
(1953) 05 SHI CK 0002
In the High Court Of Himachal Pradesh
Case No : First Appeal No. 16 of 1951

Devi Das

APPELLANT

Vs

Bushahr Sangh

RESPONDENT

Date of Decision : 18-05-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 16, Order 41 Rule 1
Limitation Act, 1908 — Section 14, 5

Citation : AIR 1953 HP 110

Hon'ble Judges : A.P. Choudry, J.C.

Bench : Single Bench

Advocate : Man Mohan Nath, Labh Singh and K.R. Khosla, for the Appellant;
Thakar Dass and Rattan Chand Sud, for the Respondent

Final Decision : Allowed

Judgement

Chowdhry, J.C.

1. This is a first appeal by the plaintiff Devi Das Mahajan against the judgment and decree of the learned Subordinate Judge of Rampur Bushahr, dated 28-12-1950, whereby his suit as agent for rendition of accounts and recovery of Rs. 100/-, or whatever be found due on the taking of accounts, was dismissed, and a decree for Rs. 22,081/-/6 was passed against him and in favour of the principal, the defendant Co-operative Society known as the Bushahr Sangh of Rampur.

2. The appeal, filed on 31-7-1951, being prima facie time barred under Article 156, Limitation Act (hereinafter referred to as the Act), which prescribes a period of 90 days from the date of the decree appealed from, the plaintiff-appellant filed along with the appeal an application for extension of period u/s 5 read with Section 14 of the Act. It appears that well within the 30-days period prescribed under Article 152 of the Act the plaintiff filed an appeal against the aforesaid judgment and decree in the Court of the District Judge Mahasu on 22-1-1951. On a preliminary objection taken on behalf of the defendant-respondent that the

appeal did not lie in that Court but in the Court of the Judicial Commissioner, the learned District Judge upheld the objection by his judgment and order dated 13-7-1951 and directed that the appeal be returned to the appellant for presentation to the proper Court. The appeal was actually returned on 18-7-1951, and, as adverted to above,, it was presented in this Court on 31-7-1951. Section 14 no doubt applies in terms only to suits, but as held in --"Munshi Ram v. Raghubir Chand" AIR 1953 Him 15 (A), relying upon AIR 1937 276 (Privy Council) the principle of that section is applicable by analogy to appeals also to ascertain sufficiency of cause for extension of period u/s 5 of the Act. The cause of action for the proceeding of appeal before the District Judge was the same as that for the present appeal, and the District Judge was unable to entertain that proceeding for want of jurisdiction. In order that the plaintiff-appellant may be entitled to the benefit of Section 14 all that remains to be seen therefore is whether he prosecuted the appeal before the District Judge with due diligence and in good faith.

3. Under para 31(b), Himachal Pradesh (Courts) Order, 1948, the appeal being from a decree of a Subordinate Judge valued at more than Rs. 5,000/-, it should have been , filed in the Court of the Judicial Commissioner. The contention of the learned counsel for the appellant, however, was that as the suit was valued at Rs. 100/- he filed the appeal in the Court of the District Judge. In support of his contention he relied upon a ruling of the Madras High Court, Kapila Ramadoss Vs. Dadiseti Appalanarasayya and Others, That was a suit for accounts of a dissolved partnership and for possession of the plaintiff's share of the partnership assets. The plaintiff had valued the relief at Rs. 100/-. The suit was dismissed and a decree for Rs. 4,000/- odd was passed against him. He thereupon filed an appeal valuing the relief at Rs. 100/-. Relying upon a ruling of the Privy Council reported as --"Faizullah Khan v. Mauladad Khan", AIR 1929 PC 147 (D), and a Full Bench ruling of the same High Court reported as In Re: Dhanukodi Nayakkar and Others, , it was held that in the matter of valuation of an appeal u/s 7(iv)(f), Court Fees Act, the plaintiff-appellant had greater freedom than the defendant-appellant and the plaintiff-appellant could value his relief in the manner in which he could value it in the plaint. Reliance was placed on that ruling before the District Judge also, but the contention, of the plaintiff-appellant was not accepted. The District Judge referred to a number of rulings, and he held, and quite rightly, that the1 preponderance of authority was that in an accounts suit it is the value of the amount of decree that determines the! Court of Appeal. Now, where there are conflicting views on a certain point and a party adopts one of the views, it should be taken to have acted in good faith even though the Court adopts the contrary view. --"Shivan Ditta v. Radha Kishan" AIR 1941 Pes 74 (F).

