CIVIL RULE.

Before Mukerji and Mitter JJ.

1931

Dec. 7.

NANDALAL GANGULI

v.

DASARATHI MUKHERJI.*

Limitation—"Sufficient cause"—Amendment of decree—Amendment as to costs—Indian Limitation Act (IX of 1908), s. 5.

Even in a case in which the amendment has no relation to the grounds upon which the validity of the decree is sought to be challenged in appeal, circumstances may appear which may justly bring the case within the meaning of the expression "sufficient cause," which appears in section 5 of the Limitation Act.

Brojo Lal Rai Chowdhury v. *Tara Prasanna Bhattacharji* (1) dissented from in so far as it suggests the contrary.

Gajadhar Singh v. *Basant Lal* (2) not followed.

Upendra Chandra Singh v. *Umesh Chandra Ghosh* (3) distinguished.

Even where the application for amendment of the decree relates only to a certain item of costs, the appellant is not precluded from saying that it was on account of the filing and pendency of that application that he thought he was entitled to wait until it was disposed of before he could be called upon to prefer his appeal, provided the circumstances do not appear to suggest that he was either negligent or was guilty of any such conduct as would debar him from asking the court to exercise in his favour the discretion which it has under the provisions of section 5 of the Limitation Act.

In considering whether "sufficient cause" has been made out or not within the meaning of that section, the question of *bona fides* has to be taken into account.

CIVIL RULE obtained by the objector in a probate case.

The facts of the case appear fully in the judgment.

Nalineekumar Mukherji for the petitioner.

Brajalal Chakrabarti, Pyarimohan Chatterji and *Dasarathi Chatterji* for the opposite party.

*Civil Rule, No. 1188F of 1931, in Appeal from Original Decree, No. 3 of 1932, against a decision of W. C. Ghosh, Subordinate Judge at Alipore, dated Sept. 19, 1930.

(1) (1905) 3 C. L. J. 188. (2) (1920) I. L. R. 43 All. 380.
(3) [1928] A. I. R. (Pat.) 265.

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MUKERJI J. This Rule has been issued to show cause why an appeal, which the petitioner has filed in this Court, should not be registered, though filed out of time, by availing of the provisions of section 5 of the Indian Limitation Act. The facts necessary to be stated are the following:—The petitioner's father was the objector in a case, in which probate of a will had been applied for by the opposite party. On the 19th September, 1930, the application for probate was allowed with costs by the Subordinate Judge, second court, at Alipore. A decree, in accordance with the aforesaid decision, was drawn up on the 22nd November, 1930. On the 16th December, 1930, the opposite party applied for an amendment of the decree. It appears from the papers, which the opposite party has now produced before us, that this application for amendment related only to the question of a certain item of costs, which had been omitted from the schedule of costs appended to the decree. The application for amendment was opposed by the petitioner's father and was adjourned from time to time, till, at last, the petitioner's father died on the 26th March, 1931. The opposite party then applied for substituting the petitioner and some other persons in place of the petitioner's father and, upon that, an order was made, allowing such substitution. Eventually, on the 14th August, 1931, the application which the opposite party had made for amendment of the decree was rejected. The present appeal was presented by the petitioner in this Court on the 1st September, 1931, and along with the memorandum of appeal and its connected papers was filed the petition on which the present Rule was issued. The question in this case is whether the petitioner has been able to establish facts, which would bring his case within the words "sufficient cause" appearing in section 5 of the Indian Limitation Act.

