

APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

PADMA LOCHAN PATAR

v.

GIRISH CHANDRA KIT.*

1917

Aug. 24.

Limitation—Limitation Act (IX of 1908), Sch. I, Art. 78—Civil Procedure Code (Act V of 1908) O. VI, r. 17; O. XXIII, r. 1, leave under.

In a suit for the recovery of money alleged to be due on accounts between the parties, Art. 78 of the Limitation Act has no application.

Raman v. Vairavan (1) distinguished.

Where a plaintiff sought to recover a sum of money upon certain allegations which were found untrue by the Trial Court and on appeal the District Judge came to the same conclusion, but held that the plaintiff might be permitted to abandon his claim with liberty to institute a fresh suit under O. XXIII, r. 1 of the Civil Procedure Code, 1908 :

Held, that in such circumstances the order under rule 1 of O. XXIII should not have been made.

Where in second appeal the plaintiff respondent applied for leave to amend his plaint, the object being to abandon the claim deliberately put forward in the Trial Court and persistently reiterated in the Appeal Court below :

Held, that such application could not be entertained.

Kokilasari v. Mohunt Rudranand Goswami (2) referred to.

SECOND APPEAL by Padma Lochan Patar, the defendant.

One Girish Chandra Kit instituted, on the 15th November 1913, a suit for the recovery of Rs 3,954-4, alleged to be due on a stated account in respect of

*Appeal from Appellate Decree, No. 1228 of 1916, against the decree of C. Tindall, District Judge of Bankura, dated March 30, 1916, modifying the decree of Ambica Charan Mojumdar, Subordinate Judge of Bankura, dated Jan. 25, 1915.

(1) (1883) I. L. R. 7 Mad. 392.

(2) (1906) 5 C. L. J. 527.

certain dealings and transactions between himself and the abovenamed defendant. The latter denied that he owed any sum to the plaintiff, and challenged several entries in the hatchitta and books of account. Two items, however, are material for the purposes of this report. The first related to a sum of Rs. 168-8-6 with regard to which the defendant contended that it was barred by limitation. The second was a sum of Rs. 2,000 which the defendant denied having ever received but contended that that amount was given by the plaintiff for the purchase of cocoons which were received by him. On the 25th January 1915, the Court of first instance gave the plaintiff a decree for Rs. 976-6, holding that the suit was barred by limitation with regard to the sum of Rs. 168-8-6, and dismissed the suit as to the sum of Rs. 2,000 on the ground that the plaintiff's allegations were untrue.

On appeal, the lower Appellate Court, on the 30th May 1916, reversed the decision with regard to the sum of Rs. 168-8-6 and as to the sum of Rs. 2,000, allowed the plaintiff leave to abandon his claim with liberty to bring a fresh suit under O. XXIII, r. 1 of the Civil Procedure Code, 1908. From that decision the defendant preferred this second appeal to the High Court; and the plaintiff a cross-objection to the effect that the decision of the Courts below on the sum of Rs. 2,000, was incorrect.

Babu Biraj Mohan Majumdar and Babu Bhagirath Chunder Das, for the appellant.

Dr. Dwarka Nath Mitra and Babu Bijoy Kumar Bhattacharjee, for the respondent.

MOOKERJEE AND BEACHCROFT JJ. This appeal arises out of a suit for recovery of Rs. 3,954-4. The Court of first instance gave the plaintiff a decree for Rs. 976-6. Upon appeal, the District Judge has modified that

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decree and we have before us an appeal by the defendant as also a memorandum of cross-objection by the plaintiff. The appeal and the cross-objection raise two questions upon which the Courts below have taken divergent views. The first question relates to a sum of Rs. 168-8-6; with regard to this, the defendant contends that the claim is barred by limitation. The second question relates to a sum of Rs. 2,000; with regard to this, the Court of first instance dismissed the suit, but the District Judge has granted the plaintiff leave to abandon his claim with liberty to institute a fresh suit under Order XXIII, rule 1 of the Civil Procedure Code of 1908.

As regards the first point, there can be no doubt that the sum really accrued due more than three years prior to the institution of the suit. The plaintiff contends that the claim is not barred by limitation under Art. 78 of the second schedule to the Indian Limitation Act. He relies upon the circumstance that the defendant sent him on the 26th February 1911, a *hundi* for Rs. 300 and, on the 22nd July 1911, a cheque for Rs. 50 which were dishonoured on presentation. His case consequently is that this attracts the application of Art. 78 which provides that a suit by the payee against the drawer of a bill of exchange (which has been dishonoured by non-acceptance) must be instituted within three years from the date of the refusal to accept. The suit before us, however, is not one of this description. It is a suit to recover money alleged to be due on accounts taken between the parties; to a suit of this description, Art. 78 can have no possible application. On behalf of the plaintiff, this was clearly realised, and an endeavour was made to support the decree of the District Judge on the ground that the delivery of the *hundi* and the cheque constituted an acknowledgment within the meaning of section 19 of

the Limitation Act. In our opinion, there is no foundation for this contention. The decision in *Raman v. Vairavan* (1) is clearly distinguishable; there the cheque was accompanied by a letter which contained an acknowledgment sufficient for the purposes of section 19. We must hold that the view taken by the Subordinate Judge in this respect was correct and his decision should not have been reversed by the District Judge.

As regards the second point, no order could properly have been made under rule 1 of Order XXIII. The plaintiff sought to recover Rs. 2,000 upon certain allegations which were found untrue by the trial Court. On appeal the District Judge came to the same conclusion, but he held that the plaintiff might be permitted to abandon his claim with liberty reserved to him to institute a fresh suit on the same cause of action. The plaintiff subsequently presented an application to the District Judge, whereupon an order was made under rule 1 of Order XXIII. The plaintiff, however, notwithstanding this order, has preferred a cross-objection to this Court to the effect that the view taken by the Courts below as to this sum of Rs. 2,000 is not correct. We are of opinion that, in such circumstances, the order under rule 1 of Order XXIII should not have been made.

As a last resort, the plaintiff seeks for leave to amend his plaint. We are not unmindful that under rule 17 of Order VI of the Civil Procedure Code very wide powers of amendment are vested in the Court, but we are clearly of opinion that the application of the plaintiff for leave to amend his plaint at this stage should not be entertained. The object of the proposed amendment is to abandon the claim deliberately put forward in the trial Court and persistently reiterated

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in the Court of Appeal below. If the amendment is granted, the result will follow that the plaintiff will start afresh on allegations wholly inconsistent with those made in the original plaint, and, to support the new allegations, he must bring forward evidence directly contradictory to the evidence already placed by him on the record. Such a feat he should not be encouraged to perform: *Kokilasari v. Rudranand* (1), *Ghurphekni v. Parmeshwar* (2), *Mohesh v. Radhakishen* (3), *Kisandas v. Rachappa* (4), *Ramji Ram v. Salig Ram* (5), *Sri Rang v. Rachhya Lal* (6).

The result is that this appeal is allowed, the decree of the District Judge set aside, and that of the Court of first instance restored, subject to this variation, that interest will run at the rate of six per cent. per annum as allowed by the District Judge. The order will carry costs both here and in the Court of Appeal below.

L. R.

Appeal allowed.

(1) (1906) 5 C. L. J. 527.

(4) (1909) I. L. R. 33 Bom. 644.

(2) (1907) 5 C. L. J. 653.

(5) (1911) 14 C. L. J. 188.

(3) (1907) 6 C. L. J. 581.

(6) (1911) 15 C. L. J. 439.