CIVIL RULE.

Before Suhrawardy, Graham and Mitter JJ.

KARALICHARAN SARMA

v.

APURBAKRISHNA BAJPEYI.*

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June 13, 26.

Limitation—Appeal—Admission of appeal after the period of limitation—Sufficient cause—Indian Limitation Act (IX of 1908), s. 5.

The papers for an appeal were handed over to the appellant's advocate in the morning of the last day for filing. The advocate through pressure of urgent work did not look into the papers till the evening of that day, when he found that was the last day.

Held, that was a sufficient cause to grant the appellant an extension of a day under section 5 of the Indian Limitation Act (IX of 1908).

Held, also, that it is enough if the appellant satisfies the court that for sufficient cause he was prevented to file the appeal on the last day and his action during the whole of the period need not be explained.

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This was a Rule obtained by the appellant (defendant) for extension of the period of limitation for filing his appeal by a day. All the material dates and facts appear fully from the judgments.

GRAHAM J. In this case the Rule was issued to show cause why the time for presenting an appeal should not be extended, and why the appeal should not be registered though filed out of time.

There is no dispute as to the facts:—

The plaintiffs, opposite parties, brought a suit for recovery of arrears of rent alleged to be due from the present petitioner (defendant No. 1) and several other persons. That suit was decreed on the 17th July, 1927, and on appeal by the defendant No. 1 was dismissed by the District Judge on the 26th September, 1929. The petitioner thereafter applied on the 23rd December, 1929, for certified copies of the judgment and decree of the District Judge. The copies were ready on the evening of the 4th January,

* Civil Rule, No. 83 (S) of 1930, in Appeal from Appellate Decree, No. 2360 of 1930.

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1930, and were taken by a clerk of the petitioner's pleader on the 6th January. The petitioner received them on the 8th January and sent them through an agent to Calcutta with instructions to make them over to the petitioner's advocate, Mr. Bijaykumar Bhattacharya. The agent reached Calcutta on the morning of the 9th January, which was, it appears, the last day for filing the appeal. It happened, however, that the advocate was pressed for time owing to having several other matters in his hands and that he was not able to examine the papers. The result was that when he returned from court in the evening it was discovered that the appeal had become time-barred.

The petitioner thereupon filed the present application for extension of time under section 5 of the Limitation Act. Now, that section lays down *inter alia* that an appeal * * * may be admitted after the period of limitation prescribed therefor, when the appellant * * * satisfies the court that he had *sufficient cause for not preferring it within the prescribed period.*

The question, therefore, is whether the petitioner has succeeded in showing that he had sufficient cause for not preferring the appeal within the period of limitation allowed, *viz.*, 90 days. Now, as to that the argument advanced on behalf of the petitioner is that he was entitled to file his appeal at any time within the period of limitation, that the papers were delivered to his advocate on the morning of the 9th January, and that if the appeal had been filed on that day it would have been in time. The argument appears to be that he had done all that he was called upon to do, that the blame for the unfortunate result lies entirely with his legal adviser and that that being so, a fit case for the admission of the appeal under section 5 has been made out. It was further contended that it was in no way incumbent upon the petitioner to submit any explanation in regard to his omission to file the appeal at an earlier date, that he was within his rights in filing the appeal at any time within the

90 days, and that it was open to him, if he so wished, to file it on the last day before the appeal became time-barred. The question is whether this is a correct view of the law, and is a right interpretation of section 5 of the Limitation Act. A number of rulings were cited in the course of the argument. From the reported decisions two principles appear to emerge, firstly, that no general rule can be laid down and that each case must be decided with reference to its own particular facts; and, secondly, that a litigant, who has been inactive or negligent, will not be entitled to the special benefit of the section. No reported case has been brought to our notice which is quite on all fours with the present case. That being so, I think the proper course is to be guided by the terms of the section itself. The words used are "sufficient cause "for not preferring the appeal * * * within such "period," *i.e.*, the period of limitation, *viz.*, 90 days. The cause required to be shown therefore presumably applies not to any particular part of the period, but to the entire period, and, if no explanation whatever is forthcoming why the appeal was not filed during the major portion of the period of limitation, an explanation designed merely to explain why it was not filed on the last day before it became time-barred would, as it seems to me, be insufficient.

There may be numerous reasons why an appeal was not filed when it might have been, but those reasons must be stated, and it is incumbent on the appellant to satisfy the court as to their existence.

