

(1976) 02 CAL CK 0034

Calcutta High Court

Case No: None

Mahendra Nath Mandal and
Others

APPELLANT

Vs

Banamali Mondal and Others

RESPONDENT

Date of Decision: Feb. 20, 1976

Acts Referred:

- Limitation Act, 1963 - Section 5

Hon'ble Judges: N.C. Mukherji, J; B.C. Ray, J

Bench: Division Bench

Advocate: Sudhis Dasgupta, for the Appellant; Sudhangsu Bhusan Sen, for the Respondent

Final Decision: Allowed

Judgement

1. This Rule was issued upon an application praying for substitution of the heirs of the deceased respondent No.2 by setting aside abatement of the connected second appeal. It has been stated in the petition that the appeal was placed before the learned Additional Registrar in Lawazima Court on November 20, 1970 and it appeared from the office note dated November 17, 1970 to the effect that the serving peon had reported on October 27, 1970 that Gangadhar Mondal, respondent No.2 in the appeal had died. Thereupon the petitioner's Advocate's clerk wrote a letter on November 23, 1970 to the appellant petitioner No.7 who had been in charge of looking after the present appeal on behalf of all the appellants for taking steps of substitution of the heirs of the deceased respondent No.2. On receipt of the said letter of the Advocate's clerk the said appellant petitioner No.7 by a letter dated December 7, 1970 informed the learned Advocate that the respondent No.2 had died in Magh, 1376 B.S. leaving the opposite party No.2(a) as his widow, the opposite parties Nos.2(b) and 2(c) as his minor sons and the opposite party No.2(d) as his minor daughter. On receipt of the said letter the Advocate's clerk wrote a letter to the petitioner No.7 intimating him that it was incumbent upon the

appellants to make an application, within ninety days from the date of death of the deceased, for substitution of the heirs of the deceased respondent No.2 and that he should make an application for substitution on setting aside abatement on showing cause for delay. The petitioner No.7 by a letter dated January 2, 1971 intimated the Advocate that although he was aware of the death of the respondent No.2 he did not know that substitution of the legal representative of the deceased respondent No.2 was necessary and that if he knew of such legal position there would not have been any delay in making the application. After that on 21st of January 1971 the application was filed.

2. Mr. Sudhis Das Gupta, learned Advocate appearing on behalf of the petitioner places before us a Bench decision of this Court reported in 29 CWN 472 (Krishna Mohan Ghosh v. Surapati Banerji & Ors. In this case it was held that "under the circumstances of the case the delay was bona fide and sufficient cause had been shown within the provisions of S.5 of the Limitation Act". The facts of the case were similar to those of the present case. In that case also the petitioner was aware of the death of the person concerned but he did not know that substitution of his legal representative was necessary or that it was the duty of the petitioner to bring in the said legal representative on the record.

3. Mr. Sudhansu Bhusan Sen, learned Advocate appearing on behalf of the opposite parties nos.1 and 3 submits that in the decision referred to by Mr. Das Gupta, their Lordships did not assign any reason for coming to the above conclusion. In that case a contention was raised that mere ignorance of law cannot be "sufficient cause" within the meaning of S.5 of the Limitation Act. It was also contended that there is a difference between mistake of law and mere ignorance of the law. Mere ignorance of the law can never be and has never been held to be a ground for extension of time under S. 5 of the Limitation Act, while mistake of law in certain cases may be so. Mr. Sen submits that this contention raised in the above mentioned case was not at all considered by the learned Judges. In this connection he refers to a subsequent Bench decision of this Court reported in 36 CWN 420 (Surendra Mohan Rai Chowdhury v. Mohendra Nath Banerjee and ors.). In this case the decision reported in 29 CWN 472 was considered and it was held by their Lordships, "In the case of Krishna Mohan Ghosh v. Surapati Banerjee and ors. that the plea of the appellant that he did not know that the substitution of the deceased respondent was necessary was taken as a bona fide mistake. No reasons were given in the judgment for this view and we would respectfully decline to endorse it". But the facts of the case reported in 36 CWN 420 are completely different from the facts of the present case. In the said case an appeal on the grounds assailing the preliminary decree was filed with a copy of the preliminary judgment and a copy of the final decree, the memorandum describing it as an appeal from the latter. At the hearing, extension of time for converting the appeal into one from the preliminary decree was prayed for on the grounds that the Advocate to whom the papers had been first sent did not advise that a copy of the preliminary decree would be

