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**(1974) 03 MAD CK 0025**

**In the Madras High Court**

**Case No :** Civil Revision Petition No. 1279 of 1971

Meghraj

APPELLANT

Vs

Jesraj Kasturjee and Another

RESPONDENT

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**Date of Decision :** 22-03-1974

**Acts Referred:**

Limitation Act, 1963 — Section 5

**Citation :** AIR 1975 Mad 137 : (1974) 87 LW 863

**Hon'ble Judges :** Ramaprasada Rao, J

**Bench :** Single Bench

**Advocate :** P.V. Subramoniam, for the Appellant; Himmatlal Mardia, for the Respondent

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**Judgement**

Ramaprasada Rao, J.—An application under Order 9, Rule 9, C. P. C. was filed by the defendant in O. S. No. 330 of 1966 on the file of

the City Civil Court, Madras, to set aside the ex parte decree passed in that suit on 29-10-1968 and to restore the suit on the file for being

disposed of in accordance with law. This application was filed on 29-11-1998. When it came up for hearing before the II Assistant Judge. City

Civil Court, Madras, the learned Judge after hearing both sides, accepted the contention of the respondent that the petition was barred by

limitation and in view of the fact that no petition for excusing the delay u/s 5 of the Limitation Act was filed along with the petition to set aside the ex

parte decree, he dismissed the application. C. M. A. 19 of 1970 was preferred to the Principal Judge, City Civil Court, Madras. The learned

appellate Judge noted that there was a day's delay in the presentation of the application. But he was in accord with the learned Assistant Judge

that as there was no application apparently a written application, u/s 5 of the

Limitation Act, the main application was not maintainable. He relied upon an unreported decision of this court in C. R. P. No. 2312 of 1966 (Mad), *Gety Bros. and Co. v. Agarali Adamji*. He would not agree with the contention of the petitioner that the delay of a day was not wilful and that the reasons given in the affidavit in support of the main application for such a day's delay ought to be noticed before final orders are passed. On the only ground that there was no prayer to excuse the delay in the filing of the main application, the court declined to interfere and admit the application by excusing the day's delay. It is as against this, the present civil revision petition has been filed.

2. Mr. P.V. Subramaniam, the learned counsel for the petitioner, contends that the court ought to have given him an opportunity to file an affidavit, or indeed a petition u/s 5 of the Limitation Act setting forth the circumstances under which the day's delay had occurred, in any event, he would state that an oral application was made before the courts below and that by itself was sufficient for the courts to go into the sufficiency of the cause of delay and find whether the application to set aside the ex parte decree could ultimately be entertained or not. Such an opportunity was denied to the petitioner both by the first court as well as the appellate court. As the orders of dismissal of both the courts below are founded purely on technical grounds, he prays for the restoration of the application or in the alternative for a remand of this subject to the first court for a reappraisal of the facts after giving an opportunity to both parties to state their respective contentions as regards the sufficiency or otherwise of the day's delay. Mr. Himmatlal Mardia, appearing for the first respondent, however, seriously contends that the laches on the part of the petitioner cannot be cured by an oral application and that it is not necessary in the eye of law to give the petitioner a second opportunity to state his reasons for the day's delay, as it would cause prejudice to the respondents. Of course, reliance is placed on the decision of our Court cited above.

3. Before I deal with the authorities, which are relevant for the purposes of this case, it is necessary to look into the text of Section 5 of the Limitation Act itself to find out its real purport and intendment of the Act. The language of Section 5 of the Act does not expressly or by necessary implication mandate the filing of a written application to obtain a relief under that

section. It reads thus-

Any appeal or application for review of judgment or for leave to appeal or any other application to which this section may be made applicable (by

or under any enactment) for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or

applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

It only says that any appeal or any application filed beyond the prescribed limit of time, under the section may be admitted after the prescribed

period if the appellant or the applicant satisfies the court that he has reasonable ground for not preferring the appeal or the application within the

prescribed time. The entire tenor and language of Section 5 leaves, therefore, a judicial discretion in courts in the matter of the application of the

principles set out in Section 5 of the Limitation Act. As all such rules are to be understood and applied as beneficial provisions, bare technicalities

ought not to prevail over the pith and substance of the provisions. As I said, there is no warrant in the language of Section 5 of the Limitation Act

to lay down as an axiomatic rule of procedure that unless an application in writing or any other similar formal application accompanies either the

appeal or the application in question, the court ought not to take cognisance of the realities and ignore the substance of the sufficiency in the cause

of each case and dismiss the said appeal or application for technical reasons, such as the absence of a written or a formal application. In fact each

case has to be decided on its own facts. It is not as if that under all circumstances a written application should be ignored; but in cases where by

inadvertence or by a bona fide error of judgment, the party assisted by counsel ushers into the portals of court, certain records which are not full

and complete, then such bona fide error of judgment should necessarily be taken into account by a court which administers not only law but also

equity haloed by good conscience in ultimately deciding whether that unfortunate litigant deserves sympathy or not. It is in this way that I have said

that Section 5 of the Limitation Act vests a judicial discretion in courts dealing with such matters. In C. R. P. 2312 of 1966 (Mad.), the learned

