
(1931) 08 CAL CK 0031
In the Calcutta High Court

Surendra Mohan Rai Choudhury

APPELLANT

Vs

Mohendra Nath Banerjee and Others

RESPONDENT

Date of Decision : 06-08-1931

Acts Referred:

Limitation Act, 1963 — Section 5
Registration Act, 1908 — Section 17

Citation : AIR 1932 Cal 589 : 140 Ind. Cas. 662

Judgement

1. (F.A. No. 144 of 1928.) Defendant 10 is the appellant in this appeal, which arises out of a suit instituted by the plaintiff for enforcement of a mortgage against defendants 1 to 7 who are the heirs of the mortgagor one Khetra Prasad Banerjee deceased, and in which defendants 8 to 12 were impleaded as defendants as being subsequent transferees. The plaintiff's case was that on 24th May 1923, Kshetra borrowed Rs. 15,000 from him by executing a hand-note in his favour agreeing to pay interest thereon at the rate of 1 per cent per month and that by way of security for the repayment of the said sum together with interest he, at the same time, deposited with the plaintiff the title-deeds relating to some immovable properties. The property concerned in this appeal is one of those properties and is premises No. 76, Barrackpore Trunk Road, The case of defendant 10 was that on 19th March 1924 Kshetra borrowed from defendant 10 a sum of Rs. 20,000 agreeing to pay interest thereon at the rate of 12 per cent per annum and executed a mortgage-deed in his favour on the security of premises Nos. 76 and 76-A, Barrackpore Trunk Road declaring that the said properties were subject only to a mortgage dated 5th December 1916 in favour of Rai Satis Chandra Chowdhury Bahadur and another for Rs. 35,000, carrying interest at the rate of 12 annas 1 pice per cent per month. The Subordinate Judge held that the plaintiff's mortgage should have priority over defendant 10's mortgage.

2. The first contention urged on behalf of the appellant, defendant 10, is that the memorandum relating to the deposit of title-deeds with the plaintiff not having been registered, the agreement embodied in it cannot be proved. The

memorandum is a letter addressed to the plaintiff and signed by Kshetra, to which a list of documents is appended. It runs thus:

Dear Sir,

This is to place on record that I have borrowed the sum of Rs. 15,000 (fifteen thousand) only from you to-day at an interest of 12 per cent par annum and executed a pro-note in your favour and I have kept the undermentioned documents of title as security for the said debt. I further assure you that the properties of which. the title-deeds are kept herewith are free from encumbrances.

3. In the case of *Pranjivan Das v. Chan Ma Phee* AIR 1916 P.C. 115 the Judicial Committee laid down the law as follows:

The law upon the subject is beyond any doubt; (1) where titles are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is scope of the title; (2) where however titles are handed over accompanied by a bargain, that bargain must rule; (3) lastly when the bargain, is a written bargain, it and. it alone must determine what is the scope and extent of security.

4. Their Lordships then quoted from. *Shaw v. Foster* [1872] 5 H. C. 321 the words of Lord Cairns:

Although it is a well-established rule of equity that a deposit of a document of title without more, without writing or without word of mouth, will-create in equity a charge upon the property referred to, I apprehend that that general rule will not apply when you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there was no document is put out of the case and reduced to silence by the documents by which alone you must be governed.

5. In the case of *Subramonian v. Lutchaman* AIR 1923 P.C. 50 their Lordships quoted the dictum of Couch, C. J., in the case of *Kedar Nath v. Sham Lall* [1873] 11 B.L.R.O.C. 405 and the passage in *Pranjivandas Mehta v. Chan Ma Phee* AIR 1916 P.C. 115 and *Shaw v. Foster* [1872] 5 H. C. 321 referred to above and then proceeded to consider whether the document before them constituted the bargain between the parties or whether it was merely the record of an entirely completed transaction. On the evidence and upon the terms of the document their Lordships held that the memorandum in question was the bargain between the parties. In the case of AIR 1931 36 (Privy Council) their Lordships referring to the case of *Subramonian v. Luchman* AIR 1923 P.C. 50 (of 58 I. A.) observed thus:

While their Lordships do not think that the language of Lord Carson conveys or was intended to convey the meaning that no memorandum relating to the deposit of title deeds can be within Section 17, Registration Act, unless it

embodies all the particulars of the transaction of which the deposit forms part, their Lordships are of opinion that no such memorandum can be within the section unless on its face it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned it constituted the agreement between the parties.

