
(1921) 05 PAT CK 0024
In the Patna High Court

Muhammad Abul Kasim and Others

APPELLANT

Vs

Chaturbhuj Sahay

RESPONDENT

Date of Decision : 25-05-1921

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : 64 Ind. Cas. 55

Hon'ble Judges : Dawson Miller, C.J.;Coutts, J

Bench : Division Bench

Judgement

Dawson Miller, C.J.—These appeals are preferred under the Letters Patent from a decision of a single Judge of this Court, dated the 20th November 1919. The appellants are respectively the defendants in three suits instituted by the same plaintiff, claiming a declaration that certain entries in the Record of Rights in favour of the defendants who were his tenants were not correct. The plaintiff succeeded in each of the suits in the Trial Court. The decree was passed on the 13th September 1917. On the 27th September the defendants in each case presented a memorandum of appeal, which, had the memorandum been accompanied by the necessary documents, would have been within time. It appears, however, that no copy of the decree was attached to the memorandum of appeal or filed in the Appellate Court. Therefore, the memorandum could not be taken as having been properly presented. This matter, however, was drawn to the attention of the appellants and four days' time was allowed within which to supply the necessary documents. The 28th September was the last date of the term in the lower Court and the vacation continued until the 30th October. According to the rules, therefore, the last day for filing a proper memorandum of appeal accompanied by the decree would be the 31st October.

2. No copy of the decree, however, was in fact filed on that date. It appears that on the 5th November the appellants' Vakil was informed that no copy of the decree had been filed and that the copy should be supplied. No steps were taken apparently by the 10th November and accordingly on the 10th November the

case was struck off. That means that the memorandum of appeal was rejected. That was done by the order of the District Judge. Subsequently on the 19th November, long after the time for presenting the appeal, the appellants tendered a copy of the decree and at the same time presented a petition setting out certain facts which they relied upon as sufficient reason for not having presented their appeal properly in time. Upon that petition the learned Judge made an order:

Admit subject to objection.

4. By which, I take it, it was meant that the appeal should be admitted subject to any objection, which must be taken at the hearing of the appeal. Now up to that time the respondents were not and could not have been present before the learned District Judge, the proceedings being entirely *ex parte*, and it does not appear that any notice or intimation of any sort was given to the respondents that the appeal had been admitted out of time subject to any objection they might take at the bearing. So far as the respondents could gather any information from the documents which they might have in the case, all that would appear would be that the memorandum of appeal was presented on the 27th September, which is clearly within time and, therefore, not open to any objection on their part on the ground of limitation. When the appeal came on for hearing, the learned District Judge, after considering the merits of the case, allowed the appeal, but not a word was said by anybody as to the admission of the appeal being out of time, nor was any objection taken by the respondents and there is nothing whatever to show that the respondents had any intimation that the appeal had not been presented quite regularly and within time. Subsequently they appealed to this Court and the case came, as I said, before a single Judge, and the question of limitation was raised.

5. The learned Judge took the view that the admission of the appeal subject to objection by the lower Court was irregular and that in fact upon the materials disclosed in support of the application to extend the time, there was no sufficient reason whatever for allowing the memorandum to be presented after the time had expired, and allowed the appeal.

6. Now in appeal before us it is contended that the learned Judge of the lower Appellate Court was justified in adopting the procedure he did and admitting the appeal subject to objection, and that in fact in taking that course he was exercising his discretion u/s 5 of the Limitation Act in favour of the then appellants and, he having exercised that discretion, it did not lie within the power of this Court to interfere with that discretion, which, it was contended, had been properly exercised by the District Judge. I quite agree that an Appellate Court ought not to interfere with the discretion exercised by the Court below, merely because upon the material before it, it might have arrived at a different conclusion. But it seems to me that in the present case no discretion at all was exercised by the learned Judge. He merely postponed the consideration of the matter until the trial and, even then, as no notice was given to the respondents,

the question was never considered. Consequently, even assuming that the order was in the first instance a proper one, it never became necessary for him to exercise any discretion on the question of limitation. In acting in the way he did, the learned Judge was taking a source which has been severely condemned by the Privy Council on the ground that such a source might lead to a useless expenditure of money and unprofitable waste of time and thus create considerable embarrassment, and in the present case I may further add another reason for not adopting that source, and that is that if an order such as this, when made, is not communicated to the opposite party, the opposite party may never have an opportunity of raising any objection at all, That is exactly what happened in this case. If, however, it could be shown that the opposite party had an opportunity of arguing the question before the lower Appellate Court and failed to take advantage of it, then different considerations might arise, but such was not the case. It may be that the admission of the appeal subject to objection was not such an irregularity as to vitiate the judgment notwithstanding that the practice is objectionable; but where no discretion has been exercised as to whether an extension of time for appealing should be allowed, it is certainly open to the party aggrieved to raise the question on appeal. In the case of *Krishnasami Panikondar v. Ramsami Chettiar* 43 Ind. Cas. 498 : 41 M. 412 : 34 M.L.J. 63 : 4 P.L.W. 54 : 16 A.L.J. 57 : 7 L.W. 156 : 23 M.L.T. 101 : 27 C.L.J. (sic) : 2 P.L.R. 1918 : 22 C.W.N. 481 : 21 Bom. L.R. 541 : 11 Bur. L.T. 121 : (1918) M.W.N. 906 : 45 I.A. 25 it was distinctly laid down, in a case where a similar order to that now under consideration had been made, that the respondents were entitled to an opportunity of raising the question of limitation. But this order of admission," say their Lordships, "was made not only in the absence of Ramsami Chettiar, the contesting respondent, but without notice to him. And yet in terms it purported to deprive him of a valuable right, for it put in peril the finality of the decision in his favour, so that to preclude him from questioning its propriety would amount to a denial of justice. It must, therefore in common fairness be regarded as a tacit term of an order like the present that though unqualified in expression, it should be open to reconsideration at the instance of the party prejudicially affected; and this view is sanctioned by the practice of the Courts in India."

7. It is, therefore, in my opinion clearly open to the present respondents to contest the Propriety of having had the appeal admitted out of time. The learned Judge before whom the appeal same took the same view and he went into the merits as to whether or not any good cause had been shown for admitting the appeal out of time, and I must confess that it would be difficult to arrive at any other conclusion than that at which the learned Judge arrived. I have already given the dates, which show that the decree was only filed in Court something like 19 days after the proper time; and the only evidence, if one can call it evidence, in support of the application for indulgence is a petition presented by the present appellants, unverified and not accompanied by any affidavit, which merely states that the petitioner's karpardaz was seriously injured by rioters in a

riot case and that he was sent to hospital and remained senseless for several days; that the petitioner did not know that a copy of the decree was not filed as ordered by the Court-that when the petitioner came to enquire about the date, the petitioner learnt about the striking off on account of the copy of the decree not being filed within the time given by the Court. His appeal was in the hands of his karpardaz and he was lying in hospital That was the only material the Court had before it. There is not a word in that petition to show that even if the karpardaz was ill, the Pleader could not have done what was necessary and what in fact he ought to have done in the first instance, namely, file a copy of the decree with the memorandum. Again, there is not a word to show when the karpardaz was ill or whether in fact his illness put it out of his power to assist the Pleader, if he required his assistance in supplying a copy of the decree on the 27th September. In fact there is no material at all upon which one can act in a petition of that sort, and in my opinion the learned Judge from whose decision this appeal is brought arrived at the right conclusion in saying that the appellants must fail upon the merits.

8. These appeals must, in my opinion, be dismissed with costs.

Coutts, J.

9. I agree.