SUPREME COURT.

U OHN KHIN (APPLICANT)

v.

DAW SEIN YIN (RESPONDENT).*

†S.C. 1949

May 30.

Appointment of Receiver—Object—Limitation for application for Special Leave—Order XI Rules 1, 2 and 10 of Supreme Court Rules—Meaning of the word "granting" in Rule 2—Sufficient cause within s. 5 of the Limitation Act—Want of due care and attention—Meaning of the word "judgment" in ss. 5 and 6 of the Union of Burma Judiciary Act.

Held : That the object of appointing a Receiver in a pending suit, is to keep the subject-matter intact, so that at the conclusion of the suit, the successful litigant may not be deprived of the fruits of his success.

The word "granting" in Rule 2 of Order X of the Supreme Court Rules, does not include "refusing."

The words "sufficient cause" are not defined or explained in the Limitation Act. From the nature of the thing it cannot be defined ; it must be decided on the facts and circumstances of each case. The fundamental principle is that a cause for delay which a party seeking the aid of s. 5, could have avoided by the exercise of due care and attention cannot be said to be a sufficient cause. A mistake by a lawyer is not *per se* a sufficient cause unless it can be shown that the mistake could not have been avoided in spite of the exercise of due care and attention. The wordings of Rules 1, 2 and 10 of Order XI of Supreme Court Rules are simple and unambiguous. Therefore no sufficient cause has been made out in the present case.

Where it is not certain whether a Certificate will be granted by the High Court as a matter of course, the prudent course is to apply to the Supreme Court for Special Leave within time allowed by law.

The question whether the meaning of the word "judgment" as in ss. 5 and 6 of the Union Judiciary Act is the same as given in *In re Dayabhai Jiwandai* v. *A.M.M. Murugappa Chettiar*, I.L.R. 13 Ran. 457, or not, is left open for future consideration.

In re Dayabhai Jiwandas v. *A.M.M. Murugappa Chettiar*, 13 Ran. 457 (F.B.); *T. V. Tuljaram Row* v. *M.K.R.V. Alagappa Chettiar*, I.L.R. 35 Mad. 1, referred to.

Chan Htoon (Attorney-General) for the applicant.

E. C. V. Foucar for the respondent.

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* Civil Misc. Application No. 8 of 1949 of the Supreme Court of the Union of Burma.

† *Present :* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE KYAW MYINT of the Supreme Court and U SAN MAUNG, J.

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The judgment of the Court was delivered by the Chief Justice of the Union.

SIR BA U.—The point canvassed before us very strenuously by the learned Attorney-General on behalf of the applicant U Ohn Khin is that the order passed by the High Court on the 4th of May 1948 setting aside an order passed during the Japanese occupation of Burma by the then Additional Divisional Court of Pyapôn appointing the applicant as Receiver in Civil Regular Suit No. 17 of 1944 of the said Court is a judgment within the meaning of sections 5 and 6 of the Union Judiciary Act. The word "judgment" as used in the Letters Patent of the several High Courts in India and in Clause 13 of the Letters Patent of the late High Court of Judicature at Rangoon gave rise to different interpretations and a conflict of decisions both in India and Burma. But so far as this country was concerned it was finally settled by a Full Bench of seven Judges *in re Dayabhai Jiwandas* v. *A.M.M. Murugappa Chettiar* (1). According to that decision the word "judgment" in clause 13 of the Letters Patent means and is a decree in a suit by which the rights of the parties in issue in the suit are determined.

The learned Attorney-General submits that the said decision requires further consideration in so far as the word "judgment" as used in sections 5 and 6 of the Union Judiciary Act is concerned. According to the learned Attorney-General the framers of the Union Judiciary Act by not adopting the language of section 109 of the Code of Civil Procedure must have intended to use the word "judgment" in a wider sense than the Full Bench did in *Murugappa*'s case (1). Therefore the construction as adopted in the case of *T. V. Tuljaram Row* v. *M.K.R.V. Alagappa Chettiar* (2)

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is, according to the learned Attorney-General, more preferable than the one adopted in *Murugappa*'s case (1), as it is in consonance with the intention of the Legislature. If the definition of judgment as given in *Tuljaram*'s case (2) is not adopted, the learned Attorney-General submits it will mean the denial of justice in several cases as in the present one. In the present case jewelleries worth at least Rs. 5 lakhs form the major portion of the subject-matter of the suit out of which the present proceedings arise. If the High Court did not find it advisable to confirm the order of the Additional Divisional Court appointing the plaintiff (now applicant in this Court) as Receiver, it should not have allowed the jewelleries to remain in the possession of the defendant-respondent, who is a lady fairly advanced in age. The object of appointing a Receiver in a pending suit is to keep the subject-matter of the suit intact so that at the conclusion of the suit the successful litigant may not be deprived of the fruits of his success. If the defendant-respondent were to die during the pendency of the suit, the jewelleries which form the major portion of the subject-matter of the suit would undoubtedly disappear and the plaintiff would undoubtedly suffer an irreparable loss if he were to succeed ultimately. What the High Court, according to the learned Attorney-General, should have done if it did not want to confirm the appointment of the plaintiff-applicant as Receiver *pendente lite* was to appoint an officer of the Court, such as the Bailiff, as Receiver with instructions to keep the jewelleries in a safe and reliable bank in Rangoon covered by insurance. The point of law that therefore arises, according to the learned Attorney-General, is whether the High Court exercised its discretion judicially in setting aside the

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order of the Additional Divisional Court appointing the plaintiff (applicant) as Receiver *pendente lite* in the case.

