

[3 Mad. 96.]

APPELLATE CIVIL.

The 15th December, 1880.

PRESENT :

MR. JUSTICE KERNAN AND MR. JUSTICE FORBES.

Bandi Subbayya.....(Defendant) Appellant.

versus

Madalapalli Subanna.....(Plaintiff) Respondent.*

Promissory note payable on demand—Limitation Act XV of 1877, Section 2—Civil Procedure Code, Sections 562† 566.‡

As the Limitation Act XV of 1877 shortens the period of limitation in the case of promissory notes payable on demand, the period of limitation [97] is governed in respect of such notes executed prior to 1st October 1877 by the provisions of Section 2 of the Act.

When a Court of First Instance, after taking evidence, dismisses a suit upon a preliminary objection without giving a decision upon the merits of the case, and the decree is reversed on appeal, the Court of appeal, if it considers the evidence on record sufficient, may decide the case, and is not bound to remand it for trial under Section 562 of the Civil Procedure Code.

In this case plaintiff sued upon two promissory notes, dated 23rd December 1874, payable on demand. Demand was made in September 1877, and suit brought on 2nd April 1879.

The Munsif dismissed the suit as barred by *Limitation*.

This decision was reversed by the District Judge upon the authority of *Appasami Chetty v. Aghilanda Ayyar* (I. L. R., 2 Mad., 113), which overruled a former ruling (Referred Case 2 of 1878; See I. L. R., 2 Mad., 400), followed by the Munsif.

* Second Appeal, No. 217 of 1880, from the decree of the Hon. J. C. St. Clair, District Judge of Kurnul, reversing the decree of the District Munsif of Nandial, dated 15th December 1879.

† [Sec. 562 :—If the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point so as to exclude any evidence of fact which appears to the Appellate Court essential to the determination of the rights of the parties, and the decree upon such preliminary point is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, together with a copy of the order in appeal, to the Court against whose decree the appeal is made, with directions to re-admit the suit under its original number in the register and proceed to investigate the suit, on the merits. The Appellate Court may, if it thinks fit, direct what issue or issues shall be tried in any case so remanded.]

‡ [Sec. 566 :—If the Court against whose decree the appeal is made has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, and the evidence upon the record is not sufficient to enable the Appellate Court to determine such issue or question, the Appellate Court may frame issues for trial, and may refer the same for trial to the Court against whose decree the appeal is made, and in such case shall direct such Court to take the additional evidence required,

and such Court shall proceed to try such issue, and shall return to the Appellate Court its finding thereon together with the evidence.]

Defendant appealed.

Narasimmayyar for Appellant.

Anandacharlu and *Sundaram Sastri* for Respondent.

The Court (KERNAN and FORBES, JJ.) delivered the following

Judgment:—Two promissory notes, payable on demand, were sued on (Exhibits A and B), dated 23rd September 1874, in suit 299 of 1879, before the 1st October 1879.

Demand was made in September 1877.

The *Limitation Act* XV of 1877 shortens the period of limitation in respect of such notes to three years from the date, in place of three years from demand under the Act of 1871, and therefore under Section 2nd of the Act of 1877 plaintiff had two years up to the 1st October 1879 to bring this suit.

The decision in referred case 22 of 1878 (I. L. R., 2 Mad. 113) overrules in effect the prior ruling in referred case No. 2 of 1878. The decision concludes this case on this point.

It is contended for defendant in appeal that the Judge should not have determined the first issue, whether the notes were genuine, as the Munsif gave no finding on this point; and that defendant did not give all his evidence as he was certain the suit would be dismissed.

There is nothing on the record to satisfy us that the defendant did not produce and examine all his witnesses. He did examine [98] those named by the Munsif. The Munsif does not appear to have stopped the case and decided the question of law. He heard the evidence through, but he did not consider it necessary to decide the first issue, as he followed a ruling of this Court on the question of law which rendered a finding on the first issue not material.

The Lower Appellate Court, however, on hearing the appeal, examined the evidence on the record and decided the first issue. The Appellate Court was entitled to do so if the evidence was, as this Court considered it was, sufficient. The Judge might have remanded the case for trial of the first issue, but he did not see fit to do so (Section 562), and we cannot say he was wrong.

We dismiss the appeal with costs.

Repeal of Acts.

*[Sec. 2 :—On and from that day the Acts mentioned in the first schedule hereto annexed shall be repealed to the extent therein specified.

References to Act IX of 1871.

Saving of titles already acquired.

Saving of Act IX of 1872, Section 25.

But all references to the Indian Limitation Act, 1871, shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred under that Act or under any enactment thereby repealed; and nothing herein contained shall be deemed to affect the Indian Contract Act, Section 25.

Notwithstanding anything herein contained, any suit mentioned in No. 146 of the second schedule hereto annexed may be brought within five years next after the said first day of October 1877, unless where the period prescribed for such suit by the said Indian Limitation Act, 1871, shall have expired before the completion of the said five years; and any other suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the said Indian Limitation Act, 1871, may be brought within two years next after the said first day of October 1877, unless where the period prescribed for such suit by the same Act shall have expired before the completion of the said two years.]

NOTES.

[CIVIL PROCEDURE—POWERS OF AN APPELLATE COURT—

Finding by an Appellate Court on evidence recorded by the first Court without any finding on it by the latter is not illegal. This principle was extended by analogy to the case where one Judge records evidence and his successor gives findings on it:—(1886) 8 All., 576 (602).

See also (1886) 9 All. 26.]

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APPELLATE CIVIL.

The 15th December, 1880.

PRESENT :

MR. JUSTICE KERNAN AND MR. JUSTICE FORBES.

Papa Sastrial.....(Plaintiff Appellant.

versus

Anuntarama Sastrial.....(Defendant) Respondent.*

Civil Procedure Code Amendment Act, effect of, on petition pending at date of its enactment.

Where an application to execute a decree was made under Section 230† of the Code of Civil Procedure before the Amendment Act (XII of 1879) came into force, but was not disposed of until after Section 230 was altered by that Act.

* C. M. S. A. No. 334 of 1880 against the order of A. C. Burnell, District Judge of South Tanjore, dated 1st April 1880.

† [Sec. 230 :—When the holder of a decree desires to enforce it, he shall apply to the Court which passed the decree or to the officer, if any, appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court, then to such Court or to the proper officer thereof.

The Court may in its discretion refuse execution at the same time against the person and property of the judgment-debtor.

Where an application to execute a decree for the payment of money or delivery of other property has been made under this section and granted, no subsequent application to execute the same decree shall be granted unless the Court is satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree; and the order of the Court granting any such subsequent application shall be conclusive evidence that due diligence was used to procure such satisfaction.

And no such subsequent application shall be granted after the expiration of twelve years from any of the following dates (namely)—

- (a) the date of the decree sought to be enforced, or of the decree (if any) on appeal affirming the same, or
- (b) where the decree or any subsequent order directs the payment of money or the delivery of property by instalments,—the date of the default in paying or delivering the instalment in respect of which the applicant seeks to enforce the decree.

Nothing in this section shall prevent the Court from granting an application for execution of a decree after the expiration of the said term of twelve years, where the judgment-debtor has by fraud or force prevented the execution of the decree at some time within twelve years immediately before the date of the application.

Notwithstanding anything herein contained, proceedings may be taken to enforce any decree within three years after the passing of this Code, unless when the period prescribed for taking such proceedings by the law in force immediately before the passing of this Code shall have expired before the completion of the said three years.]