

## APPELLATE CIVIL.

Before *Mulherjea and Latifur Rahman J.J.*

MOHAN LAL BAHETI

v.

TABIZUDDIN AHMAD.\*

1939

May 9, 1940.

**Limitation**—*Withdrawal of suit with leave to bring another—Fresh suit—Exclusion of time occupied by the first suit—Code of Civil Procedure (Act V of 1908), O. XXIII, rr. 1, 2—Indian Limitation Act (IX of 1908), s. 14.*

Where the Court gave leave to the plaintiff to withdraw a suit with liberty to institute a fresh suit on the same cause of action and the plaintiff then instituted a suit after the expiration of the period prescribed by the law of limitation,

*held* that s. 14 of the Limitation Act was not attracted and the time occupied by the previous suit could not be excluded.

*Ramdeo Dass v. Gonesh Narain* (1) distinguished.

The words "unable to entertain it" in s. 14 of the Limitation Act does not merely mean that the Court has expressed its opinion that there is defect regarding jurisdiction or otherwise; but the Court must actually by its order terminate the litigation on the ground of defect of jurisdiction or causes of a like nature.

APPEAL FROM APPELLATE DECREE preferred by the plaintiffs.

The plaintiff filed a suit in January 27, 1936, for the recovery of a sum of money due by the defendant on the basis of an adjustment of accounts made on Bhâdra, 1339 B.S., corresponding to August-September, 1932. Plaintiffs had previously instituted a suit in the High Court against the defendant on the identical cause of action on July 19, 1932. On January 21, 1936, the Court allowed the plaintiffs to withdraw the suit with liberty to institute a fresh suit on the same cause of action without deciding the question of jurisdiction.

\*Appeal from Appellate Decree, No. 1713 of 1937, against the decree of H. C. Stork, District Judge of Assam Valley Districts, dated Aug. 8, 1937, affirming the decree of A. Ahmad, Special Subordinate Judge, Assam Valley, at Jorhat, dated July 31, 1936.

*Hemendra Kumar Das* and *Anil Chandra Ganguli* for the appellants. Plaintiffs are entitled to the benefit of s. 14 of the Limitation Act and the time occupied by the first suit ought to be excluded : *Ramdeo Dass v. Gonesh Narain* (1).

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*Bijan Behari Das Gupta*, with him *Holiram Deka* for the respondent. The law of limitation would apply in the same manner as if the first suit had not been instituted. Code of Civil Procedure, O. XXIII, r. 2. The first Court did not decide that it was unable to entertain the suit on the ground of want of jurisdiction or other causes of a like nature. The plaintiffs are not entitled to the benefit of s. 14 of the Limitation Act, namely, to the exclusion of the time occupied by the first suit, that section being inapplicable in view of the provisions of O. XXIII, r. 2 of the Code of Civil Procedure.

*Sadayatan Pande v. Ram Chandra Gopal* (2);  
*Varajlal v. Shomeshwar* (3) and *Arunachellam Chettiar v. Lakshmana Ayyar* (4).

*Cur. adv. vult.*

MUKHERJEA J. This appeal is on behalf of the plaintiffs and the suit was one for recovery of a sum of Rs. 2,364 annas odd alleged to be due by the defendant on the basis of an adjustment of accounts made on Bhâdra, 1339 B.S. The present suit was instituted on January 27, 1936, and on the face of it, it is beyond three years from the date of the alleged adjustment. To get round the plea of limitation the plaintiffs invoked the provisions of s. 14 of the Limitation Act. It was stated by them in the plaint that they had instituted a suit against this defendant on the identical cause of action in the Original Side of this Court on July 19, 1933. This was prosecuted in good faith and with due diligence, and on January 21, 1936, this Court allowed the plaintiffs to withdraw the suit with liberty to institute a fresh suit on the same cause of action, inasmuch

(1) (1908) I. L. R. 35 Cal. 924.

(2) (1934) I. L. R. 57 All. 145.

(3) (1904) I. L. R. 29 Bom. 219.

