

For the reasons recorded above, I allow the preliminary objection and hold that the appeal has abated *in toto*. However, there will be no order as to costs.

R.N.M.

APPELLATE CIVIL

Before Daya Krishan Mahajan and Gurdev Singh, J.

BRAHMANAND AND ANOTHER,—*Appellants*

versus

SHIV KUMAR AND OTHERS,—*Respondents*

Civil Misc. 182/C of 1967

R. S. A: 64 of 1967

January 15, 1968.

Limitation Act (XXXVI of 1963)—S. 5 and 12—Regular Second Appeal—Filing of—Time spent in obtaining the copy of the judgment of the Trial court—Whether to be excluded—Such time—Whether can be condoned under section 5—Reasons for condonation not given—Each day's delay not explained—Condonation—Whether can be granted—Grant of condonation—Circumstances under-stated.

Held, (per D. K. Mahajan, J.)—that the time spent in obtaining the copy of the judgment of the Trial court for filing Regular Second Appeal cannot be excluded under section 12 of the Limitation Act, 1963.

Held, that in some cases, the delay in filing the judgment of the Trial Court out of limitation can be condoned under section 5 of the Act. But when in the

Brahmanand, etc. *v.* Shiv Kumar, etc. (Gurdev Singh, J.)

application for condoning the delay under the section, no reasons are stated why the application for the copy of Trial Court's judgment was filed at a late stage and each day's delay is not explained, no case is made out for such condonation.

Held (per Gurdev Singh, J.)—that there is nothing in section 12 or any other provision of the Limitation Act which entitles an appellant in a second appeal to claim the exclusion of the time spent by him in obtaining the certified copy of the judgment of the trial Court and no such concession is allowed to him even under rule 2 added by High Court to Order XLI of the Civil Procedure Code.

Held, that since an appellant in second appeal is required by the Rules of High Court to furnish a copy of the judgment of the trial Court along with the documents mentioned in sub-section (3) of section 12 of the Limitation Act, it cannot be disputed that if he is prevented from filing the appeal within the period of limitation prescribed by Schedule 1 of the Act because of the fact that the certified copy of the judgment of the trial Court is not furnished to him, it constitutes sufficient cause under section 5 of the Act for condoning the delay and admitting the appeal after the prescribed period. The exclusion of the time requisite for obtaining the certified copy of the judgment of the trial Court under section 5 of the Limitation Act, however, does not stand on the same footing as the time spent in obtaining the certified copy of the judgment and decree appealed against, to which an appellant is entitled under section 12 of the Act. Under section 12 the litigant has the right to claim exclusion of the time that he has spent in obtaining the certified copies of the judgment and decree appealed against, and even if he obtains those copies within the period of limitation prescribed for the appeal, he is not obliged to institute his appeal within the prescribed period, but, if he so chooses, can wait so as to claim benefit of the time which he had actually spent in obtaining these certified copies. Under section 5 of the Act, however, the delay can be condoned only if the appellant satisfies the Court that there was sufficient cause for his not instituting the appeal within the time prescribed under the Limitation Act. Though the failure of the Copying Department to supply him the certified copy of the judgment of the trial Court before the expiry of the period of limitation prescribed for the appeal will be taken as sufficient cause for his not instituting the appeal within the period prescribed under the Act, yet under section 5 of the Act he cannot claim the entire period spent by him in obtaining the certified copy of the judgment of the trial Court as a matter of right. In dealing with the application under section 5 of the Act, for condoning the delay caused by the fact that time was spent in obtaining the certified copy of the judgment of the trial Court the Court will naturally enquire how far the delay in lodging the appeal was caused by the non-availability of such copy of the judgment of the trial Court. In order to obtain the advantage of section 5 of the Act, the appellant had to make out sufficient cause for not preferring the appeal within the prescribed period of limitation.

Application under Section 5 Limitation Act praying that the period of limitation for filing the above appeal be extended and this appeal be treated as within time.

J. K. SHARMA, ADVOCATE, for the Appellants.

R. N. MITTAL, ADVOCATE, for the Respondents.

JUDGMENT

MAHAJAN, J.—This order will dispose of Civil Miscellaneous No. 182-C of 1967 in Regular Second Appeal No. 64 of 1967.

