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King, J.

by making a written demand on the 21st of May, 1928, for the whole of the money due on the bond. I do not think it could be held necessary for the exercise of his option that the creditor should actually institute a suit for the amount. If the creditor makes a formal written demand for the whole amount, threatening to institute a suit for recovering it if it is not paid within a stated time, then it seems to me that the creditor has clearly signified his intention and thus has exercised his option. This point is not of much importance in the view that I take of the case. I think that article 75 is clearly applicable. This means that limitation began to run from the time when the default was made, unless the creditor is proved to have waived the benefit of the default clause. No waiver is proved. I, therefore, find it impossible to resist the conclusion that the suit is barred by limitation as it was instituted more than three years after the date of the default. No other conclusion seems possible if the words of the statute are given their plain and ordinary meaning. In my opinion the decision of the trial court is correct.

BY THE COURT:—The application in revision is dismissed with costs.

Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji and Mr. Justice King

SADAYATAN PANDE (PLAINTIFF) *v.* RAM CHANDRA GOPAL (DEFENDANT)*

1934
March, 8

Civil Procedure Code, order XXIII, rule 2—Suit withdrawn against one set of defendants, by reason of multifariousness, with liberty to file a fresh suit against them—Limitation—Plaintiff not entitled to benefit of time occupied in first suit—Limitation Act (IX of 1908), section 14(1).

*Second Appeal No. 1141 of 1932, from a decree of V. Mehta, Additional Subordinate Judge of Benares, dated the 24th of June, 1932, confirming a decree of Harish Chandra Sinha, Additional Munsif of Benares, dated the 13th of July, 1931.

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When a suit is withdrawn by the plaintiff under order XXIII, rule 1 of the Civil Procedure Code, with liberty to file a fresh suit, then in computing the limitation for such fresh suit the plaintiff is not entitled to the benefit of section 14(1) of the Limitation Act, namely to an exclusion of the time occupied by the first suit; that section is inapplicable in view of the provisions of order XXIII, rule 2. Under order XXIII, rule 2 the existence of the previous suit must altogether be ignored and must not be taken into account in considering whether the subsequent suit is or is not barred by limitation.

Order XXIII, rules 1 and 2 apply to cases where the plaintiff voluntarily withdraws the suit and asks for permission to file a fresh suit; whereas section 14 of the Limitation Act applies to a case where the court by its own order has terminated the suit and has struck off the case from its file. There is no conflict between the two provisions.

The words, "is unable to entertain it", in section 14 of the Limitation Act do not merely mean that the court has expressed its mind that the suit is defective, but must mean that the court has passed an order terminating the suit or proceeding on the ground of the existence of a defect of the kind mentioned in the section.

Mr. *N. Upadhiya,* for the appellant.

Mr. *Lakshmi Saran,* for the respondent.

SULAIMAN, C.J.:—This is a plaintiff's appeal arising out of a suit which has been dismissed on the ground that the claim is barred by limitation. Previous to the present suit the plaintiff had instituted a suit on the same cause of action against two sets of defendants. An objection was taken that the suit was defective on account of multifariousness because different causes of action arising against different defendants had been wrongly joined together. The court expressed the opinion that there was this serious defect and actually ordered that the plaintiff should elect as to which of the two classes of defendants he would like to proceed against. After this order was passed the plaintiff filed an application under order XXIII, rule 1 of the Civil Procedure Code for withdrawal of the suit against one set of the defendants with permission to institute a fresh suit against them after-

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wards and chose to proceed with the suit as against the remaining defendants. The court ordered the suit to be withdrawn and granted the permission asked for. On the very day that the permission was granted the plaintiff instituted the present suit.

It is admitted that the claim of the plaintiff would be barred by time if he is not allowed to take advantage of the previous suit which was withdrawn against the present defendants. The only question is whether he is entitled to get the benefit of the provisions of section 14(1) of the Indian Limitation Act. No question has arisen as to whether he was not prosecuting the previous case with due diligence and in good faith. The suit has been dismissed on the ground that in view of the provisions in order XXIII, rule 2, section 14 of the Limitation Act is inapplicable. The case came up for disposal before a Division Bench which has referred it to a Full Bench.

