CIVIL RULE.

Before Mukerji and Mitter JJ.

RAJENDRANATH KANRAR

v.

KAMALKRISHNA KUNDU CHAUDHURI.*

1931

Dec. 7, 14, 18.

Limitation—Extension of time—Sufficient cause—Proceedings elsewhere—Practice—Appeal in apportionment case—Indian Limitation Act (IX of 1908), ss. 5, 14 (2).

The decision in *Ardha Chandra Rai Chowdhry* v. *Matangini Dassi* (1) lays down that when an appellant elects to take proceedings for setting aside an *ex parte* decree and fails on the merits in an application which he makes for that purpose, he cannot be allowed to fall back upon the remedy, which was open to him at the time when the original decree was passed and of which he did not choose to avail himself and that recourse to proceedings taken as aforesaid was not a sufficient cause within the meaning of section 5 of the Limitation Act for not presenting the appeal within time.

This proposition has not been dissented from in the Calcutta High Court in any later case and there is no authority to be found in the decisions of any other court, which is to a contrary effect.

The decision of the Judicial Committee in *Brij Indar Singh* v. *Kanshi Ram* (2) [wherein their Lordships relied on the decision in *Karm Bakhsh* v. *Daulat Ram* (3)] can never be treated as supporting such a broad proposition or laying down as a principle of universal application that the time taken in prosecuting proceedings in the nature of a review of judgment for the purpose of setting aside an *ex parte* decree should ordinarily be excluded from the period allowable for preferring an apeal from the said decree.

So far as applications for review are concerned, the decision in *In re Brojender Coomar Roy Chowdry* (4) is conclusive of the contention that at one time used to be put forward, *viz.*, that the period taken up for prosecuting the review should not be deducted in computing the period for preferring an appeal.

But this principle should not be extended to applications, which are not applications for review.

If the question of practice is to be considered, it may be said that there is no decision, in which a practice contrary to what has been laid down in *Ardha Chandra's* case (1) has been suggested.

* Civil Rules, Nos. 1117F and 1118F of 1931.

(1) (1895) I. L. R. 23 Calc. 325.
(2) (1917) I. L. R. 45 Calc. 94; L. R. 44 I. A. 218.
(3) [1888] P. R. No. 183.
(4) (1867) 7 W. R. 529; B. L. R. Sup. Vol, 728.

1931

Rajendranath Kanrar v. *Kamalkrishna Kundu Chaudhuri.*

An appeal is not maintainable against the order of the District Judge in an apportionment case refusing to set aside his *ex parte* award under Order IX, rule 13 of the Code of Civil Procedure.

Hasun Molla v. *Tasiruddin* (1) and *Banshidhur Marwari* v. *Secretary of State for India* (2) followed.

CIVIL RULES obtained by the tenant, claimant.

The facts of the cases appear fully in the judgment.

Apoorbadhan Mukherji for the petitioner.

Rupendrakumar Mitra for the opposite party.

Cur. adv. vult.

MUKERJI AND MITTER JJ. These Rules have been issued to show cause why the appeals, which the petitioner has presented to this Court, should not be registered, time for preferring the same being extended under section 5 of the Indian Limitation Act.

The facts in the two cases are similar. The petitioner was a party to two awards made by the Land Acquisition Collector and had been given a portion of the compensation money on account of his interest as tenant's share in the acquired properties. The opposite party was awarded the balance amount of the awards. The total amount of the compensation was thus divided between the petitioner and the opposite party in the proportion of one-third and two-thirds. The opposite party, thereupon, applied for references under section 18 of the Land Acquisition Act. To this the petitioner objected, alleging that the apportionment as made by the Collector was correct. The references were made and two apportionment cases were started in the court of the District Judge. There were several adjournments taken on behalf of one party or the other and ultimately, on the 12th February, 1931, for which date the cases had been finally fixed, the petitioner was absent and the District

(1) (1911) I. L. R. 39 Calc. 393. (2) (1926) I. L. R. 54 Calc. 312.