This application is made under section 5 of the Limitation Act, praying that the appeal, which has been filed out of limitation, may be treated within limitation by condoning the delay in filing the same.

In order to appreciate the question of limitation, it is necessary to set out a few salient facts. The decree appealed against was passed on the 3rd of June, 1966. The appeal was actually presented to this Court on the 14th of December, 1966. The application for obtaining a copy of the judgment and decree of the lower appellate Court was made on the 1st of July, 1966; and the same appears to have been delivered on the 31st of August, 1966, because the copy was completed and attested on that date. Therefore, the appellant was entitled to another period of sixty-two days under section 12 of the Limitation Act, besides the period prescribed by law for filing a second appeal, that is ninety days. In all, the appeal could be filed on the 152nd day of the decree appealed against. This period ends on 2nd November, 1966. The appeal was not filed by the 2nd of November, 1966. The reason for this is stated to be that an application for trial Court's judgment had been made and the appeal was filed after it was obtained. The period spent for this copy is sought to be added to the period of 152 days referred to above. An application under section 5 of the Limitation Act has been filed, wherein a prayer has been made for condoning the delay in filing the appeal. It is stated that the limitation for filing the present appeal was subsisting on 25th of October, 1966, when an application for the copy of judgment of the trial Court was made. This judgment was ready on the 7th of December, 1966 and was ultimately delivered to the appellant on 8th of December, 1966. Under the High Court Rules, it is necessary to file a copy of the judgment of the trial Court along with the memorandum

of appeal, and, therefore, the appellant is entitled to add the time spent in obtaining that copy to the period of limitation for filing the appeal.

It is unexceptionable that the time spent in obtaining the copy of the judgment of the trial court cannot be excluded under section 12 of the Limitation Act. I need only refer to the leading case on the subject—*Narsingh Sahai v. Sheo Prasad* (1). No decision to the contrary has been brought to my notice. As a matter of fact, this decision has been followed consistently by the Lahore High Court; and it is only under section 5, that in some cases, the delay in filing the judgment of the trial Court out of limitation has been condoned.

In the application for condoning the delay, no reasons are given. As a matter of fact, the copy came into the hands of the appellant on the 8th of December, 1966, and the appeal was filed on the 14th of December, 1966. There is no explanation for the delay between the 8th of December, 1966, and the 14th of December, 1966. The rule is well settled that each day's delay has to be explained. This has not been done. Therefore, no case has been made out for condoning the delay between the 8th of December, 1966 to the 14th of December, 1966. See in this connection the decision in *George Gowshala v. Balak Ram* (2), and *Sardar Prithi Pal Singh v. Pandit Hans Raj and others* (3).

It is not disputed that the appeal has been filed out of limitation; and that it had to be filed on the 2nd of November, 1966, whereas it has been filed on the 14th of December, 1966. It is, however, claimed that the time spent in obtaining the copy of the trial Court's judgment be condoned under section 5 of the Limitation Act. The time spent is from 25th of October, 1966 to 8th of December, 1966. It is no doubt true that the application for the copy of the judgment of the trial Court was filed when the period for filing the appeal had not run out. There is no reason stated why the application for the trial Court's judgment was filed at such a belated stage. It was not filed within the period of ninety days allowed for filing an appeal. On the facts of this case, therefore, we are clearly of the view that no case has been made out for condoning the delay between the 25th of October, 1966 and the 8th of December, 1966. *In Gurdit*

(1) I.L.R. 40 All. 1 (F.B.).

(2) A.I.R. 1927 Lah. 717.

(3) A.I.R. 1939 Lah. 378.

