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Jan. 31, Feb. 4.

BANK OF COMMERCE LTD., KHULNA

v.

PROTAP CHANDRA GHOSE & OTHERS

and

In the matter of a petition by the appellant under Order XI read with Order XL of the Federal Court Rules, 1942, praying for amendment of the cause title of the above-mentioned appeal by incorporating the name of Sm. Sushila Bala Ghosh in place of the deceased respondent Amal Krishna Ghose.

[SIR PATRICK SPENS C.J., SIR SRINIVASA VARADACHARIAR
and SIR MUHAMMAD ZAFRULLA KHAN JJ.]

Appeal—Dead person impleaded as respondent—Application to bring legal representative on record—Nature of such application—Ignorance of death—Whether sufficient cause for delay—Federal Court Rules, 1942, O. XV, rr. 6 & 7—Indian Limitation Act (IX of 1908), s. 5.

The Bank of Commerce Ltd., filed an appeal in the Federal Court on the 29th September, 1944, and in the memorandum of appeal A was shown as the 16th respondent. When notice of the appeal was attempted to be served on A, it was reported that he had died. This report was communicated by the appellant company's Agent at Delhi to the appellant company at Calcutta by a letter dated 19th January, 1945. On the 23rd January, 1945, the managing director of the appellant company wrote to their advocate at Calcutta to do the needful in the matter and wrote to the Khulna branch of the company to make the necessary enquiries. From a copy of a petition for substitution in another suit which had been served on the law clerk of the company at Khulna on the 18th December, 1944, it appeared that A had died on the 23rd September, 1944. On being informed of this, the appellant company's advocate at Calcutta filed a petition in the Calcutta High Court under O. XV, r. 6, of the Federal Court Rules on the 6th February, 1945, praying that S might be brought on the record as the legal representative of A. On the 22nd March, 1945, the Calcutta High Court reported that S was the proper person to be substituted in place of A but that there was no reason for excusing the delay in filing the application. When the matter came on for hearing before the Federal Court on the 5th November, 1945, it was noticed for the first time that A had died before the appeal to the Federal Court was filed and the application was therefore dismissed as misconceived. On the 15th November, 1945, a fresh application was presented to the Federal Court praying that S may be entered as a respondent to the appeal in place of A:—

Held, (i) that the case was not one of substitution of the legal representative of a party to the appeal or addition of a party contemplated by rules 6 and 7 of O. XV of the Federal Court Rules,

but the matter had to be treated so far as S was concerned as if an appeal had been preferred against him for the first time on the 15th November, 1945 ;

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(ii) that knowledge of the date of A's death could not be imputed to the company from the fact that the law clerk of the company at Khulna had such knowledge from a notice which had been served on him in connection with another proceeding, inasmuch as the said law clerk was not a general agent or in charge of the legal work of the company before the Federal Court ;

(iii) that the appellant's ignorance of A's death was under the circumstances a sufficient cause within the meaning of s. 5 of the Limitation Act for excusing the delay in making the application.

APPLICATION in Civil Appeal No. XVI of 1944. The facts of the case are set out in the headnote.

1946. Jan. 31. *P. C. Basu (Sris Chandra Dutt* with him) for the petitioner. Where an appeal has been preferred against a deceased person in ignorance of his death his legal representative can be impleaded as a respondent even after the expiry of the period of limitation for the appeal: *Gopalakrishnayya v. Lakshmana Rao* ⁽¹⁾. Ignorance of the death of the party is sufficient cause for condoning the delay provided the appellant had acted with due diligence: *Lakshmi Chand v. Behari Lal* ⁽²⁾. In this case the appellant has acted with due diligence from the very commencement of the proceedings till now. As regards the knowledge of the law clerk of the Khulna branch, he had acquired it in a totally different proceeding. He was not a general agent nor was he in charge of this case. He had no duty to communicate this information to the appellant company at Calcutta and did not in fact communicate. His knowledge cannot therefore be imputed to the appellant company: *Fenwick, Stobart & Co. Ltd., In re* ⁽³⁾.

B. Banerji (P. Lal with him) for the respondent. The present case is covered by rules 6 and 7 of Order XV of the Federal Court Rules and this application is incompetent. The application should have been made to the High Court. It is the High Court that has got the power to enquire into the facts relating to this petition: *Haidar Ali and Another v. Tassadduk Rasul and Others* ⁽⁴⁾. Inherent powers cannot be

(1) (1925) I.L.R. 49 Mad. 18.

(2) (1931) I.L.R. 54 All. 280.

(3) [1902] 1 Ch. 507.

(4) (1888) I.L.R. 16 Cal. 184 P.C.

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invoked when there are definite rules. Rules 6 and 7 of the Federal Court Rules provide for all cases of substitution and addition of parties. The clerk's knowledge is sufficient. At any rate the appellant company had notice on the 19th January, 1945. Time which expired since has not been accounted for. [Counsel also referred to r. 51 of the Privy Council Rules].

P. Lal continued. The appellant's advocate was given notice of the fact of death and was asked to "do the needful" on the 23rd January, 1945. Mistake of a lawyer is no excuse unless the lawyer had acted with due care and diligence: *Mithoo Lal v. Jamna Prasad*⁽¹⁾.

