FULL BENCH

Before Sir Syed Wazir Hasan, Knight, Chief Judge, Mr. Justice Muhammad Raza and Mr. Justice Bisheshwar Nath Srivastava.

MITTHOO LAL (DECREE-HOLDER-APPELLANT) *v.* JAMNA PRASAD AND ANOTHER (JUDGMENT-DEBTORS-RESPONDENTS)* 1933 *October 5*

Limitation Act (IX of 1908), section 5—Appeal filed beyond time—Litigant acting in good faith on the advice of counsel given honestly though negligently—Section 5, Limitation Act, whether applicable.

An appellant is not entitled to the benefit of section 5 of the Indian Limitation Act where he has acted in good faith on the advice of a counsel, which advice has been given honestly, though negligently. In order to get the benefit of that section, it is not sufficient for a litigant to show that he acted on the advice of a counsel but the Court must be further satisfied that the advice was given with due care and attention.

Chhotey Lal v. *Devi Brij Rani* (1), approved. *Surendra Mohan Ray Chaudhuri* v. *Mahendra Nath Banerji* (2), *Highton* v. *Treherne* (3), *Mirza Mohammad Baqar Ali Khan* v. *Mohammad Baqar* (4), *Sundarbai* v. *The Collector of Belgaum* (5), and *Brij Indar Singh* v. *Kanshi Ram* (6), relied on.

The case was originally heard by a Bench consisting of SRIVASTAVA and NANAVUTTY, JJ. who considering the importance of the question involved in it, referred it to a Full Bench for decision. The referring order of the Bench is as follows:

SRIVASTAVA and NANAVUTTY, JJ.:—This is an appeal under section 12(2) of the Oudh Courts Act against the decision, dated the 19th of April, 1932 passed by Mr. Justice KISCH upholding the order, dated the 21st of December, 1931, of the District Judge of Unao. The facts of the case are as follows: 1933 *February 7*

*Appeal under section 12(2), Oudh Courts Act, No. 2 of 1932, against the order of the Hon'ble Mr. Justice B. S. Kisch, Judge, Chief Court of Oudh, Lucknow, dated the 19th of April, 1932, confirming the order of Pandit Bishambar Nath Misra, District Judge of Unao, dated the 21st of December, 1931.

(1) (1929) 6 O.W.N., 1042.
(2) (1931) I.L.R., 59 Cal., 781.
(3) (1878) 48 L.J.K.B., 167.
(4) (1907) 10 O.C., 291.
(5) (1918) L.R., 46 I.A., 15.
(6) (1917) L.R., 44 I.A., 218.

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Srivastava and Nanavutty, JJ.

On the 31st of July, 1931, the Subordinate Judge of Unao dismissed an application for execution. On the 7th of September, 1931, the appellant-decree-holder filed an appeal in this Court against the order of the Subordinate Judge. On the appeal being heard on the 26th of October, 1931, the judgment-debtors-respondents raised an objection that the appeal lay to the Court of the District Judge of Unao and not to this Court, because it arose out of a suit, the valuation of which was below Rs.5,000. This objection prevailed and the memorandum of appeal was returned to the appellant for presentation to the proper court. It was presented to the District Judge of Unao on the 27th of October, 1931. The appeal was accompanied with an application under section 5 read with section 14 of the Indian Limitation Act praying that in the circumstances of the case, the appellant should be deemed to have had sufficient cause for not filing the appeal within time. The appellant also filed an affidavit with the application in which it was stated that he had filed the appeal in the Chief Court on the advice given to him by a vakil of Unao and that the mistake was not pointed out to him even by his advocate who filed the appeal in the Chief Court.

The learned District Judge was of opinion that the counsel who advised the filing of the appeal in the Chief Court did not act with due care and attention and therefore rejected the application under section 5 of the Limitation Act. On appeal to this Court Mr. Justice KISCH relying on the decision of a Bench of this Court in *Chhotey Lal* v. *Devi Brij Rani* (1) agreed with the opinion of the District Judge and dismissed the appeal.