The facts here are that the decree was passed on the 28th September and that the appeal would have been in time if filed on the 9th January. It was not in fact filed until the 10th January, and the appellant has confined himself to showing that it would have been in time if filed by his advocate on the 9th. Whether the result was due to accident, or to carelessness on the part of the advocate it is not necessary to decide. The point is that the appeal was not filed within time and the question is whether the appellant has been guilty of inaction or negligence

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so as to deprive him of the benefit of the section. It is to be observed that in showing cause the period from the 28th September to the 23rd December, nearly three months, has been entirely ignored. As to this, it is replied that paragraph 7 of the petition furnishes some explanation; but what is stated therein does not touch the point, as it refers to events that took place in January, that is to say, subsequent to the period referred to above. It seems to me that a litigant who takes no step whatever for nearly three months to file an appeal after his right of appeal has accrued, and then after allowing matters to slide until a dangerously late hour suddenly finds that his appeal has become time-barred through some accident, or omission on the part of his legal adviser, has only himself to blame for the result. In the special circumstances of this case the blame rested rather with the appellant than his advocate, since a busy advocate can hardly be expected at a moment's notice to give his undivided attention to a particular case. There is nothing to show that it was brought to his notice, or that any suggestion even was made that the appeal was about to become barred and required immediate attention.

For the reasons which I have stated it cannot I think be held that the petitioner has succeeded in showing sufficient cause for not filing the appeal within the time allowed by law. The explanation which he has submitted, relating as it does only to the events which happened on the 9th January and a few days previous thereto, cannot be deemed to be sufficient cause for not filing the appeal within the period of limitation. The case, to my mind, comes within the general rule relating to inaction or negligence, the consequence of which is to deprive the appellant of the special benefit conferred by the section. The tendency of litigants in this country to procrastinate and to put off taking action until the last moment is notorious, but it should be understood that an appellant who does so, does so at his own risk, unless he can furnish some sort of explanation

to account for his omission to file the appeal at an earlier stage. To accede to an application made in the circumstances of the present case would in my opinion have the result of encouraging litigants in the mistaken idea that there is no obligation upon them to show a reasonable degree of diligence in filing the appeal and that it is open to them to postpone taking action to the last possible moment.

For the reasons given the Rule should in my judgment be discharged.

MITTER J. I regret very much that I am unable to agree with my learned brother in the conclusion he has arrived at in this case.

The question which we have to consider in this Rule is whether sufficient cause has been made out for admitting a Second Appeal to this Court which has been filed a day too late.

The relevant facts necessary for deciding this question are as follows:—The plaintiffs, opposite parties, obtained a decree for rent against the petitioner and other persons on the 17th of July, 1927. Against this decree the petitioner preferred an appeal to the District Judge of Bankura, which was dismissed by him on the 26th of September, 1929; on the 23rd December following, the petitioner applied for copies of judgment and decree of the appellate court. The copies were ready by the 4th of January, 1930, but were not taken delivery of till the 6th of January by a clerk of the pleader who appeared for the petitioner. The petitioner received them on the 8th of January and sent the papers for filing the appeal to Mr. Bhattacharya, an advocate of this Court. The agent reached Calcutta on the 9th and made over the paper to his advocate for filing the appeal at about 9-30 a.m. of the same date. The learned advocate, however, was busy with more pressing engagements and was not able to examine the papers before he left for Court. On his return home he discovered that that was the last date for filing the appeal. On the next day, the petitioner filed an application for

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extension of time and the present Rule was issued on that application. The learned advocate has frankly admitted that he did not examine the papers as he should have done the moment the papers were made over to him on the morning of 9th as he was too busy with work in Court and had to leave for Court immediately. It appears to me that it was really a slip on his part not to have examined the papers in order to find out what was the last date for filing the appeal. An advocate cannot, any more than other men, conduct his business without sometimes making slips and I think that this is a sufficient cause for extending the period of limitation by one day, for this delay is due to the slip of the learned advocate. Slips of solicitors and counsel have been held to be sufficient to set aside decrees of dismissal for default. See the case of *Burgoine* v. *Taylor* (1), where Sir George Jessel M. R., made the following remarks which may be usefully quoted here:

"We think that the order asked for by the "defendant ought to be made. Solicitors cannot, any "more than other men, conduct their business without "sometimes making slips; and where a solicitor "watches the list, and happens to miss the case, in "consequence of which it is taken in his absence, it is "in accordance with justice and with the course of "practice to restore the action to the paper, on the "terms of the party in default paying the costs of "the day, which include all costs thrown away by "reason of the trial becoming abortive." In the case of *Rumbold* v. *London County Council* (2), the full Court of Appeal consisting of Cozens-Hardy M. R., Vaughan Williams, Moulton, Farwell, Buckly and Kennedy L. JJ., held that illness of counsel was sufficient cause for not preparing the notice of appeal in time. In *Baker* v. *Faber* (3), it was held that a mistake by one's own counsel might be sufficient excuse for not filing the appeal in time. It has been argued for the opposite party that his client has acquired a valuable right by reason of the appeal

