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come within the purview of section 20 of the Limitation Act, it is sufficient if circumstances exist which make the conclusion inevitable that the payment must have been made on account of interest. In the present case the circumstance of the interest being calculated on the date of the payment coupled with the evidence of the witnesses in whose presence the payments were made can lead to no conclusion other than that the payments were made on account of interest.

The learned counsel for the opposite-parties has relied on the cases of *Ram Prasad v. Binaek Shukui* (1), *Narain Das v. Chandrawati Kuar* (2), and *Lalji v. Ghasi Ram* (3) but they are not in point inasmuch as what they lay down is that it is necessary that at the time of a payment made under section 20 of the Limitation Act, it should be specifically mentioned whether the payment is on account of principal or interest.

I allow both the applications with costs and setting aside the order of dismissal of the plaintiff's suits passed by the court below, remand the cases to that court for trial on the merits.

*Applications allowed.*

## APPELLATE CIVIL

*Before Mr. Justice Radha Krishna Srivastava*

1940  
February, 29

MAHMUD ALI KHAN (DEFENDANT-APPELLANT) *v.* WAJID ALI KHAN AND OTHERS (PLAINTIFFS AND DEFENDANTS-RESPONDENTS)\*

*Limitation Act (IX of 1908), section 5—Review application—Filing of review application whether sufficient cause—Reasonable grounds to be proved.*

Prosecution of an application for review which proves to be infructuous is not sufficient cause within the meaning of sec-

\*Second Civil Appeal No. 313 of 1938, against the order of Badri Prasad Tandon, Esq., Additional Civil Judge of Bahraich, dated the 8th of November, 1937.

(1) (1933) I.L.R., 55 All., 632. (2) (1929) 6 O.W.N., 776.  
(3) (1930) 7 O.W.N., 420.

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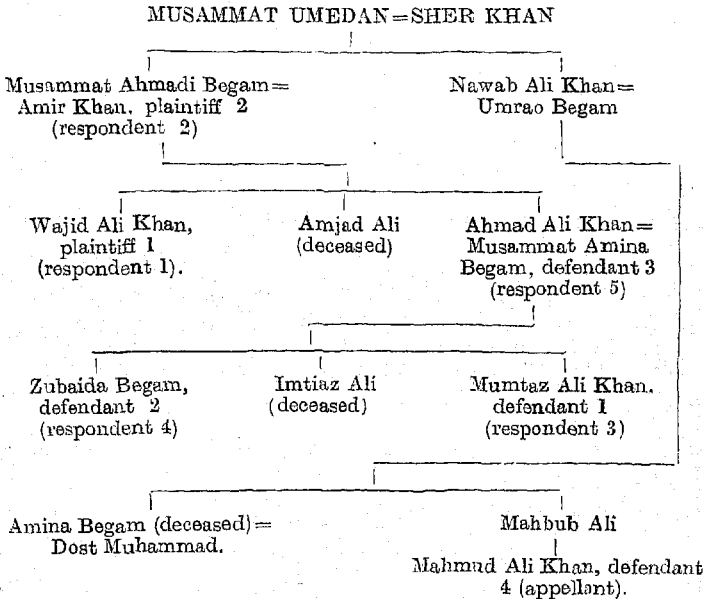
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tion 5 of the Limitation Act, and a party is not entitled to have that time deducted in his favour. Mere presentation of an application for review does not entitle a litigant as of right to deduct the period during which the application for review remains pending, but sufficient cause must be shown. *Brij Indar Singh v. Kanshi Ram and others* (1), *Ashanullah v. The Collector of Dacca* (2), and *Mahadeo Govind Wadkar v. Lakshminarayan Ramnath Marwadi* (3), referred to.

Mr. *Mohammad Hafiz*, for the appellanti.

Mr. *M. H. Qidwai*, for the respondents.

RADHA KRISHNA, J.:—This second appeal and the connected miscellaneous application arise out of a suit for possession by partition and *mesne* profits instituted in the court of the Munsif, Kaisarganj, district Bahraich, by plaintiffs respondents Nos. 1 and 2. The relationshop of the parties will appear from the following pedigree:



There were two sets of properties in the suit, viz., some zamindari detailed in List A and two houses mentioned in List B attached to the plaint. The plaintiffs claimed 7 annas 8 pies share of the zamindari on the

(1) (1917) L.R., 44 I.A., 218.

(2) (1888) I.L.R., 15 Cal., 242.

(3) (1925) A.I.R., Bom., 521.

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ground that they were entitled to 5 annas 8 pies out of the 8 annas share of Amir Khan and 2 annas out of 8 annas share of Nawab Ali Khan. As regards the two houses the plaintiffs alleged that they belonged to Amir Khan alone and their share therefore came to 11 annas 4 pies which they claimed.

*Radha  
Krishna, J*

The defendants contested the shares claimed by the plaintiffs, the main contest being on behalf of the appellant, who was defendant No. 4, in the court of first instance. The main pleas in defence were that the entire properties belonged to Mst. Umedan who had gifted them to Ahmad Ali Khan (husband of defendant No. 3 and father of defendants Nos. 1 and 2), and Mahbub Ali, father of defendant No. 4; that there was a suit in 1919 in which the present plaintiffs (respondents) and Ahmad Ali, predecessor-in-interest of defendants Nos. 1 to 3 and the heirs of Nawab Ali Khan including defendant No. 4 (appellant) were parties; and this suit ended in a compromise decree, which the defendant alleged operated as *res judicata*. The plea of adverse possession also was taken.

