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BEFORE A FULL BENCH.

(Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.)

DUBEY SAHAI (PLAINTIFF) *v.* GANESHI LÁL (DEFENDANT.)*

Act IX. of 1871, *ss.* 4 *and* 5. *b.—Admission of Appeal after the period of Limitation—Single Judge and Division Court—Jurisdiction.*

Held that the order admitting an appeal after time, made *ex parte* by a single Judge of the High Court sitting to receive applications for the admission of appeals, under a rule of the Court made in pursuance of 24 and 25 Vic., c. 104, s. 13 and the Letters Patent of the Court, s. 27, was liable to be impugned and set aside at the hearing by the Division Court before which it was brought for hearing, on the ground that the reasons assigned for admitting it were erroneous or inadequate.

AN appeal was preferred to the High Court against a decree passed on the 8th of May, 1874. The application for a copy of the decree, with a view to filing the appeal, was made on the 15th of May, 1874. The copy was ready for delivery on the 30th of May, 1874, and was taken by the appellant's pleader on the 2nd of June, 1874. The period for presenting the appeal expired on the 22nd of August, 1874, that is to say, before the High Court rose for the vacation. It was presented on the 16th November, 1874, to Stuart, C. J., the Judge sitting out to receive applications for the admission of appeals, under a rule of the High Court made in pursuance of 24 and 25 Vic., cap. 104, s. 13, and s. 27 of the Letters Patent of the Court. That day was the first day of the opening of the Court after the vacation, and the appeal was 84 days beyond time. With it was presented a certificate in the following terms:—"I hereby certify that Dubey Sahai has been under my treatment since 9th of August last. He was suffering from internal hemorrhoids and unfit to work, but now he is relieved". This certificate was dated the 22nd of September, 1874, and on its face there was a note by the Civil Surgeon of Cawnpore that the writer of the certificate was an hospital assistant at one of the city branch dispensaries, and that it appeared to be correct. The appeal was admitted by Stuart, C. J., the order of the learned Chief Justice being as follows:—"Of the above 84 days, 60 are accounted

* Regular Appeal, No. 147 of 1874, against a decree of the Subordinate Judge of Cawnpore, dated the 8th May, 1874.

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for by the vacation, leaving 24 days beyond time. Having regard to the medical certificates, and after hearing Mr. Howard in support of the application, I admit the appeal."

An objection was taken by the respondent to the hearing of the appeal on the ground that it should not have been admitted, as it was beyond time, and no sufficient cause for not presenting it within the period prescribed by law was shown. With reference to this objection, the Division Bench (Pearson and Oldfield, JJ.) before which the appeal came on for hearing, referred the following question to the Full Bench, *viz* :—

"Whether the order of a single Judge admitting an appeal after time is liable to be impugned and set aside at the hearing of the appeal by the Bench before whom it is brought on for hearing, on the groun l that the reasons assigned for admitting it are erroneous or inadequate ?"

Mr. *Howard* and Munshi *Hanuman Parshád* for appellant.

The *Senior Government Pleader* (Lála *Juála Parshád*) and the *Junior Government Pleader* (Babu *Dwárka Náth Banarji*) for respondent.

The *Junior Government Pleader* contended that the order admitting the appeal was not final, having been made *ex parte*. The party most interested in the admission, *viz.*, the respondent, who imagined that the decree of the lower Court had become final, is entitled to show that the admission was improper, and that, notwithstanding admission and registration—*The Secretary of State for India in Council* v. *Mutu Sawmy* (1). The proviso in s. 5 of Act IX. of 1871 as to admission of appeals after time only relates to admission with a view to registration. When an application for a review of judgment which is beyond time has been admitted, the respondent is entitled to show that it is beyond time, and a review can be refused, on that ground. It is only equitable that the respondent should be allowed to point out at the hearing of an appeal that the Judge who admitted it was misled by the statements of the appellant. The learned pleader cited *Syed Jafer Hossein* v.

(1.) 4 B. L. R. Ap. 84.

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Sheikh Mahomed Amir (1) and *Mowri Bewa* v. *Surendra Náth Roy* (2).

Mr. *Howard*.—The order may be open to review—*Joy Koomar Dhutta Jhá* v. *Esharee Nund Dutta Jhá* (3)—but only by the Judge who made it. It would be highly inconvenient if one Court could review another Court's order touching a question of fact. Illustration (*b*) to s. 4 of Act IX. of 1871 is subject to s. 5. *b*. The appeal has been admitted and registered and cannot be rejected on the ground that it was preferred after time—*Bharutt Chundur Roy* v. *Issur Chundur Sircar* (4).