4. The learned counsel for the defendant-respondent, however referred to the notification No. J. 79-22/48, dated 3-11-1948, published in Part II-A of the Gazette of India, dated 13-11-1948, passed by the Judicial Commissioner with the previous sanction of the Chief Commissioner under the proviso to para 31,

Himachal Pradesh (Courts) Order, 1948, where-under appeals from decrees and orders of Subordinate Judges in unclassified suits of value not exceeding Rs. 100/- have to be preferred to the Senior Subordinate Judge. The present is no doubt an unclassified suit, and it was, therefore, argued that, if Rs. 100/- was taken, by the appellant as the value of the suit, the appeal should under the said notification have been filed in the Court of the Senior Subordinate Judge and not in that of the District Judge. It was further contended, relying upon --"Brijmohandas v. Sadashiv" AIR 1940 Bor 5 (G), that a proceeding contrary to a clearly expressed provision of law cannot be regarded as prosecuting another civil proceeding in good faith u/s 14. The history of the Court at Rampur Bushahr is, however, an extremely chequered one. When the present suit was filed on 7-12-1948 the presiding officer of the Court was Sri Dina Nath, who exercised the powers of a Senior Subordinate Judge. In between that date and 28-12-1950, when the suit was eventually decided, there were many changes of officers and their powers.

Sri Dina Nath remained Senior Subordinate Judge till 8-7-1949 and was succeeded by Sri Om Parkash in the same capacity. Sri Om Prakash was transferred to Jubbal as Senior Subordinate Judge on 29-1-1950 and Sri Harish Chandra succeeded him at Rampur. Sri Harish Chandra had only the powers of a Subordinate Judge upto Rs. 500/- and he held the office till 20-9-1950, when he was succeeded by Sri A. S. Bhatnagar. Sri A. S. Bhatnagar was also a Subordinate Judge, and it was he who decided the present suit as such on, 28-12-1950. It appears that after the transfer of Sri Om Prakash from Rampur to Jubbal the present case was transferred to the Court of his successor-in-office, who was a Subordinate Judge, by an order dated 16-2-1950. No notice of this order appears, however, to have been given to any party, and the case continued in the same Court although after the transfer of Sri Om Prakash the succeeding presiding officers until the decision of the case were invested with only the powers of a Subordinate Judge and not of a Senior Subordinate Judge. It also appears that on 22-1-1951, when the appeal was filed in the Court of the District Judge, Sri Om Parkash was holding the office of a Senior Subordinate Judge at Jubbal. Strictly speaking, therefore, if Rs. 100/- was the valuation to be taken into consideration, the appeal should have been filed in the Court of the Senior Subordinate Judge at Jubbal.

From what has been stated above, however, it is manifest that the suit was filed in the Court of a Senior Subordinate Judge, that it remained pending before two successive presiding officers with that power upto 29-1-1951 and that it was transferred to the file of the succeeding presiding officer with only the power of a Subordinate Judge by an order which was not notified to the parties. In the circumstance, it was possible for the plaintiff to have remained under the misapprehension that the suit was instituted before and decided by a Senior Subordinate Judge, and therefore he cannot be blamed for having contravened the said notification. It may be added further that there is nothing to show that there was any public notification with regard to the powers of the presiding

officers who succeeded Sri Om Parkash at Rampur. Another noteworthy fact is that when the appeal was filed in the Court of the District Judge no objection was taken by his office as regards the maintainability of the appeal on foot of the said notification. Whether, therefore, the correct valuation for purposes of appeal be taken as Rs. 100/- or Rs. 22,000/- odd, I hold that the appeal was prosecuted in good faith, though of course wrongly, in the Court of the District Judge.