Sulaiman, C.J.

It cannot be said that there is any direct conflict of opinion on this question either in this Court or in other High Courts. It can only be said that the question is of some importance and is a somewhat difficult one to decide and it is on this ground only that the case has been referred to a Full Bench, though it might well have been decided by the Bench itself.

Under section 14 of the Limitation Act a plaintiff is entitled to exclude the period of time taken in prosecuting any previous civil proceeding with due diligence 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. Explanation III added to the section in the new Act makes it clear that misjoinder of parties or of causes of action is a defect of a like nature within the meaning of the section.

Prima facie it would seem that the plaintiff is entitled to get the time taken in the previous suit excluded, because the court had actually ordered that he must

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elect whether he would proceed against one set of the defendants or against the other set, and in that sense the court had expressed its opinion that it was unable to entertain the suit as filed.

Sulaiman, C.J.

Order XXIII, rule 1 permits a court to allow a suit to be withdrawn with permission to file a fresh suit if it is satisfied that the suit must fail by reason of some formal defect or there are other sufficient grounds for permitting the plaintiff to institute a fresh suit.

Rule 2 provides: "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".

Taking the words of rule 2 as they stand, there can be no doubt that they imply that for purposes of a second suit it must be assumed that the law of limitation will have its full effect as if no suit which had been withdrawn had ever been instituted. The result is that it must be treated that the suit that had been withdrawn was a non-existent suit. If this is to be the assumption then obviously the plaintiff cannot be allowed to take advantage of section 14 on the ground that he had filed the previous suit which the court was unable to entertain on account of want of jurisdiction or other cause of a like nature. The existence of the previous suit must altogether be ignored and must not be taken into account in considering whether the subsequent suit is or is not barred by limitation.

It might, therefore, seem as if there is some apparent conflict between section 14 of the Limitation Act and order XXIII, rule 2 of the Code of Civil Procedure.

There were definite rulings even when the old Acts were in force under which a plaintiff was not allowed to take advantage of the provisions in the corresponding section of the Limitation Act when he had withdrawn his suit. The legislature in passing the two Acts has not materially altered the language of the two sections

so far as the point under consideration is concerned. Both the Acts came into force on the same day, viz. 1st January, 1909. One would, therefore, expect to find that there is really no conflict between these two enactments.

But even assuming that there were such a conflict, the provision in order XXIII, rule 2 is a special provision relating to suits, as a particular case; whereas the provision in section 14 of the Limitation Act is a general provision applying to all suits which have failed for want of jurisdiction or causes of a like nature. In case of a real conflict, the special provision would therefore, prevail and must be treated as an exception to the general rule. It however seems that there is no real conflict between the two Acts. In the first place, if one Act provides that a previous suit should be treated as non-existent then it cannot be taken into account by the court at all when applying the provisions of section 14. In the second place, the words "is unable to entertain it" do not merely mean that the court has expressed its mind that the suit is defective, but must mean that the court has passed an order terminating the suit or proceeding on the ground that there is a defect of jurisdiction or other cause of a like nature on which the suit must fail. So long as the court has not terminated the proceeding but has merely given an option to the plaintiff to choose one of two alternatives and the plaintiff voluntarily chooses one, it cannot be said that the case falls within section 14 of the Limitation Act. Here it is not an act of the court which terminates the suit or proceeding, but the voluntary act of the party which does so.

Sulaiman, C.J.