STUART, C. J.—The question submitted in this reference is, whether, as a preliminary objection taken in behalf of the respondent, the order of a single Judge admitting an appeal after time is liable to be impugned and set aside by the Bench before whom it is brought for hearing, and my answer is in the affirmative. But I confess I have not derived much assistance from Act IX. of 1871. The sections of that Act which bear on the subject are ss. 4 and 5 and appended to s. 4 are two illustrations, the latter of which (*b*) is in the following terms :—"An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed." This appears to meet the present case, showing clearly, as it does, that, in the opinion of the person who prepared it, such a preliminary objection as the present might be entertained. But it is a mere illustration and not binding as law, and I can find no direct authority for it in either of the sections referred to. No doubt under s. 5 (*b*) it is provided that "any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period," and the words "appellant" and "the Court" appear to support the illustration. So far as they go however, these quotations from the Limitation Act seem to me to favor the objection, or, in other words, the opinion that the order in the present

(1.) 4 B. L. R. Ap. 103.
(2.) 2 B. L. R. A. J—C. 184.
(3.) 10 B. L. R. A. C. 155.
(4.) 8 W. R. C. R. 141.

case by a single Judge may be impugned in the form stated before the Bench of the Court hearing the appeal.

To my mind however, the right of a respondent to take such an objection may be allowed to rest on the very intelligible principle that the application to, and order by, the single Judge, is in the nature of an *ex parte* proceeding and behind the back of the respondent, who, until the appeal comes on for hearing before the Division Bench, has no opportunity of resisting the admission of the appeal, which it must be admitted he has every interest to do. Nor without express legal enactment to the contrary can a respondent be deprived of the right to plead any matter, whether preliminary or otherwise, which is relevant and germane to not only the merits of the appeal but to the hearing of it. Other preliminary objections, which may be competently considered on the application for admission and not in my opinion more entertainable than that in the present case, are constantly heard and disposed of on appeal; such as, for instance, on the ground of insufficiency of stamps, want of jurisdiction, and the like, and there seems to be no reason, on principle or by analogy, why a respondent should be less favorably situated as regards an objection of the nature in question.

My answer therefore is that, in my opinion, my order of the 4th December last may be impugned and set aside at the hearing of the appeal by the Bench before whom it is brought for hearing, on the grounds that the reasons assigned for admitting it are erroneous or inadequate.

PEARSON, J.—In answering the question referred to the Full Bench, it seems to me that a distinction must be made between an order admitting an appeal after time, after the other party to the case has had an opportunity of urging any objections he may have to make to its admission, and an order admitting an appeal after time merely on the strength of the explanation given or evidence adduced by the appellant himself of the cause of his delay in preferring the appeal.

In my opinion an order of the first kind passed by a single Judge cannot be impugned or set aside at the hearing of the appeal by the Bench before whom it comes to be heard. For although, under the rule of practice of the High Court, an appeal may be

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admitted by a single Judge and afterwards be heard by a Bench of which that Judge may or may not be a member, the Court which admits the appeal is not one Court, and the Court which hears the appeal another distinct Court, but both Courts are one and the same High Court; and the Bench cannot be held to have any power to review or interfere with the single Judge's decision between the parties on the point, whether sufficient cause was shown by the appellant for not presenting the appeal within the prescribed period.

On the other hand an order of the second kind passed by a single Judge, inasmuch as it cannot bind the party who was not invited or allowed to show cause why it should not be passed, is, I conceive, on the ground of equity, liable to be impugned and set aside when the appeal is heard by the Bench before which it is brought, under illustration (*b*), s. 4, Act IX. of 1871.

TURNER, J.—It is the practice of the Court to delegate to a Division Bench composed of a single Judge its functions of admitting appeals. The Bench so constituted enjoys the full powers of the Court, and can determine when an appeal shall be admitted or rejected. It is incumbent on the Bench so appointed to consider (*inter alia*) whether the application is presented within due time, or if presented after time whether sufficient cause is shown for the delay. On these points the Bench composed of a single Judge ordinarily decides *ex parte*. At the presentation of a plaint it is incumbent on the Court to see that the suit is within time and to pass an *ex parte* decision on this point before bringing it on the register, yet it, nevertheless, permits the defendant when he appears to answer the suit to plead limitation. In like manner, I am of opinion that the Bench which hears an appeal ought to entertain and dispose of the respondent's objection that the appeal has been admitted after the time allowed by law, and that no sufficient cause was shown for the delay in presenting the application, notwithstanding the Court admitting the appeal may have held *ex parte* that sufficient cause for the delay has been shown.