5. There can also be no doubt with regard to the appeal having been prosecuted with due diligence in the Court of the District Judge. As already noted, it was filed well within the shorter period prescribed by Article 152, which required greater diligence than if it were to be filed within the longer period prescribed by Article 156. All the conditions of Section 14 of the Act being thus satisfied, the plaintiff-appellant is entitled under that provision to the exclusion of time during which the appeal was pending in the Court of the District Judge, i.e. to the exclusion of the 178 days from 22-1-1951 to 18-7-1951. He is also entitled u/s 12 to the exclusion of the eight days from 29-12-1950 to 5-1-1951 taken in obtaining a copy of the judgment of the trial Court. Thus he is entitled to the exclusion of a total period of 186 days. The time which passed from 28-12-1950, the date of the judgment and decree of the trial Court, till 31-7-1951, when he filed the present appeal in this Court, amounted to 215 days, which was 125 days in excess of the 90-day period prescribed by Article 156. This excess of 125 days was, however, far short of the aforesaid period of 186 days which the plaintiff-appellant is entitled under Sections 12 and 14 of the Act to have excluded in computing the period of limitation prescribed for the filing of the present appeal." The appeal is, therefore, clearly within limitation. It was, however, contended by the learned counsel for the defendant-respondent that the appellant could have the benefit of Section 14 only upto 13-7-1951, when the District Judge delivered his judgment directing the appeal to be presented to the proper Court, or at the most upto 18-7-1951 when the appeal was actually returned to the appellant, but not thereafter. According to him it was still incumbent upon the plaintiff-appellant to account for the remaining period of 18 or 13 days, as the case may be, until the institution of the present appeal on 31-7-1951, and as no explanation has been offered for this delay (which is no doubt a fact) the present appeal is still liable to be dismissed as time-barred.

6. The above contention of the learned counsel for the defendant-respondent has, in my opinion, no force. There can be: no gainsaying the proposition of law, as enunciated in --"Karora Singh v. Kartar Singh" AIR 1951 Simla 170 (H), a ruling cited by the learned, counsel for the respondent, that an appellant has to account for every day of the delay in filing an appeal. But the view expressed by me above does not run counter to this proposition, for if by the exclusion of time u/s 14 of the Act the appeal be still within limitation, the appellant will be deemed to have explained every day of the delay. The rule of explanation-for-every-day-of-delay has assumed prominence in cases where sufficiency of cause for not preferring an appeal or making an application¹ within the prescribed period has been considered on an application of the provisions of only Section 5

without any reference to Section 14 of the Act. Take for instance, the aforesaid case of --"Karora Singh in AIR 1951 Simla 170 (H)", where though the appellant reached Simla on 27-6-1948 he filed the: appeal on 29-6-1948 and was unable to account for the delay of the intervening two days. In such cases there could be no doubt but that it is incumbent upon an appellant to offer some satisfactory explanation for every day of the delay between the expiry of the period of limitation and the filing of the appeal thereafter, for otherwise he would not be entitled to extension of the period of limitation u/s 5 of the Act.

It is, however, to be remembered that it is not a case of extension, but of exclusion, of time u/s 14. In other words, a party who makes out a case u/s 14 is entitled that the time during which the proceeding in: question was pending should be totally disregarded in computing the prescribed period of limitation. So in the present case if the aforesaid 186 days are totally excluded or disregarded in computing the period of limitation, the total delay of 215 days is reduced! to a delay of only 29 days, which is less than the 90-day period prescribed under Article 158. This distinction between cases where only Section 5 has to be applied and those where Section 14 comes in for application has been clearly brought out by Sulaiman, J., (as he then was) in - Ram Rup Agrahri and Others Vs. Naik Ram That was a case where the lower appellate Court had dismissed the subsequent appeal filed on 19-2-1925 as time-barred because the appellants had failed to account for the delay between that date and 12-2-1925 when the previous appeal was dismissed. The provisions of Section 14 do not seem to have been applicable in that case since it appears that the previous appeal was dismissed by the District Judge on account of a defect in the Vakalatnama filed on behalf of the appellants, and not from defect of jurisdiction or other cause of a like nature, as contemplated by the section. His Lordship, however, was prepared to give the appellants the benefit of that section and was of the opinion that the time during which the previous appeal was pending should be taken into account while exercising the discretion u/s 5 of the Act. He went on, however, to observe that that did not absolve the appellants from their obligation to show that there was sufficient cause for not filing the appeal earlier than 19-2-1925.