Judge made two awards in the two cases in favour of the opposite party. Decrees were drawn up in accordance with the awards and signed on the 6th March, 1931. To set aside the awards made *ex parte* as aforesaid, the petitioner applied under the provisions of Order IX, rule 13 of the Code of Civil Procedure. The applications, being heard on the merits, were eventually dismissed by the District Judge on the 30th June, 1931. Thereafter, on the 21st August, 1931, the petitioner presented the memoranda of appeals, in connection with which the present applications have been made by him, as appeals to be filed against the awards, which had been made *ex parte* as aforesaid. The contention of the petitioner is that the time taken for the disposal of the applications under Order IX, rule 13 of the Code should be deducted and that it should be held that the appeals, which he desires to prefer, have been filed within time. The question as to whether in circumstances such as those disclosed in the present case the appellant should be entitled to extension of time under section 5 of the Limitation Act was considered by this Court in a decision, which exactly covers the present case. That decision is in the case of *Ardha Chandra Rai Chowdhry* v. *Matangini Dassi* (1). The learned Judges, Sir Comer Petheram C. J. and Beverley J., held that, when an appellant elects to take proceedings for setting aside an *ex parte* decree and fails on the merits in an application which he makes for that purpose, he cannot be allowed to fall back upon the remedy, which was open to him at the time when the original decree was passed, and of which he did not choose to avail himself and that recourse to proceedings taken as aforesaid was not a sufficient cause within the meaning of section 5 of the Limitation Act for not presenting the appeal within time. It is conceded that this proposition has not been dissented from in this Court in any later case and it is conceded further that there is no authority to be found in the decisions of any

(1) (1895) I. L. R. 23 Calc. 325.

1931

Rajendranath Kanrar v. *Kamalkrishna Kundu Chaudhuri.*

other Court which is to a contrary effect. What, however, has been urged before us on behalf of the appellant is that the authority of this decision must be taken to have been very much shaken by the decision of the Judicial Committee in the case of *Brij Indar Singh* v. *Kanshi Ram* (1). The question for our consideration, therefore, relates to the true meaning of the decision of the Judicial Committee, upon which the petitioner has relied.

This decision has been sought to be applied to the present case from two points of view. The Judicial Committee purported to uphold the view, which was expressed by the Allahabad High Court in a Full Bench decision in the case of *Brij Mohan Das* v. *Mannu Bibi* (2), in which it was laid down that circumstances contemplated in section 14 of the Limitation Act would ordinarily constitute a sufficient cause within the meaning of section 5 of that Act. By this Full Bench decision the learned Judges of the Allahabad High Court practically overruled the broad proposition, which had been laid down by an earlier decision of that Court, *viz.*, in the case of *Ramjiwan Mal* v. *Chand Mal* (3), in which it was held that a mistake in law can never be a foundation for an application for the indulgence contemplated by section 5. To decide whether the circumstances in the present case can, in any way, be regarded as those contemplated by section 14 of the Act in order to entitle the appellant to claim the benefit of section 5 of the Act, it is necessary to consider what really those circumstances are. The decision in the case of *Ardha Chandra Rai Chowdhry* v. *Matangini Dassi* (4) itself affords an answer so far as the petitioner's contention in this respect is concerned. In that case the learned Judges pointed out that, if an application for setting aside an *ex parte* decree is refused on the merits, it is very different from a case where the application fails for want of jurisdiction or other

(1) (1917) I. L. R. 45 Calc. 94; L. R. 44 I. A. 218.
(2) (1897) I. L. R. 19 All. 348.
(3) (1888) I. L. R. 10 All. 587.
(4) (1895) I. L. R. 23 Calc. 325.

causes of a like nature. It should be remembered that the words in section 14 are these: "In computing the period of limitation "prescribed for any application, the time "during which the applicant has been prosecuting "with due diligence another civil proceeding, whether "in a court of first instance or in a court of appeal, "against the same party for the same relief shall be "excluded, where such proceeding is prosecuted in good "faith in a court which, from defect of jurisdiction "or other cause of a like nature, is unable to entertain "it." It is clear that, if the application fails on the merits, it does not fail in the way contemplated by section 14. So far as this part of the petitioner's contention is concerned, it is quite clear, therefore, that it cannot be regarded as well-founded. The other point of view, from which the petitioner contends that the decision in *Brij Indar Singh* v. *Kanshi Ram* (1), should be applied to this case is this. It is said that in this decision it has been laid down as a principle of universal application that the time taken in prosecuting proceedings in the nature of a review of judgment for the purpose of setting aside an *ex parte* decree should ordinarily be excluded from the period allowable for preferring an appeal from the said decree. We have read this decision with care, but we are unable to say that it can ever be treated as supporting such a broad proposition as has been contended for on behalf of the petitioner. Their Lordships relied upon a general principle, which had been laid down by the Punjab Chief Court in the case of *Karm Bakhsh* v. *Daulat Ram* (2), which was in these words: "All that the section" (section 5) "requires in express terms, as a condition for the "exercise of the discretionary power of admission of "an appeal presented after time is 'sufficient cause " 'for not presenting the appeal within the prescribed

(1) (1917) I. L. R. 45 Calc. 94; L. R. 44 I. A. 218.

(2) [1888] P. R. No. 183.

