PRIVY COUNCIL.*

1917, October, 16, 17 and 18 and November, 8.

KRISHNASAMI PANIKONDAR (DEFENDANT No. 1)

v.

RAMASAMI CHETTIAR (PLAINTIFF).

[On appeal from the High Court of Judicature at Madras.]

Limitation—Admission of appeal after period of limitation has expired without notice to respondent—Power of Court to grant reconsideration of order admitting it at instance of respondent—Practice of Courts in India—Suggestion by Privy Council that such practice should be altered by the Indian Courts with the view of securing final determination of any question of limitation at time of admission of appeal—Limitation Act (IX of 1908), ss. 4 and 5.

The admission of an appeal after the period of limitation has expired deprives the respondent of a valuable right by putting in peril the finality of the order in his favour. When an order admitting an appeal has been made in the absence of the respondent, and without notice to him, to preclude him from questioning its propriety would amount to a denial of justice. Such an order, so made, should therefore be treated as open to reconsideration at the instance of the respondent. This view is sanctioned by the practice of the Courts in India.

Held also that the Court was not exceeding its jurisdiction in permitting the question of limitation to be re-opened when the appeal came before it for hearing, and under the circumstances it had power to reconsider the sufficiency of the cause shown for the delay. That practice was not peculiar to Madras, but prevailed in other Courts in India.

Such a practice, however, was in their Lordships' opinion open to grave objection, and it was urgently expedient that in place of such a practice a procedure should be adopted by Courts in India which would secure, at the stage of the admission of an appeal, the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal.

APPEAL No. 119 of 1915 from an order (4th November, 1908) of the High Court at Madras, which dismissed an appeal presented by the appellant against a decree (8th February, 1905) of the Subordinate Judge of Tanjore in Original Suit No. 52 of 1904.

The suit, which was brought to recover possession of a zamindari, was decided by the Subordinate Judge in favour of the plaintiff, the present respondent; and the first defendant, now the appellant, was desirous of appealing from that decree.

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* *Present:*—Lord PARKER OF WADDINGTON, Lord WRENBURY, Sir JOHN EDGE, Mr. AMEER ALI and Sir LAWRENCE JENKINS.

His account of the matter was that his agent understood that the time for appealing had expired during the vacation of the Madras High Court, and that it was necessary therefore that the appeal should be presented on the day the High Court re-opened. The ninety days allowed by the Limitation Act, 1877, for such an appeal expired on 9th July 1905, but that being a Sunday, the appeal would have been in time if presented on 10th July, and it was arranged that the presentation of the appeal should be made on the 10th. The agent arrived at Madras on Sunday 9th and learnt that the office of the High Court had been open on Saturday 8th for the reception of appeals, and that his memorandum of appeal would be rejected unless an affidavit explaining the delay were presented with it. On hearing of this the present appellant came at once to Madras on the 11th July, and the memorandum of appeal was presented by his counsel on 12th together with affidavits of the appellant and his agent with an explanation of the delay. On 31st July the matter came, according to the rules of the High Court, for disposal by the Judge (SANKARAN NAIR, J.) sitting for that purpose. His order was, "Delay excused in the circumstances, and the appeal admitted." Thereupon the preparation of the appeal and the printing of the record were begun.

Counter-affidavits were lodged by the respondent on 22nd November 1905 which were to the effect that the appellant and his agent were both seen in Madras on 10th July, 1905 and that the affidavits of the appellant were consequently untrue.

In August 1908 when the appeal was ready for hearing the appellant received notice of an application to be made by the respondent for the dismissal of the appeal as having been presented too late. That application was made on 7th October, 1908, before a Division Bench of the High Court (MUNRO and ABDUR RAHIM, JJ.). It was supported by various affidavits, and the Court was asked to set aside the ex parte order of SANKARAN NAIR, J., and dismiss the appeal as barred by limitation. On 4th November, 1908, the Court held that the affidavits of the appellant and his agent were untrue, and even if they were true they did not amount to 'sufficient cause' within the meaning of section 5 of the Limitation Act, so as to justify them in admitting the appeal after the prescribed period of limitation had expired. "The delay", they said, "should not have been excused".

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The appellant subsequently made an application for a review of the above decision, but it was dismissed on 31st March, 1909. His ground (*inter alia*) was that the appeal having been once admitted, the Division Bench 'had no jurisdiction to consider the propriety of that admission, and to dismiss the appeal as time-barred.'

The High Court refused an application by his daughter and representative, who, on the death of her father, had been put on the record in his place, for a certificate for leave to appeal to His Majesty in Council, but she subsequently, on 7th March, 1913, obtained an order in council granting her special leave to appeal.

On this appeal—

Sir *H. Erle Richards*, K.C. and *Kenworthy Brown* for the appellant contended that the long delay (31st July, 1905, to 28th September, 1908) made by the respondent after he received notice of the admission of the appeal was sufficient to bar his application to set aside the order admitting it, and it should have been dismissed as out of time. The power to set aside such an order is derived from the provisions of the Civil Procedure Code: there is no inherent power in the Court; and a mere practice cannot create such a power. Under rules of the Madras High Court which came into force in January, 1905, the Judges (even a single Judge) can hear and determine an application out of time; it was under those rules that the order for the admission of the appeal was made. The practice of the Madras High Court since *Venkatrayudu* v. *Nagadu*(1) has been against my present contention. The Judges who heard it, it is submitted, had no power to set aside the order of SANKARAN NAIR, J., which was a determination of the question in issue: at any rate they should not have permitted the question of limitation to be re-opened at so late a stage as the hearing of the appeal. The proper, if not the only, remedy against the order was an application for a review under section 623 of the Civil Procedure Code, 1882, but that had to be made within a certain time. The application for review should have come before the same Court which allowed the admission of the appeal. In *Bharat Chunder Roy* v. *Issur Chunder Sircar*(2) it was held by the Calcutta High Court that after an appeal had been admitted

(1) (1886) I.L.R., 9 Mad., 450. (2) (1867) 8 W.R., 141.

and notice given to the respondent the appellate Court before which it came had no power to reject the appeal at the hearing. That was a decision of Sir BARNES PEACOCK, and is relied on as governing the present case. Reference was made also to *Jhotee Sahoo* v. *Omesh Chunder Sircar*(1), *Dubey Sahai* v. *Ganeshi Lal*(2) and *Vismadev Das* v. *Sitanath Roy*(3).