It will be observed that the case was decided purely on a consideration of the provisions of Section 5, and therefore it is no; authority for the view propounded by the learned counsel for the defendant-respondent that even though an appeal may be within limitation u/s 14 the appellant has still to explain the delay between the dismissal of the infructuous appeal, when he becomes aware of his mistake in filing the appeal in a wrong forum, and the subsequent preferment of appeal in the proper Court. The aforesaid distinction between Sections 5 and 14 of the Act, though amounting to a mere obiter dictum in view of what has been stated above, serves to explain my point of view, and it has been expressed in the following terms :

"As to the applicability of Section 14 of the Limitation Act, it seems to me that there is a clear distinction between exclusion of the time during which another

civil proceeding has been duly prosecuted within the meaning of that section and an extension of time for good cause shown u/s 5. If it were a question of exclusion then the appellant would be entitled to exclude from all calculation the period during which the previous appeal was pending; but if it is merely a matter of extension then he would be entitled to have time extended upto the last date when the previous proceeding terminated. If time were to be excluded then it is not incumbent on him to explain the delay for the subsequent period provided that the appeal comes within time. On the other hand, if it is only a question of extension then it is necessary for him to explain the delay between the 12th of February 1925, when the appeal was dismissed and the 19th of February 1925 when it was filed afresh."

7. The same view in regard to the essential nature of the provisions of Section 14 was in effect expressed by Sir Arnold White, C. J., in --"Kichilappa Naickar v. Ramanujam Pillai", 25 Mad 166 at p. 178 (J). That view, though again an obiter dictum since that case was also decided only u/s 5 of the Act, was expressed as follows :

"Section 14 deals with the computation of time. It does not confer a discretion on the Court, but gives a right to a party to have a certain period of time excluded from the computation of the period of limitation if the requirements of the section are satisfied."

8. There is a Full Bench decision of the Punjab High Court which fully supports the view that I have taken of the matter. It is an old ruling of the year 1888, but it does not appear to have been overruled or dissented from in any decision of countervailing weight. On the contrary, it was approved, as I shall presently show, in a subsequent Privy Council decision. That ruling of the Punjab High Court stands reported as --"Karm Bakhsh v. Daulat Ram" 183 Pun 1888 (FB) (K). That was a case where the following question was referred to the Full Bench :

"When an appellant has instituted an application for review of judgment in a lower Court, within the period prescribed for appeal, and after such application has been disposed of, presents an appeal from the first judgment after the period prescribed for appeal, is it by law necessary to the admission of the appeal that the appeal should be presented as speedily as may be after the proceedings in review have ended."

Delivering the judgment of the Full Bench Plowden, J., observed as follows : "We are of opinion that the question referred to the Full Bench must be answered in, the negative.

Section 5 of the Limitation Act directs that any appeal may be admitted after the period of limitation provided therefor, when the appellant satisfies the court that he had sufficient cause for not presenting the appeal within such period.

It seems important to observe the concluding words. 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 cause is 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 presenting his appeal, "and we: think, further, that he ought ordinarily to be deemed to have acted with reasonable diligence, when the whole period between, the date of the decree appealed against, and the date of presenting the appeal, does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal". We also agree with the High Court of Allahabad in the case reported in Indian Law Reports, --"Balwant Singh v. Gumani Ram" 5 All 591 (L), that the circumstances contemplated in Section 14 of the Limitation Act should ordinarily constitute sufficient, cause within the meaning of Section 5." The words "as speedily as may be" in the question referred to the Full Bench appear to have been taken from an earlier decision of the same High Court reported as --"Musst. Ganga v. Madho" 89 Pun 1882 (M). After referring to that ruling His Lordship went on to observe as follows : "We think that the words "as speedily as may be", ought to be interpreted as meaning no more than with such promptitude as may, under the circumstances of the particular case, be reasonably required, "and that such promptitude may ordinarily be held to exist whenever the appellant has not, after de- ducting the time properly spent in the review, exceeded the period equal to that prescribed by law for the appeal." The portions underlined (here in " ") bring out the point of view which I have taken of the matter. It will be noticed that "the circumstances" considered in determining sufficiency of cause u/s 5 consisted of the provisions of Section 14 of the Act, and it was held that such a cause will be deemed to exist when, as in the present case, the whole period between the date of the decree appealed against and the date of presenting the appeal does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal. The time between the date of the rejection of the review petition and that of presenting the appeal was not at all taken into consideration, as indeed it could not have been consistently with the view laid down in the case.