6. It should be observed here that in Subramonian's case AIR 1923 P.C. 50 their Lordships considered the oral evidence relating to the transaction and laid stress on the terms of the memorandum in which the words "we hand you herewith the title deeds," and "please also hold this as further security" and came to the conclusion the memorandum in question constituted the bargain between the parties. It should further be noted that in AIR 1931 36 (Privy Council) although the promissory note and the memorandum were dated one and the same day, and were handed to the lender at one and the same time, their Lordships referred to the evidence relating to antecedent negotiations and referred to the words of the memorandum which were:

As agreed upon in person I have delivered to you the undermentioned documents as security,

and held that the memorandum merely recorded the particulars of the deeds, the subject of the deposit, and held that it did not require registration. In the present case the expressions used in the deed are:

I have borrowed," "I have kept the undermentioned documents of title as security for the said loan

and

I further assure you that the properties of which the title-deeds are kept herewith are free from all encumbrances.

7. The plaintiff has deposed:

I paid the money in a cheque of Rs. 15,000 drawn by me on Messrs. Grindlay & Co. Kshetra handed over to me title-deeds at that time. Then I handed over the cheque to him. Then Kshetra himself wrote and signed the "handnote. Then Kshetra said he would not be able to write the letter and the list of documents as he would make mistakes in spelling and asked Babu Jatindra Nath Ganguli to write it. Jatindra Babu wrote the letter and the list of documents and Kshetra signed it.

8. Babu Jatindra Nath Ganguli as P. W. 1 and Jatindra Nath Mukherjee as P. W. 4 have not given so very clear evidence as the plaintiff as regards the different incidents of the transaction and have used words which may indicate that the incidents all took place "at the same time" or "at that time." They have however described the transaction in only a general way. P. W. 5 Kedar Nath Ghose has deposed what appears on the documents themselves, namely, that the hand-

note and the memorandum were written on one and the same sheet of paper. P. W. 4 has deposed that the first talk of giving of security took place 10 or 12 days before the date of the transaction and that 2 or 3 days before the date of the transaction Kshetra came to the plaintiff's house and then Kshetra, the plaintiff and the witness went to Dr. Kanjilal who inspected the documents and said that money could be given on loan on their security and Kshetra took back the documents. On the evidence of the plaintiff which is very clear and definite on the point we have come to the conclusion that the memorandum was the record of an entirely completed transaction and so required no registration. The second contention urged on behalf of the appellant is that it should be held that premises No. 76, Barrackpore Trunk Road, was not the subject of the mortgage in plaintiff's favour because all that was deposited in respect of it was a certified copy of a redemption certificate (item 1 of the memorandum) issued to one Iswar Chandra Banerjee, the grandfather of Kshetra. It appears that item 9 of the memorandum was the original probate of a will executed by Iswar in favour of Kshetra under which Kshetra became entitled to certain properties left by him including premises No. 76, Barrackpore Trunk Road. In *Fisher on Mortgages*, Para. 28 it has been said:

An equitable mortgage by "deposit may be valid if only some of the material documents of title to the property have been deposited (*Exp. Arkwright* [1843] *Mont. D. V. Deg.* 129 *Lacon v. Allen* [1856] 3 *Drew* 579 although a complete title be not thereby shown to the depositor's interest in the estate: *Exp. Wetherall* [1805] 11 *Ves.* 398 *Roberts v. Croft* [1857] 24 *Beav.* 223. And it follows that if part of the material documents of title be deposited with one person and part with another each depositary may have a good security [*Roberts v. Graft* [1857] 24 *Beav.* 223] unless there be evidence of a contrary intention: *Exp. Pearse* [1820] *Buck*, 525

9. It is sufficient if the deeds deposited bona fide relating to the property are material evidence of title and are shown to have been deposited with the intention of creating a charge; see *Exp. Wetherall* *Supra* [1805] 11 *Ves.* 398 *Lacon v. Allen* [1856] 3 *Drew* 579 *Robert v. Croft* [1857] 24 *Beav.* 223 and *Be Roche's Estate* [1890] 25 *L.R. Ir.* 58. As regards attested copies, there is no clear decision but it seems that an attested copy would not be enough unless, perhaps, there is proof of the original not being available: *Re Barrow, Ex parte Broadbent* [1834] 1 *Mont & A.* 635 There is no distinction between legal and equitable estates in this country: see *Webb v. Macpherson* [1904] 31 *Cal.* 57; *Imperial Bank of India v. U Rai Gyaw Thu & Co.* AIR 1923 P.C. 211 and *Dr. Ghose's Mortgage*, *Edn. 4, Vol. 1*, pp. 151 et seq., Section 59, T. P. Act, speaks of:

documents of title to immovable property with intent to create a security thereon.

10. Such documents must necessarily be documents showing the mortgagor's title, but that does not mean that they should never be held to be sufficient unless they actually connect the mortgagor with some predecessor of his whose

title the documents show. On the other hand if they purport to show the mortgagor's title in the property it is not necessary that they should connect the mortgagor with some predecessor of his who had acquired the title originally. Of course in a case where the only document deposited shows no kind of title in the mortgagor, and there are in existence documents showing his title the document deposited would not be a title deed and it may further be inferred from the circumstances aforesaid that no security was intended to be created; see *Venkataramayya v. Narasingha Row* [1911] 9 I.C. 309.

