LATCHMI AND ANOTHER

v.

MOTI AND OTHERS

[COURT OF APPEAL, 1964 (Mills-Owens P., Marsack J.A., Briggs J.A.), 8th July, 7th August]

Civil Jurisdiction

Appeal—application for leave to appeal out of time—time runs from date of perfection of judgment—court having power to enlarge time—discretion of court—Court of Appeal Rules (Cap. 3) rr.7, 20, 21, 22, 23, 30—Rules of the Supreme Court (England) 0.58 r.15, 0.41 r.3 (Annual Practice 1934).

Practice and Procedure—leave to appeal out of time—date from which time runs — perfection of judgment by entry.

The applicants applied for leave to appeal out of time in the following circumstances. Judgment against them was pronounced in the Supreme Court on the 19th March, 1963, but was not perfected by sealing and entry in the registry until the 26th November, 1963; a copy of the judgment as entered was served on the solicitor for the applicants on the 13th December, 1963 (per judgments of Mills-Owens P. and Briggs J.A.). On the 13th January, 1964, the applicants' solicitor attempted to file a notice of appeal but it was rejected by the registry as being out of time. On the 18th January, 1964, application for leave to appeal out of time was made to a judge of the Supreme Court but was refused on the 24th January, on the ground that the application was not supported by an affidavit. On the 11th February, 1964, the present application was filed. The solicitor for the applicants accepted that the delay was due to his own mistaken view that time for filing notice of appeal (which, at the material time, in the case of an appeal from a judgment in an action was thirty days) ran from the time of service of the judgment upon him.

Held: 1. *(per curiam)* That under rule 21 of the Court of Appeal Rules the time for filing the notice ran from the date when the judgment was entered or otherwise perfected.

2. (per Mills-Owens P. and Briggs J.A.) That, under rule 21 aforesaid, only the Court of Appeal could enlarge the time for appealing against a judgment (as distinct from an order).

3. (per Briggs and Marsack JJ.A., Mills-Owens P. dissenting) That the application should be refused as no ground had been put forward upon which justice required that leave to appeal out of time should be given. (per Briggs JJ.A.) It would be a hardship to grant leave at such a late date.

Semble: The discretion of the court to grant or refuse such an extension is unfettered.

Cases referred to: *Gatti v. Shoosmith* [1939] 3 All E.R. 916; [1939] Ch. 841: Re Manchester Economic Building Society (1883) 24 Ch. D. 488; 49 L.T. 793: *Kevorkian v. Burney* [1937] 4 All E.R. 97.

A Application for leave to appeal out of time.

R. G. Q. Kermode for the applicants.

D. Pathik for the respondents.

B [*Editorial Note* :— In refusing the application the majority of the Court appear to have been to some extent influenced by the fact that the applicants could themselves have perfected the judgment against which they wished to appeal. The learned President was of the opinion that they were under no obligation to do so. Since the date of this judgment the Court of Appeal Rules, including those rules which relate to notice of appeal, have been substantially amended.]

C The following judgments were read:

MILLS-OWENS P. [7th August, 1964]—

In this application for leave to appeal out of time against a judgment given in the action, questions arise, first, as to whether such
D leave may only be given by this Court and not by the Supreme Court or a judge thereof; secondly, as to the date or event from which the time for appealing is to be reckoned; and thirdly, as to the principles on which such applications are to be considered.

Rule 21 of the Court of Appeal Rules provides:

E "Time for appealing from interlocutory and final order. No appeal to the Court of Appeal from any interlocutory order, or from an order, whether final or interlocutory, in any matter not being an action, shall be brought after the expiration of fourteen days, and no other appeal shall be brought after the expiration of thirty days unless the Supreme Court or a judge thereof at
F the time of making the order or at any time subsequently or the Court of Appeal shall enlarge the time. The said respective periods shall be calculated, in the case of an appeal from an order in chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other
G cases, from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal."

Rule 23 is in the following terms:

H "Power to extend time and amend. The Court of Appeal shall have power to extend the time for appealing, or to amend the grounds of appeal, or to make any other order on such terms as the Court shall think fit to

> ensure the determination on the merits of the real question in controversy between the parties."

Rule 21 is, at first sight, difficult to construe. It may usefully be compared with Order 58 rule 15 of the English R.S.C. in force in 1934 upon which, no doubt, our Rule 21 is based. Under Order 58 rule 15 the power of enlargement of the time for appeal is expressed in the following terms —

> "unless the court or judge at the time of making the order or at any time subsequently or the Court of Appeal shall enlarge the time."

