APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

H.C. 1948

June 7.

U SHWE KYU AND FOUR OTHERS (APPELLANTS)

v.

MA TIN U (RESPONDENT).*

Limitation Act, s. 5—Sufficient cause—Ignorance of law—Money lenders' Act, s. 12—Retrospective effect—Mortgage suit—Parties claiming adverse title—Attestation.

In a suit on a mortgage bond for a claim of Rs. 7,000 the Trial Court granted a decree. An appeal filed in the District Court of Myingyan was successful, but on second appeal the High Court reversed the decision of the District Court on the ground that the District Court had no jurisdiction to entertain the appeal of the value of over Rs. 5,000. The present appeal was then filed in the High Court, and even though allowance was made for the time spent in the District Court the appellants were still out of time by about ten days due to inability to raise necessary funds.

Held: That the mistake of the appellants' Pleader amounted to sufficient cause within the meaning of s. 5, Limitation Act.

Held further: That though ignorance of law is no excuse the degree of skill and efficiency displayed by the moffusil bar is a special circumstance for adoption of a liberal construction when copies of legal Acts and enactments were not readily available for easy reference.

The District Court and the Officers of the Court shared the same notion as to forum of appeal and the pleader had honestly given the advice under which the appellants acted.

Case law on the point referred to and discussed.

Ma Hmon and others v. *Ma Shwe Me*, (1892—96) Civil, Vol. 2, U.B.R. 452; *Gopal Chandra Lahiri* v. *Solomon*, 13 Cal. 62; *Krishna* v. *Chathappan*, 13 Mad. 269.; *Nga Po An* v *Nga Nyun Bu and two others*, (1907—09) Civil Vol. 2, U.B.R., Limitation 2; *Ma Mai Gale* v. *Tun Win*, (1913-16), Vol. 8, L.B.R. 566; *Tin Tin Nyo and others* v. *M. Aung Ba Saing and one*, 1 Ran. 584; *J. N. Surty* v. *T. S. Chettyar Firm*, 4 Ran. 265; *Rakhal Chandra Ghosh and others* v. *Ashutosh Gosh and others*, 17 C.W.N. 807; *Kuri Mal* v. *Ram Nath and another*, 28 All. 414; *Nagindas Motilal and others* v. *Nilaji Moroba Naik and others*, 48 Bom. 442; *Ambika Ranjan Majumdar* v. *Manikgunge Loan Office, Limited* 55 Cal. 798; *Ghulam Mohammad* v. *Usman and others* 14 Lah. 206; *Mithoo Lal* v. *Jamna Prasad and another*, A.I.R. (1933) Oudh 523; *Kishan Chand* v. *Mohammad Husain*, A.I.R. (1942) Lah. 94; *Kayambu Pillai and another* v. *Court of Wards by Collector, Trichinopoly District and others*, A.I.R. (1942) Mad. 170, referred to.

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* Civil First Appeal No. 5 of 1948 against the decree of the Assistant Judge's Court of Myingyan in Civil Suit No. 16 of 1946, dated 9th November 1946.

Held : Where the execution of a mortgage bond is admitted it is not necessary to produce the specific proof of attestation and this fact could be proved by the other evidence.

M.F.A.K. Firm v. *Ma Mya Thein and others*, A.I.R. (1940) Ran. 184, referred to.

Held also. That the Money-lenders' Act came into force on 1st January 1947 and it has retrospective effect. No decree can be passed for an amount, which, together with interest paid is more than double the original sum borrowed.

Parties who claim under a title adversely to both mortgagor and mortgagee are not proper parties to the mortgage suit.

M.V.A.L. Viswanathan Chettyar v. *Ma Aye and three others*, 4 Ran. 214, followed.

A. N. Basu for the appellants.

Leong for the respondent.