11. Bearing these principles in mind let us now examine the facts. With the plaintiff was deposited the probate, which, in our opinion, is a substantial document showing the mortgagor's title to the property. There was also deposited a certified copy of the redemption Certificate relating to the property standing in the name of his grandfather Iswar under whose will he became entitled to it. The plaintiff's evidence is that Kshetra told him that the same had been lost long before. The plaintiff further says that Kshetra made that statement in writing, but the writing has not been produced and it may not unreasonably be argued as it has been argued, that it has not been satisfactorily proved that a writing had been given. But the deposit of the certified copy of the redemption certificate, taken along with the probate, clearly indicates an intention to create a security on the property. In these circumstances it is impossible to hold that there was no valid mortgage in plaintiff's favour in respect of the property in question.

12. The next argument advanced on behalf of the appellant is that as the plaintiff did not inquire about the other title-deeds of the property and as the appellant had on inquiry found that the original redemption certificate was with Rai Satis Chandra Chowdhury Bahadur, the prior mortgagee, subject to whose mortgage the property was being mortgaged to him, plaintiff's mortgage should be postponed till after his mortgage. Reliance in this connexion has been placed upon the statement of the law as given in *White and Tudor's Leading Cases in Equity*, Edn. 9, Vol. 2 at 180 under the leading case of *Le Neve v. Le Neve* [1747] Amb. 436 and the cases cited in support of that statement. The statement is in these words:

But the Court will impute notice on the ground of fraud or gross and wilful negligence showing that he wilfully shuts his eyes to facts, to a person with an estate and not obtaining possession of title-deeds, if he omits all inquiries as to them, or neglects to call for an abstract of title, and will hold him to have notice of those circumstances, which, had he not neglected his duty, would have come to his knowledge.

13. Reliance also has been placed in particular upon the principles enunciated by *Pry, J.*, in *Northern Counties of England & Co. v. Whipp* [1884] 26 Ch. D. 482 the particular principle applicable to the present case being that where no inquiry of title deeds has been made by a prior mortgagee, a subsequent mortgagee who was, in fact, misled by the mortgagor taking advantage of the conduct of the

prior mortgagee, could as against him take advantage of the fraudulent intent. The last mentioned principle has been codified in the Transfer of Property Act, Section 78, which says:

Where through the fraud, misrepresentation or gross neglect of a prior mortgagee another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

14. The three ingredients are disjunctive and not co-extensive; *Nanda Lal Roy v. Abdul Aziz* (1916) 43 Cal. 1052. But to apply this principle we have to see whether there was gross negligence on the part of the plaintiff. A more careful lender would perhaps have taken an affidavit from the borrower as to the loss of the original redemption certificate, but in our judgment this omission was not negligence far less any gross negligence such as the section contemplates. In the case of *Dixon v. Muckleston* [1872] 8 Ch.A. 155. Lord Selborne, L.C., observed:

It is not legal negligence to accept the owner's statement that the deeds deposited are all that are necessary. If the Court is satisfied of the good faith of the person who has got a prior equitable charge and has been satisfied that there has been a positive statement honestly believed that he has got the necessary deeds, then he is not bound to examine the deeds, nor is he bound by constructive notice of their contents or of a deficiency which by examination he might have discovered in them.

15. Besides if the conduct of the plaintiff and of defendant 10 is to be compared from the point of view of negligence, it would seem difficult to resist the conclusion that defendant 10 was infinitely more negligent in not calling for the probate of the will which itself is referred to in the deed of mortgage in his favour. We are of opinion that the decision of the Court below is right. The appeal accordingly must be dismissed with costs to the plaintiff-respondent.

16. F.A. No 253 of 1928.-(This appeal arose out of the same suit. The plaintiff arose out of sold by the mortgagor to defendant 11 had also been included in his mortgage. The Sub-Judge held that no mortgage was stated in respect of this property. After created in respect of this considering the evidence their Lordships affirmed the decision of the lower Court).

17. F.A. No. 145 of 1928.-(This appeal arose out of the plaintiff suit to enforce a different mortgage on 76 Barrack on 76 Barraekpore Trunk Road. Defendant 8 was the subsequent mortgagee of the original mortgagor- Defendant 8 in this suit was defendant 10 of Appeal No. 144 of V 28 The Sub-Judge decreed the suit on which defendant 8 appealed on the ground that the mortgage story was a myth. The High Court rejecting this contention dismissed the appeal).

F.A. No. 204 of 1929.