necessary and that another Advocate who had filed the appeal was misled by conflicting decisions as to the maintainability of an appeal from the preliminary decree after a final decree had been passed. It was held that the appeal filed could not be regarded as an appeal from the preliminary decree and that there was no excuse for either mistake and as to the ground based on the second mistake, no extension could be granted in view, specially, of the time that had elapsed since the alleged conflict of decisions had been set at rest. In conclusion Their Lordships held "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 advise, however, gross and inexcusable, if bona fide acted upon by a litigant, will entitle him to the protection of S. 5 of the Limitation Act." In the present case there is no mistake by a legal adviser. It is simply an ignorance of law on the part of the party who frankly comes before the Court and states that though he was aware of the fact of death he did not know that it was incumbent upon the appellants to file an application for substitution of the legal heirs of the deceased respondent. As already indicated the ground for not filing the application for substitution within the statutory period was the same in the case reported in 29 CWN 472. Mr. Dasgupta also refers to us a Bench decision of this Court in Civil Rule No.2370(F) of 1969 (Sm. Phulmoni Naskar v. Banshicharan Naskar & Ors.) unreported. In this case it was stated in the application that "on being asked by her Advocate as to why the petitioner did not take steps for substitution with ninety days from the date of death of deceased respondent, the petitioner told her Advocate that she did not know that substitution of the legal heirs of the deceased respondent was necessary or that it was her duty to bring in the heirs of the deceased respondent on record". M. M. Dutt and R. K. Sharma, JJ. in making the Rule absolute observed as follows: - "We are satisfied from the explanation given in paragraph 7 and 8 of the application for setting aside abatement out of which this Rule arises that the petitioner had sufficient cause in not making the application within the period of limitation".

4. Mr. Sen next refers to a decision reported in [Kokarmal Gurudayal Vs. Sagarmal Bengani](#), . The facts of this case are completely different. In this case the ground taken was that the lawyers who were conducting the petitioner's case before the trial court, the first appeal court and the second appeal court never advised the petitioner as to its rights under S. 17B until he petitioner came to Mr. A. K. Dutt (learned Advocate). It was held that in the present case if the petitioner had stated that it was under the impression that there was no period of limitation for an application under S. 17B(1) owing to the impossibility of applying the relevant provisions, the petitioner's case under S. 5 might have deserved careful consideration, but a plea of this nature, is, in our opinion, a plea of mere ignorance of law arising out of the petitioner's neglect or failure to seek proper legal advice. On this plea we would not be justified in excusing the petitioner's delay under S. 5 of the Limitation Act.

5. Mr. Dasgupta also places before us another Bench decision of this Court reported in [Union of India Vs. Makhanlal Dey](#), . In this case it has been laid down "It is not to be supposed or encouraged that a bare allegation of sufficient cause is enough. Positively, there are certain sensitive areas as to which the law will require in a case, the test of sufficient cause to be passed. Such an area has long been and still is that no utter negligence, carelessness, bad faith of the applicant, his misconduct, his initial approach to the lawyer being not bona fide and the like. Negatively there are types of cases such as no inaction of applicant, no lack of his bona fides, diligence and due care, no gross want of legal skill and laches of his lawyer, no case of deliberate mistake and callous misfortune and the like: as to which the Court should be prepared to say with some confidence that they do not enter into the field".

6. Relying on the principles laid down in the above case Mr. Dasgupta submits that in the present case it must be said that the appellant No.7 who is an ordinary villager was quite ignorant of the legal position that it was necessary for the appellant to file an application for substitution within 90 days from the death of the deceased respondent No.2. From the correspondence referred to in the petition which were placed before used by Mr. Dasgupta and from the statements made in the petition we are satisfied that the petitioner was ignorant of the legal position and relying on the decision reported in 29 CWN 472 and the unreported decision referred to above in this case we hold that the delay in filing the present application should be condoned.

7. In the result the application succeeds and the Rule is made absolute. The abatement resulting from the death of the respondent No.2 is set aside and the heirs of the said respondent No.2 as mentioned in the application be substituted in place of the deceased respondent No.2. There will be no order for costs.