The learned counsel for the appellant has questioned before us the correctness of the decision in *Chhotey Lal* v. *Devi Brij Rani* (1). He has relied on the decisions in *Dattatraya Sitaram Gaihari* v. *The Secretary of State for India in Council* (2), *Nagindas Motilal* v. *Nilaji Moroba*

(1) (1929) 6 O.W.N., 1042. (2) (1920) I.L.R., 45 Bom., 607.

Naik (1), *Shib Dayal v. Jagannath Prasad* (2), *Ambika Ranjan Majumdar* v. *Manikgunge Loan Office, Ltd.* (3) *Debendranath Sinha* v. *Nagendranath Singh Saha Roy* (4) and *Kandaswami Mudaliar* v. *P. Arunachala Chetti* (5) in support of the contention that where a litigant has acted upon the advice of his pleader he should be deemed to have acted in good faith and in such circumstances he should be considered to have made out sufficient cause for condoning the delay. It has also been pointed out that in *Nagindas Motilal* v. *Nilaji Moroba Naik* (1) it has been held that the case of *Coles* v. *Ravenshear* (6) which was relied on in *Chhotey Lal* v. *Devi Brij Rani* (10) is no longer good law.

Reference was also made to the observations of their Lordships of the Judicial Committee in *Sunderbai* v. *The Collector of Belgaum* (7) in support of the argument that if an appeal is filed beyond the prescribed period of limitation by reason of the appellant relying on the legal advice given to him, he is entitled to the benefit of section 5 of the Limitation Act even though the advice was a mistaken one.

The learned counsel for the respondents has on the other hand referred to *Tin Tin Nyo* (8) and *J. N. Surty* v. *T. S. Chettyar Firm* (9) in support of the view taken by the Bench of this Court in *Chhotey Lal* v. *Devi Brij Rani* (10).

In view of the conflict of decisions on the question and the importance of it, we think that it is a fit case in which the matter should be decided by a Full Bench. We accordingly refer the following question to a Full Bench for decision under section 14(1) of the Oudh Courts Act:

Whether the case of *Chhotey Lal* v. *Devi Brij Rani* (10) lays down the correct law, or whether an

(1) (1924) I.L.R., 48 Bom., 442.
(2) (1922) I.L.R., 44 All., 636. (F. B.).
(3) (1927) I.L.R., 55 Cal., 798.
(4) (1925) 30 C.W.N., 479.
(5) (1925) Mad., 462.
(6) (1907) 1 K.B.D., 1.
(7) (1918) L.R., 46 I.A., 15.
(8) (1923) I.L.R., 1 Rang., 584.
(9) (1925) I.L.R., 4 Rang., 265.
(10) (1929) 6 O.W.N., 1042.

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appellant is entitled to the benefit of section 5 of the Indian Limitation Act where he has acted in good faith on the advice of a counsel, which advice has been given honestly, though negligently.

Mr. *K. N. Tandon,* for the appellant.

Messrs. *Ram Bharose Lal* and *Suraj Sahai,* for the respondents.

HASAN, C. J.:—The question which we have to answer is formulated by the Division Bench in the following terms:

> "Whether the case of *Chhotey Lal* v. *Devi Brij Rani* (1) lays down the correct law, or whether an appellant is entitled to the benefit of section 5 of the Indian Limitation Act where he has acted in good faith on the advice of a counsel which advice has been given honestly, though negligently."

