

Dewan and ors. Vs. Buddhu and ors.

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Court : Allahabad

Decided On : Jun-23-1914

Reported in : AIR1914All521; 25Ind.Cas.30

Judge : Sundar Lal, J.

Appellant : Dewan and ors.

Respondent : Buddhu and ors.

Judgement :

Sundar Lal, J.

1. This is an appeal arising out of a suit for damages for malicious prosecution in respect of a charge made by defendant No. 1 against the plaintiffs under Section 347, Indian Penal Code. The other defendants are said to be the instigators and abettors of the charge. The claim was laid at Rs. 1,142. The Court of first instance found that the charge was false and groundless and made maliciously and without reasonable and probable cause. It decreed the claim for Rs. 305 on account of damages.

2. The learned Judge in appeal reversed the decree of the learned Subordinate Judge and has dismissed the suit.

3. The plaintiffs have appealed to this Court. The first ground raised in the appeal is that the appeal filed by the defendants in the Court below was filed long after the expiration of the period of limitation prescribed by law for the institution of appeals and that no explanation was given for the delay in the institution thereof which in law could be regarded as sufficient and adequate under Section 5 of the Limitation Act of 1908. Now the facts of the case, so far as they bear on this point are as follows: The learned Subordinate Judge pronounced his judgment in the case on 2nd December 1912 and a decree bearing that date was prepared in accordance with law.

4. Applications for copies of the judgment and the decree in the case were made on 9th December 1912, and the copies were ready for delivery and posted on the notice board on 10th December 1912. Mr. Weston had appeared as Counsel for the defence in the Court of the Subordinate Judge, and it appears from the affidavit filed by the Rev. H. T. Thomas, that the defendants instructed Mr. Weston to file an appeal against the said decree. The papers were delivered to him and a sum of Rs. 40 was paid to him on 20th December 1912. It is not stated whether this amount was paid on account of the costs of the appeal or on account of Counsel's fee or both. The time for filing the appeal expired on 3rd January 1913, but no appeal was actually filed before that date. There is no explanation whatever given as to why the appeal was not filed by Mr. Weston, nor has it been stated whether the appellants took any steps to ascertain whether their appeal had been filed before the end of January. It appears from the affidavit of the Rev. Mr. Thomas that at about the end of January an inquiry was made of Mr. Weston as to the date fixed for the hearing of the appeal, and in reply a letter which was said to bear date 1st January 1913, but was really written on 1st February 1913 was sent intimating that the appeal had not been filed, and that the sum of Rs. 40 paid was being refunded by money order. The money order was received on the 3rd February 1913. The letter of Mr. Weston has not been produced. It is stated in the affidavit that one Lal Mohammad was sent to Mr. Weston to ascertain from him in detail the circumstances under which Mr. Weston had not filed the appeal. Whether Lal Mohanimad saw Mr. Weston or not and whether the latter gave any and what explanation for his act, we do not know. Neither Mr. Weston nor Lal Mohammad filed any affidavit, nor even the appellants themselves on the point.