On behalf of the opposite party it has been contended that the application for amendment related only to a particular item of costs, which had been

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omitted from the decree that was prepared in accordance with the decision of the court below and that it had nothing whatsoever to do with the merits of the case and that, therefore, there was no reason at all as to why the petitioner's father, or, for the matter of that, after the petitioner's father's death, the petitioner himself should have waited and not preferred the appeal which he now seeks to have registered. Reliance in this behalf is placed specially upon a decision of this Court in the case of *Brojo Lal Rai Chowdhury* v. *Tara Prasanna Bhattacharji* (1). In that case Mr. Justice Mookerjee laid down a proposition, explaining the provisions of section 5 of the Indian Limitation Act in so far as they would apply to a case of this nature and illustrating that proposition by two sub-propositions, which I shall presently quote. He said:—"Every amendment made "in a decree under section 206, Civil Procedure Code, "does not necessarily entitle a party who prefers an "appeal against the decree to claim an extension of "time under the second paragraph of section 5 of the "Limitation Act; whether there is sufficient cause for "such extension must depend upon the circumstances of "each individual case." To the proposition thus laid down no objection can possibly be taken, and indeed, if I may say so, I would, with the utmost respect, agree with what the learned judge has meant to say by this proposition. As regards the sub-propositions, one of them is in these words: "If the "grounds on which the appeal is based are intimately "connected with the amendment of the decree or if "the grounds are directed against the decree only in "so far as it has been amended," the court should "exercise in his" (that is to say, the applicant's) "favour the discretion vested in it by paragraph 2 of "section 5 of the Limitation Act." This also is a proposition which is absolutely correct. The other proposition, however, has been laid down in these words: "If the amendment has no relation to

(1) (1905) 3 C. L. J. 188, 192.

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"the grounds upon which the validity of the decree "is sought to be challenged in appeal," such appeal should not be admitted out of time. With this proposition, I am afraid, I cannot agree, because it means to circumscribe and limit the discretion which section 5 of the Limitation Act confers upon a court by the terms in which that section is expressed. In my opinion, even in a case in which the amendment has no relation to the grounds upon which the validity of the decree is sought to be challenged in appeal, circumstances may appear which may justly bring the case within the meaning of the expression "sufficient "cause," which appears in that section. In addition to the case cited above, two other cases have also been referred to on behalf of the opposite party. One of them is the case of *Gajadhar Singh* v. *Basant Lal* (1). In that case the case of *Brojo Lal Rai Chowdhury* v. *Tara Prasanna Bhattacharji* (2) was followed and, it being found that the appeal which was sought to be preferred did not attack the amended decree or raise any question in connection with it, the learned judges held that the appellant could not call in his aid the provisions of section 5 of the Limitation Act. The other case referred to on behalf of the opposite party is the case of *Upendra Chandra Singh* v. *Umesh Chandra Ghosh* (3). It is not necessary to examine the decision in that case, because the facts there were entirely different, the appellant himself having made an infructuous application for amendment of a decree and waited till that application was disposed of before he filed the appeal. I am of opinion that, even though the application for amendment of the decree in the present case related only to a certain item of costs, the petitioner is not precluded from saying that it was on account of the filing and pendency of that application that he thought that he was entitled to wait until it was disposed of before he could be called upon to prefer his appeal. The circumstances do not appear to me to suggest that the petitioner was either

(1) (1920) I. L. R. 43 All. 380. (2) (1905) 3 C. L. J. 188.
(3) [1928] A. I. R. (Pat.) 265.

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negligent or was guilty of any such conduct as would debar him from asking the court to exercise in his favour the discretion, which it has under the provisions of section 5 of the Limitation Act. In considering whether "sufficient cause" has been made out or not within the meaning of that section, the question of *bona fides* has got to be taken into account and I am unable to find that the petitioner's conduct, in not preferring the appeal earlier than he has done, was actuated by anything else than a *bona fide* belief that he was entitled to wait. In this view of the matter, I am of opinion that the present Rule should be made absolute.

It is quite true that by not having preferred the appeal within time and waiting for the disposal of the application for amendment, the petitioner or his father has put the opposite party to some amount of difficulty and harassment. Because of that I would, while making the Rule absolute and directing that the appeal be now registered, further make an order that the petitioner should pay to the opposite party by the 4th January, 1932, the costs of this Rule—hearing fee being assessed at three gold mohurs. The payment of such costs will be a condition precedent to the registration of the appeal. If the condition is not complied with, it goes without saying that the Rule will stand discharged and the appeal will be rejected.

MITTER J. I agree.

Rule absolute.

G. S.