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who appeared to be between fifty and fifty-five, his hair half gray half black, and his general appearance betokening that age. Dr. Ferdinand thought that he looked fifty-five. In this state of the evidence, we think that it is quite impossible for the Court to say that the age of the assured was not that given in the declaration of Otal, or that it is proved that the assured fraudulently understated it.

The Advocate General has objected to the award of interest. It should run at six per cent. from the date of the plaint. To that extent the decree will be varied. In all other respects, it will stand confirmed with costs. The defendants will be allowed in reduction of the amount of decree the premia for one year less the premium already paid.

Attorneys for the appellants:—Messrs. *Ardesir, Hormusji and Dinsha.*

Attorneys for the respondents:—Messrs. *Mulji and Rághaoji.*

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

1895. *April* 5.

CURSANDA'S NA'THA' AND ANOTHER, PLAINTIFFS, *v.* LA'DKA'VAHOO AND OTHERS, DEFENDANTS.*

Limitation—Limitation Act (XV of 1877), Secs. 5 and 14—Guardian and minor—Decree against minor—Neglect of guardian to appeal—Leave to appeal granted to minor after attaining majority—Practice—Procedure.

One Kessowji Jádhowji died in 1886 and by his will directed his daughter-in-law Ládkávahoo to adopt Karamsey Mádhowji, his nephew's son, and "to this lad as his inheritance" he gave the residue of his property. In a suit filed to have the will construed, a decree was passed on 1st October, 1887, declaring (*inter alia*) that until his adoption by Ládkávahoo, Karamsey Mádhowji was not entitled to any part of the estate. Karamsey Mádhowji was then a minor and was represented in the suit by his father and guardian. No appeal was made against the decree, but the guardian and Ládkávahoo began to negotiate with each other as to the sum of money which each should receive out of the testator's residuary estate as the price of giving and receiving the boy in adoption. These negotiations continued until 1890, when Ládkávahoo died, and the adoption directed by the will thus became impossible. In December, 1894, Karamsey Mádhowji, alleging that he had only attained majority on the 14th of that month, applied for a review of judgment, but his application was rejected(1). In

* Suit No. 185 of 1887.

(1) See I. L. R., 19 Bom., 571.

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March, 1895, he obtained a rule *nisi* for leave to appeal against the decree of 1st October, 1887. He submitted that the circumstances amounted to "sufficient cause" under section 5 of the Limitation Act (XV of 1877), and that he had not unduly delayed his application after attaining full age.

Held, that the special circumstances did amount to "sufficient cause" under the above section, and that leave to appeal should be granted. The guardian was desirous that the adoption ordered by the decree should take place, hoping that he would obtain a large sum of money for giving the minor in adoption. His interests were, therefore, in conflict with those of the minor, and the interests of the latter were not sufficiently consulted in deciding whether or not to appeal against the decree.

RULE *nisi* obtained on the 8th March, 1895, by Karamsey Mádhowji, formerly a minor defendant in the case, calling on the plaintiffs to show cause why he should not be allowed to appeal against the decree made in this suit on the 1st October, 1887.

This rule was granted upon a petition of the same date presented by Karamsey Mádhowji, which set forth the following facts:—

One Kessowji Jádhowji died in 1886, leaving a will and property to the extent of ninety lákhs or thereabouts. The plaintiffs were the executors of his will.

Ládkávahoo was his daughter-in-law, being the widow of his predeceased son Liládhar Kessowji. By his will Kessowji Jádhowji directed Ládkávahoo to adopt the petitioner Karamsey Mádhowji (who was his nephew's son), and then gave the residue of his property "to this lad as his inheritance".

In 1887 the executors filed this suit to have the will construed, and to ascertain the rights and interests of the petitioner in the testator's estate. The suit was heard by Farran, J., who on the 1st October, 1887, passed a decree whereby it was declared (*inter alia*) that until his adoption by Ládkávahoo the petitioner was not entitled to any part of the said estate. The trial of the case before Farran, J., is reported at I. L. R., 12 Bom., 185.

The petitioner was then a minor, and in the suit was represented by his father and guardian Mádhowji Kutchra.

Subsequently to the decree, Ládkávahoo corresponded with the petitioner's said guardian and with the solicitors for the executors with the ostensible object of arranging for the petitioner's adoption.

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The petitioner, however, alleged that Ládkávhoo and his guardian were influenced in delaying the adoption by persons whose interest it was to prevent its taking place, and that they were not so anxious that the adoption should be carried out as occupied in endeavouring to obtain out of the estate of the testator large sums of money for themselves as the price of the petitioner's being adopted and given in adoption. This correspondence continued throughout the years 1887, 1888, 1889 and 1890. Ultimately Ládkávahoo went on a pilgrimage and died without making any adoption, and the adoption of the petitioner directed by the will became impossible.

The petitioner contended that his father and guardian committed a gross breach of duty in entering into such negotiations for his own benefit and in not appealing against the decree of Farran, J., which declared adoption to be necessary.

The petitioner further alleged that he only attained the age of eighteen on the 14th December, 1894, and that he had no funds of his own to enable him to take steps in the matter; that with the assistance of friends he had recently applied to Farran, J., for a review of judgment, but that a review had been refused[1]. He, therefore, sought to appeal against the decree, submitting that he had had sufficient cause for not appealing before, and that he had not unduly delayed this application after attaining full age.

In support of his petition the petitioner filed an affidavit, in which he stated that Ládkávahoo had demanded four lákhs of rupees out of the residuary estate of the testator as the price of receiving, and his father one lákh as the price of giving, the petitioner in adoption, and he produced a draft agreement by which it was agreed that, in consideration of the adoption taking place, these sums should be paid out of the testator's estate.

