
(1870) 03 CAL CK 0007

Calcutta High Court

Case No: Regular Appeal No. 153 of 1869

Mutusawmy and
Another

APPELLANT

Vs

The Secretary of State
for India in Council

RESPONDENT

Date of Decision: March 3, 1870

Judgement

Norman, Officiating C.J.

1. This is an appeal from a decree of the Recorder of Moulmein, under the provisions of the 27th section of Act XXI of 1863. The decision of the Recorder was given on the 23rd February 1869, and the appeal was presented to this Court, and admitted, on a special application, by the Chief Justice and Mr. Justice Dwarkanath Mitter, on the 12th July last. The order endorsed on the petition of appeal was "let this appeal be filed." That order was made upon an affidavit of Mr. Collis, the Officiating Solicitor to the Government:, which stated, that from an endorsement on the copy of the judgment of the Recorder of Moulmein, he believed that a copy of the judgment was not obtained earlier than the 29th of March 1869; that a copy of the judgment and other papers were transmitted from Moulmein to the Chief Commissioner of British Burmah at Rangoon, and subsequently forwarded by him on the 12th April to the Solicitor in Calcutta; that on the 21st of April, the papers so received were submitted by Mr. Collis to the Advocate-General for his opinion; that the Advocate-General's opinion advising an appeal was received by Mr. Collis on the 18th of June; that on the same day Mr. Collis despatched a telegram to the Chief Commissioner of British Burmah for authority to appeal; that a reply was sent by telegraph on the 24th of June; but that the reply was not received by Mr. Collis in Calcutta until the 3rd of July. The affidavit was sworn on the 8th July, the order directing that the appeal should be filed was made on the 12th July, and the appeal was filed on that day. Mr. Paul for the respondent took a preliminary objection to the hearing of the appeal, on the ground that it was not filed within the time limited by section 333 of Act VIII of 1859; and that no sufficient cause was shown on the face of Mr. Collis' affidavit why the appeal should not have been presented at an earlier period.

2. A case appears to have been decided by the Chief Justice and Mr. Justice Kemp, that after registering and admitting an appeal, and causing notice to be served on the opposite party, an appellate Court cannot, at the hearing, reject the appeal upon the ground that it was not preferred within the prescribed time. That case is *Bharutt Chunder Roy v. Issur Chunder Sircar* 8 W.R. 141. Mr. Paul contended that many cases could be put in which that rule would not apply. No doubt, notwithstanding that an appellate Court might have admitted an appeal, if it were shown to such Court by the opposite party that the appellant had obtained leave for the admission of the appeal by any misrepresentation or suppression of fact, or if he could show that there was no sufficient cause of any sort or kind, or if he showed that the appellate Court had made any mistake in admitting the appeal, though the appellant himself had not been guilty of any fraud, probably the Court would feel itself at liberty to set aside its own order, and direct that the petition of appeal should be removed from the file. A case of that kind appears to have come before Mr. Justice Phear and Mr. Justice Hobhouse, *Mowri Bewa v. Surendra Nath Roy* 2 B.L.R. A.C. 184, note.

3. It is sufficient for me to say, in the present case, that Mr. Paul has not shown us any reason for supposing that the Chief Justice and Mr. Justice Mitter in admitting the appeal had done so under any mistake, or in fact that they were wrong in admitting it in the way in which they did.

4. It appears that the decree was passed on the 23rd of February; on the 24th February the appellant put in a petition for a copy of the decree. He did not obtain a copy until the 29th of March, and as Mr. Paul does not show, and there is nothing to show, that the copy could have been obtained at an earlier period, I think that at the present stage of the case I must assume that the appellant was not guilty of any laches but that he got the copy from the Court as soon as it was ready for delivery. If then, the time between the 24th of February and the 29th of March be allowed him, it would appear that, in presenting the petition of appeal on the 12th of July, the appellant is 12 or 16 days after time.

5. In considering whether that was an unreasonable delay, whether there was sufficient cause for not presenting the appeal in a shorter period, it is necessary to consider the position of the parties to this suit. Now though the suit has been brought against Mr. Inglis, the Executive Engineer of the Moulmein Division, against whom I may observe by the way that the plaint does not disclose any cause of action. The real defendant in this suit is the Secretary of State for India in Council; I say, the real defendant in the suit, because the Secretary of State for India in Council is the person who ought to have been made defendant, and the money which will go to satisfy the decree is public money and payable by the Government, and it has been agreed that the appeal shall proceed as if the suit had been properly framed as a suit against the Secretary of State for India in Council. The cause was tried in Moulmein. From Moulmein it was necessary to refer to Rangoon, where the Chief Commissioner resides. It was necessary for the Chief Commissioner to communicate with the Solicitor to the Government of India, and obtain

the advice of the Advocate-General, who is the legal adviser of the Government of India and of the Secretary of State here. When in addition to all these circumstances which tend to cause delays which do not exist in the case of ordinary defendants, we add that a telegram instructing Mr. Collis to proceed with the appeal was delayed on the road for 10 days, we cannot but see circumstances in this case which fully justified the Chief Justice and Mr. Justice Mitter in considering that sufficient cause had been shown to their satisfaction for not having presented the appeal within 90 days. Apart, therefore, from the question whether as in this case there is nothing to show that the order of the Chief Justice and Mr. Justice Mitter admitting the appeal was obtained by misrepresentation or mistake, apart from the question whether objection can be taken to the entertainment of the appeal at this stage of the proceedings, it appears to me clear that there was sufficient in Mr. Collis' affidavit to justify the Chief Justice and Mr. Justice Mitter in making the order they did, and we cannot now question the propriety of their order in admitting the appeal.

For these reasons I think that we ought to bear this appeal.