

(1924) 08 BOM CK 0031

In the Bombay High Court

Case No : Civil Application No. 203 of 1924

Nariman Rustomji Mehta

APPELLANT

Vs

Hasham Ismayal

RESPONDENT

Date of Decision : 18-08-1924

Acts Referred:

Limitation Act, 1908 — Section 5

Citation : AIR 1925 Bom 137 : (1924) 26 BOMLR 1261 : 85 Ind. Cas. 191

Hon'ble Judges : Lallubhai Shah, J; Kincaid, J

Bench : Division Bench

Judgement

Lallubhai Shah, Ag. C.J.

1. This is an application for leave to appeal to His Majesty in Council. The application was filed on February 12, 1924. The decree sought to be appealed from was passed on February 9, 1923. The application is, therefore, beyond time, and the first question is whether the delay in presenting the application should be excused. The reason relied upon for excusing the delay is that the petitioner filed an application for a review of the decree, now sought to be appealed from, on April 13, 1923. On that application a rule was granted by this Court in September 1923, and that rule was discharged on February 11, 1924. It is urged that as the petitioner was pursuing the remedy by way of review, the time taken up from April 13, 1923, up to February 11, 1924, should be excused u/s 5 of the Indian Limitation Act and reliance is placed upon the decision in 22 CWN 169 (Privy Council) .

2. In the present case, having regard to the fact that the petitioner was prosecuting this application in good faith, we think that the time occupied in prosecuting that application should be deducted in calculating the period of limitation for presenting the application for leave to appeal to His Majesty in Council. If that time is deducted, it is clear that the application is within time.

3. We, therefore, make the rule absolute on the application for excusing delay,

and order the costs of the rule to be costs in the rule on the main application.

4. As regards the application for leave to appeal to His Majesty in Council, the trial Court had dismissed the suit, and in appeal this Court passed a decree for dissolution, and directed an account of the partnership to be taken. The case was remanded to take accounts. u/s 110, therefore, of the Code of Civil Procedure, if the petitioner, who is the original defendant, can show that the subject-matter involved in this appeal is worth Rs. 10,000 or more he would be entitled to the necessary certificate. On this point, he relies upon the 2nd paragraph of Section 110, because it is clear on the facts of this case that the amount or value of the subject-matter of the suit in the Court of first instance, or the amount or value of the subject-matter in appeal cannot be shown on the present materials to be Rs. 10,000 or upwards. It is urged that the decree or final order directly or indirectly involves a claim or question respecting property of the amount or value of Rs. 10,000 or upwards. Beyond the mere statement in the petition there is nothing to support this statement. No affidavit has been filed. The plaintiff values his share in the plaint provisionally at Rs. 5001. The same valuation was accepted for the purposes of the appeal to this Court; and for the first time it is alleged in the petition that the value is more than Rs. 10,000.

5. It is contended that the property for this purpose must be taken to be the whole of the partnership property. No authority is cited in support of that proposition. The decision of this Court in *De Silva v. De Silva* (1904) 6 Bom. L.R. 403 is against this contention. That was a case of partition; but on principle it can make no difference on this point whether it is a partition suit or a partnership suit. It is the value of the appellant's share and not the whole of the property that should be looked to. The petitioner can succeed only if the value of the whole of the partnership property is taken as the basis for determining the amount or value of the property affected by the decree. That cannot be done; and there is no allegation that the value of the share of the defendant is Rs. 10,000 or more. We, therefore, discharge the rule with costs.

Kincaid, J.

6. I agree.