(1) (1878) 9 Ch. D. 1. (2) (1909) 100 L. T. 259.
(3) [1908] W. N. 9.

having become barred under the Statute of Limitations. The answer to this argument is furnished by the following observations of Brett M. R., in *Highton* v. *Treherne* (1). The Master of Rolls said: "But "where there has been a *bonâ fide* mistake, not "through misconduct nor through negligence nor "through want of reasonable skill, but such as a "skilled person might make, I very much dislike the "idea that the rights of the client should be thereby "forfeited. It seems to me obvious that the court has "jurisdiction to enlarge the time under some "circumstances. Therefore, why not on the present "occasion? It has been said that when the time for "appealing is past, the person who would be "respondent has a vested right to retain his judgment. "But obviously it is not an absolute right, and I am "perfectly confident that the practice of all the courts "has been to treat it as not an absolute right, though "the courts are chary of enlarging the time when "the time allowed by the rule has run out."

In the case of *Brojo Gopal Ray Burman* v. *Amar Chandra Bhattacharya* (2), the learned Chief Justice points out that there is a certain fallacy in language commonly employed to the effect that an order admitting an appeal under section 5 deprives the respondent of a vested right granted to him by section 3 and attention is drawn to the opening words of section 3 which are to the following effect: "Subject "to the provisions contained in sections 4 to 25 "inclusive." For these reasons, I am not impressed by the argument that the order admitting the appeal filed a day too late, if there was sufficient cause for the day's delay, would deprive the opposite party of a vested right.

It has been argued strenuously for the opposite party that, as no explanation has been given as to why the appellant waited for the last possible moment to file the appeal, sufficient cause has not been shown for extending the period of limitation. I do not think that, in the circumstances of the present case, his

(1) (1878) 48 L. J. Q. B. 167, 168. (2) (1928) 32 C. W. N. 935.

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antecedent inaction or negligence should at all be taken into account. The appellant has a right to say that he put the papers of his case in the hands of his advocate within the period of limitation and his appeal would have been in time but for the slip made by the advocate, and that he is, therefore, bound to explain only the delay of one day by which the appeal was out of time. The law allows him 90 days to file the appeal and if he files it on the 91st day he has only to explain how the delay of one day should be accounted for. There may be a hundred reasons for his not stirring before the 23rd of December for taking steps to file the appeal. It may be due to other pressing pre-occupations, it may be due to his not being able to find funds for prosecuting the appeal, it may be due to his hesitation till the last moment about the advisability of filing the appeal, it may be due to other adventitious circumstances over which he may have no control. The fact remains that notwithstanding all inaction or negligence the appellant did put the papers in the hands of his advocate in time and he would have filed his appeal in time but for the mistake made by his learned advocate. I do not mean to say that the conduct of the appellant in waiting so long before applying for the copies is commendable, but I am constrained to arrive at the conclusion that the delay of one day is not due to any fault on the appellant's part. I would therefore make the Rule absolute and admit the appeal and direct that it be registered, but this only on terms that the petitioner pay to the opposite party the costs of this Rule including the hearing-fee which I would assess at 1 gold mohur.

GRAHAM AND MITTER JJ. As we differ in our opinion, the case will now be laid before the Chief Justice, in order that it may be sent to a third Judge, in accordance with the provisions of clause 36 of the Letters Patent,—the point upon which we differ being as to whether the appellant in this case has been able to show that he had sufficient cause for not preferring his appeal within time.

Owing to this difference of opinion the matter was referred to a third Judge and was heard by Suhrawardy J.

Bijaykumar Bhattacharya for the petitioner.

Karunamay Ghosh for the opposite party.