Order XXIII, rules 1 and 2 therefore apply to cases where the plaintiff on discovering that his suit must fail either by reason of some formal defect or that there are sufficient grounds for withdrawing the suit, applies voluntarily for the withdrawal of the suit and asks for permission to file a fresh suit and the court grants

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Sulaiman, C.J.

his prayer. Whereas section 14 of the Limitation Act would apply to a case where the court by its own order has terminated the suit or proceeding and has struck off the case from its file on the ground that either it has no jurisdiction to entertain it or that there is some cause of a like nature which makes it impossible for the court to entertain it. In this view there would be really no conflict whatsoever between the two sections.

So far as this Court is concerned three cases have been brought to our notice. One is the Full Bench case of *Mathura Singh* v. *Bhawani Singh* (1), which is really not directly in point. There the question was whether the defect of misjoinder of causes of action would be a fatal defect within the meaning of section 14 of the Limitation Act, and the Full Bench ruled that it was such a defect. The view taken in other High Courts was to the contrary. It was to set this conflict at rest that explanation III has been added to section 14. In the Full Bench case no question appears to have been either urged or considered as to whether the striking off of the names of all the plaintiffs amounted to an abandonment of the claim or a withdrawal of the claim, nor was any question raised as to the applicability of the corresponding section of the old Act, namely, section 374 of the Civil Procedure Code.

DALAL, J., in *Rahim Ali* v. *Yehia Khan* (2) distinguished the earlier Full Bench case on a ground which it is not necessary to consider here and held that section 14 could not help the plaintiff in such a case.

There is also an observation made in the case of *Ram Pati Kunwar* v. *Phool Singh* (3) which supports the same view but the point was not absolutely necessary for the decision of that case. The same view appears to have been taken in the other High Courts; see *Varajlal* v. *Shomeshwar* (4), *Arunachellam Chettiar* v. *Lakshmana Ayyar* (5), and *Upendra Nath Nag* v. *Surya*

(1) (1900) I.L.R., 22 All., 248.
(2) A.I.R., 1928 All., 402.
(3) [1932] A.L.J., 421 (423).
(4) (1904) I.L.R., 29 Bom., 219.
(5) (1915) I.L.R., 39 Mad., 936.

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Kanta Roy (1). I would, therefore, hold that the plaintiff is not entitled to claim the benefit of the provisions of section 14(1) of the Limitation Act on account of the previous suit which he chose to withdraw.

MUKERJI, J.:—I agree and have nothing to add.

KING, J.:—I agree.

BY THE COURT:—The order of the Court is that the appeal fails and is dismissed with costs.

MISCELLANEOUS CIVIL

Before Mr. Justice Bennet

SURENDRA SINGH (DEFENDANT) *v.* GAMBHIR SINGH AND ANOTHER (PLAINTIFFS)*

1934
March, 12

Court Fees Act (VII of 1870), schedule I, article 1; schedule II, article 17(iii)——Declaratory suit where no consequential relief is prayed—Cross-objection in such case—Ad valorem *court fee not payable on the cross-objection.*

In the case of a declaratory suit where no consequential relief is prayed, *ad valorem* court fee is neither payable on the plaint or memorandum of appeal nor on the cross-objection.

Although article 17(iii) of schedule II of the Court Fees Act does not specifically mention a cross-objection while it mentions plaint or memorandum of appeal, on general principles the words "plaint or memorandum of appeal" in that article should be construed to include a cross-objection. A cross-objection and an appeal are very intimately connected and there is no essential difference, from the point of view of court fees, between the one and the other, and there is no reason why a person who files a cross-objection should have to pay an *ad valorem* court fee, whereas if he filed an appeal instead of a cross-objection he would not have to pay an *ad valorem* fee but only a fixed fee of Rs.10.

Further, section 7(iv)(*c*) of the Court Fees Act provides that in the case of declaratory suits where consequential relief is prayed, the plaintiff shall state the amount at which he values the relief sought; and the *ad valorem* court fee can be calculated accordingly. But there is no such provision for a declaratory suit where no consequential relief is prayed. The principle of the

*Stamp Reference in First Appeal No. 209 of 1930.

(1) (1912) 20 Indian Cases, 205.