

It is further ordered that the amount on deposit be directed to be paid to the plaintiffs upon their application to the proper officer.

With regard to the costs of this appeal it appears to me that the appellant's grievance has arisen solely owing to his neglect to draw this matter to the notice of the Subordinate Judge at the trial. Had he done so the matter would undoubtedly have been dealt with in the judgment and credit for the amount deposited would have been given to the appellant. In the circumstances it is ordered that each party bear his own costs of this appeal.

FOSTER, J.—I agree.

*Decree varied.*

## APPELLATE CIVIL.

*Before Dawson Miller, C. J. and Foster, J.*

JOGINDRA NARAYAN CHAUDHURI

*v.*

CHINAI MUHAMMAD SIRCAR.\*

1924.

*Dec., 10.*

*Limitation Act, 1908 (Act IX of 1908), Schedule I, Articles 89, 115 and 116—Principal and agent, written agreements between—Accounts, suit for—Limitation.*

The plaintiff engaged the defendant as his agent to look after two villages and collect the rents, rendering an account to the plaintiff. There were two written agreements in the case, one relating to each of the villages. The first was executed in 1905 and the other in 1906. The defendant was dismissed sometime in September or October, 1917. He had rendered no accounts and the present suit for accounts was instituted on the 26th May, 1920. The trial Court took the view that as the relations between the plaintiff and the defendant depended on a contract the case was governed by Article 115, and dismissed the suit on the preliminary point. On appeal, *held*, that the proper Article applicable was Article 89; and that the suit having been brought within three years from

\* First Appeal no. 240 of 1921, from a decision of B. Suresh Chandra Sen, Subordinate Judge of Purnea, dated the 27th April, 1921.

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the date when the defendant's services terminated, the suit was *prima facie* in time unless it could be shown that some demand was made before that date with regard to all or some of the sums due for the years in question and that that demand was refused.

*Shib Chandra Roy v. Chandra Narain Mukherjee*(1), followed.

*Jogesh Chandra v. Binode Lal Roy*(2), *Easin Sarkar v. Barada Kishore Acharyya Chowdhry*(3), and *Mati Lal Bose v. Amin Chand Chattopadhyay*(4), distinguished.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C.J.

*Lal Mohan Ganguly*, for the appellant.

DAWSON MILLER, C. J.—This is an appeal on behalf of the plaintiff from a decision of the Subordinate Judge of Purnea, dated the 27th April, 1921, dismissing the plaintiff's claim on the ground that it was time barred under Article 115 of the Limitation Act. The plaintiff has appealed and contends that the case is governed not by Article 115 but by Articles 88 and 89 of the Limitation Act.

The facts shortly stated are that the plaintiff engaged the defendant as his agent to look after two villages and collect rents rendering an account to the plaintiff. There were two written agreements in the case, one relating to each of the *mauzas*. The first was executed in the year 1905 and the other one in the following year. The claim is for an account of the collections made between the years 1312 and 1313, B.S., respectively, for the two villages and the year 1323, B.S. which later year would cover the period between the middle of April 1916 and the middle of April 1917. The defendant was dismissed sometime in about *Assin* 1324 that is in September or October, 1917. He has rendered no accounts and the present suit was instituted on the 26th May, 1920.

(1) (1905) I. L. E. 32 Cal. 719.

(2) (1910) 11 Cal. L. J. 43.

(3) (1909-10) 14 Cal. W. N. 122.

(4) (1905) 1 Cal. L. J. 211.