U AUNG THA GYAW, J.—The appellants in this case were sued in the Court of the Assistant Judge, Myingyan, on a registered mortgage bond alleged to have been executed by the 1st appellent U Shwe Kyu and his deceased wife Daw Gyan Byu on the 23rd November, 1931. The sum borrowed was said to be Rs. 1,700 bearing interest at the rate of Rs. 2 per cent per mensem. The total debt now due after deducting the sum of Rs. 500 received towards the interest paid on three occasions was said to amount to Rs. 7,000. Daw Gyan Byu has been dead these ten years. The 2nd to 5th appellants who are said to be the children of the mortgagors have been impleaded as party defendants on the score that they are now in possession of the mortgaged lands.

The 1st defendant-appellant contended that the mortage deed in suit was not executed in accordance with law, that it was not properly attested, that two of the latter payments of interest were not in fact made, that the suit was barred by limitation in consequence, that no consideration was received under the mortgage and that the debt had otherwise been settled by

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arrangement made by the plaintiff-respondent's mother Daw Nge.

The trial Court found that the suit mortgage bond was duly executed and registered, that consideration passed under the same, that by reason of the terms of section 7 of the Courts (Emergency Provisions) Act, 1943 (Burma Act No. XI of 1943), the suit was not barred by the Law of Limitation, that the debt had not been liquidated or satisfied, and, holding further that the Money-lenders' Act was not then in force, no relief under the same was granted to the defendant-appellants and a preliminary mortgage decree for the amount claimed was thus passed in the suit on the 9th November, 1946.

On the 8th January, 1947, the appellants, contrary to the provisions of section 13 (*1*) (*a*) of the Courts Act, 1945 (Burma Act No. XIV of 1945), published in the Government of Burma, Home Department Notification No. 136, dated the 5th October, 1945, preferred an appeal in the District Court of Myingyan in Civil Appeal No. 1 of 1947, instead of in the High Court, to which the appeal properly lay. The District Court, apparently unaware of its want of jurisdiction in the matter, heard and decided the appeal, setting aside the judgment and decree of the Court of the Assistant Judge, on the 24th March 1947.

The plaintiff-respondent thereupon preferred in the High Court on the 30th May, 1947, Civil Second Appeal No. 65 of 1947, and on the 14th November, 1947, succeeded in getting the decision of the District Court reversed on the sole ground of its lack of jurisdiction to entertain the appeal from the judgment and decree of the Court of the Assistant Judge.

The defendant-appellants then brought the present appeal on the 16th January, 1948, and by then the appeal was found to be barred by time to the extent of

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320 days. The defendant-appellants have now asked that this inordinate delay in filing their present appeal be excused under sections 5 and 14 of the Limitation Act on the ground that they were wrongly advised by their lawyer to file their first appeal in the District Court and that they had by taking the said advice committed a *bona fide* mistake. Even if due allowance be given to the period of time spent in pursuing the remedy in the wrong Court, the appellants are still out of time by about 8 or 10 days, and in regard to this matter they offered a further excuse that additional delay was due to their inability to raise the necessary funds in time to pay for the costs of their present appeal.

Section 5 of the Limitation Act provides that any appeal or application for a review of judgment or for leave to appeal, or any other application, etc., 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. Section 14 of the Act provides that in computing the period of limitation prescribed for any suit, the time during which the plaintiff 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 nature, is unable to entertain it.

The point raised on the appellants' behalf has been dealt with in a number of decisions of this and other Courts in Burma. In *Ma Hmon and others* v. *Ma Shwe Me* (1), the Court of the Judicial

(1) (1892—96) Civil, Vol. 2, U.B.R. 452.

