APPELLATE CIVIL.

1915
February, 11.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

BUDDHU AND OTHERS (DEFENDANTS) *v.* DIWAN AND OTHERS (PLAINTIFFS.)*

Act No. IX of 1908 (Indian Limitation Act), section 5—Limitation—Appeal—Discretion of Court—Barrister—Liability for negligence.

Held that an appeal will lie on the question of limitation where the lower appellate Court in admitting the appeal to it under section 5 of the Indian Limitation Act has not exercised a judicial discretion.

The mere fact that the papers of the case and a fee of some sort had been left with a legal practitioner in order that he might file an appeal, but that he had not done so and had returned the papers only after the expiry of the period of limitation, would not be in itself a sufficient ground for admitting an appeal 37 days beyond time.

Per RICHARDS, C. J.—*Semble* that if an advocate who is a barrister or other professional gentleman receives and accepts instructions to file an appeal or make an application and the client loses his right to appeal or make the application as the result of the negligence of the barrister or practitioner to file the appeal or application within time, such barrister or vakil would be liable to his client in a court of law.†

THIS was an appeal under section 10 of the Letters Patent from the decision of a single Judge of the Court. The facts of the case are fully set forth in the judgement under appeal, which was as follows:—

"This is an appeal arising out of a suit for damages for malicious prosecution in respect of a charge made by defendant No. 1 against the plaintiffs under section 347 of the Indian Penal Code. The other defendants are said to be the instigators and abettors of the charge. The claim was laid at Rs. 1,142. The court of first instance found that the charge was false and groundless and made maliciously and without reasonable and probable cause. It decreed the claim for Rs. 305 on account of damages. The learned Judge in appeal reversed the decree of the learned Subordinate Judge and has dismissed the suit. The plaintiffs have appealed to this Court. The first ground raised in the appeal is that the appeal filed by the defendants in the court below was filed long after the expiration of the period of limitation prescribed by law for the institution of appeals, and that no explanation had been given for the delay in the institution thereof which, in law, could be regarded as sufficient and adequate under section 5 of the Limitation Act of 1908. Now the facts of the case so far as they bear on this point are as follows. The learned Subordinate Judge pronounced his judgement in the case on the 2nd of December, 1912, and a decree bearing that date was prepared in accordance with law. Applications

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* Appeal No. 72 of 1914, under section 10 of the Letters Patent.

[†But see *Alston* v *Pitambar Das*, I.L.R., 25 All., 509. Ed.]

