

CIVIL RULE.

Before Suhrawardy and Chotzner JJ.

NABA KUMAR CHOWDHURY

v.

HIGHEAZANY.*

1924

March 3.

Limitation—Limitation Act (IX of 1908), s. 22—Suit by plaintiff in his personal capacity—Amendment of plaint by adding plaintiff in his capacity of an administrator after the expiration of the period of limitation—Effect of amendment.

Where the plaintiff originally sued in his personal capacity but later on after the expiry of the period of limitation amended the plaint by adding himself in his capacity of an administrator also :—

Held, that as the amendment made a change of form only and not of substance, the suit was not barred by limitation.

Soona Mayna v. Soona Navena (1), *Prasanna Kumar v. Mohabharat* (2) referred to.

THIS was a Rule obtained by the defendant for setting aside a decree of the Small Cause Court Judge at Dacca on the ground that the suit was barred by limitation; the suit was at first brought by the plaintiff, only in his private capacity, later on after the expiry of the period of limitation the plaintiff amended the suit by adding himself in his capacity of an administrator also; the suit being decreed the defendant moved the High Court under section 25 of the Provincial Small Cause Courts Act and obtained the present Rule.

Babu Rajendra Chandra Guha, for the petitioner. On the date of the amendment, the debt was extinguished; at any rate so far as the shares of the two sisters are concerned, the plaintiff's suit must fail.

* Civil Rule No. 986 of 1923, against the order of Suresh Ch. Chowdhury, Sub-Judge of Dacca, dated June 30, 1923.

(1) (1916) 20 C. W. N. 833.

(2) (1903) 7 C. W. N. 575.

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The suit is barred by limitation under section 22 of the Limitation Act.

Babu Iswar Chandra Chakerbutty, for the opposite party. This is not a case of addition of parties or of change of persons, the mere alteration of capacity in which the plaintiff now sues does not affect the question of liability to pay or of limitation. The suit is within time.

SUHRAWARDY AND CHOTZNER JJ. This case raises an important question of limitation. The plaintiff brought this suit against the defendant for a certain sum of money which he alleged that the defendant had realised from plaintiff's tenants but had retained in his own possession. The right under which he sued the defendant was not specified in the plaint and we take it that it was in his personal capacity. The suit was brought within the period of limitation but after the expiration of that period, the plaintiff prayed to be permitted to sue not only in his personal capacity but also as administrator to the estate of the deceased proprietor and the plaint was amended accordingly. The Small Cause Court Judge found that the money belonged to the estate which was inherited by plaintiff and his two sisters and of which the plaintiff was the administrator and decreed the suit. The defendant contends that at the time of the amendment of the plaint the claim was barred by limitation and the suit ought to have been dismissed.

The question is not free from difficulty and there seems to be little or no judicial authority in point. The lower Court has cited two Madras cases *Rajam v. Mathur Krishna* (1), and *Mathur Krishna v. Rajam* (2), the latter decision having been passed on appeal from the former case. In the first case Hannay J. sitting singly has expressed the view that in a case

(1) (1914) 25 I. C. 945.

(2) (1915) 33 I. C. 357.

like the present, the suit is not barred. There the plaintiff had brought the suit in his personal right but on the objection of the defendant he was permitted to sue, after the expiry of the period of limitation for himself and as Manager of certain mill. The appellate judgment in the second case is not altogether convincing as the learned Judges in confirming the order relied upon the decision of the Judicial Committee of the Privy Council in the case of *Peary Mohan Mookherjee v. Narendra Nath Mookherjee* (1) where the facts were different. There the suit was brought in time by a person on behalf of a debuttar. Subsequently, as the result of litigation, the right to represent the debuttar devolved upon another person who got himself substituted in place of the original plaintiff after the period of limitation. Their Lordships held that there was no change of plaintiff in the suit which was not barred by limitation. That case therefore has no bearing on the question before us.

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The real question is whether it is a case of misdescription which will ordinarily include non-description as in the absence of any description the plaintiff should be held to have brought the suit in his personal capacity. The case may be looked at from different points of view. According to the defendant the debt due by him to the estate of the deceased was extinguished as barred by limitation on the date on which the amendment was made. According to the plaintiff there has been no change in the person to whom the money is payable and the alteration in the capacity in which he sues does not affect the defendant's liability to pay. It ought not to make any difference whether the plaintiff takes the money with the right hand or the left. In short there has been no change of "persona", no change of the person to whom the

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money is *payable* though there may perhaps have been some change in the basis on which the debt is *due*. In our opinion this view is correct. If the plaintiff instead of applying for the amendment of the name of the cause or of his own description had applied merely to amend the statement of his claim in the body of the plaint by adding that the money was due to him as administrator of an estate, it can hardly be said that that would be equivalent to the introduction of a new plaintiff in the suit. If the debt is payable to the plaintiff alone and *to no one else*, the change in the capacity of the plaintiff to maintain the suit will not have the effect of introducing a new plaintiff. Some light is thrown on this point by the decision of the Judicial Committee of the Privy Council in the case of *Soona Mayna v. Soona Navena* (1) where their Lordships were considering a provision of law similar to s. 22 of the Limitation Act. Lord Parker of Waddington there observed: "Their Lordships are of opinion that section 23 contemplates cases in which an action is defective by reason of the person or one of the persons in whom the right of action is vested not being before the Court If A is the right person to sue, it would be clearly wrong to allow him, for the sake of avoiding the limitation ordinance, to take advantage of a suit improperly instituted by B." The change is one of form only and not of substance. The same view has been adopted in cases where the defendant is originally sued in his personal capacity but upon a subsequent amendment of the plaint is described as executor of a deceased person; *Prasanna Kumar v. Mohabharat* (2).

We are accordingly of opinion that the suit is not barred by limitation and this Rule must be discharged with costs.

A. S. M. A.

Rule discharged.

(1) (1916) 20 C. W. N. 833.

(2) (1903) 7 C. W. N. 575.