The above rule came on for argument before Sargent, C. J., and Bayley, J.

Macpherson and *Inverarity* for the plaintiffs showed cause:—We say the petitioner attained majority in May, 1894, while he alleges he did not come of age until December, 1894. The petitioner is barred by limitation.

(1) See I. L. R., 19 Bom., 571.

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Lang (Advocate General) for the petitioner in support of the rule:—It was the duty of the guardian of the petitioner to protect his interests. The lower Court passed a decree declaring that the petitioner took no part of the estate unless he was adopted. It was for the minor's interest that he should be declared entitled under the will to the estate, even if he were not adopted. His guardian ought, therefore, to have appealed against the decree. But he hoped to make money out of the adoption, and was, therefore, content with the decree which declared adoption to be necessary. He, therefore, did not appeal, and the minor's interests were sacrificed. Now that Ládkávahoo is dead the effect of the decree is to exclude the petitioner from the estate altogether. His guardian wholly failed in his duty to the petitioner. The interests of the two were in conflict. Under these circumstances the petitioner ought now to be allowed to appeal. He only attained his majority in December. The circumstances show "sufficient cause" within the meaning of section 5 of the Limitation Act (XV of 1877). He cited *In re Manchester Economic Building Society* (1); *Curtis* v. *Sheffield*(2).

SARGENT, C. J.:—The question here is whether "sufficient cause" for the delay in presenting the appeal has been shown. What circumstances will constitute "sufficient cause" within the meaning of the fifth section of the Limitation Act (XV of 1877) is a point that has often been discussed; but no rule has been laid down defining or specifying the nature of the circumstances which are to be regarded as sufficient under the section. It is impossible to lay down any such rule, and I shall not attempt it. The English case that has been cited, *In re Manchester Economic Building Society*(3), does not assist us much. The passage from the judgment of the Master of the Rolls that has been relied upon only in fact re-states the question that we have to decide.

There is no dispute here as to the facts until we come to the time at which the petitioner is said to have attained full age. Until then how does the case present itself. The suit was brought for the purpose of having the testator's will construed.

(1) 24 Ch. D., 488. (2) 21 Ch. D., I.
(3) 24 Ch. D., 488, at p. 497.

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By that will the residue of the estate is bequeathed to the petitioner as adopted son. But the important question is raised as to whether under this bequest the petitioner is entitled to take the residue unless he is adopted. The Judge who tried the case has held that on that condition alone he is entitled to the property; and that unless he is adopted the property must go elsewhere. In his judgment on review[1], the Judge says that the question was a difficult one and was in his opinion one which might properly have gone to appeal. That then is the nature of the case and the point to be decided.

It appears that, after the decision of the lower Court was given, negotiations with reference to the proposed adoption began between the lady who was to adopt and the father of the petitioner who was to give him in adoption. Both were anxious to effect the adoption, and both sought to make a profit out of it, and it appears that there was some arrangement made between them, that upon the adoption taking place the adopting mother was to get four lákhs out of the estate, and the father was to get one lákh. It was thus manifestly to the advantage of the petitioner's father and guardian that the decree of the lower Court should stand, and that the adoption which it declared to be necessary should be carried out. He would naturally desire that the decree which declared adoption to be necessary should remain in force rather than that it should be upset. It was thus clearly not his interest to appeal, while for the minor it was most important, if it was possible, to obtain a declaration from the appeal Court that he was entitled to the property under the will, whether he was adopted or not. Here, then, we have the interests of the minor and of his guardian in conflict—the interest of the minor requiring an appeal, the interest of the guardian being that the decree, which directed an adoption for which he would get a lákh of rupees, should not be questioned, but should remain in force.

The negotiations with regard to the adoption continued for some time, and in 1889 Ládkávahoo left Bombay and subsequently died when on pilgrimage. The adoption directed by the will thus became impossible.

(1) See I. L. R., 19 Bom., 571.

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Nothing more was done until December, 1894. The petitioner says he did not until then attain majority. He also says that the pecuniary circumstances of his father and himself were such that it was impossible for either of them to take steps in the matter. In that month, however, with the assistance of a friend, the petitioner applied to Farran, J., for a review of judgment, but his application was refused, and now the petitioner comes to this Court for leave to appeal.

We think that up to December, 1894, the special circumstances amount to "sufficient cause" and excuse the delay in proceeding. That being so, we think that nothing since then has occurred which should lead us to refuse the petitioner leave to appeal. If the delay until then is held excused, we ought to excuse the delay since that time.

Under the circumstances, we think the petitioner may appeal. We consider that his interests (he being then a minor) were not sufficiently consulted in deciding the question as to whether or not to appeal from the decree of the Division Court, and that he ought now to be allowed to take his case to appeal.

Rule made absolute.

Attorneys for the petitioner:—Messrs. *Little and Co.*

Attorneys for the respondent:—Messrs. *Nanu and Hormasji.*

ORIGINAL CIVIL.

Before Mr. Justice B. Tyabji.

KANKUCHAND SHIVCHAND AND ANOTHER, PLAINTIFFS, *v.* RUSTOMJI HORMUSJI, DEFENDANT.*

1895. *July* 23.

Limitation Act (XV of 1877), Sch. II, Art. 75—Instalments—Payment of debt by instalments—Right to sue for whole debt on default of payment of any instalment—Default in payment—Waiver of right to sue—Proof of waiver—Nature of proof.

On 15th August, 1891, the defendant executed a document admitting that he was indebted to the plaintiffs in the sum of Rs. 2,125 and agreeing to pay the amount in seven instalments, the first (Rs. 401) to be paid in August, 1891, the

*Suit No. 267 of 1895.