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Commissioner, Upper Burma, following the Indian cases of *Gopal Chandra Lahiri* v. *Solomon* (1) and *Krishna* v. *Chathappan* (2) held the view that a judicial discretion must be exercised in the construction of the words "sufficient cause" in section 5 of the Limitation Act with reference to the special circumstances of a particular case and that though the provisions of this section must be applied with much circumspection and caution, they should be applied without hesitation where it was shown that delay was due to no fault of the appellant's own but to special causes beyond his control. In *Nga Po An* v. *Nga Nyun Bu and two others* (3) the decision in *Krishna* v. *Chathappan* (2) was again quoted with approval to support the *dictum* that in the exercise of discretion under section 5 of the Limitation Act the words "sufficient cause" should receive a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of *bona fides* is imputable to the appellant. In *Ma Mai Gale* v. *Tun Win* (4) it was held that a *bona fide* mistake on the part of a pleader might be a sufficient cause for admitting an appeal after time, but no mistake was *bona fide* unless made in spite of due care and attention. It was found in this case that the pleader who mis-calculated the value of the suit for purposes of appeal was wanting in the exercise of due care and attention and that the mistake he committed was not due to inadvertance as pleaded by him. In the case of *Tin Tin Nyo and others* v. *M. Aung Ba Saing and one* (5) a Bench of this Court, dealing with the facts similar to those now dealt with, held that in order that the provisions of section 5 of the Limitation Act might

(1) 13 Cal. 62.

(2) 13 Mad. 269.

(3) (1907—09) Civil, Vol. 2, U.B.R., Limitation 2.

(4) (1915-16) Vol. 8, L.B.R. 566.

(5) 1 Ran. 584.

be invoked in favour of an appellant, it must be found that the error was one that might easily have occurred even if reasonably due care and attention had been exercised by his Advocate. It was found that the mistake pleaded by the appellant in that case could only be accounted for by the fact that no care at all was taken, that no consideration was given to the question as to the forum in which the appeal lay and that the very obvious necessity for considering the value of the lands, the subject-matter of the appeal, for purposes of jurisdiction was entirely neglected. The same view was adopted by a Full Bench of this Court in *J. N. Surty* v. *T. S. Chettyar Firm* (1) where it was held that though a *bona fide* mistake on the part of a pleader was sufficient cause for admitting an appeal after time, no mistake was *bona fide* unless made in spite of due care and attention.

A number of Indian decisions have been placed before us in support of the appellants' claim that the mistake on the part of the appellants' pleader in regard to the forum in which the appeal lay should constitute a sufficient cause within the terms of section 5 of the Limitation Act. In *Rakhal Chandra Ghosh and others* v. *Ashutosh Gosh and others* (2) it was pointed out that it was neither necessary nor desirable that any attempt should be made to find precisely and exhaustively the meaning of the expression "sufficient cause" but that these words should receive a liberal construction so as to advance substantial justice when no negligence, nor inaction, nor want of *bona fides* was imputable to the appellant. In this case the particular matter before the Court was the miscalculation of the period of limitation made by a pleader and it was observed that the question whether the miscalculation in question did constitute a sufficient cause in any particular case must be decided

(1) 4 Ran. 265. (2) 17. C.W.N., 807.

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by the Court having regard to all the facts and circumstances of that case. When a client *bona fide* accepts the advice of counsel as to the proper procedure to adopt in the course of litigation and misled by that advice fails to file an appeal within time, he is entitled to the benefit of section 5 of the Limitation Act and should not be visited with the serious penalty which is involved in the rejection of this appeal : see *Kura Mal* v. *Ram Nath and another* (1). See also *Nagindas Motilal and others* v. *Nilaji Moroba Naik and others* (2), *Ambika Ranjan Majumdar* v. *Manikgunge Loan Office, Limited* (3) and *Ghulam Mohammad* v. *Usman and others* (4). The law was again reviewed in the Full Bench case of *Mithoo Lal* v. *Jamna Prasad and another* (5) where again it was stressed that what constituted "sufficient cause" could not be laid down by hard and fast rules but that it must be determined by a reference to all the circumstances of each particular case with a view to securing the furtherance of justice. In order that mistaken advice given by counsel may be sufficient cause within the meaning of section 5, such advice must be given with due care and attention and not through gross negligence. Filing of an appeal in a wrong Court through gross carelessness of the counsel is not a "sufficient cause" for presenting the appeal to the proper Court after the expiry of the period of limitation. This *dictum* is however subject to the qualification contained in the observation made by Srivastava J., one of the Judges of the Bench, to the following effect :

"While on the one hand I am not prepared to lay down that erroneous advice of a pleader howsoever gross or negligent it may

(1) 28 All. 414.
(2) 48 Bom. 442.
(3) 55 Cal. 798.
(4) 14 Lah. 206.
(5) A.I.R. (1933) Oudh 523.

be, must always and under all circumstances be regarded as a sufficient cause for extension of time ; I am equally not prepared to hold that a litigant acting *bona fide* upon the advice of his counsel should in no circumstances be entitled to the protection of section 5 if the counsel has in the opinion of the Court acted negligently even though honestly in giving the advice."