The trial court held that the zamindari belonged to Amir Khan and Nawab Ali; that the compromise in the suit of 1919 was binding and the decree passed thereon operated as *res judicata* and that the plaintiffs were entitled to 5 annas 8 pies share only out of Amir Khan's share. As regards the claim to share in the two houses, the plaintiffs withdrew their claim to one and the trial court held that the other house belonged exclusively to Amir Khan and the plaintiffs as his heirs were entitled to 11 annas 8 pies share therein. The plaintiffs' claim was, therefore, decreed in accordance with the finding.

Against this decree an appeal was filed on behalf of defendant No. 4 Mahmud Ali Khan, mainly on the grounds that (1) the principle of *res judicata* applied also to the house property and (2) that 5 annas 8 pies share of the zamindari decreed to the plaintiffs should

not be out of the entire property but only out of 8 annas share of Amir Khan. The appeal was heard before Mr. Badri Prasad, Additional Civil Judge, Bahraich, on the 23rd October, 1936. At the time of argument the defendant-appellant did not challenge the decree of the trial court with respect to plaintiffs' share in the zamindari property and the plaintiffs-respondents also put in an application praying that they had no objection if the appeal was allowed with respect to the house. The result was that the lower appellate court by its order dated the 8th November, 1937, modified the decree of the trial court by passing a decree in favour of the plaintiffs-respondents for 5 annas 8 pies share of the zamindari properties and dismissing the plaintiffs-respondents' suit with respect to the houses and directing that "the parties shall bear their own costs of the appeal and they shall pay and receive their costs of the suit in the trial court in proportion to their success and failure in the case." Thereafter on the 16th November, 1937, an application was filed on behalf of the defendant No. 4—appellant before the lower appellate court—for review of the order in respect of costs as passed by the said court. This application was dismissed on the 26th August, 1938.

The present appeal was filed in this Court on the 1st November, 1938, which is admittedly beyond the period of limitation. Together with the appeal the appellant has filed an application under section 5 of the Indian Limitation Act (which is the connected Miscellaneous Application No. 882 of 1938). The appellant's contention is that the time taken by the review application, viz. from the 16th November, 1937, to the 26th August, 1938, should be excluded in computing the period of appeal filed by him, as he did not file the appeal, because "he thought that the matter was so simple and small" that it could be easily corrected by the court below, and there was no need for filing a second appeal.

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Krishna, J.*

After hearing the counsel for the parties, I am of opinion that there is no force in the appeal and the application under section 5 of the Indian Limitation Act. The appeal is admittedly against the decree of the lower appellate court dated the 8th November, 1937, and is thus clearly beyond time. The appellant seeks the benefit of section 5 of the Indian Limitation Act. Section 5 lays down that an appeal may be admitted after the period of limitation, when the appellant satisfies the court that he had sufficient cause for not preferring the appeal within time. The counsel for the appellant has argued that prosecution of an application for review (infructuous though it was) was sufficient cause, and he was entitled to have that time deducted in his favour. I do not agree to this contention. Mere presentation of an application for review does not entitle a litigant as of right to deduct the period during which the application for review remains pending. The Privy Council decision in *Brij Indar Singh v. Kanshi Ram and others* (1) cited by the counsel for the appellant does not lend support to any such wide proposition of law. Section 5 of the Indian Limitation Act gives the court discretion to excuse the delay in filing an appeal. An appellant who desires to be excused the delay must satisfy the court that there were sufficient circumstances existing in the case to account for the delay and therefore the appellant must satisfy the court that there were reasonable grounds for review. In this opinion of mine I am supported by the observations in the cases reported in *Ashanullah v. The Collector of Dacca* (2) and *Mahadeo Govind Wadkar v. Lakshminarayan Ramnath Marwadi* (3). In this particular case I am not satisfied that the appellant had reasonable grounds for review. Strictly speaking the application dated the 16th November, 1937, does not come within the purview of

(1) (1917) L.R., 44 I.A., 218.

(2) (1888) I.L.R., 15 Cal., 242. at

(3) (1925) A.I.R., Bom., 521, at  
522.

243.

conditions for review laid down in order XLVII, rule 1 of the Code of Civil Procedure. His grounds for review were really grounds of appeal. That being so I am of opinion that there was no sufficient cause for filing the application for review and therefore there was thus no sufficient cause for the delay in filing the appeal. Therefore the application under section 5 of the Indian Limitation Act for "excusing the delay must be dismissed, and in consequence the appeal must fail, as it has been filed long after the period of limitation expired.

On merits too, I am of opinion that the appellant has no case. Costs are always in discretion of the court (*vide* section 35 of the Civil Procedure Code). In this case I think the appellate court exercised a sound discretion in the matter of the award of costs. That being so there can be no appeal against the decree of the lower appellate court as to costs only.

I, therefore, dismiss the appeal as well as the Miscellaneous Application with costs.

*Appeal dismissed.*

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## APPELLATE CIVIL

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*Before Mr. Justice Ziaul Hasan*

ORI LAL (DEFENDANT-APPELLANT) *v.* MST. RAHIM ZADI  
(PLAINTIFF-RESPONDENT)\*

1940  
March, 11

*Court Fees Act (VII of 1870) (as amended), section 7(i) (c)—  
Suit for cancellation of sale-deed on ground of fraud and  
undue influence—Plaintiff in possession of property sold—  
Court-free whether payable ad valorem on market value of  
property sold.*

Where a plaintiff files a suit for cancellation of a sale-deed on the ground that it had been obtained by fraud and undue influence and the plaintiff is in possession of the property sold, he cannot be required to pay *ad valorem* court-fee on the

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\*Second Civil Appeal No. 26 of 1938, against the order of M. Ziauddin Ahmad, District Judge of Gonda, dated the 29th of October, 1937.

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*Radha  
Krishna, J.*