The points thus raised are very interesting and important points. If they are not considered now, they may have to be considered at some other time. But before we can consider them, the first and the most important question that calls for consideration is the question of limitation. The High Court set aside the order of the Additional Divisional Court by an order passed on the 4th May 1948 and an application was thereafter filed in the High Court under section 5 of the Union Judiciary Act for a certificate to appeal to this Court. The High Court dismissed the application by an order dated the 17th January 1949, and on the 5th February 1949 the present application under section 6 of the Union Judiciary Act was filed in this Court. The question is whether the application is within time. The learned Attorney-General submits that it is as it falls within Order XI, Rules (1) and (2) of this Court's Rules. The said rules are in the following terms :

"(1) Where a certificate has been given under section 5 of the Union Judiciary Act, any party who desires to appeal shall file a petition of appeal in this Court.

(2) Subject to the provisions of sections 4, 5 and 12 of the Limitation Act, the petition shall be presented within thirty days from the date of the order granting the certificate."

The meaning of the rules as they stand is as clear as it possibly can be. They mean that when a certificate granting leave to appeal to this Court is granted by the High Court a petition of appeal shall be filed within one month from the date of the grant. These rules therefore deal with the matter of appeals only and nothing else. But when the matter of *applications for special leave* to appeal filed under section 6 of the Union Judiciary Act comes under consideration, the

rules that apply are 10 (*a*) and 10 (*b*) of Order XI, which run as follows :

"10. (*a*) When a party desires to pray for special leave to appeal under section 6 of the Union Judiciary Act, the petition of appeal shall be accompanied by a special petition indicating the grounds upon which special leave is sought, and both petitions shall, unless the Court otherwise directs, be heard together.

10. (*b*) Subject to the provisions of sections 4, 5 and 12 of the Limitation Act, the petition shall be presented within ninety days from the date of the decree or order from which leave to appeal is sought."

Now, as pointed out above, the order from which leave to appeal is sought was passed on the 4th of May 1948 and the present application was filed only on the 5th February 1949. The application is therefore, on the face of it, barred by 164 days, making an allowance of 22 days occupied in getting copies of the order of the High Court. To get over this bar of limitation two submissions are made by the learned Attorney-General. The first is that the word "granting" as used in Rule 2 of Order XI of this Court's Rules also means "refusing" and if it does the present application is in time as it was filed within 30 days from the date on which the application for a certificate under section 5 of the Union Judiciary Act was refused. The second submission is that in the circumstances obtaining in this case, the delay of 164 days should be excused under section 5 of the Limitation Act. The circumstances are that the learned Attorney-General was genuinely under the impression that an order appointing or refusing to appoint a Receiver in a pending suit was a judgment within the meaning of section 5 of the Union Judiciary Act. If it was a judgment, as he thought it was, a certificate to appeal should be granted by the High Court as a matter of course as the amount involved was, both in the trial

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Court and in the High Court, well over Rs. 10,000 and as the High Court set aside the order of the Additional Divisional Court.

Dealing with the first submission, if we have to put the construction as desired by the learned Attorney-General on the word "granting" as used in Order XI, Rule 2 of this Court's Rules, it will render the meaning of the said rule almost, to say the least, unintelligible. If the word "granting" also means "refusing" the rule will run thus :

> "Subject to the provisions of sections 4, 5 and 12 of the Limitation Act, the petition shall be presented within 30 days from the date of the order *refusing* the certificate."

What petition is to be filed ? The petition of appeal as laid down in Rule 1 is to be filed. How can a petition of appeal be filed if no certificate is granted therefor. Therefore the rule if considered in the way as desired by the learned Attorney-General would become meaningless. We cannot therefore accept his first submission.

Dealing with the second submission, the question is whether a mistake of law made by a lawyer is "a sufficient cause" within the meaning of section 5 of the Limitation Act. What is meant by "sufficient cause" is not defined or explained in the Act. From the nature of the thing it cannot be defined ; it must be decided from the facts and circumstances of each case. The one fundamental principle that has been adopted by the Courts in India is that a cause for delay, which a party seeking the aid of section 5 of the Limitation Act could have avoided by the exercise of due care and attention, cannot be said to be "a sufficient cause." It follows therefore that a mistake of law made by a lawyer is not *per se* "a sufficient cause" unless it can be shown that the

mistake could not have been avoided in spite of the exercise of due care and attention.

Now, in the present case, the mistake made by learned counsel for the applicant could have been avoided if Rules 1 and 2 and Rules 10 (*a*) and 10 (*b*) of Order XI of this Court's Rules had been studied with due care and attention. These rules are, as pointed out above, quite simple and easy to understand. Assuming that the order passed by the High Court, setting aside the appointment of the plaintiff-applicant as Receiver, was a judgment, as assumed by the learned counsel for the applicant, it does not necessarily follow that a certificate would as a matter of course be granted by the High Court under section 5 of the Union Judiciary Act, though the practice has been all along to give a certificate in a case where the amount involved in the trial Court and in the High Court is over Rs. 10,000 and where the High Court has upset the judgment of the trial Court. If by chance no certificate was granted the only method by which the unsuccessful litigant can come to this Court would be to apply for special leave to appeal under section 6 of the Union Judiciary Act. It must then be done within 90 days from the date of the decree or order from which leave to appeal is sought. Where it is not certain that a certificate under section 5 of the Union Judiciary Act would be granted by the High Court as a matter of course the prudent course to adopt is to apply to this Court under section 6 of the Union Judiciary Act within the time allowed by law. This is the practice that has been adopted by some members of the Bar.

Having regard to all the circumstances of the case we are of opinion that no sufficient cause has been shown to excuse the delay of 164 days in this case. We dismiss the application with costs five gold mohurs.