(4) (1915) I. L. R. 39 Mad. 936.

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as it had no jurisdiction to try the suit. The plaintiffs claim that, under s. 14 of the Limitation Act, they are entitled to a deduction of the period between July 19, 1933, and January 21, 1936, and it is not disputed that in that case the suit will be well within time.

Besides the plea of limitation, several other defences were raised by the defendant. Both the Courts below have held on evidence that the plaintiff's case was proved, but they agreed in dismissing the plaintiffs' suit on the ground of limitation, holding that s. 14 of the Limitation Act was not applicable to the facts of the present case. It is against these concurrent decrees of dismissal that the present Second Appeal has been preferred.

The only point for our determination is whether or not the plaintiffs' suit is barred by limitation. It is not disputed on behalf of the appellants that the suit would be time barred unless the plaintiffs can have an extension of the period of limitation under s. 14 of the Limitation Act. The first question is whether the plaintiffs can claim the benefit of s. 14, even though they themselves withdraw the previous suit with liberty to institute a fresh suit on the same cause of action. Order XXIII, r. 2, lays down that in any fresh suit instituted on permission granted under the last preceding rule the plaintiffs would be bound by the law of limitation in the same manner as if the first suit has not been instituted. This is apparently an exception engrafted on the provisions of s. 14 of the Limitation Act and the rule clearly means that the suit withdrawn is to be ignored altogether and deemed non-existent for the purpose of considering the period of limitation for the fresh suit. I agree, however, with the view taken by the Allahabad High Court in *Sadayatan Pande v. Ram Chandra Gopal* (1) that there is no real conflict between O. XXIII, r. 2 and s. 14 of the Limitation

(1) (1934) I. L. R. 57 All. 145.

Act and the expression "unable to entertain it" which occurs in s. 14 of the Limitation Act does not merely mean that the Court has expressed its opinion that there is defect regarding jurisdiction or otherwise; but the Court must actually by its order terminate the litigation on the ground of defect of jurisdiction or other causes of a like nature.

In the present case, the order of withdrawal passed by this Court stands as follows:—

The point of jurisdiction is raised by the defendants and the plaintiffs apparently feel that the question of jurisdiction may cause them some difficulty. The plaintiffs have asked leave to withdraw the suit with liberty to institute a fresh suit on the same cause of action. The permission is given.

There is no decision here on the question of jurisdiction and from the order set out above it does not appear that the Court was unable to entertain it. There was no evidence adduced in the previous case and though the question of jurisdiction was raised by the defendant in his written statement the allegations made in the plaint do not show that the suit was filed in the wrong Court which had no jurisdiction to entertain it. This fact, in my opinion, distinguishes the present case from case of *Ramdeo Dass v. Gonesh Narain* (1), upon which stress is laid by the learned advocate for the appellants. There the suit was filed in the Original Side of this Court with the leave of the Registrar only, under cl. 12 of the Charter. During the pendency of that suit it was decided by a Special Bench of the Court that the suit filed with the leave of the Registrar was bad in law and following that ruling the plaint was actually returned to the plaintiff, leave being given to withdraw the suit and file another suit on the same cause of action. It was held by Fletcher J. that in filing the new plaint the plaintiff could claim exclusion of the period which was occupied by the previous suit. It may be pointed out that the plaint there was actually returned to the plaintiff and the Court had definitely terminated the previous suit on the ground

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that it had no jurisdiction to entertain it. The order allowing the withdrawal of the suit must, therefore, be deemed to be without jurisdiction and no such order could be passed after the plaint was returned on the ground that the Court had no jurisdiction to entertain it.

I agree with the Courts below in holding that s. 14 of the Limitation Act is not attracted to the facts of the present case and consequently the plaintiffs' suit must be dismissed as being barred by limitation.

The appeal accordingly fails and it is dismissed. There will be no order as to costs in this appeal.

LATIFUR RAHMAN J. I agree.

*Appeal dismissed.*

A. C. S.