Singh v. Charan Das (4), the learned Judges of the Lahore High Court refused to condone a delay of six days spent in obtaining a copy of the trial Court's judgment. This is how the matter was disposed of:—

** * * * *

It certainly cannot be allowed under section 12 of the Limitation Act, but he urges that section 5 can be invoked to his aid. We are, however, unable to see how this can be done. Had the appellant failed to obtain a copy of the trial Court's judgment at the commencement and been compelled to obtain this copy towards the end of the period of limitation, we think that section 5 could be utilised. He had, however, obtained this copy early in June, and we are unable to see any reason for holding that there was any sufficient cause for the delay in this case. We consider that the appellant has been grossly negligent. He could have proceeded to Lyallpur on the 22nd June, and had he done so, the appeal could have been filed within the 90 days. Instead of that he contended himself with instructing counsel to apply by post, with the result that his application did not reach the Copying Department at Lyallpur till the 2nd July. We have duly considered 9 I.C. 381, 14 I.C. 403, 50 I.C. 760 and 44 I.C. 831 authorities with which we are in accord.

* * * * *

In *Madan Gopal v. Malawa Ram* (5), the facts of which case are somewhat similar to the facts of the present case, a prayer under section 5 was negatived in the following terms:—

** * * * *

Mr. Badri Das for the appellant has argued that as, according to the rules of this Court, it is incumbent upon appellant to file a copy of the judgment of the first Court also, the appellant in this case was entitled to the benefit of the period spent in obtaining copy of the judgment of the first Court. The application for copy of the first Court's judgment was made on the 20th July, 1921 and it was not delivered till the 29th of July, 1921. If this period were to be allowed to the appellant, his appeal would certainly be within time. It is provided

(4) A.I.R. 1922 Lah. 415.

(5) A.I.R. 1923 Lahore 96.

Brahmanand, etc. v. Shiv Kumar, etc. (Mahajan, J.)

in clause (3) of section 12 of the Limitation Act that where a decree is appealed from or sought to be reviewed the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded. Now, in this case, the decree appealed from is the decree of the appellate Court. Therefore, only the time requisite for obtaining the copy of the judgment on which the decree appealed against is founded should be excluded. I am aware that this Court has framed a rule making it necessary to file a copy of the First Court's judgment with the memorandum of appeal. This Court has power to alter, amend and add to rules of procedure laid down in the Code of Civil Procedure according to section 122 of the Code; but it has no power to alter the period of limitation provided by the Limitation Act. This view of the law is supported by the Full Bench decision of the Allahabad High Court in *Narsingh Saha v. Sheo Parsad* (6). Mr. Badri Das has asked me to extend the period of limitation in this case under section 5 of the Limitation Act and treat the appeal as within time, but I see no sufficient reason for doing this. The judgment appealed against was delivered on the 11th of April, 1921, and the appellant did not apply for copy of judgment and decree till the 4th July, 1921. A court is not bound to show indulgence to a litigant who is not prompt in seeking his remedy.

* * * * *

To the same effect is the decision of the same learned Judge in *Chuhar Mal v. Bira Ram and another* (7); and also the decision in *Babu Singh and others v. Mangat Rai and another* (8).

Mr. Sharma, learned counsel for the appellants, then argued that the practice of this Court was not to receive the appeals without the copy of the trial Court's judgment. We are afraid, there is no such practice.

For the reasons recorded above, we see no option but to dismiss this appeal as barred by limitation. However, there will be no order as to costs.

(6) (1918) 40 All. 1.

(7) A.I.R. 1923 Lah. 461.

(8) A.I.R. 1927 Lah. 192.

GURDEV SINGH, J.— I agree that this appeal must be dismissed as barred by time. In view of the importance of the question involved and the misconception that seems to prevail about an appellant's right to exclude the time spent in obtaining certified copies of judgments and decree, I would like to state my own reasons.

The decree appealed against was passed on 3rd June, 1966. The certified copies of the decree and the judgment on which it is based were applied for by the appellant within 90 days, the period of limitation prescribed for the appeal, and after excluding 62 days spent in obtaining the certified copies of the judgment and the decree appealed against, the appeal could be instituted on 152nd day, which expired on 2nd November, 1966, in view of the provisions of section 12 of the Limitation Act. The appeal, however, could not be instituted by that date as the certified copy of the judgment of the trial Court, which under the Rules of this Court had to be filed along with the memorandum of appeal, was not ready. The application for obtaining the certified copy of the judgment of the trial Court was made on 25th October, 1966, i.e., before the expiry of 152 days from the date of the decree. This certified copy of the judgment of the trial Court was ready on 7th December, 1965, though according to the averments in the appellants' application under section 5 of the Limitation Act, it was delivered to him on 8th December, 1965. The appeal accompanied by this certified copy of the judgment of the trial Court as well as the certified copies of the decree and judgment appealed against was, however, presented to this Court only on 14th December, 1966. The appellant applies for condonation of the delay under section 5 of the Limitation Act urging that the delay was occasioned by the fact that the Copying Department had taken a good deal of time in preparing and supplying him the certified copies required to be filed with the memorandum of appeal. At the same time that he is entitled to the deduction of the entire period spent by him in obtaining the certified copies of the judgments of both the Courts, and if this is allowed to him, then his appeal is within time. Thus, the short question for consideration is:—