I was a party to the decision in *Chhotey Lal* v. *Devi Brij Rani* (1), but I have heard arguments in this case with anxious consideration and with a completely open mind. Had I been persuaded either by the arguments or by the weight of precedents quoted in the course of the arguments I would have been prepared to disagree with the view of law expressed in that case. As regards the case law on the subject it is not necessary to review it in this judgment. The whole body of it has recently been considered, and, if I may respectfully say so, carefully considered by two learned Judges of the High Court at Calcutta in *Surendra Mohan Ray Chaudhuri* v. *Mahendra Nath Banerji* (2). At page 805 the learned Judges in expressing their conclusion are reported to have said as follows:

> "From a review of the cases referred to above it would appear that there is no authority for the view that a mistake of a legal advisor, however gross and inexcusable, if *bona fide* acted upon by a litigant, will entitle him to the protection of section 5 of the Limitation Act. In this Court,

(1) (1929) 6 O.W.N., 1042. (2) (1931) I.L.R., 59 Cal., 781.

in the case of *Ambica Ranjan Majumdar* v. *The Manikgunge Loan Office Ltd.* (1), SUHRAWARDY, J., while condoning the mistake in that particular case, refused to lay down any such general rule. In our opinion, the rule expressed by BRETT, M. R., in *Highton* v. *Treherne* (2) embodies a sound working formula and is supported by the general trend of judicial decisions in this country."

I entirely agree with this conclusion. The rule laid down by BRETT, M. R., in *Highton* v. *Treherne* (2) referred to in the above quotation is as follows:

> "In cases where a suitor has suffered from the negligence or ignorance or gross want of legal skill of his legal advisor he has his remedy against that legal advisor, and meantime the suitor must suffer. But where there has been a *bona fide* mistake, not through misconduct nor through negligence nor through want of reasonable skill, but such as a skilled person might make, I very much dislike the idea that the rights of the client should be thereby forfeited. It seems to be obvious that the Court has jurisdiction to enlarge the time under some circumstances. Therefore, why not on the present occasion? It has been said that when the time for appealing is past, the person who would be respondent has a vested right to retain his judgment. But obviously it is not an absolute right, and I am perfectly confident that the practice of all the courts has been to treat it as not an absolute right, though the courts are chary of enlarging the time when the time allowed by the rule has run out."

And yet there is another important ground as to why I should adhere to the view laid down in *Chhotey Lal* v. *Devi Brij Rani* (3). This rule has been the rule of practice in interpreting the provisions of section 5 of the Indian Limitation Act for a long time in the past.

(1) (1927) I.L.R., 55 Cal., 798. (2) (1878) 48 L.J.K.B., 167.
(3) (1929) 6 O.W.N., 1042.

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In *Nawab Mirza Muhammad Bakar Ali Khan* v. *Muhammad Bakar and Musammat Saiyada and another* (1) Sir EDWARD CHAMIER, Judicial Commissioner of Oudh, said:

> "The fact that the appeal was filed on this advice is not disputed, and if we were to adopt the rule of the Allahabad High Court in the case of *Kura Mal* v. *Ram Nath* (2) we might hold at once that sufficient cause has been made out by the defendant for not presenting this appeal within time, for it is not suggested that the defendant did not act *bona fide* on the advice given to him by his Advocate. But except possibly in one case this Court has never held that it is sufficient for the client to show that he acted on the advice of Counsel. It has, I believe, except in the case to which I have just referred, always held that the Court must be satisfied that the advice was given with due care and attention."

The passage quoted above was also quoted in the judgment of the case of *Chhotey Lal* v. *Devi Brij Rani* (3) and it unmistakably shows that even previous to the date of the decision of Sir EDWARD CHAMIER the uniform practice of the courts in Oudh has been in accordance with the view that it is not sufficient for a litigant to show that he acted on the advice of a Counsel but that the court must be further satisfied that the advice was given with due care and attention. In these circumstances I am of opinion that the principle of *stare decisis* applies.

My answer therefore to the first part of the question is in the affirmative and to the second part in the negative.

RAZA, J.:—I would also answer the question referred to the Full Bench in the same way as it has been answered by the learned CHIEF JUDGE.

It is difficult and undesirable to attempt to define precisely the meaning of the words "sufficient cause" used in section 5 of the Indian Limitation Act. To do

(1) (1907) 10 O.C., 291. (2) (1906) I.L.R., 28 All., 414.
(3) (1929) 6 O.W.N., 1042.