That the Court may, nay must (except in the cases excepted), notwithstanding the admission of the appeal, dismiss it if it be shown to have been presented beyond time, is shown by the language of the Limitation Act. The Court has therefore the power of dismiss-

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ing an appeal at the hearing for a reason which would have justified it in refusing to admit the appeal, and I cannot see anything in the Procedure Code nor in the Limitation Act which prohibits us from adopting the same practice in respect of the plea of limitation when pleaded to the admission of the appeal, as we have followed without objection in respect of the plea of limitation in bar of suit. We are bound to afford to a respondent the same opportunity of urging the one plea as to a defendant of urging the other; and we should take the ruling of the Bench admitting the appeal in the absence of the respondent as a decision subject to re-consideration on the appearance of the respondent, in the same manner as we in practice hold the admission of a suit on the register to be a decision subject to re-consideration on the appearance of the defendant. The term "if the Court be satisfied, &c.," in s. 5, paragraph *b.*, applies in my judgment not only to the Court exercising its function in admitting the appeal but to the Court exercising its function in deciding the appeal. I would therefore reply that the Court hearing the appeal can and should dispose of the plea urged by the respondent.

SPANKIE, J.—During the argument several decisions of the Calcutta Court were cited, and amongst them, the ruling of a majority of the Court, as delivered by Sir Barnes Peacock, to the effect that an appellate Court, after admitting and registering an appeal and serving notice on the opposite party, has no power, at the hearing, to reject the appeal, upon the ground that it was not preferred within the prescribed period.

Bhurutt Chundur Roy v. *Issur Chundur Sircar*, (1).

When the Bill for the limitation of suits was introduced into the Legislative Council on the 2nd December, 1870, it was stated by Mr. Fitz-James Stephen that s. 5 "provides for the case where a period of limitation expires when the Court is closed, empowers the Court in proper cases to admit an appeal or an application for review after the period applicable thereto, and declares, in accordance with a decision of Sir B. Peacock,

The words of clause *c.* section 5 as originally proposed are, "that no Court after admitting and registering an appeal shall dismiss it on the ground that it was not presented within the prescribed period."

(1) 8 W. R. C. R. 141.

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that an appeal once admitted shall not be dismissed as late." The Bill as passed, Act IX. of 1871, contains no such provision as that contained in cl. *c.*, s. 5 of the proposed Bill. S 4, and s. 5 and cls. *a.* and *b.*, remain as they were in the proposed Bill. It appears therefore that the Legislature in passing the Bill, as amended, no longer intended to declare that an appeal once admitted shall not be dismissed on the ground that it was not presented within the prescribed period.

S. 4 of the law as it is (Act IX. of 1871) provides that—"subject to the provisions contained in ss. 5 to 26 (inclusive), every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence." The provisions of s. 5, in so far as they affect the question before us, are as follows:—Clause *b.* "Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period." It is the appellant who is to satisfy the Court. No procedure is laid down for calling upon the party, who would become respondent if the appeal were admitted, to show cause why it should not be admitted. It is enough if the appellant satisfies the Court that he had sufficient cause for not presenting the appeal within the prescribed period. This is the only point upon which satisfaction is required. The Court admitting the appeal has to satisfy itself whether there is sufficient ground for admitting and registering the appeal, in order that it may be heard and determined. Until this has been done, no notice can issue under the law to respondent.

Under authority conferred by s. 13 of the High Courts' Act of Parliament, this Court has made a rule by which a single Judge may receive and admit appeals. But any rule made by the Court is subject to the Laws and Regulations which may be made by the Governor-General in Council. By s. 23, Act XXIII. of 1861, a regular appeal shall be *heard* and *determined* by a Court

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of two or more Judges. This section amends s. 532 of Act VIII. of 1859, and it clearly refers to the number of Judges who are to *hear* and *determine* the appeal. It does not touch the question of admission; another section provides for the presentation of the memorandum of appeal. Appeals are to be preferred to the appellate Court and may be admitted or rejected, and if admitted they must be registered either by the Court or one of its officers; after which follows the procedure by which they may be eventually heard and determined. A single Judge of the Court, so far, under the rules of the Court, appears to be competent to admit an appeal, though after time, if the person who presents it satisfies him that he had sufficient cause for not presenting the appeal within the prescribed period. But when the respondent, in obedience to notice, after registration, appears to answer the appeal (the case being then before the two Judges who must, by law, hear or determine it), and finds for the first time that the memorandum of appeal should have been presented at an earlier date and that it is barred by s. 4 of Act IX. of 1871, he of course takes a preliminary objection to this effect, not so much against the admission as against the hearing and determination of the appeal. When he finds that the appeal should not have been admitted at all, an objection of this nature is the best answer that he can make to it, and one that he is entitled to make, for he was no party to the admission. The order admitting the appeal was not passed in his presence or by the Bench before which he is to answer the appeal. There is nothing in the law which connects him with the appeal until he is called upon to answer it, and the Court which is to try the appeal is bound to dispose of his objections to its being heard at all.

