APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Ba U.

S. M. ALLY

v.

MAUNG SAN NYEIN.*

1936

Jan. 20.

Limitation—Admission of appeal after time—Sufficient cause—Reasonable diligence of the appellant necessary—General rule—Circumstances of the case—Illness as an excuse—Limitation Act (IX of 1908), s. 5.

Under s. 5 of the Limitation Act the Court may in its discretion admit an appeal presented after time if there is sufficient cause for not presenting the appeal within the prescribed period. In exercising its discretion the Court must consider whether the appellant has acted with reasonable diligence in prosecuting the appeal. This is the general rule, and the circumstances of each case must be examined to see whether they fall within or without the terms of the general rule.

Brij Indar Singh v. *Kanshi Ram*, I.L.R. 45 Cal. 94; *Karm Bakhsh* v. *Daulat Ram*, (1888) P.R. No. 183, 478— *referred to.*

A plea of illness is not sufficient unless the effect of the illness was such that in the circumstances it would afford a reasonable excuse for the delay in presenting the appeal.

Mazoom Ali Khan v. *Panchoo Bibi*, 1 W.R. (Misc.) 23—*referred to.*

Le Hu v. *Ah Yin*, (1897-1901) 2 U.B.R. 451—*considered.*

The applicant was late by five days in filing an appeal, and relied upon illness as an excuse for the delay. The probabilities were against his contention being genuine; there was no medical evidence of his illness; and, even assuming that the applicant had been ill, there was nothing to show that he could not have sent instructions to his advocate to file the appeal within the prescribed period.

Held, that there was no sufficient cause for admitting the appeal.

Sanyal for the appellant.

Kalyanwalla for the respondent.

PAGE, C.J.—In this case the applicant brought a suit against the respondent in the Rangoon Small Cause Court in which he sought to recover the amount which he alleged was due to him in respect of a promissory note executed in his favour by the

* Special Civil First Appeal No. 174 of 1935 from the judgment of the Small Cause Court of Rangoon in Civil Regular No. 2274 of 1935.

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respondent. The defence was that the respondent had not executed the promissory note and that his signature thereon was a forgery. The learned Chief Judge dismissed the suit with costs upon the ground that he was not satisfied that the respondent executed the promissory note. The judgment of the Small Cause Court was delivered on the 20th September, 1935, and an appeal from that judgment was presented to the High Court on the 13th November, 1935, that is to say, five days out of time. An application has been made to this Court under section 5 of the Limitation Act for the admission of the appeal after the prescribed period of limitation for filing the appeal has expired upon the ground that the applicant had sufficient cause for not preferring the appeal within time.

Now, in *Brij Indar Singh* v. *Kanshi Ram* (1) the Judicial Committee of the Privy Council confirmed the following general rule to be observed in applying section 5 as enunciated by Plowden J. in *Karm Bakhsh* v. *Daulat Ram* (2):

"All that the section requires in express terms as a condition for the exercise of the discretionary power of admission of an appeal presented after time is sufficient cause for not presenting the appeal within the prescribed period. If such can be shown, the Court may in its discretion, which is of course a judicial and not an arbitrary discretion, admit the appeal. We think the true guide for a Court in the exercise of this discretion is whether the appellant has acted with reasonable diligence in prosecuting his appeal, * * *."

That is the general rule, and Lord Dunedin, delivering the judgment of the Board, added:

"There may be a general rule as to the exercise of discretion, but each case must, nevertheless, be examined as to its own

(1) (1917) I.L.R. 45 Cal. 94. (2) (1888) P.R. No. 183, 478.

circumstances to see whether they make it fall within or without the terms of the general rule."

Now, in support of the present application the applicant relies upon certain circumstances alleged in an affidavit which he swore for the purpose of the present appeal on the 12th November, 1935. They are as follows :

"I say that on or about the 10th of October 1935 I went away to Toungoo on some very urgent business and for the purpose of raising money to enable me to file the appeal.

I say that at the time I left for Toungoo I was suffering from severe fever and pain all over my body, and on my arrival there the fever increased attended with swelling of the knees and thighs so much so that I was bed-ridden and disabled from getting up from bed.

I say that I returned to Rangoon on the afternoon of the 10th October 1935 and that I am still unable to move about freely on account of my swelling of the knees and thighs."

It is plain that these allegations as they stand do not disclose sufficient cause for admitting the appeal under section 5 of the Limitation Act. In the first place it would appear that the applicant proceeded to Toungoo and returned to Rangoon on the same day, (10th October, 1935), although it is stated in his affidavit that when he was at Toungoo he was bed ridden and disabled from getting up from bed. On the face of the affidavit therefore the allegations, upon which the applicant relies would appear to be false. The learned advocate for the applicant, however, at first stated that the applicant must have intended to allege in the affidavit that he arrived at Toungoo on the 10th September and not on the 10th October. The learned advocate for the respondent thereupon pointed out that that could not be so because the decree of the Small Cause Court was not passed until the 26th September,

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1935. The learned advocate for the applicant thereupon changed his ground and submitted that the applicant must have intended that the 10th October which he alleged was the date of his return to Rangoon should be read as the 10th November, 1935. Be it so. It is obvious that from the 10th October until the 10th November the applicant took no steps to appeal against the decree that had been passed against him in the Small Cause Court.

Now, the ground upon which he bases the present application is a mere plea of sickness, and that in itself, in my opinion, unless the effect of the sickness was such that in the circumstances it would afford reasonable excuse for the delay in presenting the appeal, would not justify the Court in exercising its discretion in admitting the appeal under section 5. That was laid down as long ago as 1864 in *Mazoom Ali Khan* v. *Panchoo Bibi* (1). In *Le Hu* v. *Ah Yin* (2) Burgess J.C. observed that

"there are general grounds why a plea of sickness should only be accepted upon the very strongest proof of entire disability to attend to any duty if accepted at all, as an excuse for delay in the presentation of an appeal.

In a case of paralysis, for instance, it might happen to a man to be struck down by a stroke the moment judgment against him was delivered and to remain in an unconscious state thereafter continuously till after the expiry of the period allowed for appeal. In such an extreme case there might be good cause for extending the time under section 5 of the Limitation Act.

But it can very rarely happen that a man should thus be rendered incapable by malady of exercising his powers of mind at all, and though he may not be physically able to attend Court and present an appeal, it must be possible for him to arrange for this to be done by another."

In my opinion these observations of Burgess J.C. are too wide. It is a matter for the Court to consider

(1) 1 W.R. (Misc.) 23. (2) (1897-1901) 2 U.B.R. 451.

in each case whether the effect of illness as proved is such that it afforded sufficient cause for the failure to present the appeal within the time prescribed by law. In the present case there does not appear to me to be any reason shown why the applicant during the time when he alleges that he was at Toungoo should not have given instructions to his learned advocate in Rangoon which would have enabled him to present the appeal within time. Indeed, there is no medical certificate or any other corroborative evidence to support the allegation of the applicant that he was ill at all. For these reasons, in my opinion, the applicant has failed to discharge the onus that lies upon him to satisfy the Court that he had sufficient cause for not preferring the appeal within the time limited by law.

The result is that the application is dismissed with costs. We assess the costs at five gold mohurs.

BA U, J.—I agree.