18. This was an appeal by defendant 9 from a final decree for sale in a suit which the plaintiffs instituted for enforcing a mortgage in their favour by deposit of title

deeds of some immovable properties. The appellant was one of several defendants. His claim was based upon a subsequent mortgage of title deeds in respect of some of the properties. The other defendants were the heirs of the mortgagor who was dead and some other mortgagees, mesne as well as subsequent. On the appeal being called on 10th July 1931, and the grounds on which it was sought to be pressed being stated by Mr. Dwarkanath Chakravarti, advocate for the appellant, the advocate appearing for the plaintiffs-respondents pointed out that the said grounds assailed the validity of the preliminary decree, from which however no appeal had been preferred. The Court then rose and the further hearing of the appeal stood over till 13th July 1931.

19. On 13th July 1931, Mr. Chakravarti, on behalf of the appellant, filed a petition sworn to by the affidavit of one Nani Lal Banerjee, purporting to be a karpardaz of the appellant, and accompanied by a certified copy of the preliminary decree that had been passed in the suit. Certain facts were stated in the petition and on the basis thereof it was prayed therein:

that) the formal defects, if any, in the memorandum of appeal might be allowed to be amended and a short delay in filing the appeal specifically against the preliminary decree may be excused and a certified copy of the preliminary decree annexed herewith might be received.

20. As the plaintiffs respondents had no notice of this application that was attempted to be made, we adjourned the hearing. The case came on for hearing on 21st July 1931. On that date the plaintiffs-respondents filed a counter-affidavit together with a certified copy of an extract from the register of applications for copies and also another paper containing certain information. The hearing of the application was concluded on that day, and we then called for the original registers of such applications. These have arrived and have been inspected by the learned advocates for the parties and by ourselves.

21. It is not suggested that the final decree in the suit has not followed the directions contained in the preliminary decree, and it is not disputed that the object of the appeal is to challenge the validity of those directions. An attempt was made to establish that the appeal, as it stands, should be regarded as an appeal from the preliminary decree. In the memorandum of appeal it is stated that the appeal was from the judgment and decree dated 22nd March 1929. The papers filed along with the memorandum of appeal were, besides the vakalatnama, certified copies of the judgment dated 28th February 1929 (i.e. the preliminary judgment) and of the decree dated 18th March 1929 and signed on 22nd March 1929, (i.e. the final decree). It should be stated here that no copy of the decree that was drawn up and signed on 8th March 1929 in accordance with the preliminary judgment was filed.

22. Under the Code, Order 41, Rule 1, the memorandum shall be accompanied by a copy of the decree appealed from, and unless the appellate Court dispenses with it, of the judgment on which it is founded. The memorandum here purported

to be of an appeal from the final judgment and decree dated 22nd March 1929 and was accompanied by a copy of the final decree and a copy of the preliminary judgment. The appeal therefore was clearly not in order; but even if the irregularity be condoned it can in no conceivable view be regarded as an appeal from the preliminary decree which was not even referred to in the memorandum and no copy of which accompanied it.

23. To convert the appeal into one from the final decree the appellant relied, as he must rely, upon the statements contained in his petition sworn to by his karpardaz Nani Lal Banerjee. The statements shortly put are these: that on 5th March 1929 he applied for copies of the preliminary judgment and preliminary decree; that the said copies were obtained on 19th March 1929; that in the meantime, on 18th March 1929, the final decree was passed; that by the end of March or beginning of April the appellant sent the papers to Dr. Kanjilal, a well-known advocate of this Court since dead, and Dr. Kanjilal advised that a copy of the final decree should be obtained which was then applied for and actually received on 16th May 1929; that during the last week of May 1929 the appellant personally made over to Dr. Kanjilal copies of the judgment and of the two decrees and all relevant papers and thereafter Mr. Quasim, an advocate of this Court, filed the appeal; and that Dr. Kanjilal then informed the appellant that the appeal has been filed within time on 25th June 1927. These statements are stated in the aforesaid affidavit to be true to the deponent's knowledge.

24. If they are true, they make out a case that the appellant had put the copies of the two decrees in the hands of an experienced advocate of this Court with the object of filing such appeal or appeals as would enable him to challenge the validity of the preliminary decree, and that advocate having got the appeal filed through another advocate had assured him that everything was all right. If these circumstances were made out there would be a very strong case for allowing the appellant extension of time for preferring an appeal from the preliminary decree and for converting the present appeal in the way asked for. Unfortunately for the appellant a material portion of this story, at any rate, is not true; a copy of the preliminary decree was applied for along with that of the preliminary judgment on 5th March 1929, but as the preliminary decree had not been prepared the office reported to that effect on the 6th, and no copy of the preliminary decree was again applied for afterwards and none was received either then or at any time before July 1931 when the copy filed now with the application before us was taken. These facts are clear upon the counter-affidavit filed on behalf of the plaintiff-respondent and are amply established upon an inspection of the registers and indeed are now admitted on behalf of the appellant.