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so would be to crystallize into a rigid definition that judicial power and discretion which the Legislature has, for the best of all reasons, left undetermined and unfettered. What constitutes "sufficient cause" cannot be laid down by hard and fast rules. It must be determined by a reference to all the circumstances of each particular case. A court may give a liberal construction to the words "sufficient cause", but the interpretation must be in accordance with judicial principles and with due regard to the respondent's side of the question. I think the period for preferring an appeal should not be extended simply because the appellant's case is hard and calls for sympathy. A client preferring a time-barred appeal under the mistaken advice of his Counsel may be entitled to the benefit of section 5 of the Indian Limitation Act; but the mistake must be *bona fide*, i.e. made in spite of due care and attention. The question is whether the error is one which might have easily occurred, even if reasonably due care and attention had been exercised by the Counsel. *Bona fide* mistake on the part of the Counsel may be excused, but want of care and attention on his part is, I think, no "sufficient cause." Filing of an appeal in a wrong court through gross carelessness of the Counsel is not in my opinion a "sufficient cause" for presenting the appeal to the proper court after the expiry of the period of limitation.

SRIVASTAVA, J.:—I was a party to the order of reference to a Full Bench. As I still feel somewhat oppressed by the considerations which influenced me in making the reference I think it proper that I should briefly state them.

Section 5 of the Limitation Act gives the court discretion to extend the period of limitation in the case of appeals and certain applications "when the appellant or applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within" the period of limitation prescribed therefor.

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There is attached to it an explanation which provides that the fact of the appellant or applicant being misled by any order or practice or judgment of the High Court may be sufficient cause within the meaning of the section. Thus it will be seen that the Legislature has taken care not to lay down any hard and fast rules to control the discretion of the court. In fact the rule appears to have been made designedly elastic to meet the varying circumstances of different cases. This consideration is brought into further relief by comparing the provisions of section 5 with the provisions of the analogous section 14 in which due diligence and good faith have been made necessary conditions for invoking the benefit of the rule. I am therefore in entire agreement with the observations of my learned brother RAZA, J., that it is undesirable to define precisely the meaning of the words "sufficient cause" so as to crystallize into a rigid definition the discretion which the Legislature has, for the best of reasons, left undetermined and unfettered. This discretion must be exercised in each particular case according to its facts and circumstances with a view to secure the furtherance of justice.

It is true that when a suitor has suffered from the negligence or ignorance or gross want of legal skill of his legal adviser, he has his remedy against that legal adviser. But in this country a contest between a client and a Counsel is generally an unequal one. At best the remedy is very expensive for the suitor and he can seldom be certain of his success. So it seems to me that when the question is one not between the litigant and his Counsel but only whether the litigant had sufficient cause or not for the delay it is easy to conceive of cases in which it would be very unjust to penalize the litigant and to make him suffer for the mistake of his legal adviser to whom he was entitled to look up for advice. On the other hand I realize that it is not desirable to encourage negligence on the part of Counsel who are responsible for giving proper advice to their clients.

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The argument that when an appeal or application has not been filed within the prescribed time and the respondent or the opposite party has by reason of the efflux of time acquired a valuable right, it should not be lightly tampered with, is also not without weight. I am therefore of opinion that it would not be proper, even in the name of guiding judicial principles, to lay down any general rule for the interpretation of the term "sufficient cause" as used in section 5. While on the one hand I am not prepared to lay down that the erroneous advice of a pleader howsoever gross or negligent it may be must always and under all circumstances be regarded as a sufficient cause for extension of time, I am equally not prepared to hold that a litigant acting *bona fide* upon the advice of his Counsel should in no circumstances be entitled to the protection of section 5, if the Counsel has in the opinion of the court acted negligently even though honestly in giving the advice. The case of *Chhotey Lal* v. *Devi Brij Rani* (1) approves and adopts the view taken by a Bench of the late Court of the Judicial Commissioner of Oudh in *Nawab Mirza Muhammad Bakar Ali Khan* v. *Muhammad Bakar* (2) to the effect "that the court must be satisfied that the advice was given with due care and attention." It seems to me that this in effect lays down a rigid rule and goes a little too far in imposing upon the appellant or applicant the burden of satisfying the court that the advice was given with due care and attention.

