

considerably curtailed. This no doubt is so, but such appears to us to be the intention of the Legislature in favor of the tenant.

THAYAMMA
v.
KULANDA-
VELU.

We shall call upon the Lower Appellate Court to return a finding upon the following issues :—

(1) “Whether the notice required by section 39 was duly served.

(2) “Whether the present suit was brought within time.”

Fresh evidence may be taken.

[The District Judge having reported that neither party called any evidence, these second appeals were dismissed at the final hearing.]

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

KULLAYAPPA (PLAINTIFF), APPELLANT,

v.

LAKSHMIPATHI (DEFENDANT), RESPONDENT.*

1889.
Jan. 18.
March 20.

Limitation Act—Act XV of 1877, ss. 4, 6, 14—Proceedings bonâ fide prosecuted in a Court without jurisdiction—Rent Recovery Act (Madras)—Act VIII of 1865, s. 78—Rent claimed by landlord not having tendered legal patta.

A landlord not having tendered a legal patta to his tenant made a demand on him as for rent, and on his refusal to pay attached his holding. The tenant, to release the attachment, paid the sum demanded under protest on 23rd September 1885. On 22nd March 1886 the tenant filed a suit on the small cause side of the District Munsif's Court to recover the amount so paid : that suit was dismissed for want of jurisdiction on 2nd September 1886. On the last-mentioned date the tenant filed the present suit on the same cause of action :

Held, (1) the suit was not barred by limitation under the six-months' rule in s. 78 of the Rent Recovery Act by reason of the provisions of s. 14 of the Limitation Act, 1877 ;

(2) the landlord not having tendered a legal patta was not in a condition to establish any right to recover rent directly or by way of set off.

SECOND APPEAL against the decree of S. Gopalacharyar, Subordinate Judge of Madura (East), in appeal suits Nos. 374 and 478 of 1887, reversing the decree of M. A. Tirumalacharyar, District Munsif of Dindigul, in original suit No. 438 of 1886.

Suit to recover, together with interest, Rs. 71-2-3 being a sum paid under protest by the plaintiff to the defendant to release

* Second Appeal No. 1166 of 1888.

KULLAYAPPA
 v.
 LAKSHMI-
 PATHI.

the attachment of the plaintiff's land by the defendant for arrears of rent wrongly alleged to be due by the plaintiff to the defendant for Fasli 1293.

The District Munsif held that no proper patta having been tendered by the defendant to the plaintiff for Fasli 1293, the attachment was illegal; finding, however, that on the footing of a proper patta there would have been due by the plaintiff to the defendant Rs. 43-9-8, he passed a decree for the plaintiff for Rs. 22-8-7 only.

Both parties appealed against this decree, and on appeal, the Subordinate Judge held that the suit was barred by limitation, and accordingly passed a decree dismissing it.

The facts supporting the plea of limitation appear sufficiently for the purpose of this report from the judgment of Kernan, J. Upon this plea the Subordinate Judge said:—

“Section 78 above referred to prescribes that Civil Courts shall not take cognizance of such a suit unless it be instituted within six months from the time at which the cause of action arose. Here the cause of action is admitted to have arisen on 25th September 1885, when the money was paid by the plaintiff, see *Hanuman Kamut v. Hanuman Mandur*(1), and this suit was instituted on 2nd September 1886; but the intervening time between 22nd March 1886 when the plaint was presented treating the claim as a small cause suit, and 2nd September 1886 when it was returned, is sought to be excluded from calculation under section 14 of the Limitation Act, 1877. Section 4 of that Act lays down that subject to the provisions contained in sections 5 to 25, every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule thereto annexed shall be dismissed. It is therefore clear that under ordinary circumstances recourse could be had to the provisions of section 14 only in a case where the limitation for the suit is provided by the second schedule annexed to the Act. But here the period of limitation has been provided by a special enactment and not by the Limitation Act. That enactment contains no saving provision of the kind, nor entitles the parties to claim the benefit of section 14 of the Limitation Act. On the authority of the rulings in *Mohammad Buhadoor Khan v. The Collector of*

(1) I.L.R., 16 Cal., 51.

Bareilly(1), *Gobindo Coomar Chowdhry v. Manson*(2), and *Timal Kuari v. Ablakh Rai*(3), and on the *ratio decidendi* of the ruling in *Syed Mohidin Hussen Saheb in re*(4), I must hold that the advantage of section 14 of the Limitation Act cannot be claimed by the plaintiff, and that his suit must be deemed to have been instituted more than six months after the date on which the cause of action arose."

KULLAYAPPA
v.
JAKSHIMI-
PATHI.

The plaintiff preferred this second appeal.

Mahadeva Ayyar for appellant.

Subramanya Ayyar for respondent.

KERNAN, J.—The appellant was the plaintiff in the original suit No. 438 of 1886. The respondent was the defendant in that suit.