25. The result is that the explanation which the appellant has given for not having preferred an appeal from the preliminary decree fails; and the appeal having been filed on the very last day that it could be filed, in view of the dates on the copy of the final decree that he had obtained, no question of any particular diligence on his part arises. The case therefore has to be judged as of

an ordinary litigant who through mistake either on his part or on the part of his advocate omitted to prefer the appeal. We have no other statement; on behalf of the appellant, and Mr. Quasim too, it may be said, has not made any.

26. If the dictum of the Judicial Committee in the case of Krishnasami Pandi Kondar v. Ramasami Chettiar AIR 1917 P.C. 179 that if through delay on his part it becomes necessary for a litigant to ask the Court to exercise in his favour the power conferred in Section 5, Limitation Act, the burden rests on him of adducing distinct proof of the sufficient cause on which he relies, be strictly applied, then after the appellant's own account as contained in his "application is put aside, little remains of his case to be considered.

27. On a careful perusal of the appellant's petition it seems to us beyond doubt that it was drafted with no particular regard for truth but rather with the object of bringing the case within the decision of this Court in the case of Prasanna Kumari v. Ram Chandra [1913] 17 I. C.155. In that case the appellant had obtained a copy of the decree to be appealed against, and given it in time to his vakil, but by some mistake the vakil did not file the copy of the decree and died soon after and this Court excused the delay, Cases in which the litigant was diligent but the delay was due to negligence of his lawyer have no application in the present case.

28. Mr. Chakravarti has then pressed us to hold that as it is apparent that if the appellant had been advised that an appeal from the preliminary decree was necessary to be filed he would undoubtedly have done all that was required of him to have it filed, and as the appellant had entrusted his case to an advocate of this Court who must be presumed to have been fully acquainted with law and procedure, he acted bona fide in accordance with the advice he received and must therefore be allowed an extension of time, so that the delay being excused, the present appeal should be converted into an appeal from the preliminary decree and treated as having been filed in time. This argument brings us to a question on which the decisions in this country unfortunately are far from uniform and as regards which it has been said more often than once that an attempt to reconcile the conflict is fruitless and hopeless. The question is how far and in what circumstances an honest mistake on the part of a litigant caused by erroneous advice given to him by his lawyer may be a ground entitling him to protection u/s 5, Lim. Act. It has been repeatedly said by Judges that the directions given to Courts by that section cannot be crystallized into a rigid rule of law but has to be exercised in each, case with reference to its own special facts and with a view to secure the furtherance of justice. Or, as Lord Selborne observed in *Garter v. Stubbs* [1880] 6 Q.B.D. 116 that there is no positive rule as to an absolute statement of the cases in which and in which only the discretion of the Judge or Court should be exercised to enlarge the time of appealing and that in each individual case the surrounding circumstances must be looked to. . While however there cannot be any rigid or positive rule in a matter of this description, the truism that each case should depend on its own

circumstances is not destructive of the idea that there can be certain general principles to guide Courts in the exercise of their discretion. *Brij Indar Singh v. Kanshi Ram* A.I.R: 1917 P.C. 156. A brief review of some of the more important decisions therefore will not be altogether useless. „ Cases of English Courts may be cited in "which mistakes of counsel, if made bona fide, were regarded as sufficient cause for excusing the delay, e.g., *Johnson v. Warwick* [1856] 17 O. B. 516 *Pritchard v. Pritchard* [1884] 14 Q. B. D. 55 and *Highton v. Treherne* [1878] 48 L. J. Ex. 167. In the case last mentioned Brett, M. R., observed:

In cases where a suitor has suffered from negligence or gross want of legal skill of his legal adviser he has his remedy against that legal adviser and meantime the suitor must suffer. But where there has been a bona fide mistake, not through misconduct or through negligence nor through want of reasonable skill, but such as a skilled person might make, I very much dislike the idea that the rights of the client should be thereby forfeited. It seems to be obvious that the Court has jurisdiction to enlarge the time under some circumstances. Therefore why not on the present occasion ? It has been said that when the time for appealing is past, the person who would be respondent has a vested right to retain his judgment. But obviously it is not an absolute right, and I am perfectly confident that the practice of all Courts has been to treat it as not an absolute right, though the Courts are chary of enlarging the time when the time allowed by the rule has run out.

29. On the other hand decisions may be cited in which it was held that mistake of one's own counsel was not a sufficient reason for extending the time fixed for appealing; *International Financial Society v. The City of Moscow Gas Co.* [1877] 7 Ch. D. 241 *In re Coles and Ravenshear* [1907] 1 K. B. 1 and *In re Helsby* [1894] 1 Q. B. 742. In the last mentioned case Lord Davey observed:

I cannot see that a mistake made by a solicitor of a party who is applying for an extension of time is sufficient ground for extending it.

