APPELLATE CIVIL.

Before Mr. Justice Coutts Trotter and Mr. Justice Phillips.

1915, September 17.

29 M.L.J 569

A. L. A. R. ARUNACHELLAM CHETTIAR AND THREE OTHERS (PLAINTIFFS), APPELLANTS,

v.

LAKSHMANA AYYAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

(Indian) Limitation Act (*IX of* 1908), *sec.* 14—*Withdrawal of suit—Fresh suit, filing of, whether saved by.*

Section 14 of the (Indian) Limitation Act (IX of 1908) applies only to cases where a Court itself decides that it is unable to entertain a suit for want of jurisdiction or other cause of a like nature and has no application to a case where the plaintiff himself withdraws his suit on discovery of some technical defect which would involve a failure.

Varajlal v. Shomeshwar (1905) I.L.R., 29 Bom., 219 and *Upendra Nath Nag Chowdhury* v. *Surya Kanta Ray Chowdhury* (1913) 20 I.C., 205, followed.

SECOND APPEAL against the decree of D. G. WALLER, the acting District Judge of Tinnevelly, in Appeal No. 273 of 1912, preferred against the decree of T. MUNRO FRENCH, the Additional District Munsif of Tinnevelly, in Original Suit No. 300 of 1910.

The facts of the case appear from the judgment.

S. Srinivasa Ayyangar for the appellants.

E. S. Chidambaram Pillai for the first respondent.

S. E. Sankara Ayyar for the second respondent.

The following judgment of the Court was delivered by

COUTTS TROTTER AND PHILLIPS, JJ.

COUTTS TROTTER, J.—This appeal raises a question of some interest and the circumstances in which it is raised are these:—The appellant brings this suit against two persons who were at one time partners in respect of moneys advanced by him to them. The only question for decision is whether this action is barred by limitation as regards the various items in the account which became due more than three years before the date of this suit. The Courts below have held that this suit was barred in respect

* Second Appeal No. 325 of 1914.

of these items. An ingenious argument has been adduced before us to show that that decision was wrong and the plaintiff is entitled to take the benefit of section 14 of the Limitation Act. The circumstances in which he claims that benefit are these. He instituted a previous suit against the same parties as those in this proceeding, and as originally framed that suit included his claim now said to be barred and apparently included nothing that would have made that suit as originally launched bad for misjoinder or any other cause; but during the pendency of the proceeding he was allowed to amend the plaint and to put in another cause of action as to which it is not seriously disputed that it rendered the suit as it then stood bad for misjoinder of causes of action. Thereupon he applied to the Court in which the suit was pending for leave to amend it or withdraw it with permission to institute a fresh suit in respect of the subject-matter of that action, at any rate in so far as it coincided with the claim he makes here today. That can be done under the provisions of rule 1 of Order XXIII. Rule 1 of Order XXIII says :—

(1) At any time after the institution of a suit, the plaintiff as against all or any of the defendants, withdraw his suit or may, abandon part of his claim.

(2) Where the Court is satisfied (*a*) that a suit must fail by reason of some formal defects or (*b*) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

That is what the plaintiff did in this case. Whether he abandoned the whole of his claim or such part of it only as we are concerned with in this appeal, he obtained the right to institute a fresh suit. Rule 2 of Order XXIII is in these terms: "In any fresh suit instituted on permission granted under the last preceding rule the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted." On the face of it that appears to be conclusive and fatal to the appellant's case; but he contends that the rule with its reference to the law of limitation impliedly subjects the whole matter to the provisions of the law of limitation then in

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force and that section 14 of the Limitation Act expressly preserves his rights. Section 14 of the Limitation Act is as follows :—" In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence, another suit whether in a Court of First Instance or in a Court of Appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it." It may be conceded for the purposes of this case, though it is not altogether clear, that there is no express finding against the plaintiff that he did not prosecute his suit in the other Court with due diligence. The question then arises whether section 14 preserves his rights in a case where his suit has not been dismissed by the tribunal, but has been voluntarily abandoned by himself on discovery of a technical defect which would involve a failure. The matter is not free from difficulty and it has been decided in *Varajlal* v. *Shomeshwar* (1) that the section in question of the Limitation Act has no application to a case of withdrawal of the suit and can apply only to cases where the failure of the suit was due to the action of the Court. The same result has been arrived at by the Calcutta High Court—*Upendra Nath Nag Chowdhury* v. *Surya Kanta Ray Chowdhury*(2). These are quite clear authorities for the position advanced by the respondent and we think they should be followed, particularly, when it is seen that by so construing the section of the Limitation Act there is no conflict between the two sections and no necessity to adopt a forced construction in order to reconcile them. If we treat the section of the Limitation Act as unconcerned with suits which are voluntarily abandoned or withdrawn, the sections do not need reconciling as each deals with a separate subject-matter. The Limitation Act deals with suits which are terminated by the action of the Court while the Civil Procedure Code deals, as the heading of the order shows, with cases where suits are withdrawn or abandoned by a voluntary act of the plaintiff.

We think that the appeal fails and should be dismissed with costs.

S.V.

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(1) (1905) I.L.R., 29 Bom., 219. (2) (1913) 20 I.C., 205.