“Whether the appellant is entitled to the exclusion of the entire period spent by him in obtaining the certified copies of the judgments of both the trial and the appellate Courts, and even if it be held that he was not entitled to deduct the period spent by him in obtaining the copy of the judgment of the trial Court, whether the time spent

Brahmanand, etc. v. Shiv Kumar, etc. (Gurdev Singh. J.)

in obtaining the certified copy of the judgment of the trial Court can be allowed to him under section 5 of the Indian Limitation Act ?”

The only provision under which a litigant can claim the time spent by him in obtaining certified copies of certain judgments and decrees is that contained in sub-section (3) of section 12 of the Indian Limitation Act, 1963 (hereinafter referred to as the Act), which lays down that in computing the period of limitation.

“Where a decree or order is appealed from or sought to be revised or reviewed, or where an application is made for leave to appeal from a decree or order, the time requisite for obtaining a copy of the judgment on which the decree or order is founded shall also be excluded.”

The meaning of the expression “time requisite” is now well-settled. It means time properly and reasonably required. In *Jijibhoy N. Surty v. T. S. Chettyar* (9), Lord Phillimore in this connection observed:—

“The word ‘requisite’ is a strong word; it may be regarded as meaning something more than the word ‘required’. It means ‘properly required’, and it throws upon the pleader or counsel for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default.”

Earlier in *Pramatha Nath Roy v. William Arthur Lee* (10), their Lordships of the Judicial Committee had ruled that no period can be regarded as requisite under the Act, which need not have elapsed; if the appellant had taken reasonable and proper steps to obtain the order.

The appellant before us had applied for the certified copies of the judgment and decree of the first appellate Court, against which the present appeal had been preferred, on 1st July, 1966, and he obtained the same on 31st August, 1966. Under sub-section (3) of section 12 of the Limitation Act, which has been reproduced above, he is entitled as a matter of right to exclude this period of 62 days

(9) A.I.R. 1928 P.C. 103.

(10) A.I.R. 1922 P.C. 322.

spent by him in obtaining the certified copies of the judgment and decree appealed against in computing the period of limitation for his appeal. Thus, he could institute the appeal within 152 days from the days from the date of the decree appealed against, i.e., on or before 2nd November, 1966.

Under rule 1 of Order XLI of the Civil Procedure Code, the memorandum of an appeal is required to "be accompanied by a copy of the decree appealed from and (unless the appellate Court dispenses therewith) of the judgment on which it is founded." In case of a second appeal, or an appeal from an appellate decree, Rule 2 added by this Court to Order XLII of the Civil Procedure Code as far back as 19th March, 1926, provides:—

"In addition to the copies specified in Order 41, rule 1, the memorandum of appeal shall be accompanied by a copy of the judgment of the Court of first instance, unless the Appellate Court dispenses therewith."

It is thus obvious that for proper presentation of this appeal the appellant had to obtain certified copies not only of the judgment and decree of the first appellate Court but also that of the judgment of the trial Court. So far as the time spent by him in obtaining the certified copies of the judgment and decree appealed against is concerned, as has been observed earlier, the appellant had a right to exclude it from consideration in accordance with the provisions of sub-section (3) of section 12 of the Limitation Act, and since he had spent 62 days in obtaining those copies, he could well wait till 2nd November, 1966, for instituting his appeal. There is, however, nothing in section 12 or any other provision of the Limitation Act, which entitles an appellant in a second appeal to claim the exclusion of the time spent by him in obtaining the certified copy of the judgment of the trial Court and no such concession is allowed to him even under rule 2 added by this Court to Order XLII of the Civil Procedure Code. In this connection, the observations of a Division Bench of the Lahore High Court in *Madan Gopal v. Malawa Ram* (5), to which my learned brother has referred in the course of his judgment, are relevant. About Raoof, J., delivering the judgment of the Court, observed:—