In *Kishan Chand* v. *Mohammad Husain* (1) the appellant on the mistaken advice given by his pleader who was not conversant with a recent notification filed an appeal in the wrong Court in good faith. It was held that there was sufficient cause within the meaning of section 5 for excluding the time taken in transmitting the appeal from the wrong Court to the proper Court. In *Kayambu Pillai and another* v. *Court of Wards by Collector, Trichinopoly District and others* (2) the *dictum* given in *Krishna* v. *Chathappan* (3) was quoted with approval to the effect that the words " sufficient cause " in section 5 must be liberally construed so as to advance substantial justice particularly when no negligence, nor inaction, nor want of *bona fides* was imputable to the applicant, and it was further observed that the question of excusing the delay had to be approached from the point of view of the petitioner's conduct rather than of the advantage gained by the other side.

Much of the observations made in these decisions obviously run counter to the maxim that ignorance of law is no excuse : *ignorantia legis non excusat*, but the degree of skill and efficiency displayed by the mofussil Bar is deemed to be a special circumstance justifying the adoption of a liberal construction of the words of the statute. In this particular case the pleaders in the out-stations in Burma resumed their practice after the upheaval caused by the invading armies which twice

(1) A.I.R. (1942) Lah. 94. (2) A.I.R. (1942) Mad. 170.
(3) 13 Mad. 269.

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overran the country and from the affidavits filed in support of the appellants' application there is good reason to believe that copies of local Acts and enactments were not readily available to the members of the Bar for easy reference. The Courts Act, 1945, introduced substantial changes in the constitution and jurisdiction of subordinate Courts and the wording of the relevant section relating to the jurisdiction of appellate Courts was also materially changed though the matter of the appellate jurisdiction of the District Court relating to decrees of the value exceeding Rs. 5,000 has remained unchanged. However, in the circumstances in which the parties were placed at the time, the question relating to the proper forum to which the present appeal lay could well have been a matter of justifiable doubt and it cannot therefore be said that the appellants' pleader was guilty of gross negligence when the advice offered by him to the appellants was that their appeal lay to the District Court and not to this Court. The mistaken notion under which the appellants' pleader acted at the time was shared by the learned District Judge and the ministerial officers of this Court. There is thus good reason to think that the pleader concerned had honestly given the wrong advice under which the appellants acted and consequently we are of the view that the delay in bringing the present appeal was due to sufficient cause within the meaning of section 5 of the Limitation Act. We feel further disposed to condone the further delay of 8 or 10 days which had resulted from the penury to which the appellants were reduced by having to have recourse to the wrong Court for the furtherance of their claim.

As to the merits of this appeal, only two material points have been urged before this Court, namely, that the mortgage bond in suit was not executed in

accordance with law and that under section 12 of the Money-lenders' Act, 1945 (Burma Act No. XXVII of 1945), no decree could be passed for a sum greater than the principal of the original loan and arrears of interest which, together with any interest already paid, exceeds the amount of such principal.

