

(1977) 08 CAL CK 0002

Calcutta High Court

Case No: Civil Revision 2243 (S) and 2244 (S) of 1976

State

APPELLANT

Vs

Motilal Ganguly

RESPONDENT

Date of Decision: Aug. 1, 1977**Acts Referred:**

- Limitation Act, 1963 - Section 5

Citation: (1977) 2 ILR (Cal) 376**Hon'ble Judges:** A.P. Bhattacharya, J**Bench:** Single Bench**Advocate:** P.N. Palit, for the Appellant; Ganendra Chandra De, for the Respondent**Final Decision:** Dismissed

Judgement

A.P. Bhattacharya, J.

These two Rules arise out of two petitions u/s 5 of the Limitation Act explaining the delay in filing the appeals in question.

2. The uncontroverted facts are that the judgment was delivered on September 30, 1975. Application for certified copies were made on October 3, 1975. Certified copies were supplied on December 11, 1975. On calculation the last day of filing of the appeals would be March 6, 1976. But the appeals had been preferred on April 1, 1976. There is, therefore, a delay of 25 days in filing of the two appeals in question. This delay is sought to be explained in the petitions u/s 5 of the Limitation Act in para. 4. The relevant allegation is that the certified copies of judgment and decree were placed before the learned Advocate Mr. P.N. Palit on March 7, 1976, for drafting the memoranda of appeals. The appeals were preferred by the State of West Bengal. The learned Advocate due to mistake in calculation advised the State that the last day for filing of the appeals was April 1, 1976. The file together with the memoranda of appeals were returned on March 28, 1976 and thereafter, orders of the Legal Remembrancer was obtained thereon for filing the appeals. The appeals

were then filed on April 1, 1976.

3. The question is whether on these facts alleged, in the affidavit, if the facts are even established, whether sufficient cause of delay stands established.

4. Both the Rules are opposed and it is contended on the side of the opposite parties that there is no sufficient cause for condoning the delay in these cases. The learned Advocate for the opposite party has referred to the Supreme Court decision reported in [Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd.](#), where Section 5 has been construed and the two important considerations bearing upon Section 5 has been discussed. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. The other consideration is that if sufficient cause for excusing delay is shown, discretion is given to the Court to condone the delay and admit the appeal. This decision of the Supreme Court has been considered in several decisions of this Court. In the instant case, certified copies of judgments and decrees were placed before the State Advocate Mr. Palit on March 7, 1976, obviously by the department. The last day for filing the appeals is calculated as March 6, 1976, in the manner indicated hereinbefore. In the event, the appeals were already barred by time when the relevant papers were placed before the State Advocate Mr. Palit. There is no explanation of this one day's delay on behalf of the Petitioner. Delay of each day has got to be explained while invoking Section 5 of the Limitation Act. Apart from that, the delay in respect of the subsequent period from March 7, 1976 to April 1, 1976, is sought to be explained by stating that this was owing to the mistake in calculation by Advocate Mr. Palit. No calculation sheet is filed in this Court. There is affidavit of Mr. Palit on record. Even accepting the statement made in the petition it should be considered whether such a ground can be accepted by the Court in the circumstances of the case. The method of calculation is simple and there is no scope for mistake. The duty of the Advocate in such a case with regard to Section 5 of the Limitation Act has been discussed in the decision in [Bhakti Bh. Mondal Vs. Khagendra K. Bandopadhyaya and Others](#). His Lordship has referred in paragraph 23 to the observation of Lord Justice Brett in *Highton v. Treherne* (1978) 39 L.T. 412 and accepted the principle is that a suitor cannot in all cases invoke the right to enlarge the time on the ground of wrong legal advice. Where there is a bona fide mistake not attributable to negligence or want of due skill the Court has jurisdiction to enlarge the time. This principle was followed in this decision and while considering Section 5 of the Limitation Act it has been observed as follows:

An Applicant applying for condonation of delay in such cases has to establish by evidence : (a) that the advice was given by a skilled or competent person, (b) that the lawyer who gave the opinion exercised reasonable care, (in other words, the advice was the result of a bona fide mistake not attributable to negligence or want of due skill) and (c) that the view taken by the lawyer was not such as would have been

entertained by a competent person exercising reasonable skill.

5. A delay of seven days in filing of an election petition by the Petitioner on the ground of wrong advice was not accepted by the Court. The election petition was dismissed as in the opinion of the Court sufficient cause had not been made out in the application. This decision was followed in [The Rajputana Trading Co. Pvt. Ltd. Vs. Malaya Trading Agency](#), where S.C. Ghose J. had observed that mistaken advice of a lawyer given negligently and without due care is not a sufficient cause for condonation of delay under that section.

6. That being the position, the circumstances of the present case do not show that the advice that was given by the Advocate was given with due and reasonable care. As I have already observed the calculation does not involve any particular skill and if a lawyer makes mistake in this respect of 25 days, it cannot be a bona fide mistake. The advice can either be said to be negligent or given without reasonable care. In the circumstances of the present case, I am unable to accept that such wrong advice of lawyer can be considered as sufficient cause for condonation of delay. Moreover, there is no affidavit by the learned Advocate nor had any sheet calculation showing how the mistake was committed in this case. On facts, I am not convinced that any such wrong advice was given by the State Advocate. In the aforesaid circumstances, the applications must fail as sufficient cause has not been made out therein. The applications are dismissed on contest and the Rules are discharged.

7. I make no orders as to costs.