

## ORIGINAL CIVIL.

—  
*Before Mr. Justice Wilson.*

1879  
 June 14.

' GERENDER COOMAR DUTT v. S. M. JUGGADUMBA DABEE.

*Practice—Summons to Defendant to appear and answer—Issue of Summons after expiry of Period of Limitation—Delay—Rules of High Court (4th December 1875) 1, 2, 5.*

In a suit upon a promissory note dated the 4th June 1873, payable three months after date, the plaint was filed on the 22nd November 1873, but no summons to appear was issued until the 13th September 1878, when a Judge's order for the issue of a summons was obtained *ex parte*.

*Held*, that the suit was not barred by limitation.

A summons ought not to be ordered to issue after the lapse of the period of limitation prescribed for a suit, unless the plaintiff has, in the meantime, done what he can to prosecute his suit with proper diligence.

If a defendant is aggrieved by an order directing a summons to issue in such a case, he ought to apply to set aside the order, and the summons under it.

THE facts of this case fully appear in the judgment.

Mr. Piffard for the plaintiff.

Mr. Mitter for the defendant.

WILSON, J.—This is a suit on a promissory note. The plaintiff proved his case. The only defence suggested was one of limitation founded upon the following facts:—

The note was made on the 4th of June 1873, payable three months after date. The plaint was filed on the 22nd of November 1873; no summons to appear was issued till 1878. On the 13th of September 1878 a Judge's order was obtained *ex parte* for the issue of a summons, and a summons was accordingly issued and served. The defendant contends, that in the interval between the filing of the plaint in 1873, and the issue of the summons in 1878, the suit became barred by limitation, and, that the order of the 13th of September 1878 could not revive it. If the first of these propositions is true, the second must, I think, follow. But I do not think the first proposition is true.

There are now, as there have long been, statutory provisions determining the time within which suits may be commenced,— that is to say, within which plaints may be filed; and there are statutory provisions, now applicable to this Court, as well as others, limiting the time for many proceedings in a suit. But no time is limited by statute within which a summons to appear must be issued after the plaint is filed. The matter is, however, dealt with by rules of this Court. Rule 1 of the Rules of the 4th of December 1875 directs, that a summons shall be taken out and delivered to the sheriff for service within fourteen days after the institution of the suit; and that, in default, the plaint is to be taken off the file. The next rule gives the plaintiff liberty to apply to restore it on sufficient grounds, and the 5th rule prohibits the sheriff from receiving any summons after the fourteen days, unless ordered to do so. The result is, that a summons to appear can now be issued to the sheriff after the fourteen days, only by order of a Judge. These rules were not in force when this suit was instituted, and the plaint was never struck off the file. No decree or order dismissing the suit has ever been made, and a Judge has ordered the issue of the summons. I think, therefore, the suit has been throughout, and is, a subsisting suit.

I have been referred to the case of *Ram Kissen Doss v. Luckey Narain* (1). Pontifex, J., there held, that the issue of a second writ of summons ought not to be ordered after the lapse of the limitation period for such a suit since the previous summons, unless the plaintiff has in the meantime done what he could to prosecute his suit with proper diligence. I agree in that view, and I think at least equal strictness ought to be observed as to the issue of the first summons.

In the present case I must presume that the Judge who made the order was satisfied, that the plaintiff had done what was necessary to entitle himself to it. If the defendant thought himself aggrieved by it, he ought to have applied to set aside the order and the summons issued under it.

Attorney for the plaintiff: Baboo *Shamuldhone Dutt*.

Attorneys for the defendant: Messrs. *Swinhoe, Law, & Co.*

(1) I. L. R., 3 Calc., 312.