1931

Rajendranath Kanrar v. *Kamalkrishna Kundu Chaudhuri.*

" 'period.' If such cause is shown the court may in its "discretion, which is of course a judicial and not an "arbitrary discretion, admit the appeal. We think "the true guide for a court in the exercise of this "discretion is whether the appellant has acted with "reasonable diligence in presenting his appeal, and we "think, further, that he ought ordinarily to be deemed "to have acted with ordinary diligence, when the "whole period between the date of the decree appealed "against, and the date of presenting the appeal, does "not, after excluding the time spent in prosecuting "with due diligence a proper application for review "of judgment, exceed the period prescribed by law for "presenting the appeal." Having referred to this proposition of law, enunciated in the Full Bench decision referred to above, their Lordships proceeded to consider the practice, which had obtained in the other Courts in this country. Their Lordships then said that the general rule as to the exercise of discretion, laid down by the Punjab High Court in the case referred to above, is not merely a general rule which obtained in that Court but that it had been recognised in a Full Bench decision of the Calcutta High Court in the case of *In re Brojender Coomar Roy Chowdry* (1). Their Lordships quoted a passage from the judgment in the last mentioned Full Bench case, which runs in these words: "If a party presents "an application for review of judgment within the "ordinary period limited for appealing, the time "occupied by the court in disposing of such application "will not be reckoned among the days limited for "appealing, but will be added thereto, and a "memorandum of appeal presented within such "extended period will be received as presented within "time." Their Lordships further referred to what was said by Sir Barnes Peacock C. J. in the aforesaid Full Bench case (1), *viz.*, that this practice was in conformity with what had been laid down by fourteen Judges of this Court so far back as 1865 and

(1) (1867) 7 W. R. 529; B. L. R. Sup. Vol. 728.

that this pratice was upheld in Madras since 1860 and was also the practice followed in Bombay and Allahabad. Their Lordships, therefore, found that to lay down a contrary view would be to interfere with a practice, which after all was a rule of procedure and had been laid down by Full Benches in all the Courts of India and had been acted on for many years and that to interfere therewith would be to cause great inconvenience; and for that reason their Lordships did not propose to interfere with it. We are of opinion that so far as applications for review are concerned, this decision is conclusive of the contention that at one time used to be put forward, *viz.*, that the period taken up for prosecuting the review should not be deducted in computing the period for preferring an appeal. But there is no reason whatsoever for extending the rule, which their Lordships approved of for holding by analogy that this principle should be extended to applications, which are not applications for review. Indeed, if the question of practice is to be considered it may be said, as we have already said, that there is no decision, in which the practice contrary to what has been laid down in the case of *Ardha Chandra Rai Chowdhry* v. *Matangini Dassi* (1) has been suggested. It has then been contended that there is a distinction between the case of *Ardha Chandra Rai Chowdhry* v. *Matangini Dassi* (1) and the present case. The distinction suggested is that, in that case, the appellant had taken an appeal to this Court from the order of the court below rejecting his application to set aside the *ex parte* decree but that in the present case the appellant has remained satisfied with the order, which the court below made against him, and has not preferred an appeal against that order. This distinction in our opinion can only inure, if at all, to the prejudice of the appellant and not in his favour; and for this reason, *viz.*, that in *Ardha Chandra's* case (1) above referred to, from the

(1) (1895) I. L. R. 23 Calc. 325.

1931

Rajendranath Kanrar v. *Kamalkrishna Kundu Chaudhuri.*

fact that an appeal was preferred by the appellant against the order refusing to set side the *ex parte* decree it may be inferred that he had greater faith in the justice of his cause, whereas the appellant in the present case was satisfied with the order which was made on the merits of his application. For these reasons, we are of opinion that it is not possible to hold in the present case that the appellant has been able to make out a sufficient cause within the meaning of section 5 of the Limitation Act.

Lastly, it has been argued on behalf of the petitioner that he should be allowed now to convert the memoranda of appeals, which he has filed in this Court, into memoranda of appeals as from the order, which the court below has made refusing to set aside the *ex parte* award. Such an appeal in our opinion is not maintainable in view of the decisions of this Court in the cases of *Hasun Molla* v. *Tasiruddin* (1) and *Banshidhur Marwari* v. *Secretary of State for India* (2). Our attention has been drawn to an earlier decision of this Court in the case of *Behary Lal Sur* v. *Nanda Lal Goswami* (3), in which, it is urged, a contrary view was taken. Even though the facts of that case may not be distinguishable from those of the other two decisions, to which we have referred above, we are not prepared to say that that decision is entitled to so much weight as the two decisions aforesaid because the question, which was decided in the said two decisions, does not appear to have been raised or decided in that case.

The result is that, in our opinion, the Rules should be discharged and we order accordingly. We make no order as to costs.

Let the papers be sent to the Registrar to make the usual order in connection with court-fees on the memoranda of appeals.

Rules discharged.

G. S.

(1) (1911) I. L. R. 39 Calc. 393. (2) (1926) I. L. R. 54 Calc. 312.
(3) (1907) 11 C. W. N. 430.