It would appear, upon a careful reading of this rule, that the position thereunder was as follows — where the appeal was proposed to be brought against an order, as opposed to an appeal against a judgment, the time for appealing could be extended by the court or judge which made the order and that such power was exercisable either at the time of the making of the order or subsequently; alternatively the Court of Appeal could have extended the time in such a case; in the case of a judgment, however, the application had to be made to the Court of Appeal. That this was so follows from the reference to "the court or judge at the time of making the order", which clearly confines the power of enlarging time of the Supreme Court or a puisne judge to the actual tribunal by which the order was made, except, of course, that in addition the Court of Appeal had the same power. According to the marginal note to Order 58 rule 15 of the R.S.C. it was confined to appeals from interlocutory and final orders. The marginal note to our Rule 21 is in the same terms. But it is clear that Order 58 rule 15 extended, as our Rule 21 extends, to appeals against judgments because each goes on to provide for the date from which time is to be calculated and in doing so specifically provides that in the case of a judgment it is from the time when the judgment is entered or otherwise perfected. As a matter of construction, orders are related to the word "signed" and judgments are related to the word "entered", on the principle of *reddenda singula singulis*.

Rule 21 differs from the former Order 58 rule 15 of the R.S.C. in that instead of referring to "the court or judge at the time of making the order . . ." it refers to "the Supreme Court or a judge thereof at the time of making the order . . .", but, on its wording, the effect must be the same, that is to say that the power is confined (except for the overall power of the Court of Appeal) to the tribunal which made the order. If the Supreme Court was to have had overall power, that is to say that one puisne judge sitting in court could deal with the order of another puisne judge, the reference to the Supreme Court would have appeared immediately before the reference to the Court of Appeal.

To summarise, the authorities empowered to enlarge time are —

(1) In the case of an order, final or interlocutory, the court or judge which made it; alternatively the Court of Appeal;

(2) In the case of a judgment, only the Court of Appeal.

Rule 30 (providing that whenever, under the Rules, an application may be made either to a puisne judge or to a judge of appeal, it shall be made in the first instance to a puisne judge) appears to refer back to Rule 20 dealing with ex parte applications. Rule 30 appears to have no reference to Rule 22 under which a puisne judge, or the Supreme Court, or the Court of Appeal (but not apparently a judge of appeal) may order a stay of execution. It is not clear what applications may be made ex parte, but, in principle, an ex parte application to enlarge time should not be admitted after the time limited has elapsed. The power of the Supreme Court or puisne judge to enlarge time in respect of an appeal against its, or his, own order, however, is not limited to exercise within the period prescribed by Rule 21 but may be exercised "at any time subsequently"; as has been indicated, on an application made out of time this would be on an *inter partes* application, and it relates only to final or interlocutory orders.

No doubt Rule 23 was enacted *ex abundante cautela,* as it is implicit in Rule 21 that the Court of Appeal has power to enlarge the time for appeal in all cases. It may be mentioned that under Rule 7 the Court of Appeal is given general power to enlarge time, but as Rules 21 and 23 are of particular application to time for appeal they are the appropriate rules to be considered on the matter of enlargement of time for appeal.

Turning to the second point, that is to say, when time begins to run, it appears clear that in the case of a judgment, which is what we are concerned with on the present application, time runs from the date of the perfecting of the judgment. Although under Order 41 rule 3 of the English R.S.C. (as applied to Fiji) judgment is entered *nunc pro tunc,* that is to say, is entered by sealing in the registry as of the day upon which judgment was pronounced and takes effect as from that day, Rule 21 clearly provides that time runs from the date of entry or perfection of the judgment. A judgment remains inchoate until entry and may indeed be amended by the trial judge at any time before entry *(Halsbury* (3rd Edition) Vol. 22, para. 1664 at p.784).

