurisdiction, for it was their invariable practice daily to go into questions of limitation and other preliminary objections at the final hearing of appeals though at the time of the preliminary hearing such time-barred or incompetent appeals had been admitted *ex parte* by another Bench.

Counsel for the Crown continued, that it appeared from the record that the petitioner was not poor and had as his Vakil one of the leading Darjeeling lawyers. There was no affidavit that this legal adviser had misled him, but only an affidavit from a Barrister, who had to deal with this client through that very same Vakil, and even in that affidavit he did not say that he was under the impression that the High Court could be moved long after the expiry of 60 days from the date of the Sessions Judge's order, as was the case here.

The record showed that the petitioner had been shown much consideration by the learned Deputy Magistrate of Darjeeling both before and after the demolition order (*viz.*, in granting a local inspection and stay of execution), and he had no real grievance on the merits.

[CAMMIADE J. We will not go into the merits, and Mr. Barwell has not done so.]

Counsel for the Crown continued that the real position was that the petitioner had gone to the Chairman of the Darjeeling Municipality for a further administrative relief instead of coming to the High Court promptly to challenge that demolition order in its judicial aspect. Further even if the petitioner had come to the High Court with due diligence and could have made out a good case, he could not insist, as of right, on their Lordships interfering, for in Revision it was always a matter of discretion to make the Rule absolute or not. Apart from limitation he resisted this application as being very stale and not prosecuted with due diligence.

Mr. N. Barwell, in reply, asked the Court not to re-open the question of limitation as no new material had been placed before it; otherwise, relying on the decision in *Abdul Matlab's* case, (1) he would have to press their Lordships to make a reference to a Full Bench on this question, as to the power of a Bench hearing a Rule to discharge it on the preliminary objection of limitation, with regard to which indulgence had already been granted by the Divisional Bench that had issued the Rule. He did so, as the question of law raised on the merits in this case were of great public importance, viz., whether cases under section 244 (S) of the Darjeeling Municipal Act were

(1) (1922) I. L. R. 50 Calc. 423.

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proceedings governed by the provisions of the Code of Criminal Procedure and the owner an accused person, whereas the learned Deputy Magistrate of Darjeeling had ignored all the provisions of that Code and treated the owner as not an accused and the provisions of section 244 (S) of the Darjeeling Municipal Act as those of a self-contained Act overriding the Code of Criminal Procedure.

SUHRAWARDY J. The order complained against in this case was passed by the Deputy Magistrate of Darjeeling on the 21st December 1925. The order was passed under section 244 (S) of the Darjeeling Municipal Act (I of 1900, B. C.) directing the demolition of an unauthorised structure in the petitioner's house. The Sessions Judge of Darjeeling was moved against the order of the Deputy Magistrate, and he rejected the application on the 31st March 1926. The present Rule was obtained from this Court on the 11th August 1926 calling upon the Deputy Commissioner and the opposite party to show cause why the order complained of should not be set aside. On the face of it this application is too stale. But it is argued by the learned counsel appearing for the petitioner that inasmuch as one Division Bench of this Court has issued the Rule, we are not entitled to question the propriety of the order on the ground that the application was made too late. We have considered the matter carefully inasmuch as the point of law raised in the case is one of some importance, and we have come to the conclusion that we should not in the present case depart from the practice of this Court. That an application to this Court against an order of the Court below should be made within 60 days from the date of the order is now well established by authorities. It is a question of practice no doubt; but the practice is uniform, and only in special circumstances

it can be departed from. See the cases of *In the matter of Khetra Mohun Giri* (1) and *Raj Chandra Bhuiya* v. *Emperor* (2). Our attention has been drawn to the case of *Abdul Matlab* v. *Nandalal* (3) and on the authority of that case it is argued that since the High Court has chosen to issue a Rule it should be heard on the merits. There an application was made to this Court and a Rule granted against an order passed by a Magistrate of the 1st class on appeal from a subordinate Magistrate. It was pointed out that the proper procedure was to move the Sessions Judge for a reference to this Court. This the petitioner had not done, and it was argued that the Rule should be discharged upon that ground. The learned Judges held that in the circumstances of the case the High Court having issued the Rule it should be heard on the merits. The consideration that prevailed with their Lordships to come to that conclusion are very different from those arising in the present case. There the matter was to be finally decided by the High Court whether it was by way of a reference by the Sessions Judge or on an application by a party to the High Court. It was a mere matter of procedure, and the learned Judges rightly thought that it should not stand in the way of the petitioner obtaining relief in that case. In the present case an application was made and a Rule obtained *ex parte*. The opposite party has been called upon to show cause, and one of the causes shown is that the application is made out of time. We fail to see why we should not take the objection of the opposite party into consideration and decide the point in his

(1) (1916) I. L. R. 43 Calc. 1029 ; 20 C. W. N. 1170.

(2) (1916) 25 C. L. J. 564.

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presence. We are not, moreover, sure that the attention of the learned Judges, who granted this Rule, was drawn to the various dates on which the orders of the Courts below were passed. In the body of the petition it is stated that the application should have been made within 60 days from the Magistrate's decision, but it was not made within that time due to an oversight on the part of the petitioner's legal advisers. An affidavit was filed sworn by a Barrister practising in Darjeeling in which he said that he was all along under the impression that 60 days from the Sessions Judge's order was the period for moving the High Court. It is possible that this affidavit caught the eye of the learned Judges and they thought that the present application must have been made within 60 days from the order of the Sessions Judge. As a matter of fact the application was made about 5 months after the order of the Sessions Judge and about 8 months after the order of the Magistrate. We also fail to find any special circumstance in this case which will entitle us to extend the time in favour of the petitioner. As we have said, the petitioner simply says that the application could not be made in time owing to the oversight on the part of the petitioner's legal advisers. That is hardly a ground for departing from the settled practice of this Court. This Rule must therefore be discharged.

CAMMIADE J. agreed.

G. S.

Rule discharged.