30. Martin and Pratt, JJ., in their judgments in the case of *Nagindas Motilal v. Nilaji Moroba* AIR 1924 Bom.399 have pointed out how this strict rule has been subsequently relaxed and the Supreme Court Rules of Practice 1883 have been amended resulting in such decisions as *Baker v. Faber* [1908] W. N. 9 and *Rumbold v. London County Council and Scott* [1909] 100 L. T. 259. There can be no doubt that litigants in this country are, more often than not treated with greater indulgence in the matter of delay, when it is a question whether it should be excused or not u/s 5, Lim. Act,, on the ground of erroneous advice given by a lawyer. The explanation to Section 5 of the Act itself suggests it and there are decisions expressly laying this down. One of these decisions was passed only ten years ago in the case of *Shib Dayal and Another Vs. Jagannath Prasad*, in which Sir Greenwood Mears, C. J., said:

In the past 15 years legal education has progressed in this country and Courts are right in demanding, in the public interest, increasing competence in legal

practitioners. Whilst I am of opinion that the English rule is a salutary one, and the Courts should ordinarily insist upon legal practitioners giving correct advice, it may nevertheless be that to demand at the present moment a normal standard of efficiency would impose hardship upon litigants.

It is also reasonably plain from the two decisions of the Judicial Committee in the cases of *Brij Indar Singh v. Kashiram* and *Sunder Rai v. Collector of Belgaum* AIR 1918 P.C. 135 that the fact that a litigant has been misled by erroneous legal advice given by his lawyer may form a ground for sufficient cause within the meaning of Section 5 of the Act. In the first of these cases the Judicial Committee affirmed the proposition that circumstances contemplated in Section 14, Lim. Act, would ordinarily constitute a sufficient cause within the meaning of Section 5. In the second case their Lordships said that the party who acts under a mistaken advice (in that case it was the Secretary of State acting under the advice of the Legal Remembrancer) is not precluded from showing that it was owing to his reliance on that advice that no appeal was preferred within time. There is however no authority, English or Indian, in which it has been said that an erroneous advice of a competent lawyer whatever its nature may be, if acted on bona fide by a litigant will afford him protection; and very few cases have gone further, than *Highton v. Treherne* [1878] 48 L.J. Ex. 167 in which Brett, M. R., made the remarks quoted above. Indeed it is not possible to go any further, if not only the appellant but his opponent have to be borne in mind, the latter having acquired a valuable right by the expiry of the time limited for preferring an appeal which should not be lightly tampered with: *Krishnasami Pandikondar v. Ramasami Chettiar* AIR 1917 P.C. 179.

31. In most of the cases in this country, though not in all of them, in which a delay due to a mistake or an erroneous advice of a lawyer has been excused, it is the principle of *Highton v. Treherne* [1878] 48 L.J. Ex. 167 that has been consciously or unconsciously followed. As regards decisions of the Bombay High Court it would be enough to cite three cases; *Ram Ravji Jambhekar v. Pralhaddas Sulekaram* AIR 1918 P.C. 135 in which the mistake of the pleader was said to be a stupid, though not an unaccountable, blunder; *Dattatraya Sitaram Gadkari Vs. The Secretary of State for India*, in which the decision proceeded upon the ground that the mistake was of such a nature that the question involved might appear to be so entirely free from doubt to one person that only one opinion was possible and yet another might come to a different conclusion; *Nagin Das v. Moti Lal* AIR 1924 Bom. 399 where a recent enactment was unknown to the advising pleader. One of the latest decisions of the Allahabad High Court is the Full Bench case of *Shiv Dyal v. Jagannath Prasad* AIR 1922 All. 490. In that case a second appeal was presented within time without a copy of the judgment of the Court of first instance as required by the rules and when the said copy was filed the appeal was out of time. Sir Grimwood Mears, C.J., refused to break away from the earlier decisions of the Court, in which similar mistakes committed under counsel's advice had been condoned, and observed:

Whilst I am of opinion that the English tula is a salutary one, and Courts should insist upon legal practitioners, giving correct advice it might nevertheless be that to demand at the present time a, normal standard of efficiency would impose hardship upon litigants.

32. The learned Chief Justice appears to have observed:

An honest mistake, even though a negligent one, ought not in the present state of the profession of the district, be allowed to operate to the prejudice of clients.

