

Bhagirathi Padhan and ors. Vs. Achuta Padhan and ors.

Bhagirathi Padhan and ors. Vs. Achuta Padhan and ors.

SooperKanoon Citation : sooperkanoon.com/528263

Court : Orissa

Decided On : Dec-15-1964

Reported in : AIR1965Ori193

Judge : G.K. Misra, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 2(2) and 115 - Order 41, Rule 11; Limitation Act, 1908 - Sections 5, 12(2) and 14

Appeal No. : Second Appeal No. 312 of 1963 with Civil Revn. No. 251 of 1963

Appellant : Bhagirathi Padhan and ors.

Respondent : Achuta Padhan and ors.

Advocate for Def. : S. Mohanty, Adv.

Advocate for Pet/Ap. : S.C. Mohapatra, Adv.

Disposition : Appeal allowed

Judgement :

G.K. Misra, J.

1. Plaintiff's suit for partition was decreed on 26-9-62 by the Munsif of Angul. Defendants appellants filed Title Appeal No. 8 of 1962 in the Court of the Subordinate Judge, Dhenkanal, on 29-11-62. The learned Subordinate Judge held

that the appeal was barred by limitation by three days. He rejected the application under Section 5 of the Limitation Act (hereinafter referred to as the Act) for condoning the delay. Ultimately the appeal was dismissed as being barred by limitation. Against the appellate decree, the second appeal and the Civil Revision have been filed.

It has been held in Civil Revision No. 34 of 1963 that a Civil Revision is not maintainable against the order dismissing the appeal as being barred by limitation as it amounts to a decree. In that view of the matter, Civil Revision No. 251/63 is dismissed as not maintainable.

2. The first question for consideration is whether there was delay in filing the appeal before the Subordinate Judge. To appreciate the contention, certain dates in chronological order may be noted-

29-9-62-Trial Court judgment was delivered.17-10-62-An application was filed by the appellants for copies of the judgment and decree of the trial Court,

20-10-62-The decree of the trial Court was signed, on the same day assessment was made by the copying Department and the appellants were called upon to supply requisites.

23-10-62-Appellants filed the requisites.29-10-62-Copy was ready for delivery.29-11-62-Title appeal 8/62 was filed in the Court of the Subordinate Judge, Dhenkanal. The appeal was admitted on the same-day.

15-1-63-Respondent appeared after service of notice.22-4-63-The appeal was finally heard on this date-when it was noticed in the course of argument that the appeal was barred by limitation. On the same day a petition. was filed with the affidavit of Sri Durga-Charan Bhutia, advocate for the appellants praying for condoning the delay.

Section 12 of the Act prescribes for exclusion of time in legal proceedings. Sub-section (1) lays down that in computing the period of limitation prescribed for any appeal, the day from which such period is to be reckoned shall be excluded. Under Article 152 of the Act, an appeal to the Court of a District Judge under the Code of

Civil Procedure, 1908, is to be filed within thirty days from the date of the decree or order appealed from. So 20-10-1962 must be excluded in computing the period of limitation under Section 12(1).

Under Section 12(2) of the Act, in computing the period of limitation prescribed for an appeal, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree appealed from, shall be excluded. There was conflict of authorities as to the exact connotation of the expression 'the time requisite for obtaining a copy of the decree.' In *Jagat Dhish v. Jawahar Lal*, AIR 1961 S C 832 the conflict has been resolved. The legal position, as it stands now, may be summarised. The time to be excluded is not the time actually taken but the time properly required for obtaining a copy of the decree. An appellant need not apply for a copy of the decree, which is non-existent and has not been prepared or signed by the Judge. The whole of the time required for preparing a decree must necessarily be excluded in all cases where the intervention of the party is not at all necessary for preparation of the decree. In cases where the intervention of the party is essential in the matter of preparation of a decree, the Court would be required to consider whether the time taken up for preparation of the decree would be attributed to the fault or negligence of the appellant. If it could be so attributed, the party would not be entitled to the exclusion under Section 12(2) of the Act. An instance of such cases may be in the matter of preparation of final decree in a partition suit where a party is called upon to furnish the requisite stamp on which the final decree is to be engrossed. But such a question would not at all arise in the matter of preparation of a decree which entirely depends upon the activities of the office and the Judge. Under Section 12(2), therefore, the time between the pronouncement of the judgment and the signing of the decree must be excluded in such cases.

The appellants would thus be entitled to the exclusion of time for the entire period from 29-9-62 to 20-10-62. The appeal was to be filed within 30 days from 20-10-62 after excluding that date under Section 12(1). The appellants are therefore entitled to further exclusion of 7 days from 23-10-62 to 29-10-62. The appeal was filed after 40 days from the date of the decree. Thus there is delay of three days.

From the affidavit filed by Sri D.C. Bhutia advocate for the appellants in the lower appellate Court, it appears that this delay of three days occurred as in computing the period of limitation, he excluded the period of 3 days from 17-10-62 to 19-10-62 under the impression that as the appellants applied for copies on 17-10-62, three days must also be excluded. This mistaken impression was the result of misconception of law. There cannot be double exclusion. As this period of 3 days is already comprised in the period from the date of the pronouncement of the judgment to the date of signing of the decree, appellants are not entitled to double exclusion of the over-lapped period. In *Manoo Rai v. Keshwar Rai*, AIR 1948 Pat 260 this question was fully discussed and there was no room for commission of such a patent mistake.