In the present case judgment was pronounced in Court on the 19th March, 1963, but was not perfected by sealing and entry in the registry until the 26th November, 1963. Time, therefore, ran as from the latter date, so that the period of 30 days expired during the Christmas holidays. It appears that the applicants' solicitor mistakenly considered that time ran as from the date upon which he was served by the successful party with a copy of the judgment as entered, that date being the 13th December, 1963. On the 13th January, 1964, exactly 30 days after the date of service, he attempted to file notice of appeal but it was rejected by the registry as being out of time. On the 18th January, he filed a motion before a judge of the Supreme Court for leave to appeal out of time. Unfortunately the application was not supported by an affidavit and, on the 24th January, was refused on that ground; further, as has been indicated above, this being an application to appeal against a judgment the application should properly have been made to the Court of Appeal.

On the 11th February, 1964, the application, which is now before us, was filed and it is supported by an affidavit, sworn on the 4th February, by the solicitor deposing to the facts and dates mentioned above and accepting that the delay was due to his own mistaken view that time ran from the date of service of the judgment upon him. Although, in terms, the application is made under Rule 20, I am prepared to treat it as an application properly made under Rule 23. The delay amounted to 17 days (26th November, 1963, to 13th January, 1964) if the date of the abortive attempt to file notice of appeal is taken; 22 days if the date of the application to the puisne judge is taken; and 46 days, if the date upon which the application to this Court is taken.

As to the priciples upon which the Court should act in considering an application for extension of time for appeal, it appears that the Court has an unfettered discretion. Prior to the amendment of the English R.S.C. in 1909 such an application required the "special leave" of the Court. The 1909 amendment deleted the word "special". Before this amendment the mistake of a legal adviser was not regarded as a special circumstance; after the amendment such a mistake had been admitted as a reason for granting leave out of time. The matter was fully considered in *Gatti v. Shoosmith* [1939] 3 All E.R. 916, to which our attention was drawn by counsel for the applicants. In his judgment, Lord Greene, M.R., at p. 919, stated —

> "the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say 'may be', because it is not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think is the proper rule which this court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case. There may be facts in a case which would make it unjust to allow the appellant to succeed upon that argument.
>
> The discretion of the court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised."

Later in his judgment, in which MacKinnon and Finlay, L.JJ. concurred, the Master of the Rolls said —

> "We are not, I think, concerned here with any question at all as to the merits of this case or the probability of success or otherwise."

In the present case, accepting that we are not concerned with the probability of success or otherwise of an appeal, nevertheless there are some aspects of the litigation to which attention should be paid. It is a case where members of a family are split into two factions

in an endeavour to prevent their mother from making a gift of her gift of her property to one or other of them, and where litigation has been going on since 1959. In an action commenced in 1959, the mother, Ram Dulari, claimed that a transfer executed by her in favour of the present applicants, being some of her children, should be set aside on the ground of undue influence. That action was discontinued; whether or not upon terms is not known to us. The present action is one instituted by four other children, against Ram Dulari as 1st defendant and the present applicants as 2nd and 3rd defendants. The plaintiffs, the respondents to the present application, claimed first that the mother held the property in trust for the whole of the family but failed on this issue; secondly they claimed to have the transfer set aside on the ground of undue influence on the part of the 2nd and 3rd defendants. The learned trial Judge held that the transfer had been executed under such undue influence and gave judgment for the plaintiffs, setting aside the transfer. The mother, although a defendant, gave evidence wholly in favour of the claim that the transfer was executed by her under the undue influence of her co-defendants, the present applicants. In effect, therefore, the plantiffs obtained a judgment on a case made by one defendant against other defendants. I would not wish to make any observations upon the merits or demerits of the case. Obviously it is in the interest of all parties that the litigation which has gone on since 1959, affecting a property of comparatively small value, should be brought to an end, but that is no reason, in my view, to shut out the unsuccessful parties from the exercise of an undoubted right, a right which, in my view, is in the nature of a fundamental right. As has been said: finality is good, but justice is better.

We have been given no explanation of the delay on the part of the successful plaintiffs in perfecting the judgment. It has been suggested that the present applicants as the unsuccessful parties might have entered it and thus perfected it themselves so as to enable them to bring an appeal, but why should they convert an inchoate judgment against themselves into a perfected judgment and thus provide the means of it being enforced against them? It was for the successful plaintiffs to move if they wished; so long as they did not do so the unsuccessful parties were entitled to rest. Were they expected to make inquiry week by week as to whether judgment had been entered? The respondents have shown no anxiety to avail themselves of the judgment.