33. Apparently, the learned Chief Justice was making a distinction between a mistake committed with some amount of care" and circumspection, that is to say, a mistake which one may not unnaturally commit and a mistake committed with gross or culpable negligence. The earlier decisions on which he relied appear to have been *Wazir Ali v. Zainab* [1903] A.W. 32 in which an appeal had been filed in a wrong Court, *Kuramali v. Ramnath* [1906] 28 All. 414 in which a revision petition had been filed instead of an appeal, and *Anjora Kunwar v. Balu* [1907] 29 All. 638 in which also an appeal had been filed in a Court to which it did not lie. In the said Full Bench case *Banerjee, J.*, relied also upon an earlier Full Bench decision in *Brij Mohan Das v. Mannu Bibi* [1897] 19 All. 848 in which had been held that Section 14., Lim. Act, applied to a case where a plaintiff had been prosecuting his suit in a wrong Court in consequence of a bona fide mistake of law. He distinguished the case in *Budhu and Others Vs. Dewan and Others*, in which Sir Henry Richard, C. J., refused to condone the delay saying that even if the nonfiling of the appeal within time was due to the neglect of counsel the Court could hardly lay down a general rule that the neglect of the legal practitioner engaged is always to be deemed as a sufficient cause for admitting an appeal for an application after the time prescribed by law. He distinguished that case as one in which there was culpable negligence on the part of the counsel. The Madras High Court in the case of *Krishna v. Chathapan* [1890] 13 Mad. 269 in which an appeal had been presented in a wrong Court under professional advice broadly observed:

The true rule is whether under the special circumstances of each case the appellant acted under an honest though mistaken belief formed with due care and attention. Section 14, Lira. Act indicates that the legislature intended to show indulgence to a party acting bona fide under a mistake. We think that Section 5 gives the Courts a discretion which is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words "sufficient cause" receiving a liberal construction so as to advance substantial justice where no negligence or inaction nor want of bona fides is imputed to the appellant.

34. In the case of *Kichalppa v. Ramanujam* [1890] 13 Mad. 269 in which a litigant instead of preferring an appeal from an erroneous decision which advised him to seek his remedy in a particular way, pursued that remedy and failed and then preferred an appeal out of time, it was held that the real question to be

considered u/s 5, Lim. Act was not whether the appellant had been misled by the decision or whether he was seeking his remedy in the wrong Court bona fide, but whether he was litigant during the period during which he was doing so. The Burma High Court has held that for the delay to be excused the question to be determined is whether the error is one which might easily have occurred even if reasonably due care and attention had been exercised by the advocate: *Tin Tin Nyo v. Maung Ba Saing* AIR 1924 Rang 148 and *Surty J. N. v. Chettir Firm* AIR 1927 Rang. 20. The Punjab Court held that before a mistake of law can be accepted as sufficient cause it is necessary to satisfy the Court not only that the mistake was honestly made but also that it was made despite due care and attention on the part of the appellant or his pleader: *Fakir Chand v. Municipal Committee* [1913] 59 P.R. 1913. In the Patna High Court *Sir Dawson Miller, C. J.*, said in the case of *S.C. Dey v. Mt. Rajivanbi Koer* AIR 1923 Pat. 140 that when a party pleads that he has been misled by the mistake of his legal advisor the principle on which the Court acts is that the mistake might arise even amongst practitioners of experience. This statement of the rule is perhaps a little too narrow but still it recognizes the broad distinction that there is between excusable and non-excusable mistakes. The same Court laid down in *Jodhan Prasad v. Nanku Prasad* [1918] 3 Pat. L. J. 484 that wanton negligence on the part of a pleader was not a sufficient cause within the meaning of Section 5, Lim. Act.

35. Some of the decisions of this Court may now be examined. In *Gopal Chandra Lahiri v. Soloman* [1895] 13 Cal. 62 *Garth, C. J.*, said:

What is the sufficient cause? Merely that the learned Counsel did not happen to read the deed until the 30th March when he did so for the purpose of a proceeding in another suit. If this were to be deemed a sufficient cause for the application not being made in due time, it would be an equally good cause for delaying the application for a year or any longer time, whenever the learned Counsel may happen to read its contents.

36. In the case of *Bishendut Tewari v. Nandan Pershad* [1908] 12 C. W. N. 25 *Woodroffe, J.*, excused a delay on the ground that there was a bona fide mistake of calculation on the part of the appellant's pleader, the mistake arising by reason of his overlooking the fact that the application for copy of the decree had been made before the decree was signed. In the case of *Sarat Chandra Bose v. Saraswati Debi* [1907] 34 Cal. 216 in which the appellant himself was a pleader, it was argued that his pleaders were misled by a certain decision, and *Mookerjee, J.*, said:

Upon an examination of the case relied upon we are unable to appreciate that it can possibly have misled the appellant.

37. In *Rakhal Chandra v. Ashutosh Ghosh* [1913] 19 I.C. 931 *Chatterjea, J.*, said:

We think that a bona fide mistake committed by a pleader in calculating the period of limitation may constitute a sufficient cause within the meaning of

Section 5, Lim. Act. Whether the miscalculation of the period of limitation by a pleader does not constitute a sufficient cause in any particular case must be decided by the Court having regard to all the facts and circumstances of the case.