3. Sri D.C. Bhutia in paragraph 4 of the affidavit to the application under Section 5 of the Act stated that the delay in filing the appeal was committed by him acting on a bona fide mistake of law even after taking due caution. Mr. Mohanty contended that the advice given by Sri Bhutia would not have been given by any senior lawyer in spite of due care and caution, and, as such, it does not come within the purview of 'sufficient cause' under Section 5. In support of this contention he placed strong reliance on a Division Bench decision of this Court in *Raja Gopal v. Dolgovinda*, 25 Cut L T 315 : (AIR 1959 Orissa 31). The passage relied upon may be quoted :

'Mr. Rao, however, contends that the client proceeded on the advice of his lawyer and as such the lower appellate Court ought to have condoned the delay and made the joint decree-holder a party to the appeal. Can it be said that the advice was given in good faith The expression 'good, faith' has been defined in the Indian Limitation Act as 'nothing shall be deemed to be done in good faith which is not done with due care and attention'. The position, as it appears to us, is manifest that a slightest care and attention would have impelled the advocate to make others as necessary parties in the appeal. The position has been made clear on review of several cases on the point in my judgment in Bench decision in *Tirumala Bhaskara Rao Naidu v. Panasa Narayanamma*, 22 Cut L T 309 : ((S) AIR 1956 Orissa 124), that it cannot be the rule of law that any mistaken advice by a counsel is a sufficient ground under Section 5 of the Limitation Act, A party is not

completely absolved of his responsibility and automatically becomes entitled to the protection under Section 5 of the Limitation Act merely by entrusting his work to a senior advocate. But if the view taken by the legal adviser is quite a reasonable view even though mistaken, and the advice could be given by any senior lawyer in spite of due care and caution, then only the party is entitled to the provisions of Section 5 or Section 14 of the Limitation Act,'

If the above passage lays down the correct law, Mr. Mohanty's contention is unassailable and the application under Section 5 must be rejected. It is, however, noteworthy that the aforesaid passage makes no distinction in the legal requirements under Sections 5 and 14 of the Act which prescribe two different standards.

4. To appreciate the contention, it is worthwhile to quote Section 5 and Section 14(1) of the Act.

'5. Any appeal or application for a 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.

Explanation : The fact that the appellant or applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of this section.

14(1) In computing the period of limitation prescribed for any suit, the time during which the plaintiffs has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like manner, is unable to entertain it.'

It is to be emphasised that the two expressions 'due diligence' and 'good faith' in Section 14 do not occur in Section 5 which enjoins only 'sufficient cause'. It can never be contended that the aforesaid expressions in Section 14 involve the same concept as the expression 'sufficient cause' in Section 5. If it were so, the Legislature could have used identical expressions in both the sections, particularly when 'good faith' has been defined in the Act under Section 2(7). Mohapatra, J. who wrote the judgment in both the cases was conscious of this distinction in 22 Cut L T 309 : ((S) A I R 1956 Orissa 124). That he was alive to the distinction would be apparent from the following passage-

'We have made it clear earlier that if the lawyer has committed that mistake on account of palpable negligence, his client cannot seek protection under Section 14 of the Act. Indeed the previous decisions, that we have referred to, were under Section 5 of the Limitation Act where the only ingredient necessary to bring it within the section was that there should be sufficient cause for the delay; but as the sufficient cause pleaded in those cases arose out of choice of a wrong forum and as the appellant prayed for condoning the delay on account of the time taken in the wrong Court, they are cases to be governed by the analogy under the provisions of Section 14 of the Act (para 10).'

It is thus manifest that in the earlier decision, the Bench was alive to the fundamental distinction in legal requirements under Sections 5 and 14, 22 Cut L T 309 : ((S) A I R 1956 Orissa 124), which is a decision directly under Section 14, was wrongly followed in 25 C L T 315 : (AIR 1959 Orissa 31), which is a case only under Section 5. The earlier decision lays down the correct law. The later decision is unsupportable in view of the recent pronouncement of the Supreme Court in Ramlal v. Rewa Coalfields, AIR 1962 S C 301, where their Lordships pointed out the distinction between the two as follows :

'In this connection we may point out that consideration of bona fides or due diligence are always material and relevant when the Court is dealing with applications made under Section 14 of the Limitation Act. In dealing with such applications the Court is called upon to consider the effect of the combined provisions of Sections 5 and 14. Therefore, in our opinion, considerations which

have been expressly made material and relevant by the provisions of Section 14 cannot to the 'same extent and in the sama manner' be invoked in dealing with applications which fall to be decided only under Section 5 without reference to Section 14',

The underlined (here into' ') words emphasise the fundamental distinction between Sections 5 and 14. The view of this Court expressed in paragraph 10 of 25 Cut L T 315 : (A I R 1959 Orissa 31) is contrary to law and cannot be followed.