P. C. Basu in reply. This case is not covered by rule 6 or rule 7. These rules provide for substitution of the representatives of deceased parties and for the addition of parties. Amal Krishna was not in the eye of the law a party to the appeal as he had died before the filing of the appeal.

Cur. adv. vult.

Feb. 4. The order of the Court was read by

SPENS C. J.—This is an application by the appellant in Civil Appeal No. XVI of 1944 praying that the name of one Sushila Bala Ghosh may be entered as a respondent to this appeal in place of her son Amal Krishna Ghose (deceased). The appeal was filed on the 29th September, 1944, and Amal Krishna Ghose was there shown as the 16th respondent; but when notice of the appeal was attempted to be served on him, it was reported that he had died. This report was communicated by the appellant's Agent at Delhi to the appellant Company in Calcutta by letter dated the 19th January, 1945. On the 23rd January, 1945, the Managing Director of the appellant Company wrote to Mr. S. C. Dutt, the Company's advocate at Calcutta, to "do the needful in the matter" and wrote to the Khulna branch of the Bank to make the necessary enquiries. From a copy of a petition for substitution in Title Suit No. 9 of 1942 which had been served on the law clerk of the Company at Khulna on the 18th December, 1944, it appeared that Amal Krishna Ghose had died on the 23rd September, 1944. On being informed of this, the appellant's advocate at Calcutta filed a petition in the Calcutta

(1) A.I.R. 1933 Oudh 523.

High Court, under Order XV, r. 6, of the Federal Court Rules, 1942, praying that Sushila Bala Ghosh might be brought on the record as the legal representative of the deceased Amal Krishna. This petition was apparently prepared on the 5th February, 1945, but filed in the Court on the 6th February. By order dated the 22nd March, 1945, the High Court reported that Sushila Bala Ghosh was the proper person to be substituted in the place of Amal Krishna, but the learned Judges were of the opinion that there was no reason for excusing the delay in filing the application. When the matter came on for hearing before this Court on receipt of this report, on the 5th November, 1945, it was noticed for the first time that Amal Krishna had died before the appeal was filed in this Court and not after the appeal was filed. The application was therefore dismissed as misconceived. On the 15th November, 1945, the application now under consideration was accordingly presented. The matter has in effect to be dealt with on the footing that so far as the heir of Amal Krishna is concerned, an appeal is for the first time being preferred now.

Notice of this application was issued to Sushila Bala Ghosh as well as to the respondents in the appeal. Sushila Bala, the person sought to be added as the heir of Amal Krishna, alone appeared by counsel and opposed the application. Two contentions have been urged on her behalf: (1) it has been argued that even on the footing that Amal Krishna had died before the filing of the appeal in this Court, an application to add his legal representative as a party should on the terms of Order XV, r. 6, of the Federal Court Rules have been filed in the High Court and not in this Court; and (2) that no sufficient cause has been shown for not making this application or preferring an appeal so far as the new respondent is concerned within the period allowed by law. The first contention proceeds on a misapprehension of rr. 6 and 7 of Order XV. Rule 6 no doubt deals with two classes of cases, namely, substitution of the representative of one who was a party to an appeal, and addition of a party. The present case obviously does not come under the first category, because Amal Krishna was not in the eye of the law a

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party to the appeal as originally preferred, as he had died before the date of the filing of the appeal. The "addition" of parties referred to in the rule cannot cover the representative of a party in whose favour a decree had been passed by the lower Court, because in such a case the proper course will be to prefer an appeal against him and not merely add him as a party to an appeal that had already been preferred against other parties. That this was the intention of the rule is shown by the fact that the reference in the same rule to s. 5 of the Limitation Act is limited to applications to bring the legal representative of a deceased party on the record. Rule 7 also shows that the addition spoken of in r. 6 refers to an addition necessitated by a party already on the record "undergoing a change of status." Where an appeal has to be preferred for the first time against the heir of a person in whose favour the lower Court had passed a decree, the mere fact that an appeal had already been preferred as against other persons will not justify the application being treated merely as one to add a party. Even if it be so in form, it is in substance an appeal preferred against him for the first time, and it is only on that footing that the question of the application of s. 5 of the Limitation Act to such cases will arise.

The question of the sufficiency of the cause for the delay has to be decided in the light of the following facts. The appellant Company succeeded to the assets of an institution known as the Khulna Loan Bank Ltd., by an order of the High Court passed on the 12th May, 1941, under s. 153-A of the Indian Companies Act. As these assets comprised numerous items of amounts due to the Bank under promissory notes, mortgage deeds and decrees, a large number of proceedings were started under the Bengal Money-lenders Act, 1940, to scale down the amounts due to the Bank under these various heads. Some of these proceedings seem to have been pending in the High Court at Calcutta and some in the Courts in the mofussil. Several appeals arising out of these proceedings have also come before this Court. It appears from the affidavits filed here that the appellant Company had a law clerk, Sashi Bhushan Ghose, looking after the company's court work in