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for copies of the judgement and the decree in the cases were made on the 9th of December, 1912, and the copies were ready for delivery and posted on the notice board on the 10th of December, 1912. Mr. Weston had appeared as counsel for the defence in the court of the Subordinate Judge, and it appears from the affidavit filed by the Reverend H. J. Thomas, that the defendants instructed Mr. Weston to file an appeal against the said decree. The papers were delivered to him and a sum of Rs. 40 was paid to him on the 20th of December, 1912. It is not stated whether this amount was paid on account of the costs of the appeal, or on account of counsel's fee or both. The time for filing the appeal expired on the 3rd of January, 1913, but no appeal was actually filed before that date. There is no explanation whatever given as to why an appeal had not been filed by Mr. Weston, nor has it been stated whether the appellants took any steps to ascertain whether their appeal had been filed, before the end of January. It appears from the affidavit of the Reverend Mr. Thomas that at about the end of January an inquiry was made of Mr. Weston as to the date fixed for the hearing of the appeal, and in reply a letter which was said to bear date the 1st of January, 1913, but was really written on the 1st of February, 1913, was sent intimating that the appeal had not been filed, and that the sum of Rs. 40 paid was being refunded by money order. The money order was received on the 3rd of February, 1913. The letter of Mr. Weston has not been produced. It is stated in the affidavit that one Lal Muhammad was sent to Mr. Weston to ascertain from him in detail the circumstances under which Mr. Weston had not filed the appeal. Whether Lal Muhammad saw Mr. Weston or not, and whether the latter gave any and what explanation for his act, we do not know. Neither Mr. Weston nor Lal Muhammad filed any affidavit, nor even the appellants themselves, on the point. There is no statement on their behalf as to whether they themselves took any interest in their proposed appeal. From the 3rd to the 12th of February, 1913, efforts were made to secure the services of some counsel or pleader to file the time-barred appeal, which was ultimately filed 37 days beyond time, with the affidavit of the Reverend H. J. Thomas to which I have already referred. The learned Judge made an *ex parte* order admitting the appeal under section 5 of the Limitation Act, which he affirmed at the hearing of the appeal. No reasons are given in the said orders for excusing this long delay in the institution of the appeal. The time prescribed for filing an appeal to the District Judge from the decree of the Subordinate Judge is thirty days. Giving the defendants the benefit of two days more spent in obtaining copies of the decree and the judgement appealed against, they had time up to the 3rd of January, 1913. The mystery remains unexplained as to why the appeal was not filed. It may be, as Dr. *Tej Bahadur Sapru* suggests, that Mr. Weston had not much faith in the appeal, as it appears from a statement made in the judgement of the court of first instance that 'defendant's learned counsel (Mr. Weston) frankly admitted that there was absolutely no proof on the record to rebut the evidence adduced by the plaintiff as regards issue No. 1—whether the complaint filed by defendant No. 1 was false and malicious and without reasonable and probable cause.' It is not stated what Mr. Weston's instructions were, whether

he was to file the appeal only if he thought there was a fair chance of success, or to file it regardless of the possible result. I cannot understand a member of the bar of Mr. Weston's position not filing the appeal unless his instructions justified him in not filing it in the circumstances of this case. It is not suggested that there was any misapprehension on the part of Mr. Weston as to the time within which the appeal ought to have been lodged, or that the defendants were misled by anything done by the plaintiffs appellants. "Quoting LORD DAVEY, from another case, COLLINS M.R. made the following observations in *In the matter of Coles and another* (1):—'Upon the question whether time ought to be extended, speaking for myself, I am inclined to adopt the view of the late JAMES L. J., that a party has a vested right in an order of the court in his favour and ought not to be deprived of an advantage given to him by the rules, unless there has been on his part some conduct raising an equity against him or in a case of inevitable accident'. As observed by JENKINS, C. J., in *Karsondas Dharamsey* v. *Gangabai* (2), 'when the time for appealing is once passed, a very valuable right is secured to the successful litigant, and the court must therefore be fully satisfied of the justice of grounds on which it is sought to obtain an extension of the time for attacking the decree, and thus perhaps depriving the successful litigant of the advantages he has obtained.' It was, therefore, for the defendants to make out very cogent grounds for excusing this long delay. It might be perhaps suggested that they had done all they had to do on their part in handing over the papers to Mr. Weston and supplying him with the necessary costs for filing the appeal, and that it was due to the accident of Mr. Weston either carelessly or deliberately not filing the appeal. But it has not been stated what Mr. Weston's instructions were. I cannot impute any negligence or carelessness on the part of Mr. Weston on the materials now on the record.

"The learned Judge of the court below did not apparently subject the explanation of the delay to any scrutiny. It appears that on the 7th of December, 1912, he had held in a complaint filed by one Bishambhar Sahai against Buddhu under section 211, Indian Penal Code, which had resulted in a conviction of the latter, that there were no grounds for such conviction. He had held that Buddhu was not able to prove his criminal charge against the present defendants and Bishambhar Sahai and reversed the conviction of Buddhu in appeal. He was already predisposed to consider Buddhu's case favourably, and he admitted the appeal without much scrutiny, and on the appeal coming on for hearing he admitted a copy of his judgement in the criminal appeal as he says '*to save a remand.*' That judgement was no evidence against the present appellants, either of the facts found or of the conclusion at which the Judge had in that case finally arrived. The case of *Palakdhari Singh* (3) points out the limits within which a judgement not *inter partes* might be used. He took it in only to save a remand (I presume for the purpose of supplying evidence in justification of the charge, which did not exist on the record).