On the question of due execution and proper attestation there is sufficient evidence on the record to establish the fact that both U Shwe Kyu and his wife Daw Gyan Byu had taken part in the execution of the bond and its subsequent registration in the Registration Office. U Shwe Kyu himself has admitted the execution of the suit mortgage bond and the circumstances in which the transaction took place. U Shwe Kyu had a son whose name was U Teik-kheindria. According to the defendant Ohn Mya, a son of the first defendant U Shwe Kyu, this *phongyi* wanted to go to India and prevailed upon the first defendant to raise the necessary expenses for his Indian trip. The document in suit was written by him and besides U Shwe Kyu's signature a cross-mark purporting to be that of Ma Gyan Byu appears under the same. On its side margin the two attesting witnesses were mentioned as Maung Sein and Chit Po, both sons of the first defendant-appellant. The parties were apparently on friendly and intimate terms with Daw Nge, the mother of the respondent from whom the loan was taken. U Shwe Kyu admits in his evidence that Ma Gyan Byu and Maung Sein came along with him to the Registration Office to get the mortgage bond registered. Endorsements relating to this registration bear the signatures and cross-marks purporting to be those of the executants and read with the evidence of Maung Ba Kaw (P.W. 2) who then worked as a clerk in the Registration Office, there can be no question that U Shwe Kyu and Ma Gyan Byu did execute the suit mortgage bond and

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that Maung Sein, their son, was one of the attesting witnesses for it was Maung Sein who appeared before the witness and identified his parents.

Objection has been taken on the appellants' behalf that no proof of proper attestation has been furnished by the plaintiff-respondent in regard to the suit mortgage bond. On this point the case of *M.P.A.K. Firm* v. *Ma Mya Thein and others* (1) is brought to our attention. It is there held that where the execution of the mortgage bond is admitted it is not necessary to produce specific proof of the attestation of the document and that this fact can be proved by other evidence in the case. In this case in view of the admissions made by U Shwe Kyu and of the evidence given by other witnesses relating to the transaction it was unnecessary for the plaintiff-respondent to call any attesting witness to prove the due execution of the document. The effect of the evidence adduced in favour of the plaintiff-respondent and the admissions made by the 1st appellant himself clearly establish the fact that the mortgage bond in suit was properly executed and attested, and there is no substance in the objection raised on the appellants' behalf in this appeal.

The next objection raised in this appeal relating to the amount of the mortgage debt to which the plaintiff-respondent is justly entitled under the provisions of section 12 of the Money-lenders' Act does not appear to admit of any adequate reply. The Money-lenders' Act came into force on the 1st January, 1947, and, from the wording of the section itself, it has retrospective effect and this Court cannot in the circumstances pass a decree in the respondent's favour for more than the sum which, together with the amount of interest

(1) A.I.R. (1940) Ran. 184.

admittedly received by her, totals twice the original sum borrowed by the 1st appellant. Consequently, the 1st appellant is liable to repay the sum of Rs. 2,900 only to the plaintiff-respondent under the mortgage bond in suit.

It is noticed that the decree in this case has also been passed against the 2nd to 5th appellants, who, from the statements made in their written statement, claimed the mortgaged property as heirs to their grand-mother Ma Thaw, the mother of their deceased mother Daw Gyan Byu, one of the executants of the mortgage bond. The plaintiff-respondent from the statement made in paragraph 10 of her plaint appears to have impleaded these defendants as parties to the suit merely for the reason that as children of the 1st defendant-appellant U Shwe Kyu they have been in actual possession of the mortgaged lands. Under Order 34, Rule 1 of the Code of Civil Procedure all persons having an interest either in the mortgage-security or in the right of redemption are liable to be joined as parties to the mortgage suit. It is clear from this that parties who are claiming under a title adversely to that of both the mortgagor and the mortgagee are not proper parties to the mortgage suit and the claims made by them cannot be adjudicated in the same. This is made clear in the decision in *M.V.A.L. Viswanathan Chettyar* v. *Ma Aye and three others* (1). The 2nd to 5th appellants are not therefore proper parties to the present mortgage suit and no mortgage decree can therefore be passed against them.

Accordingly this appeal will be accepted in part and a preliminary mortgage decree will be passed against the 1st defendant-appellant in respect of a sum of Rs. 2,900 only with proportionate costs. The suit

(1) 4 Ran 214

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against the remaining defendant-appellants will be dismissed. There will be no order for separate costs in their favour.

U TUN BYU, J.—I agree.