9. The Privy Council decision in which the above Full Bench view of the Punjab High Court was approved is reported as "Brii Indar Singh v. Kanshi Ram" AIR 1917 PC 156 (N). That was a case where the appeal against a decision of the District Judge dated 16-3-1908 was filed in the High Court on 21-4-1909, & the appellant sought to exclude the time taken by him in review proceedings before the District Judge from 20-3-1908 to 24-4-1908 and in an appeal to the High Court upto 6-4-1909 u/s 14 of the Act. Observing that although S.14 did not in terms apply to appeals its relevance should be considered, their Lordships

referred to the aforesaid Full Bench decision of the Punjab High Court as laying down a general rule as to the exercise of discretion. They further observed that the authority for that Full Bench decision was much wider, and in that connection they cited with approval the following from the Full Bench decision of the Calcutta High Court in *In re "Brojender Coomar Roy, (1867) 7 WR 529 (FB) (O) :* "If a party presents an application for review of judgment within the ordinary period limited for appealing, the time occupied by the Court in disposing of such application will not be reckoned among the days limited for appealing, but will be added thereto, and a memorandum of appeal presented within such extended period will be received as put in within time."

It will be noticed that the view expressed in the aforesaid Full Bench decision of the Calcutta High Court was in effect the same as that held in the 1888 Full Bench decision of the Punjab High Court. Their Lordships of the Privy Council were of the view that the general rule laid down in the Full Bench decision of the Punjab High Court applied to the facts of the case. They further held that the proceedings in question were reasonably prosecuted and in good faith. In other words, they held that the appellant was entitled to the benefit of Section 14. Thereafter they went on to observe as follows: "The question of what he did in the fifteen days is neither here nor there. For, accepting the general rule as stated above, the period for appealing being ninety days, the dates stand thus: The District Judge Sanford's order was made on the 16th March 1908. That order was set aside on the 8th April 1908. Thus only twenty-three days out of the ninety had expired. That left forty-seven days. And after the proceedings for review terminated only fifteen days were consumed before the appeal was presented."

It will be observed that after deducting the time taken over review-proceeding the appeal in the High Court was filed within the 90-days period, and it was held that it was immaterial that fifteen days had elapsed between the termination of those proceedings and the filing of the appeal in the High Court. Thus, their Lordships of the Privy Council gave full effect to the aforesaid 183 Pun 1888 (FB) (K) decision of the Punjab High Court.

10. The same view was taken in a decision of the Patna High Court reported as *Ramcharita Sahu Vs. Ram Narayan Sahu, .* The appellant filed an appeal in the High Court on 26-6-1919 against an order in execution proceedings passed on 7-12-1918 dismissing his application under Order 21, Rule 90, C. P.C. The appeal was prima facie time-barred, and therefore the appellant filed an application for extension of time u/s 5 of the Act by exclusion of the time taken by the appellant from 8-12-1918 to 17-5-1919 in endeavouring to have his case reinstated under Order 9, Rule 9, C.P.C. The application under Order 9, Rule 9 was rejected because the lower Court held, on foot of a recent decision of the High Court, that it had no jurisdiction in the matter. Their Lordships excluded the time from the total period allowed for filing the appeal, and, relying upon the aforesaid Privy Council ruling of AIR 1917 P. C. 156 (N), they held that it did not matter that the

appellant had assigned no real reason for having waited from 17-5-1919 to 26-6-1919 for filing his appeal in the High Court.

11. The learned counsel for the defendant-respondent cited a number of rulings in support of what he contended was the opposite view. The first was the Privy Council ruling reported as "Ram Narain Joshi v. Parmeswar Narain Mahta", 30 Ind App 20 (PC) (Q). The plaintiff in that case filed two suits against different defendants in respect of the same property u/s 283, C. P. C, 1882, corresponding to Order 21, Rule 63 of the present Code. The suits were tried together and dismissed by the trial Court on 25-6-1894. In one suit he valued the appeal as above Rs. 5,000/- and filed it in the High Court, while in the other he valued it at less than Rs.5,000/- and filed it before the District Judge on 3-9-1894. The appellant applied to the High Court for transfer to that Court of the appeal pending before the District Judge so that both the appeals might be disposed of together by the High Court. This application was allowed on 9-8-1895, but in the course of its disposal it was pointed out by the pleader for the respondent that the appeal had been wrongly preferred to the District Judge since the property in both the suits being the same the proper valuation of the appeal should have been above Rs. 5,000/-. Thereafter on 16-9-1895 the appellant applied to the High Court conceding that the District Judge had no jurisdiction to hear the appeal that was filed before him and praying that it be treated as an appeal filed in the High Court. The High Court dismissed that application and also the appeal for want of jurisdiction.