SUHRAWARDY J. There being difference of opinion between my learned brothers Mr. Justice Graham and Mr. Justice Mitter, this matter has been referred to me as the third Judge. The question arising in this case is a very simple one, which is whether, on the facts of this particular case, sufficient cause has been shown by the petitioner for extension of time under section 5 of the Limitation Act for the admission of the appeal. The facts are fully set out in the judgments of my learned brothers. The only relevant dates are the following: The decree of the lower appellate court was passed on the 26th September, 1929, and drawn up on the 28th September. On the 23rd December, 1929, the petitioner applied for copies of judgment and decree of the appellate court. The copies were ready by the 4th January, 1930, and were taken delivery of by the petitioner's pleader's clerk on the 6th January. The petitioner received them on the 8th January and sent the papers through an agent for filing an appeal to Mr. Bhattacharya, an advocate of standing of this Court. The agent reached Calcutta on the 9th January and saw Mr. Bhattacharya, at about 9-30 a.m. and handed over the papers to him. Mr. Bhattacharya being busy with more pressing work was unable to examine the papers then and there. On his return from Court he looked into the papers and discovered that the last date for filing the appeal was the 9th of January, 1930. The appeal was actually presented on the next day with an application for extension of time and the present Rule was issued on that application. There is no dispute about the facts. The only question is whether the petitioner has been able to show "sufficient cause" within the meaning of section 5 of the Limitation Act. I have had the advantage of reading the differing

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judgments of my learned brothers which present both sides of the case so fully that no further argument is necessary for deciding the point. It seems to me that the real point on which the two learned Judges have differed is whether the petitioner is required to satisfy the Court that he was unable to present his appeal in time on account of some misadventure or accident on the last date on which it ought to have been presented or whether he should satisfy the Court that he was unable to present the appeal during the entire period prescribed by law. I have given my earnest consideration to this question, as there are no authorities to guide me in this matter. It seems to me that the language of section 5, as it stands, is capable of only one construction, namely, that the right to present an appeal extends up to the very last day and if on account of some sufficient cause it could not be presented on that day and if the court is satisfied with the existence of such a cause, the period may be extended. The words of section 5 are: "When "the appellant or applicant satisfies the court that "he had sufficient cause for not preferring the appeal "or making the application within such period." The question is what is the meaning of the words "within such period." To my mind it means within the period which ends with the last day of the prescribed period, that is to say, before the expiration of the last day for limitation. If the legislature intended that the defaulting party should satisfy the court that he was unable for valid reasons to present the appeal, during the whole of the 90 days, one would expect it to have used the words "during such "period" instead of "within such period" or some other apposite expression. Under section 3 of the Limitation Act, every appeal preferred after the period of limitation prescribed therefor shall be dismissed. The point of time to which one should look at to see if the appeal has been preferred in time is the last day on which it should have been presented. The Limitation Act provides the starting period of limitation and its terminus: If any action is taken between this period,

it will be considered as within time. If it is not taken on or before the last date of the period of limitation prescribed in the first schedule to the Limitation Act, the right lapses. In my judgment, one cannot insist that a party must file his appeal before the last date for filing it. There must be some reason for the legislature to have fixed various periods of limitation for various reliefs sought from court and these periods have been fixed with a view to make it convenient for the aggrieved party to seek redress from court. I am, accordingly, of opinion that if the petitioner satisfies the court that he was prevented from filing the appeal on the last date, that is the 9th of January, 1930, the indulgence prayed for may be granted.

I now come to the next question as to whether the petitioner has been able to show sufficient cause for presenting the appeal one day too late. It may be said that there was some negligence or want of proper attention on the part of Mr. Bhattacharya. As soon as the papers were handed over to him he should have looked into them to find out what was the last date for filing the appeal. But, at the same time, it was possible that it did not strike him that the appellant had come on the very last day for filing an appeal. I do not think that any serious charge can be laid at the door of Mr. Bhattacharya for not looking into the matter as soon as the papers were brought to him. On the facts of this case, I am inclined to hold that it was due to a pure accident that this appeal could not be presented in time and was only one day too late. The client had done all that the law required him to do. He obtained copies in time and placed them before the advocate. The question as to the delay in his applying for copies of judgment and decree does not pertinently arise, because he had come with the papers to his advocate within the period of limitation. It so happened that on the day he saw his advocate the latter was so pressed for time that he could not attend to the matter. I have carefully considered the facts and circumstances of the case and, in my judgment, the petitioner has been able to make out a

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case for the exercise of our powers under section 5 of the Limitation Act. I, accordingly, agree with my learned brother Mitter J., for the reasons given by him and make the Rule absolute and direct that the appeal be registered. The petitioner will pay to the opposite party one gold mohur as ordered by Mr. Justice Mitter as costs of the hearing before the Division Bench and one gold mohur as costs of the hearing before me. I direct that the payment of costs to the learned advocate for the opposite party be made a condition precedent to the hearing of the appeal under Order XLI, rule 11.

N. G.