"I am aware that this Court has framed a rule making it necessary to file a copy of the First Court's judgment with the memorandum of appeal. This Court has power to

Brahmanand, etc. v. Shiv Kumar, etc. (Gurdev Singh. J.)

alter, amend and add to rules of procedure laid down in the Code of Civil Procedure according to section 122 of the Code; but it has no power to alter the period of limitation provided by the Limitation Act. This view of the law is supported by the Full Bench decision of the Allahabad High Court in *Narsingh Saha v. Sheo Prasad* (6)".

Since an appellant in a second appeal is required by the Rules of this Court to furnish a copy of the judgment of the trial Court along with the documents mentioned in sub-section (3) of section 12 of the Limitation Act, it cannot be disputed that if he is prevented from filing the appeal within the period of limitation prescribed by Schedule I of the Indian Limitation Act because of the fact that the certified copy of the judgment of the trial Court is not furnished to him, it constitutes sufficient cause under section 5 of the Indian Limitation Act for condoning the delay and admitting the appeal after the prescribed period. [*Union of India v. Firm Balwant Singh Jaswant Singh* (11)]. The exclusion of the time requisite for obtaining the certified copy of the judgment of the trial Court under section 5 of the Limitation Act, however, does not stand on the same footing as the time spent in obtaining the certified copy of the judgment and decree appealed against, to which an appellant is entitled under section 12 of the Limitation Act. Under Section 12 the litigant has the right to claim exclusion of the time that he has spent in obtaining the certified copies of the judgment and decree appealed against, and even if he obtains those copies within the period of limitation prescribed for the appeal, he is not obliged to institute his appeal within the prescribed period, but, if he so chooses, can wait so as to claim benefit of the time which he had actually spent in obtaining these certified copies. Under section 5 of the Limitation Act, however, the delay can be condoned only if the appellant satisfied the Court that there was sufficient cause for his not instituting the appeal within the time prescribed under the Indian Limitation Act. Though the failure of the Copying Department to supply him the certified copy of the judgment of the trial Court before the expiry of the period of limitation prescribed for the appeal will be taken as sufficient cause for his not instituting the appeal within the period prescribed under the Act, yet under section 5 of the Act he cannot claim the entire period spent by him

(11) I.L.R. 1956 Punj. 1129 (F.B.)=A.I.R. 1957 Punj. 27 (F.B.).

in obtaining the certified copy of the judgment of the trial Court as a matter of right. In dealing with the application under section 5 of the Act, for condoning the delay caused by the fact that time was spent in obtaining the certified copy of the judgment of the trial Court will naturally enquire how far the delay in lodging the appeal was caused by the non-availability of such copy of the judgment of the trial Court.

To avail of the time spent in obtaining certified copies of the decree and judgment, an appellant has to apply for such certified copies before the prescribed period of limitation runs out. If he makes the application for copies after the entire prescribed period of limitation has elapsed, surely he cannot claim any advantage under sub-section (3) of section 12 of the Limitation Act, because after the period of limitation has expired and the appeal has already become barred by time, the exclusion of the time taken in obtaining the certified copies, which were applied for after the expiry of the period of limitation, would not save the limitation. In *Batan Singh and others v. Nathu Birju* (12), P. C. Pandit, J., ruled that an appellant can claim the time spent by him in obtaining a certified copy of the judgment of the trial Court where the application for copy is made by him after the expiry of the prescribed period of limitation, but before the expiry of the extended period after deducting the time spent by him in obtaining the certified copies of the judgment and decree appealed against. In view of this decision, the appellant was well within his rights in applying for a certified copy of the judgment of the trial Court on 25th October, 1966, and if for non-availability of that copy he was prevented from filing the present appeal, he can be allowed extension of time under section 5 of the Limitation Act. The appellant claims that he is entitled to the entire period between 25th October, 1966 and 8th December, 1966, which he spent in obtaining the certified copy of the judgment of the trial Court, and if this entire period is excluded, along with the time spent by him in obtaining copies of the judgment and decree appealed against, from the prescribed period of limitation, his appeal was well within time, as the period of limitation so extended by exclusion of the time spent in obtaining of the copies of the judgment and decree, which were to be filed with the appeal expired on 17th November, 1966. This contention is clearly untenable. As has been observed earlier, in order to obtain the advantage of section 5 of the Limitation Act, the appellant had to make out sufficient cause