5. In AIR 1962 S C 361 their Lordships approved the dictum in Krishna v. Chathappan, ILR 13 Mad 269 that the words 'sufficient cause' must receive liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant. In this case, negligence or inaction or want of bona fides has not been attributed to the appellants personally. The mistaken calculation o the lawyer is responsible for the delay. Though Rajendra Bahadur v. Rajeshwar Bali, AIR 1937 P C 276 was a case under Section 5 of the Act, the principles of Section 14 were applied on analogy as it involved facts of filing an appeal in another Court having no jurisdiction. Even in such circumstances where a stiffer standard was made applicable to determine the meaning of 'sufficient cause,' their Lordships observed :

'Mistaken advice given by legal practitioner may in the circumstances of a particular case give rise to sufficient cause within the section though there is certainly no general doctrine which saves parties from wrong advice.'

In the present case there was no lack of bona fides on the part of Sri Bhutia. His lack of legal knowledge born out of want of touch with the current or recent authorities finally concluding the matter was responsible for the delay. Mr. Mohapatra contends that it is not that Sri Bhutia alone, who practises in the mofussil Court of Dhenkanal, suffers from this confusion, but that it is attributable even to some senior advocates and certain orders passed by the High Court saying that there was no delay even though there was stamp reporting to the contrary, and in fact there was delay on account of the process of double exclusion. He supplied a chart of some second Appeals a copy of which was served on Mr. Mohanty.

In Second appeal No. 17 of 1961, the stamp report was that there was delay of 4 days. Order No. 9 dated 28-8-1961 passed by G.C. Das, J. was to the effect:

'There is no question of limitation in this appeal in view of the latest S. C. decision.'

In Second appeals Nos. 42 and 43 of 61 (which were analogous), the stamp report was that there was delay of 1 day. Order No. 8 dated 23-8-1961 passed by G.C. Das, J., was to the effect:

'In view of the S. C. decision reported in 1960 (meaning 1961) S. C. there is no question of limitation in this case.'

In Second appeal No. 151 of 1961 stamp report was that there was delay of 3 days. Order No. 9 dated 5-12-1961 passed by R.K. Das, J., was to the effect:

'It appears that the second appeal has been filed within time. No steps are to be taken regarding limitation.'

It is contended by Mr. Mohanty that in all the aforesaid cases there was limitation by mistaken calculation adopting the process of double exclusion and that the Bench Order cannot be supported.

The explanation to Section 5 of the Act does not assist Mr. Mohapatra's contention. Sri Bhutia in his affidavit does not state that he was misled by the aforesaid orders of the High Court in computing the prescribed period of limitation. The Explanation enjoins that in fact a party must be misled by the order or practice or judgment of the High Court.

Mr. Mohapatra, however, contends that though the affidavit does not in terms come within the scope of the Explanation, the fact that wrong orders were passed by the Bench assisted by senior advocates of the High Court on erroneous appreciation of the Supreme Court decision, indicates that the mistake in computation by the process of double exclusion cannot be said to be the outcome of lack of bona fides or inaction or negligence of Sri Bhutia. It was a bona fide mistake honestly committed. The argument has considerable force and cannot be ignored. In *Shib Dayal v. Jagannath*, AIR 1922 All 490 (FB) their Lordships held

that an honest though a negligent mistake about High Court practices by a pleader in the mofussil court was a sufficient cause for extending the period of limitation under Section 5. Though that case was not one of mistaken computation of the period of limitation, there are certain observations which are apposite. Mears, C. J., observed as follows :

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

In *Rakhal Chandra Ghosh v. Ashutosh Ghosh*, 17 Cal W N 807 a Division Bench held that bona fide mistake committed by a pleader in calculating the period of limitation may constitute a sufficient cause within the meaning of Section 5 of the Act. Whether a miscalculation constitutes a sufficient cause in a particular case be decided by the High Court with regard to all the facts and circumstances of that case. On facts the Calcutta case is on all fours with the present case.

6. It is to be noted that Sri Bhutia's mistaken computation is indefensible. It was, however, honestly committed. In this regard it must be said that though the appellants might succeed in showing sufficient cause, they are not entitled to condonation of delay as a matter of right. It is open to the Court in exercise of its discretion to further see whether the delay should be condoned. The exercise of discretion must be judicial and not arbitrary. Sri Bhutia is a junior member of the Bar practising at Dhenkanal, an ex-State area, where the Bar is not yet much developed. He appears to have been confused by the fact that the period covered by an application for copy must be excluded from the period of limitation ignoring the further fact that there cannot be a process of double exclusion. In that context the fact that similar mistakes had been committed even by senior advocates and the Benches of the High Court, cannot also be overlooked. Taking all these factors into consideration I am of opinion that the mistaken computation of Sri Bhutia was honestly done and there was no negligence, inaction or want of bona fides on his part. The delay is accordingly condoned.

7. In the result, the judgment of the lower appellate Court is set aside and the case is remanded to it for disposal on merits. As the respondents have unnecessarily suffered on account of mistaken advice of the appellant's lawyer, the appellants

are to pay a consolidated costs of Rs. 50/- to the respondents as condition precedent to the hearing of the appeal.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com