It has been said that the Court cannot reject the appeal at the hearing, because, according to s. 350 of Act VIII. of 1859, the judgment must be for confirming or reversing or modifying the decree of the lower Court, and therefore there is no authority for rejection. This was the view taken by Sir Barnes Peacock in the case referred to above, which led to the enactment of s. 4, Act IX. of 1871. S. 4, subject to the provisions of s. 5, provides that an appeal presented after time shall be dismissed, although limitation has not been set up as a defence. The illustrations of this section are as follows: —"(*a*).—A suit is instituted

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after the prescribed period of limitation. Limitation is not set up as a defence and judgment is given for the plaintiff. The defendant appeals. The appellate Court must dismiss the suit. (*b*).—An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed."

In the first illustration, though the defendant does not plead limitation and a decree is passed against him, yet if he appeals, the moment the Court hearing and determining the appeal finds that the suit was barred by limitation, it must dismiss the suit. It must, as a Court, obey the provisions of s. 4, which are imperative. The appeal, though it has been admitted and registered, though on the hearing no objection as to limitation has been taken by respondent, yet if the Court finds that it was admitted too late, must be *dismissed*. The Court does not reject the appeal but dismisses it, thus practically affirming the decree of the Court below. The appellate Court then must dismiss the appeal. That is, the two Judges who sit to hear and determine the appeal must dismiss it, even though a single Judge has admitted and registered it. It is not therefore the appellate Court hearing and determining the appeal that necessarily admits it, nor is it bound by the admission and registration permitted by another Judge.

It is contended that s. 4, being subject to the provisions of s. 5, if the Court admits the appeal and has satisfied itself that the appellant had sufficient cause for not presenting the appeal within time, the admission under such circumstances cannot be questioned. But to this I would reply that the Court receiving the memorandum of appeal has only to satisfy itself on the showing of the person who presents it that the case is one that may be admitted for registry. The Judge admitting the appeal is not required to go beyond this. Cl. *b*. does not say that when the Court has satisfied itself, it *shall* admit the appeal. Admitted it *may* be, but if when it comes on for hearing the Court sitting to hear and determine the appeal finds, either of its own motion or on the representation of the respondent, that it was admitted after time without sufficient excuse, it is bound under the provisions of s. 4 of the Act to dismiss the appeal. If, on the other hand, the excuse is found to be sufficient, the provisions of s. 5 are fully complied with. The appeal proceeds and is heard and determined.

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Holding this view of the case, I would reply that the Judges at the hearing of the appeal are at liberty to question its admission by a single Judge.

OLDFIELD, J.—S. 5, Act IX. of 1871, gives the Court a discretion to admit an appeal after expiration of the period of limitation prescribed for it, when the appellant satisfies the Court that he had sufficient cause for not presenting the appeal within such period. The Judge of this Court sitting for receiving applications and admitting appeals exercises a discretion under this section, but subject to the provisions of s. 4.

Illustration *b.* of s. 4, which applies generally to appeals after they have been admitted and registered, is to this effect:—"An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed." This is a general direction for the dismissal of appeals under certain circumstances, notwithstanding their previous admission and without reference to the authority admitting them, and will, in my opinion, apply to appeals admitted by a Judge of the Court under the discretion given him by s. 5, and this power of subsequent dismissal, I apprehend, is intended to be exercised by the Court sitting for the hearing of the appeal, and that Court having both parties before it (which the Judge admitting the appeal had not), is bound to determine whether the appeal should not be dismissed, sufficient cause not being shown why it should be entertained after the period prescribed by limitation.

BEFORE A FULL BENCH.

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(Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.)

QUEEN *v.* NAIADA.

Act XLV. of 1860, *ss.* 59, 377—*Punishment—Transportation in lieu of Imprisonment.*

When an offence is punishable either with transportation for life or imprisonment for a term of years, if a sentence of transportation for a term less than life is awarded, such term cannot exceed the term of imprisonment.

* Appeal from a conviction by the Sessions Judge of Moradabad, dated the 26th April, 1875.