There is no statement on their behalf as to whether they themselves took any interest in their proposed appeal. From 3rd to 12th February 1913 efforts were made to secure the service of some Counsel or Pleader to file the time barred appeal, which was ultimately filed 37 days beyond time with the affidavit of Rev. Mr. Thomas to which I have already referred. The learned Judge made an ex parte order admitting the appeal under Section 5 of the Limitation Act which he affirmed at the hearing of the appeal. No reasons are given in the said orders for excusing this long delay in the institution of the appeal. The time prescribed for filing an appeal to the District Judge from the decree of the Subordinate Judge is 30 days. Giving the defendants the benefit of two days more spent in obtaining copies of the decree and the judgment appealed against, they had time up to 3rd January 1913. The mystery remains unexplained as to why the appeal was 'not filed. It may be, as Dr. Tej Bahadur Sapru suggests, that Mr. Weston had not much faith in the appeal, as it appears from a statement made in the judgment of the Court of first instance that 'Defendants' learned Counsel (Mr. Weston) frankly admitted that there was absolutely no proof on the record to rebut the evidence adduced by the plaintiff as regards issue No. 1' (whether the complaint filed by defendant No. 1 was false and malicious and without reasonable and probable cause). It is not stated what Mr. Weston's instructions were, whether he was to file the appeal only if he thought there was a fair chance of success, or to file it regardless of the possible result. I cannot understand a member of the Bar of Mr. Weston's position not filing the appeal, unless his instructions justified him in not filing in the circumstances of this case. It is not suggested that there was any misapprehension on the part of Mr. Weston as to the time within which the appeal ought to have been lodged, or that the defendants were misled by anything done by the plaintiffs-appellants. Quoting Lord Davey from another case, *Collins, M. R.*, made the following observations in *In Re: Coles and Ravenshear* (1907) 1 K.B. 1 : 76 L.J. K.B. 27 : 95 L.T. 750 : 23 T.L.R. 32: 'Upon the question whether time ought to be extended, speaking for myself I am inclined to adopt the view of the late James, L.J., that a party has a vested right in an order of the Court in his favour, and ought not to be deprived of an advantage given to him by the rules, unless there has been on his part some conduct raising an equity against him', or in a case of inevitable accident." As observed by Chief Justice Jenkins in *Karsondas*

Dharamsey v. Bai Gungabai 30 B. 329 at p. 330 : 7 Bom. L.R. 965: 'When the time for appealing is once passed a very valuable right is secured to the successful litigant, and the Court must, therefore, be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of the time for attacking the decree, and thus perhaps depriving the successful litigant of the advantages which he has obtained ' It was, therefore, for the defendants to make out very cogent grounds for excusing this long delay. It might be perhaps suggested that they had done all they had to do on their part in handing over the papers to Mr. Weston and supplying him with the necessary costs for filing the appeal and that it was due to the accident of Mr. Weston either carelessly or deliberately not filling the appeal. But it has not been stated what Mr. Weston's instructions were. I cannot impute any negligence, or carelessness on the part of Mr. Weston on the materials now on the record.

5. The learned Judge of the Court below did not apparently subject the explanation of the delay to any scrutiny. It appears that on 7th December 1912, he had held in a complaint filed by one Bishambher Sahai against Budhu under Section 211, Indian Penal Code which had resulted in a conviction of the latter, that there were no grounds for such conviction. He had held that Budhu was not able to prove his criminal charge against the present defendants and Bishambher Sahai and reversed the conviction of Budhu in appeal. He was already pre-disposed to consider Budhu's case favourably, and he admitted the appeal without much scrutiny and on the appeal coming on for hearing he admitted a copy of his judgment in the criminal appeal, as he says, 'to save a remand' That judgment was no evidence against the present appellants, either of the facts found in that case or of the conclusions at which the Judge had finally arrived. The case of Collector of Gorakhpur v. Palakhdhari Singh 12 A. 1 points out the limits within which a judgment not inter partes might be used. He took it in only to save a remand (I presume for the purpose of supplying evidence in justification of the charge, which did not exist on the record). I have no hesitation in holding that the explanation given of the delay in filing the appeal was utterly inadequate.

6. The only question which has pressed itself on my attention is, whether I should now in appeal set aside the order of the learned Judge admitting the appeal and

excusing the delay.

7. If the learned Judge had really exercised a discretion upon proper materials, I should not have re-considered the matter at all. It is evident from what I have already said that the learned Judge had not really applied his mind to consider the explanation of the delay in presenting the appeal after 3rd January 1913. No explanation was given to him as to why Mr. Weston had not filed the appeal within time. He had, therefore, no opportunity of considering the sufficiency or otherwise of the reasons for that fact. They were as unexplained to him as they are to me. In the absence of any explanation of this fact, I think, that he was, as I am, bound to reject the appeal as time-barred.

8. I, therefore, set aside the decree of the lower Appellate Court and reject the appeal to that Court as time-barred. I restore the decree of the Court of first instance with costs in all Courts which in this Court will include Counsel's fee on the higher scale.

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