Khulna. It is not very clear which of the officers of the Bank was in charge of the business before the High Court at Calcutta; but the affidavit filed here by the Secretary of the Company states that it is the Secretary that looks after the cases before this Court. It also appears from the record that all material papers relating to the present appeal had been sent to Delhi several days before the death of Amal Krishna Ghose though the appeal was in fact filed in this Court six days after his death. Mr. Dutt, the Calcutta advocate of the Bank, who is also an advocate of this Court, has sworn to an affidavit stating that he drew up and signed the petition of appeal in this case and forwarded it to Delhi some time in the middle of September, 1944, and he believed that the appeal had been filed in this Court before the 23rd September, 1944, and that was the reason why he filed the application before the Calcutta High Court as a legal representative petition to bring on record the heir of a party who had died pending the appeal. He has also stated that it was only on the 5th November, 1945, when the matter was being argued before this Court, that he became aware for the first time that the appeal had been filed on the 29th September, that is after the death of Amal Krishna Ghose. We have not been asked to reject these statements as untrue. The Secretary of the appellant Bank has sworn to an affidavit stating that he was not aware of the death of Amal Krishna Ghose before enquiries were made in respect thereof, after receipt of the letter dated the 19th January, 1945, from the Agent at Delhi, and we see no reason to reject the statement as untrue.

It has however been pointed out that in December 1944, the law clerk at Khulna had been served with a petition in connection with another proceeding in the Court at Khulna to which the appellant Bank was a party, and that the factum and the date of Amal Krishna's death had been disclosed there. The Secretary has stated that these facts were not communicated by the law clerk either to the Manager of the Khulna branch of the Bank or to the Head Office. This is not improbable, because the question before the Khulna Court at that time only related to the legal representative

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of the deceased coming on the record and some extension of time in that connection was prayed for. Both these might well have been treated as mere formal matters by the law clerk and the counsel there. It is only if by a rule of law the knowledge of the agent can be treated as the knowledge of the principal that the appellant Bank can be fixed with knowledge of the factum and the date of Amal Krishna's death. We are unable to hold that the doctrine of constructive knowledge can be applied to this case. Sashi Bhushan Ghose was not a general agent, and he was not in charge of the legal work of the Bank before the Federal Court. It was not his duty to make any report to the Bank in respect of matters which might have a bearing upon litigation pending before the Federal Court. The fact that affidavits might sometimes have been sworn to by him, even in respect of litigations pending before the High Court or the Federal Court, will not show that he was in charge of the work before the Federal Court, because in so far as matters that happened in Khulna were concerned he would be the person naturally to be thought of to swear to an affidavit, whether he had charge of the Federal Court work or not. In cases where the agent is under no duty to report, the principal cannot be fixed with knowledge of information acquired by the agent, unless the agent was acting as such in respect of the transaction in which the knowledge is material (Halsbury's Laws of England, Vol. I, s. 477).

In dealing with the question of sufficient cause, Courts have generally laid stress upon the diligence of the party concerned. That the appellant Bank cannot be charged with lack of diligence is shown by the fact that the appeal in the case was filed even without waiting for the full period allowed for the purpose by the rules of the Court. Likewise, the Secretary of the Bank put himself in communication with the Calcutta advocate almost immediately on receipt of the report of death from the Agent at Delhi, and the application before the Calcutta High Court was filed without any avoidable delay as soon as the fact and the date of the death of Amal Krishna had been ascertained from the

Khulna records. The proper test to be applied in dealing with such cases was adopted by the Allahabad High Court in *Lakshmi Chand v. Behari Lal* ⁽¹⁾. The learned Judges there said: "We can find no justification for holding that ignorance of the death, in the absence of negligence or other act or omission for which the applicant can be held to be responsible, should not be held to be sufficient cause within the meaning of the Limitation Act." Judged by this test the delay up to the 6th February, 1945, must be held to have been satisfactorily explained.

As regards the interval between the 6th February, 1945, and the date of the filing of the present application, the position, as has been already stated, is that everybody including counsel in Calcutta acted on the assumption that Amal Krishna died only after the appeal had been filed in this Court. We see no reason for holding that in making this assumption the appellant or their counsel acted negligently, because the circumstances already set out might reasonably have led them to make this assumption. If this mistake was discovered only on the 5th November, 1945 (when the matter was being discussed before this Court), we think that the appellant is entitled to ask that the omission to present the application in its present form before that date should not be attributed to any negligence or lack of diligence. On behalf of the respondent, our attention was drawn to a decision of the Chief Court of Oudh (*Mithoo Lal v. Jamna Prasad*) ⁽²⁾. Even there the learned Judges declined to lay down any hard and fast rule and recognised that the question must be determined by reference to all the circumstances of each particular case, with a view to securing the furtherance of justice. The decision does not therefore materially help the respondent. We accordingly direct that Sushila Bala Ghosh be added as a party to the appeal and that the cause title of the petition of appeal be amended accordingly. There will be no order as to costs on this petition.

Petition allowed.

Agent for the petitioner: *Ganpat Rai.*

Agent for the opposite party: *P. K. Bose.*

(1) (1931) I.L.R. 54 All. 280.

(2) A.I.R. 1933 Oudh 523.

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