(12) I.L.R. (1961) 2 Punj. 518=A.I.R. 1961 Punj. 503.

for not preferring the appeal within the prescribed period of limitation. In the case before us, the certified copy of the judgment of the trial Court, for which the appellant had applied on 25th October, 1966, was ready and attested on 7th December, 1966. There is nothing in the copy to indicate when it was delivered to the appellant, but even if we accept his word that it came into his hands only on 8th December, 1966, the fact remains that it was six days thereafter that he instituted this appeal. It is thus obvious that though uptill 8th December, 1966, the appellant was prevented from filing his appeal because of the fact that the certified copy had not been furnished to him before that day, it cannot be said that the non-availability of the copy had prevented him from filing the appeal during the period of six days between 8th December, 1966, and 14th December, 1966. There is nothing in the application made by the appellant under section 5 of the Limitation Act, or the affidavit accompanying it, to explain why the appellant waited till 14th December, 1966, to institute his appeal even after he had obtained the certified copy on 8th December, 1966. It is now well-settled, and this has not been disputed by the appellant's learned counsel, that in order to take advantage of section 5 of the Limitation Act, the appellant has to explain each day's delay. In *Ram Lal and others v. Rewa Coalfields Ltd.* (13), while dealing with the exercise of the discretion vesting in the Court under section 5 of the Limitation Act, Gajendragadkar, J., (as he then was) speaking for the Court, observed as follows:—

“It is, however, necessary to emphasize that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the Court by section 5. If sufficient cause is not proved, nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown, then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its *bona fides* may fall for consideration; but the scope of the enquiry while exercising the discretionary power after sufficient cause is shown would naturally be limited only to such facts as the Court may regard as

relevant. It cannot justify an enquiry as to why the party was sitting idle during all the time available to it. In this connection we may point out that considerations of *bona fides* or due diligence are always material and relevant when the Court is dealing with applications made under section 14 of the Limitation Act. In dealing with such applications the Court is called upon to consider the effect of the combined provisions of sections 5 and 14. Therefore, in our opinion, considerations which have been expressly made material and relevant by the provisions of section 14 cannot to the same extent and in the same manner be invoked in dealing with applications which fall to be decided only under section 5 without reference to section 14."

In the light of this authoritative pronouncement, though the appellant cannot be called upon to explain or to justify his failure to apply for the certified copy of the judgment of the trial Court before 25th October, 1966, while the period of limitation, as extended under section 12 by the exclusion of the time taken in obtaining the certified copies of the judgment and decree appealed against, was still subsisting, he cannot escape his liability for accounting for the delay of six days which he took in instituting the appeal after 8th December, 1966, when admittedly all the certified copies of the judgments and decree, which were required to be filed with the memorandum of appeal, were in his hands. Under section 5 of the Limitation Act, where the non-availability of the copy of the judgment of the trial Court is the only reason put forward for not filing the appeal within the prescribed period, an appellant is not entitled to claim the entire period spent by him in obtaining the certified copy of the trial Court's judgment, but only such period during which that copy was not made available to him. If after having obtained the certified copy, he remains inactive and still decides to wait, he does so at his own peril. As soon as the certified copy of the judgment of the trial Court, in absence of which he could not file the appeal, comes into his hands, he has to act diligently and institute the appeal. The appellant in the present case has given no reason for not coming to the Court with his appeal soon after he had obtained the certified copy of the trial Court's judgment on 8th December, 1966. Accordingly, I find that he is not entitled to the benefit of section 5, and rejecting his application under that section, his appeal must be dismissed as barred by time.

R. N. M.