The appellant is a tenant of the respondent, who attached the holding of the former, under the Rent Recovery Act, in order to recover Rs. 71-2-3 alleged to be due for rent for Fasi 1293. The respondent did not tender to the appellant a proper patta and was therefore not entitled to proceed to attach or sell the appellant's land. The respondent was about to set up for sale the land under the attachment and the appellant under protest and to prevent the sale, paid the respondent on the 23rd September 1885 Rs. 71-2-3 claimed for rent. This suit was filed on the 2nd September 1886 praying for a decree directing the repayment by the respondent to the appellant of the sum paid under protest and interest amounting in all to Rs. 75. The Munsif decided that as no proper patta had been tendered by the respondent, the attachment was illegal.

But he allowed the respondent to set off as against the appellant's claim, the sum which he found would be a proper sum to be paid by the appellant if a proper patta had been tendered. The sum so allowed was Rs. 42-5-10 and interest amounting to Rs. 6-3-10 in all to Rs. 48-9-8 and the Munsif made a decree for the appellant for Rs. 22-8-7 and proportionate costs.

Both plaintiff and defendant appealed to the Subordinate Judge against the Munsif's decree. The plaintiff appealed on the ground that the set off should not have been allowed, and the defendant appealed on the ground that the plaintiff's entire claim should have been disallowed and that his suit was barred by limitation.

(1) L.R., 1, I.A., 167.

(2) 15 B.L.R., 56.

(3) I.L.R., 1 All., 254.

(4) 8 M.H.C.R., 44.

KULLAYAPPA
 v.
 LAKSHMI-
 PATHI.

The Subordinate Judge dismissed the plaintiff's appeal, and allowing the defendant's appeal, reversed the Munsif's decree and dismissed the suit, principally on the ground that it was barred by limitation.

The appellant has appealed to this Court on the ground that the suit is not barred by limitation, and that the set off should not have been allowed. The facts on which the question of limitation has been raised are these, viz., the cause of action arose to the appellant on the 23rd September 1885,—that being the day on which the money was paid by him; the plaint in this suit was filed on the 2nd of September 1886 in the Munsif's Court under Act VIII of 1865, section 78; but that section limits the time for bringing an action under it to six months from the date of the cause of action; the period of six months from the cause of action expired on the 23rd of March 1886. But the appellant had filed in the Munsif's Court on the small cause side on the 22nd of March 1886 a suit under section 78 of the Act for the same cause of action as in this suit, and that suit was on the 2nd of September 1886 dismissed on the ground that the Court had no jurisdiction to hear the suit. In *Shaunkara Subbion v. Vellayan Chetty*(1) it was held that a suit on the small cause side filed under circumstances like those here, was not maintainable by the Small Cause Court for want of jurisdiction. Section 14 of the Limitation Act, 1877, provides as follows:—“ In computing the period of limitation prescribed for
 “ a suit, the time during which the plaintiff has been prosecuting
 “ with due diligence another civil proceeding whether in the Court
 “ of first instance or in appeal against the defendant shall be
 “ excluded when the proceeding is founded on the same cause of
 “ action and is prosecuted in good faith in a Court, which from
 “ defect of jurisdiction or other cause of the like nature is unable
 “ to entertain it.” Section 4 of the Limitation Act, 1877, is as follows:—“ Subject to the provision contained in sections five to
 “ twenty-five (inclusive) every suit instituted after the period of
 “ limitation prescribed therefor by the second schedule hereto
 “ annexed shall be dismissed.” Section 6 provides that when by any special law a period of limitation is specially prescribed for any suit, nothing in the Limitation Act shall affect or alter the period so prescribed.

It has been several times decided that the general sections of the Limitation Act from 5 to 25 are applicable to suits for which periods of limitation are prescribed other than those described in the second schedule to the Limitation Act—See *Nijabutsola v. Wazir Ali*(1) and *Khetter Mohun Chuckerbutty v. Dinabashy Shaha*(2) as to registration: and *Guracharya v. The President of the Belgaum Town Municipalities*(3) and *Reference under Forest Act V of 1882*(4), as to a suit brought before a Court which had no jurisdiction to try it.

Therefore this suit, which was filed on the 2nd of September 1886, being the day of the dismissal of the prior suit, was not barred by limitation as regards time, as the previous suit was filed one day before the expiry of six months from the date, 23rd September 1885, when the cause of action accrued.

The Judge observed that the plaintiff did not act in good faith as it had been decided long before he filed the suit that such suit would not lie in a Small Cause Court. No doubt every one is supposed to know the law, and the law is always certain; but if that principle was to be strictly applied, then section 14 of the Act would be useless, so far as regards defect of jurisdiction. I think the Judge was in error in this respect. The Judge also observes that the plaintiff did not prosecute the prior suit with due diligence, but we do not see evidence of any want of due diligence.

The Munsif was wrong in allowing credit to the respondent for any sum as for rent, as the respondent not having tendered a patta was not in a condition to establish any right to recover rent directly or by way of set off.

I think the decree of the Lower Appellate Court should be reversed, and a decree should be made for plaintiff for the sum claimed, Rs. 71-2-3, and interest up to the date of this decree at 6 per cent. per annum, with cost of this suit throughout, including the costs of the appeal.

MURTESAMI AYYAR, J.—I concur.

(1) I.L.R., 8 Cal., 910.

(2) I.L.R., 16 Cal., 265.

(3) I.L.R., 8 Bom., 529.

(4) I.L.R., 10 Mad., 210.