38. In the case of *Sunder Koer v. Raghunath Sahai* [1911] 12 I. C. 677 the learned Judges on examining the facts of the case came to the conclusion that the mistake committed by the lawyer in that case was one that might be made by experienced practitioners of the Court and then excused the delay. In the case of *Krishna Mohan Ghosh Vs. Surapati Banerjee and Others*, the plea of the appellant that he did not know that substitution of a deceased respondent was necessary was taken as a bona fide mistake. No reasons are given in the judgment for this view and we would respectfully decline to endorse it. In *Promatha Nath Mukherji Vs. Bhabataran Ganguly*, the pleader was under a wrong impression as to the date on which the appeal was to be filed and it was not argued that the impression was the result of any gross negligence on his part. In the case of *Soneswar Das v. Kanakram* AIR 1923 Cal. 249 it was argued that the delay was due to a mistake of the pleader; Rankin, J., as he then was, observed:

The learned District Judge has made observations in his judgment as to the mistake made by the pleader for the appellant not being bona fide. I do not quite understand that; but my view is, looking at this matter myself, that what has happened is that from the ordinary point of view the mistake has been made without any real excuse.

39. We do not refer to the decisions of the type of *Kumudini v. Kamala Kanta* AIR 1922 Cal. 217 which were cited before us on behalf of the appellant because those cases only lay down that the Courts, in the exercise of their discretion u/s 5, Lim. Act, may well be guided by the provisions of Section 14 which in terms does not apply to appeals. This proposition has received the approval of the Judicial Committee in the case of *Brij Indar Singh v. Kashiram* AIR 1917 P.C. 156. The nature of the question, on which the Court has jurisdiction to entertain a suit or an application, is such that legal advisers may very often differ in their opinion about it.

40. From a review of the cases referred to above it would appear that there is no authority for the view that a mistake of a legal adviser, however gross and inexcusable, if bona fide acted upon by a litigant, will entitle him to the protection of Section 5, Lim. Act. This Court, in the case of *Ambika Ranjan Majumdar Vs. Manikganj Loan Office Ltd., Suhrawardy, J.*, while condoning the mistake in that particular case refused to lay down any such general rule. In our opinion the rule expressed by Brett M.E. in *Highton v. Trehearne* [1878] 48 L.J. Ex. 167 embodies a sound working formula and is supported by the general trend of judicial decisions in this country.

41. It has then been argued on behalf of the appellant that the learned advocate who filed the appeal was misled by the conflicting decisions in this Court as regards the competency of appeals from preliminary and final decrees, and by

the language used in some of those decisions which would indicate that an appeal from the preliminary decree is not competent after the final decree is passed. The language used in some of these decisions, it may be conceded, is not very happy. But there could, in our opinion, be no possible mistake as to what the decisions purported to lay down, if only the judgments were read in the light of the facts involved. The conflict that existed in these decisions has been pointed out by Rankin, C. J., in the Full Bench decision of this Court in the case of *Taleb Ali and Another Vs. Abdul Aziz and Others*, in these words:

It will be seen therefore that in this Court the decisions have followed two distinct lines, according as the appeal from the preliminary decree was lodged before or after the final decree was passed. No difficulty has been felt in the former case. In the latter case, it is not possible to say, under the Code of 1908, that the appeal from preliminary decree was incompetent, but it was said that its competence depended upon the bringing of another appeal from the final decree itself.

42. There was no decision, nor indeed could there be any upon the plain prohibitory words of Section 97 of the Code, that after a final decree was passed, no appeal from the preliminary decree was necessary in order to challenge the propriety of the preliminary decree, but that an appeal from the final decree would be sufficient for the purpose. We very much regret that such a mistake should have been committed, but we cannot regard this mistake as excusable. There is a danger in cases of this description of being led away by sympathy for a legal practitioner's error into interfering unduly with the rights which his client's opponents may have already obtained under an existing decree: see the observations of Martin, J., in *Nagin Das Motilal v. Nilaji Moroba* at p. 456 (of 48 Bom.) and to quote the words of Macleod, C.J., in that case at p. 445 (of 48 Bom):

Ordinarily if a litigant asks the advice of a person learned in law and gets wrong advice, the Court is not anxious that he should have to suffer owing to the fault of his legal adviser. But in every application of this nature there are two parties to be considered. The opponent has as much right to have the hardships of his case considered in his favour as the applicant.

43. We have anxiously considered if it is possible in any way to regard the mistake as an excusable one, but we regret we have not been able to arrive at that opinion. Moreover, even if by some process of reasoning we could arrive at a conclusion in appellant's favour, we can see nothing on which the time which has elapsed since the Full Bench decision of this Court above referred to was published in September 1930, may be excused.

44. The result is that, in our judgment, the application should be rejected and the appeal should be dismissed with costs. We order accordingly. In view of the fact that the appeal is dismissed as being incompetent we assess the hearing fee at a reduced fee of five gold mohurs to the appealing respondents.