

REFERENCE FROM CALCUTTA COURT OF SMALL CAUSES.

1885
February 21.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Wilson.

NOBIN CHUNDER KURR (PLAINTIFF) v. ROJOMOYE DOSSEE
(DEFENDANT).*

Limitation Act XV of 1877, s. 14—Exclusion of time of proceeding bona fide in Court for a cause of like nature to want of jurisdiction.

The plaintiff on the 31st March 1884 brought a suit in the Small Cause Court on a promissory note, dated the 24th April 1879. In his plaint he omitted to set out certain payments of interest by the defendant, which payments (if so set out) would have had the effect of saving the suit from being barred by limitation. The Judge of the Small Cause Court *held*, that on the face of the plaint the suit was barred, and rejected the plaint on the 24th April 1884, under cl. c. of s. 54 of the Civil Procedure Code.

On the 25th April 1884 the plaintiff brought a fresh suit on the same promissory note, and in his plaint set out how it was that he claimed exemption from limitation. *Held*, that in computing the period of limitation, the plaintiff was not entitled under s. 14 of Act XV of 1877 to exclude the time during which he was prosecuting the previous suit.

THE plaintiff brought a suit on the 31st March 1884, in the Calcutta Court of Small Causes, to recover from the defendant a sum of Rs. 1,458-9-9, being the balance of principal and interest due on a promissory note made by the defendant in favor of Bonomally Chuckerbutty, or order, dated the 24th April 1879. This promissory note was endorsed over to the plaintiff.

The defendant made certain payments on account of interest on the 3rd June 1880, 17th January 1881, and the 1st April 1881, amounting in all to Rs. 210, which payments were endorsed on the said promissory note by the defendants' agent. There was, however, no clause in the plaint setting out these payments of interest for the purpose of showing that the suit was not barred by limitation. The learned first Judge of the Small Cause Court, on the 24th April 1884, rejected the plaintiff's plaint under s. 54

* Small Cause Court Reference No. 9 of 1884, from a decision of H. Millet, Esq., First Judge of the Calcutta Court of Small Causes, dated the 10th December 1884.

(cl. c) of the Code of Civil Procedure, it being manifest on the face of the plaint that the suit was barred by limitation.

The plaintiff thereupon, on the 25th April 1884, filed a fresh suit on the same promissory note, inserting in his plaint a clause showing the payments of interest above stated, and the fact of the institution of the first suit. The defendant at the hearing contended that the time during which the previous suit was pending could not be excluded in determining whether the suit was barred by limitation.

The learned first Judge of the Small Cause Court was of opinion that the plaintiff under the circumstances was not entitled under s. 14 of the Limitation Act to exclude the time during which he was prosecuting his previous suit, and, contingent on the opinion of the High Court on the case next stated, dismissed the plaintiff's suit.

"This suit is brought to recover Rs. 1,458-9-9 principal and interest due on a promissory note payable on demand, and dated the 24th April 1879. This note was originally made in favour of Bonomally Chuckerbutty, and endorsed over by him to the plaintiff. The plaint states: "The plaintiff claims exemption from limitation because of payments of interest amounting to Rs. 210 endorsed by defendant's agent, Kannai Lal Mullick, who made such payments as payments of interest, and endorsed the same on the 3rd June 1880, the 17th January 1881, and the 1st April 1881, and because of a suit instituted by the plaintiff on the 31st March 1884, within three years from the last payment of interest, *viz.*, the 1st April 1881, in which suit the plaint was rejected by the Court on the 24th April 1884." *

"The present suit was instituted on the 25th April 1884; if therefore the time during which the other suit was pending in this Court cannot be excluded in accordance with s. 14 of the Indian Limitation Act, the plaint must either be rejected or the present suit dismissed."

"It may be stated here that plaints in this Court can be rejected at any time, they being filed in Court *as of course* and not presented for admission. This is in consequence of the modified form of the Code of Civil Procedure as applicable to this Court."

"The defendant has taken the objection alluded to before, *viz.*, that the time during which the previous suit was pending cannot be excluded."

"The previous suit, as stated in the present plaint, was instituted on the 31st March, and the plaint was on the 24th April rejected under s. 54 of the Code of Civil Procedure, as it was manifest on the face of the plaint that it was barred by limitation. That plaint was an ordinary plaint on a promissory note, no clause claiming exemption from limitation having been inserted. This being so, can it be said the plaintiff was prosecuting the

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previous proceeding with due diligence, the reason for the failure of the plaintiff (judging by his present statement) being that he had not complied with the terms of the last paragraph of s. 50 of the Code of Civil Procedure. Had he complied with that section, and set out the fact of payment of interest as set out in the present plaint, the previous plaint would not have been rejected. I am of opinion that this failure on the part of the plaintiff is want of due diligence on his part. In fact a similar question has already been decided by a Full Bench of the High Court at Calcutta, *Chunder Madhub Chuckerbutty v. Bissessuree Debea* (1.) There the case had in the first instance been brought under some old procedure not specially mentioned. By that procedure it was necessary for the plaintiff to set out certain boundaries in his plaint. He failed to do so and was non-suited. The question there was whether the time occupied by that proceeding could be deducted from the period of limitation when the plaintiff filed a fresh plaint in respect of the same subject-matter. The majority of the Full Bench held it could not be deducted. The question then had to be decided on s. 14 of Act XIV of 1859 (the old Limitation Act), but there is practically no difference as regards diligence between s. 14 of that Act and s. 14 of the present Limitation Act. By this decision I am bound, and, I may state my own opinion coincides with that of the majority of the Full Bench. Either party is desirous, in the event of the suit being decided against him, that the matter should be referred to the High Court, and I think it advisable that it should be so.

Should the Hon'ble Judges of the High Court be of opinion that the plaintiff was prosecuting the previous suit with due diligence, it will still be open to them to say whether limitation is a "cause of a like nature" to jurisdiction. The question referred will be whether in computing the period of limitation, the plaintiff under the circumstances above set out is under s. 14 of the Indian Limitation Act, 1877, entitled to exclude the time during which he was prosecuting his previous suit in this Court? Contingent on the opinion of the High Court my judgment is that the suit be dismissed as barred by limitation."

Mr. Pugh appeared on the reference on behalf of the defendant and cited *Rajendro Kishore Singh v. Bulakey Mahton* (2), and *Chunder Madhub Chuckerbutty v. Bissessuree Debea* (1)

No one appeared on behalf of the plaintiff.

The opinion of the Court (GARTE, C.J., and WILSON, J.) was that the question should be answered in the negative.

(1) 6 W. R. 184; B. L. R., Sup. Vol. 553.

(2) 1 L. R. 7 Calc., 867.