In doing so the following facts were taken into consideration, by the High Court: (1) that there was no fresh memorandum of appeal filed in the High Court, (2) that the application, dated 16-9-1895 was not an application for the admission of a time-barred appeal, (3) that even if it be supposed that a fresh memorandum of appeal had been presented with an application for condonation of delay, it had not been shown that there was sufficient cause for not presenting the appeal before, (4) that the mistake as to valuation was inexcusable since the same property was in dispute in both the suits, and (5) that even supposing that the mistake could be overlooked and treated as sufficient cause for the appeal not having been filed within time, it was not till 16-9-1895 that the party in question filed the said application in the High Court although he had become aware of his mistake more than five weeks earlier on 9-8-1895 in the course of disposal of his application for transfer of the appeal. Their Lordships of the Privy Council reviewed the aforesaid reasons given in the judgment of the High Court and held that they could not properly interfere in the case as they were not satisfied that the refusal by the High Court to admit the appellant's appeal after date was wrong.

It will thus be seen that their Lordships of the Privy Council dismissed the appeal on the broad ground that the High Court did not appear to have exercised its discretion properly in not admitting the appellant's appeal after date. They did not uphold specifically the view of the High Court that it was incumbent upon the

appellant to explain the delay between 9-8-1895 and 16-9-1895. It will also be noticed that the just mentioned reason was only one of the various circumstances taken into consideration by the High Court in rejecting the appellant's prayer. This decision of the Privy Council is therefore of no help to the respondent.

12. The next case relied upon by the learned counsel for the defendant-respondent was that of - Hamida Bibi Vs. Fatima Bibi, . A decree for rent was passed against two co-tenants and satisfied by one of them. The latter filed a suit for contribution against the other co-tenant on 20-5-1913 in the Small Cause Court, which returned the plaint for presentation to the proper Court on 27-11-1913 on the finding that it had no jurisdiction to try the suit. The plaintiff refused to take back the plaint and filed a revision in the High Court on 19-2-1914, which was dismissed on 16-3-1915. On 15-6-1915 the plaintiff applied for the return of the plaint which was actually returned & presented in the Court of the Munsif on 30-6-1915. It was held that even if it be assumed that the plaintiff was entitled to exclude the period from 20-5-1913 to 16-3-1915, she could not in any case be allowed to exclude the period between 16-3-1915 and 30-6-1915 u/s 14 inasmuch as she did not prosecute her suit with due diligence in view of the fact that she waited for three months after the dismissal of her application for revision before she asked for the return of the plaint and that, therefore, the suit was barred by time.

It will be noticed that the view held was that the suit itself was not prosecuted with due diligence by the plaintiff. If so, the plaintiff was clearly not entitled to the exclusion of any time u/s 14, to say nothing of the subsequent period from 16-3-1915 to the institution of the suit on 30-6-1915. The ratio of this decision was, therefore, quite different from that propounded on behalf of the respondent in this case. In any case, if it purported to hold that even if the suit was within time by virtue of the provisions of Section 14 the plaintiff had still to account for the period immediately before the institution of the suit, I would respectfully differ from that opinion in view of what I have held above on the basis of "183 Pun Re 1888 (FB) (K)", decision of the Punjab High Court and AIR 1917 PC 156 (N) ruling.

13. Another case apparently holding the opposite view is that of the Calcutta High Court reported as- Kamiruddin Mallik Vs. Sm. Bishupriya Chowdhurani, The question in that case was whether an appeal filed in the lower appellate Court on 18-11-1925 against an order dated 18-4-1925 was time-barred. The appellant sought to exclude the time from 18-5-1925 to 31-10-1925 taken by him in prosecuting another appeal which had been dismissed as incompetent. The previous appeal was held incompetent because it had not been filed against the proper order of the trial Court. The District Judge dismissed the subsequent appeal from the proper order filed on 18-11-1925 as time-barred. On appeal the High Court held that in view of the pronouncement of the Judicial Committee in the aforesaid--"Brij Indar Singh's case (N)" the provisions of both Sections 5