The decisions of the various High Courts as regards the circumstances in which a litigant who has been misled by the mistaken advice given to him by his lawyer should or should not be allowed the protection of section 5 of the Limitation Act, are by no means uniform. It would serve no useful purpose to discuss or try to deduce any general principles from them because naturally each decision is influenced by its special facts and circumstances. However, I may just make a reference to the

(1) (1929) 6 O.W.N., 1042. (2) (1907) 10 O.C., 291.

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Privy Council decision in *Sunderbai* v. *The Collector of Belgaum* (1). In this case an appeal which lay to the district court was presented, under competent legal advice, to the High Court; the memorandum was returned for presentation in the district court. At the time of presentation, an appeal to the district court was time-barred, but an appeal to the High Court, if it lay, would have been in time. The District Judge on an *ex parte* application admitted the appeal without prejudice to the question of limitation. The appeal was afterwards transferred to the High Court which made an order under section 5 of the Indian Limitation Act that there was sufficient cause for the delay. Their Lordships held that the order was rightly made. They observed that "the fact that the defendants had acted on mistaken advice as to the law in appealing to the High Court in 1910 did not preclude them from showing that it was owing to their reliance on that advice that they had not presented the appeal to the Court of the District Judge within the prescribed period of limitation." It is significant to note that their Lordships did not address themselves to any consideration of the question whether the advice had or had not been given with due care and attention.

In *Brij Indar Singh* v. *Kanshi Ram* (2) their Lordships of the Judicial Committee dealing with the provisions of section 5 of the Limitation Act remarked as follows:

> "To interfere with a rule, which after all is only a rule of procedure, which has been laid down as a general rule by Full Benches in all the courts of India, and acted on for many years would cause great inconvenience and their Lordships do not propose to interfere."

It has been pointed out by the Hon'ble the CHIEF JUDGE that for a very long time the uniform practice in the courts in Oudh has been in accordance with the

(1) (1918) L.R., 46 I.A., 15. (2) (1917) L.R., 44 I.A., 218.

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view expressed in *Nawab Mirza Muhammad Bakar Ali Khan* v. *Muhammad Bakar* (1) which was followed in *Chhotey Lal* v. *Devi Brij Rani* (2) and that therefore the principle of *stare decisis* applies. I must therefore bow to this consideration and following the principle of *stare decisis,* answer the questions referred to the Full Bench in the way they have been answered by the Hon'ble CHIEF JUDGE.

BY THE COURT—The first part of the question is answered in the affirmative and the second part in the negative.

REVISIONAL CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice J. J. W. Allsop

MOHAR SINGH (PLAINTIFF-APPELLANT) *v.* AMAR SINGH (DEFENDANT-OPPOSITE PARTY)*

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Civil Procedure Code (Act V of 1908), *Schedule II, paragraph* 1—*Arbitration—Reference to arbitration—Commissioner appointed by court for recording evidence of certain witnesses —Parties presenting an application to Commissioner, addressed to court, that they had agreed to refer the case to arbitration—Presentation of application, whether valid—Court, whether justified in referring case to arbitration on that application.*

Where a commissioner was appointed by a court for the examination of certain witnesses and on the date fixed by the commissioner for examination of the witness, the parties presented to the commissioner an application addressed to the court trying the suit stating that the parties had agreed that the matter in difference between them should be referred to the arbitration of three persons named in the application and the commissioner thereupon verified the correctness of the application and forwarded the application for reference to arbitration together with the proceedings recorded by him to the court, *held,* that the commissioner was an officer of the court and in

*Section 115, Application No. 105 of 1932, against the order of M. Mohammad Tufail Ahmad, Munsif of Utraula, district Gonda, dated the 26th of September, 1932.

(1) (1907) 10 O.C., 291. (2) (1929) 6 O.W.N., 1042.