On the present application the mother, Ram Dulari, has appeared in person and also filed an affidavit stating that she is entirely satisfied with the judgment, but she may well be a person who is prepared to say whatever the particular faction of the family with which she is associated at any particular time requires her to say. According to her affidavit she has recently sold the property. It remains to be seen whether the sale was a valid one, whether it was a genuine sale, to a purchaser for value without notice, or liable to challenge on the ground that it was made *pendente lite*. It also remains to be seen whether the sale was effected at a time when it was known to her that the applicants intended to appeal and had taken steps towards that end; in other words whether her actions have been wholly unmeritorious.

In the circumstances of the case I would accede to the application, subject to terms.

BRIGGS J.A.

This is an application for leave to appeal out of time. Rule 23 of the Court of Appeal Rules gives this Court power to extend the time for appealing in Civil cases. As I read that rule this Court has an unfettered discretion whether or not to grant an extension of time.

Judgment in this case was pronounced in open Court as long ago as March 19th, 1963. It was entered in the Registry on November 26th, 1963. Rule 21 of the Court of Appeal Rules states that the time for appealing from a judgment is thirty days, which runs from the date on which judgment is entered in the Registry or otherwise perfected.

Notice that the judgment had been so entered was received by the appellants' solicitors on December 13th, 1963. They had, therefore, thirteen days in which to lodge an appeal for the thirty day period would have expired on December 26th, 1963.

The solicitors for the appellants mistakenly thought that they had thirty days in which to appeal from the date on which they were served with notice that the judgment had been entered and it was not until January 13th, 1964, that they attempted to file their notice of appeal. As it was out of time, this was rejected by the Registry. It will be noticed that even if the solicitors had not been mistaken in their reading of the rule, the application was a day late.

Realising their mistake, an application was made to a Judge of this Court for leave to appeal out of time on January 18th, 1964. This was dismissed by Mr. Justice Knox-Mawer on January 24th, 1964, because no reason whatsoever was advanced for the application. No affidavit was filed with the motion praying for leave to appeal out of time. This application was misconceived. It is only this Court which has the power to grant leave to appeal out of time against a judgment in an action.

It is sought to rectify this second mistake on the part of the solicitors for the appellants by this present application.

The ground on which this application is brought is that it is the appellants' solicitors and not the appellants who are to blame for the delay: a delay of six months from the date of the entry of the judgment. It was also urged by the appellants that the respondents should have entered the judgment given in March, 1963, before November, 1963. And that this contributed to the delay.

Counsel for the appellants stated in Court that his clients knew they were going to appeal or at least considered the possibility of an appeal on the date on which judgment was given in the Supreme Court: namely on March 19th, 1963. It would have been possible for judgment to have been entered and sealed by the appellants and an appeal lodged within 30 days from that date at any time after that date. If the appellants were indeed intending to appeal, that is what should have been done. Admittedly it would have meant the perfect-

ing of a judgment against themselves but it was a judgment which they wished to have set aside and it was a judgment where an order for stay of execution would doubtless have been given.

A As I have said above, the discretion of this Court to grant an extension of time is unfettered. As is shown in the case of *Gatti v. Shoosmith* [1939] 3 All E.R. 916, the mistake of a legal adviser may be a ground for the exercise of that discretion in a suitable case. In that case the appellants were a few days too late owing to a mis-
B understanding of the rule relating to the time given for lodging an appeal. However, written notice that they were intending to appeal had been given to the other side within the time allowed by the rule.

In the case before us no such written notice was given. And the date of this application for leave to appeal out of time can hardly be said to refer to a period of a few days.

C This action arises out of a family dispute. The amount involved is not large and in my judgment it would be a hardship to grant leave to appeal out of time at such a late date as this.

I regret that I am unable to agree with the judgment of the learned President of this Court. But the appellants have not convinced me of any ground on which it would be just to the parties to grant this
D application.

I would, therefore, dismiss this application.

MARSACK J.A.

I have had the advantage of reading the judgments of the other two members of the Court and do not consider it necessary to set
E out in detail the facts, which appear in each of those judgments. Nor do I desire to comment on the conclusions of the learned President with regard to the date from which the time for lodging notice of appeal starts to run. I shall limit myself to consideration of the question whether, in the circumstances of this particular case, the application should be granted.

F The question of granting leave to appeal out of time is entirely a matter for the discretion of the Court. As is said by Brett, M.R. in *Re Manchester Economic Building Society* (1883) 24 Ch.D 488 at p. 497 —

> "I know of no rule other than this: that the court has power to
G give the special leave and exercising its judicial discretion is bound to give the special leave if justice requires that that leave should be given."