(1) (1897) L. R., 1 K. B., 1. (2) (1905) I. L. R., 30 Bom., 329.
(3) (1889) I. L. R., 12 All., 1.

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"I have no hesitation in holding that the explanation given of the delay in filing the appeal was utterly inadequate.

"The only question which has pressed itself on my attention, is whether I should now in appeal set aside the order of the learned Judge admitting the appeal and excusing the delay.

"If the learned Judge had really exercised a discretion upon proper materials, I should not have reconsidered the matter at all. It is evident from what I have already said that the learned Judge had not really applied his mind to consider the explanation of the delay in presenting the appeal after the 3rd of January, 1913. No explanation was given to him as to why Mr. Weston had not filed the appeal within time. He had, therefore, no opportunity of considering the sufficiency or otherwise of the reason for that fact. They were as unexplained to him as they are to me. In the absence of any explanation of this fact I think that he was, as I am, bound to reject the appeal as time-barred.

"I, therefore, set aside the decree of the lower appellate Court and reject the appeal to that court as time-barred. I restore the decree of the court of first instance with costs in all courts.

The defendants appealed.

Mr. *R. K. Sorabji*, for the appellants.

The Honble Dr. *Tej Bahadur Sapru*, for the respondents.

RICHARDS, C. J.—The facts connected with this appeal are fully reported (see 12 A. L. J., 837). It appears that a suit was brought before the Additional Subordinate Judge claiming damages for malicious prosecution. The suit was decreed in part on the 2nd of December, 1912. Copies of the decree and judgement were delivered to the defendant on the 10th of December. The defendant had up to the 3rd of January, 1913, to appeal to the District Judge. No appeal was filed until thirty-seven days after that date. An application was then made to admit the appeal though late. The appeal was admitted. The only fact that the learned District Judge had before him when admitting the appeal was set forth in an affidavit in which it was stated that instructions had been given to Mr. Weston, a barrister, together with a sum of Rs. 40, for the purpose of filing an appeal. No affidavit of Mr. Weston was filed. No explanation was given why Mr. Weston did not file the appeal. Nor was it even alleged that the non-filing of the appeal to the District Judge was due to Mr. Weston's negligence. Under these circumstances the learned Judge of this Court considered that the District Judge had not exercised a judicial discretion when allowing the appeal to be filed after time. I do not think that we would be justified in

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setting aside the decree of this Court. Even if the non-filing of the appeal were due to the neglect of Mr. Weston, the court could hardly lay down a general rule that the neglect of the legal practitioner engaged is always to be deemed a sufficient reason for admitting an appeal or application after the time prescribed by law.

It is suggested that if that appeal is not admitted the client has no remedy because no suit lies against a barrister for neglect. I do not at all agree to the suggestion. I do not wish to be taken as expressing any opinion as to whether or not Mr. Weston was negligent. It may have been that he got some special instructions from this client as to the filing of the appeal. But in my opinion if it was shown that an advocate who is a barrister or other professional gentleman, received and accepted instructions to file an appeal or make an application and the client lost his right to appeal, or make the application as the result of the negligence of the barrister or practitioner to file the appeal or application within time, such barrister or vakil would be liable to his client in a court of law.

I would dismiss the appeal.

BANERJI, J.—I also am of opinion that the appeal should be dismissed. The learned Judge in the court below did not subject the reason alleged for the delay of thirty-seven days in the filing of the appeal to such scrutiny as he was bound to do. He must, therefore, be taken not to have exercised a judicial discretion in admitting the appeal beyond time. On this ground alone I would hold that the learned Judge of this Court was justified in reversing the decision of the learned District Judge. I do not think it necessary to express any opinion on the other point touched upon by the learned Chief Justice in his judgement.

BY THE COURT:—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.