On counsel proceeding to go into the merits of the case [*De Gruyther*, K.C., referring to *Corporation of St. John* v. *Central Vermont Railway Co.*(4) objected that no ground could be taken now other than that already argued which had alone been urged in applying for special leave to appeal, but he did not press the objection].

SANKARAN NAIR, J., might have qualified his order by the words 'subject to objection at the hearing,' but there is still an order which he had jurisdiction to make, and which under the circumstances should stand.

De Gruyther, K.C. and *C. O'Gorman* for the respondents were not called upon.

The judgment of their Lordships was delivered by

Sir LAWRENCE JENKINS.—On the 4th November, 1908, the High Court of Madras dismissed an appeal from an original decree on the ground that it was barred by limitation. From this order of dismissal the present appeal has been preferred, and in its support it has been contended, first, that the order was without jurisdiction and, secondly, that it was erroneous on the merits.

The original decree was passed on the 8th February, 1905, in the Court of the Additional Subordinate Judge at Tanjore in the plaintiff's favour.

Against it the first defendant, Krishnasami Panikondar, preferred an appeal to the Madras High Court. The last day for its presentation was the 10th July, when the Court re-opened after vacation; but it was not presented until the 12th July 1905.

It was then returned to the appellant as out of time. It thus became necessary for the appellant to satisfy the Court that he had sufficient cause for not presenting his appeal within the prescribed period.

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(1) (1879) I.L.R., 5 Calc., 1.
(2) (1878) I.L.R., 1 All., 35.
(3) (1912) I.L.R., 40 Calc., 259.
(4) (1889) L.R., 14 A.C., 590.

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He accordingly again presented his appeal on the 26th July, supported this time by affidavits purporting to explain the delay. The application for admission came before SANKARAN NAIR, J., sitting as a single Judge, and on the 31st July he made an order in these terms: "Delay excused in the circumstances and appeal admitted."

When notice of this appeal was served on the respondents does not appear, but in the following November affidavits were filed controverting the material allegations in those on which delay had been excused. Further affidavits were subsequently filed on both sides.

The appeal thus admitted came on for hearing before a Division Bench of the Court on the 7th October, 1908, and at the outset it was objected that the appeal was out of time, and so not competent. The Court, after an examination of the several affidavits, accepted this view and dismissed the appeal as provided by section 4 of the Indian Limitation Act. A subsequent application for review failed.

It has been argued that the admission of the appeal by SANKARAN NAIR, J., was final, and that the Division Bench had no jurisdiction at the hearing of the appeal to reconsider the question whether the delay was excusable. But this order of admission was made not only in the absence of Ramasami Chettiar, the contesting respondent, but without notice to him. And yet in terms it purported to deprive him of a valuable right, for it put in peril the finality of the decision in his favour, so that to preclude him from questioning its propriety would amount to a denial of justice. It must, therefore, in common fairness be egarded as a tacit term of an order like the present that though unqualified in expression it should be open to reconsideration at the instance of the party prejudicially affected; and this view is sanctioned by the practice of the Courts in India.

But there remains the contention that, at any rate, the Court exceeded its jurisdiction in permitting the question of limitation to be reopened at so late a stage as the hearing of the appeal. This objection, however, has all the appearance of an afterthought. It was not urged at the hearing, though the appellant was represented by so experienced an advocate as Sir Bashyam Ayyangar; nor was it even mentioned in the original review

petition. It was no doubt advanced at a later stage as an additional ground for review, but it met with no success, for the High Court held that the procedure adopted in this case was in accordance with the usual practice of the Court. The authorities, moreover, show that this practice is not peculiar to Madras, and in the circumstances their Lordships hold that the Division Bench had jurisdiction to reconsider the sufficiency of the cause shown, and to do this at the hearing of the appeal.

But while this procedure may have the sanction of usage, it is manifestly open to grave objection. It may, as in this case, lead to a needless expenditure of money and an unprofitable waste of time, and thus create elements of considerable embarrassment when the Court comes to decide on the question of delay. Their Lordships therefore desire to impress on the Courts in India the urgent expediency of adopting in place of this practice a procedure which will secure at the stage of admission, the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal.

On the merits little need be said. It is the duty of a litigant to know the last day on which he can present his appeal, and if through delay on his part it becomes necessary for him to ask the Court to exercise in his favour the power contained in section 5 of the Indian Limitation Act, the burden rests on him of adducing distinct proof of the sufficient cause on which he relies. It was with the claim of such a litigant that the Division Bench had to deal, and after a careful and critical examination and appreciation of the evidence, the learned Judges distrusted his explanation and held that sufficient cause had not been shown. The Court therefore declined to exercise in his favour the power to excuse delay. It has not been shown that in this the Court fell into any error, and their Lordships consequently decline to interfere with its decision. They will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant: *Douglas Grant.*

Solicitor for the respondent: *Chapman-Walkers* and *Shephard.*

J.V.W.