In deciding whether justice demands that leave should be given, care must, in my view, be taken to ensure that the rights and interests of the respondent are considered equally with those of the applicant.
H In the present case the learned President would exercise his discretion in the direction of granting leave. I regret that I am unable to take this view but find myself in accord with that expressed by my brother Briggs.

Counsel for the applicants put forward, in support of the application, two authorities: *Kevorkian v. Burney* [1937] 4 All E.R. 97 and *Gatti v. Shoosmith* [1939] 3 All E.R. 916. The principles to be taken into consideration by the Court in deciding how judicial discretion should be exercised are well expressed by Lord Greene, M.R., in the latter case, in the passage quoted in the judgment of the learned President. In each of the two cases leave to appeal was granted out of time. In each, however, the circumstances were far different from those which apply here. In *Kevorkian v. Burney* the appellant was in America at the time when the order appealed from was made, that is to say shortly before the beginning of the long vacation. At the commencement of the following term application was made for an extension of time in which to appeal. Lord Greene says at p. 99 —

> "This, however, is not a case of mistake, but a case of a difficulty occasioned by the date on which the trial came on, and by the necessity for communicating with the plaintiff, who was abroad, before doing a thing which ought not to be done without the instructions of the client. As I have said, a letter was written to the client, but it takes some time for a letter to reach America, notwithstanding the increase in the speed of passage to that country, and it was necessary, in my judgment, that the matter should be explained by letter; it could not satisfactorily be explained by cablegram."

In *Gatti v. Shoosmith,* Lord Greene, M.R. says at p. 920 —

> "The reason for the appellant's failure to institute his appeal in due time, was a mere misunderstanding, deposed to on affidavit by the managing clerk of the appellant's solicitors—a misunderstanding which, to anyone who was reading the rule without having the authorities in mind, might very well have arisen. The period involved is a very short one, it is only a matter of a few days, and the appellant's solicitors, within time, informed the respondent's solicitors by letter of their client's intention to appeal. That was done within the strict time, and the fact that the notice of appeal was not served within the strict time, was due entirely to this misunderstanding."

In the present case an appeal was, as counsel concedes, in contemplation though not actually decided upon when judgment was given on the 19th March, 1963. The matter was then allowed to rest until after service of the judgment on the 11th December, 1963. No explanation has been given as to why no steps were taken earlier by the unsuccessful party to have a judgment, of which they complained, reviewed in a higher court.

The error made by appellants' solicitors when a copy of judgment was served on the 11th December, 1963, was of an entirely different character from that referred to in the judgment in *Gatti v. Shoosmith.* There was no question of a misunderstanding—held to be forgivable in Gatti's case—of the rule to the extent of thinking time for appealing ran from the date of service and not the date of entry of judgment. Rule 21 is clear on the point. But even after service the applicant had ten or eleven days before the commencement of the Christmas vacation in which to lodge notice of appeal.

Although at the hearing of the application counsel stated that the delay had been due to a misunderstanding in his office, the affidavit filed by the applicants' solicitor in support of the application for leave does not say that the solicitor mistakenly believed that the time for appealing ran from the date of service and not of entry of the judgment. Even if he had been under this impression, his notice of appeal was not filed within thirty days of that date. Thirty days from the 11th December would have expired on the 10th January, and his original notice of appeal was not filed until the 13th January. That, as has been stated, was rejected as being out of time.

It was not until the 11th February, 1964, that an application was properly made to this Court. That application was made 47 days after the expiry of the time for lodging notice of appeal, time having commenced to run from the 26th November. Even the faulty application made to a judge of the Supreme Court for an extension of time was not filed until 23 days after the expiry of that period. There are no circumstances present in this case such as the absence in America of the appellant referred to in *Kevorkian v. Burney* (supra) or the giving of notice to respondents' solicitors within the proper time and the very short period of delay involved in *Gatti v. Shoosmith* (supra). It is true that every application of this nature must be determined on its own facts; but a careful study of the facts of this case disclose, in my view, no real basis for the exercise of the Court's discretion in the applicants' favour.

In the result I am of the same opinion as my brother Briggs that no ground has been put forward in this case upon which justice requires that leave to appeal out of time should be given. Accordingly I would refuse the application.

Application dismissed.