Judge in the circumstances noticed by him was not inclined to admit a petition without an application for excusing the delay. No doubt the

observation is that no petition for excusing the delay in filing the petition to set aside the ex parte decree was filed and that in those circumstances

there was no other option than to uphold a plea of the respondent that the petition for setting aside the ex parte decree was barred. But in the view

I have expressed before and having regard to the judicial precedents in the past and particularly of the Division Bench of Allahabad High Court

presided over by Sulaiman, C.J., I am of the view that no such formal application or written application is absolutely necessary. In deserving cases

courts can in exercise of their inherent power and certainly in order to channelise beneficially their judicial discretion, excuse the delay even on an

oral application, having regard to the circumstances of that particular case. In the instant case, there was a day's delay. The learned counsel, who

presented the application has explained before me and in the presence of the first respondent that he made a bona fide mistake in that he calculated

the number of days available in the month of October as 30 instead of 31 days. It is human to err and whether this explanation of the learned

counsel is sufficient or not has not been adverted to by the courts below. For my part I am satisfied about the bona fides, but I am not prepared to

express any opinion about it in the view that I intend taking. Before parting with the case, I am obliged to refer to the decision of the Allahabad and

Punjab High Courts which have taken a view similar to the one I have indicated above.

4. In *Mt. Kulsoomun Nissa and Another Vs. Noor Mohammad alias Sultan Haider and Another*, a Division Bench of that court presided over by

Sulaiman, C.J. and Bennet, J. was dealing with a case where a memorandum of appeal was filed beyond time, but without a written application for

excusing the delay u/s 5 of the Limitation Act. Considering this aspect Sulaiman, C.J. speaking for the Bench said-

The first ground on which the appeal has been dismissed by the lower appellate court is that the plaintiffs had not made any formal application for

an extension of time u/s 5 of the Limitation Act, and that, therefore, their appeal against Hakim Shyam Sundarlal was beyond time. In our opinion

the court below has erred in exercising its discretion in this matter. The reason why Hakim Shyam Sundarlal's name was omitted from the names of

the respondents obviously was that his name did not find a place in the decree. He was impleaded later on within 30 days of the substitution of his

name. We think that the lower court should have allowed the defendant to get round the technical objection of the absence of a formal application

for extension of time.

To the same effect but in more clear language *Dua. J. in Firm Kaura Mal Bishan Dass Vs. Firm Mathra Dass Atma Ram, Ahmedabad and Others*,

observed thus-

The discretion u/s 5 of the Limitation Act has to be a judicial discretion and not an arbitrary one. Merely because there was no written application

filed by the appellant is hardly a sufficient ground for refusing him the relief, if he is otherwise entitled to it. Procedure is meant for advancing and

not for obstructing the cause of justice: and if the entire material is on the record it cannot promote the ends of justice, if that material is ignored and

the relief refused to the appellant, merely because he had not claimed it by means of a formal application in writing or that a formal affidavit was not

filed. The language of Section 5 also does not provide that an application in writing must be filed before relief under the said provision can be

granted.

The consensus, therefore, appears to be this. If under explainable circumstances an appeal or an application is filed in court, but without a formal

application or a written application for excusing the delay in the presentation of the same, then the court should circumvent technicality and afford a

reasonable opportunity to the aggrieved party to mend matters. Otherwise, it would lead to miscarriage of justice.

5. In the instant case, the learned counsel for the petitioner, who filed the papers in this court has according to him sufficiently explained as to why

he filed the papers beyond a day. But as I said I am not inclined to deal with that aspect because, the court below did not advert to the

circumstances under which the delay was caused.

6. Whilst therefore remitting the subject-matter to the appropriate City Civil Judge of the City Civil Court, Madras, I give an opportunity to the

petitioner to file an affidavit explaining the circumstances under which he filed the appeal a day after the prescribed period. The respondents, of

course, will have equally the opportunity to file a counter-affidavit to the same. The learned Judge hearing the application on merit shall dispose of

the said application but in the light of the observations made by me as above.

7. The civil revision petition is allowed to the extent indicated and there will be no order as to costs.