and 14 had to be looked into, that looking at it from the point of view of Section 14 all that the appellant was entitled to get as deduction of the amount of time taken by him in preferring the appeal was the period during which he was prosecuting with due diligence the previous appeal, that Section 14 was, however, not exhaustive of all the circumstances that may go to constitute sufficient cause within the meaning of Section 5, and that from the point of view of Section 5 the appellant had still to explain the delay of 17 or 18 days between the dismissal of the first appeal on 31-10-1925 and institution of the second on 18-11-1925. It was found that the delay of 9 or 10 days had been sufficiently explained but not for the remaining eight days. In spite of that the delay was condoned on the ground that too exacting a standard should not be applied in making the calculations for purposes of exercising the discretion u/s 5 of the Act.

It will thus be seen that although purporting to apply the opposite view propounded in this case by the learned counsel for the defendant-respondent, their Lordships decided in effect in favour of the appellant on the view of the matter which I have expressed above. It will also be noted that although their Lordships referred to the Privy Council ruling in "Brij Indar Singh's case (N)", they went on to decide the case partly u/s 14 and partly u/s 5 of the Act. On a strict interpretation of that "Privy Council ruling", there would be no question of passing on to Section 5 for dealing with a part of the case on the view that Section 14 was not exhaustive of all the circumstances that may go to constitute sufficient cause, for, if after exclusion" of time u/s 14 the appeal is within limitation, that fact would by itself constitute sufficient cause within the purview of Section 5 of the Act.

14. Lastly, the learned counsel for the respondent relied upon--"Raj Maiik v. Dr. Susanta Sen" AIR 1951 Sim 209 (T). The plaintiff's suit for ejectment was decreed ex parte in that case on 31-8-1948. The defendant filed an appeal to the District Judge on 27-1-1949 along with an application for extension of time u/s 5 of the Act as the appeal was on the face of it time-barred. Holding that the appeal was within time the District Judge set aside the ex parte decree and remanded the case for a fresh trial. The plaintiff went up in appeal to the High Court. Relying upon the aforesaid Full Bench decision in "Karim Bakhsh's case (K)", the District Judge was of the view that it was sufficient for the appellant to explain why the appeal had not been filed within the prescribed 30 days. Their Lordships differed from this view and held that the appellant had also to explain the subsequent delay upto the very moment of the filing of the appeal. It is manifest that it was a pure case of ascertain-ment of sufficiency of cause u/s 5 so that the appellant had to explain every day of the delay after the expiry of the prescribed 30 days from 31-8-1948 and uptill the institution, of the appeal on 27-1-1949. There was no proceeding pending in between those dates, and, therefore, no question of the application of Section 14 arose. That being so, the ruling in "Karm Baksh's case (K)" did not at all come in for application. The learned District Judge was, therefore, clearly in error, and for the same reason this ruling has no application to the facts of the present case.

15. It will thus appear that the learned counsel for the defendant-respondent has not been able to displace the view which I have expressed above, and which finds support from the "Full Bench decision in 183 Pun Re 1888 (K)" and the Privy Council ruling of AIR 1917 PC 156 (N)". I, therefore, hold that the present appeal is not time barred.

16. Coming to the merits of the appeal its decision lies within a short compass. But before I proceed further I have to remark that this is a somewhat strange case. The plaintiff's agent came forward with a claim against the defendant principal for Rs. 100/- or whatever be found due on the taking of accounts, the defendant definitely pleaded, and several of the defence witnesses clearly deposed, that the accounts had been adjusted and the specific sum of Rs. 13,000/- was admitted by the plaintiff to be due by him to the defendant, taut the Commissioners appointed by the trial Court for going into the accounts found that as much as Rs. 22,081/0/6 was due from the plaintiff and the trial Court has in a summary judgment accepted the Commissioners' report and passed a decree for that amount in favour of the defendant. At no stage during the lengthy arguments had in this case was it suggested on behalf of the defendant-respondent that the amount of Rs. 13,000/- had been pleaded in the written-statement and deposed to by the defence witnesses by some mistake. It may be that on the accounts being properly gone into the defendant may still be found to be entitled to the said, or even a larger, amount, but so far as the present decree is concerned it cannot stand.

17. The learned counsel for the parties took me through a good deal of the accounts, and it was apparent that the accojnts were not simple but complicated. This was, therefore, pre-eminently a fit case in which the trial Court should have passed a preliminary decree under Order 20, Rule 16, C. P. C. The plaintiff alleged in the plaint that he was entitled to a certain commission and travelling allowance, and that the defendant was liable to render account. Directions on these points should have been given to the Commissioner under Rule 17. The trial Court recorded a finding with regard to the commission but none with regard to travelling allowance or the alleged liability of the defendant to render account. Even with regard to the commission, it was strenuously argued before me on behalf of the plaintiff-appellant that on a strict interpretation of the pleadings no issue on1 that point should have been framed because the defendant should have been held to have admitted the plaint allegation. The written-statement was no doubt vague, and therefore the trial Court would have been well advised to clarify the point by examining, the parties under Order 10, Rule 2, C. P. C. or by asking them to file the necessary particulars. Even though no preliminary decree was passed, the trial Court should have given the said directions for the guidance of the Commissioners when passing the order of their appointment, for without the said directions it was not possible for the Commissioners to arrive at a correct finding.

18. The fatal defect in the present case however is that instead of going into the

accounts themselves the Commissioners delegated the task to others. This is quite apparent from a perusal of the Commissioners' report where they have stated that Gopi Ram Inspector and Sundar Lal Sub-Inspector had laboured hard in preparing the account of Sangh. The Commissioners further stated that it was these officials who had verified the accounts. They further remarked that the plaintiff did not show his accounts to the said officials when they prepared the accounts. Nowhere in their report have the Commissioners stated that they themselves went through the accounts. There is no doubt that at one place they do say that the statements of the parties were recorded and the accounts of the Sangh were examined; but they do not say who examined the accounts. From the mere fact that the statements of the parties were recorded by the Commissioners it cannot necessarily be concluded that the accounts were also examined by them, especially in view of the aforesaid passages wherefrom it clearly appears that the examination of accounts was left to the said two officials. The learned counsel for the defendant-respondent referred to the statement of Th. Hardayal Singh President of the defendant Sangh before the Commissioners to the effect that the basis on which the parchas Exs. D. 4 and D. 3 were prepared had been shown to the Commissioners, in the presence of the plaintiff. What the basis of those parchas was has however not been clarified. Moreover, even if it be supposed that the word "basis" meant the books of account of the defendant, the mere fact that they were shown to the Commissioners would not necessarily mean, especially in view of the aforesaid portions of the Commissioners' report, that the Commissioners had themselves gone through the accounts for the purpose of arriving at their finding. The order passed by the trial Court on 16-8-1950 appointing the Commissioners did not empower them to delegate their function to anybody else. True, this objection was not taken before the trial Court, but it cannot for that reason be shut out in this Court when it appears to be well-founded on the very face of the record. I am of the opinion that on this ground alone the judgment and decree of the trial Court should be set aside and the case remanded for a fresh trial. In view of what has been stated above the question of the terms of the agency, including that of commission, will have to be redetermined. The question of whether the defendant was liable to render account, as alleged by the plaintiff, will also have to be decided. After deciding all the necessary facts in order to enable it to give the requisite directions to the Commissioner for going into the accounts, the trial Court will pass a preliminary decree appointing a Commissioner and incorporating the directions. On receipt of the Commissioner's report in pursuance of the preliminary decree, the trial Court will give parties time to file objections, if any, against his report, and thereafter proceed to pass a final decree according to the law. It was pointed out to me in the course of the arguments that the President and the Vice-President through whom the defendant Sangh has been sued have been replaced. The Court will ascertain: the fact and pass necessary orders in that connection also.

19. A word about the costs of this appeal. Considering that the disposal of the

appeal from the decision of the trial Court has been considerably delayed on account of the plaintiff having first filed his appeal in a wrong Court, although he did so bona fide, and considering that the ground on which the Commissioners' report and the trial Court's judgment thereon have been set aside was not taken by him in the trial Court, I would grant him only half the costs of the present appeal.

20. The appeal is allowed, the judgment and decree of the trial Court are set aside and the suit is remanded to the trial Court for being readmitted at its original number in the Register of Civil Suits and disposed of afresh in the light of the above observations. The plaintiff is awarded half the costs of the present appeal against the defendant Sangh, which will bear its own costs of the present appeal. The past and future costs in the trial Court will abide the result and will be in the discretion of that Court.