The learned Subordinate Judge, before whom the case came for trial took the view that as the relations between the plaintiff and the defendant depended on a contract the case was governed by Article 115. That Article provides for compensation for the breach of any contract express or implied not in writing registered and not herein specifically provided for. The period of limitation is three years and the time from which the period begins to run is that date when the contract is broken or, where there are successive breaches, when the breach in respect of which the suit is instituted occurs, or, when the breach is continuing, when it ceases. The learned Subordinate Judge in arriving at the conclusion that Article 115 applied rather than the earlier Article relied upon the cases of *Jogesh Chandra v. Binode Lal Roy* (1) and *Easin Sarkar v. Barada Kishore Acharyya Chowdhry* (2). With regard to the former case a registered contract was relied upon as bringing the case not within Article 115 of the Limitation Act but within Article 116. Now Article 116 is not an Article which like the one immediately preceding applies only to cases not specially provided for in other parts of the schedule. It applies to compensation for the breach of a contract in writing registered and it may well be that in a case of a registered contract that Article which gives six years as the period of limitation is to be preferred to Article 89 which limits the period to three years only. Whether that interpretation of the Act is right or wrong we are not concerned with in the present appeal. The question for determination here is whether Article 115 which relates to a contract not in writing registered, and not specially provided for in other parts of the schedule is to be given preference to Article 88 and Article 89 where the suit clearly falls within these Articles. The first of the cases therefore relied upon by the learned Subordinate Judge does not appear to me to be any authority for the view which he appears to have taken in this case. It is true that in that case there is a dictum to the effect that where there is a

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 (1) (1909-10) 14 Cal. W. N. 122. (2) (1910) 11 Cal. L. J. 48

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definite contract to account at the end of the year the proper Article would be Article 115 as the contract would be broken by the failure of the agent to account at the end of each year but it must be noted that in that case the contract was in writing and registered and the Article which was applied was Article 116. The dictum to which I have referred was based apparently upon the case of *Mati Lal Bose v. Amin Chand Chattopadhyay* (1), a case in which again there was a dictum to the effect that Article 115 would over-ride the provisions of Article 89 where both were applicable. This however was merely a dictum because the question in dispute in that case related to the effect of Article 116 upon the earlier Article, namely, Article 89 and it was not necessary for the Court in that case to consider what the effect would be in a case coming under Article 115.

In the other case relied upon by the learned Judge, namely, *Easin Sarkar v. Barada Kishore Acharyya Chowdhry* (2), again it was proved that there had been a demand and a refusal to render an account more than three years before the suit was brought and therefore it was of no moment whether Article 89 or Article 115 was applied. It was not necessary therefore in that case to consider the question under which of these Articles the suit came. The matter, however, has been considered by other decisions in the Calcutta High Court and I need only refer to that of *Shib Chandra Roy v. Chandra Narain Mukerjee* (3). That was a suit by a principal against his agent for an account and for recovery of money from him that might be found due. It was held there that it was a suit for movable property received by the agent on behalf of the principal and not accounted for and was governed by Article 89 of the schedule to the Limitation Act. The learned Judges there pointed out that the cases to which I have already referred dealt merely with Article 116 and were no authority for the proposition that

(1) (1905) 1 Cal. L. J. 211.

(2) (1910) 11 Cal. L. J. 63.

(3) (1905) I. L. R. 32 Cal. 719.

Article 115 would over-ride Article 89 and in the result they found that Article 89 was the proper Article to apply in such cases. If that is the proper Article to apply in the present case and, in my opinion, it undoubtedly is, then it would appear that the present suit is not barred by limitation. The learned Judge seemed to think that it was barred upon the allegations in the plaint and without taking any evidence he decided the suit against the plaintiff. He seems to have relied upon certain allegations in paragraph 4 of the plaint where it is stated that :

“ Notwithstanding the fact that he was repeatedly asked to submit collection and *nikas* (adjustment) papers he did not do so nor is he inclined to submit them. Therefore in *Asin*, 1924, the *Bangla* year, the plaintiff dispensed with his services in connection with the collection and realization of the same *mauzas*.”

The learned Judge seems to have assumed that these repeated applications were applications made at the end of each financial year or that they were at all events at some period anterior to the time when the last collections were made and certainly anterior to three years from the time when the plaintiff brought his suit. There is nothing however in the plaint to indicate that any demand was made more than three years before the institution of this suit. The suit was brought within three years from the date when the defendant's services terminated. Therefore the suit is *primâ facie* in time unless it can be shown that some demand was made before that date with regard to all or some of the sums due for the years in question and that demand was refused. That is a question of fact which will have to be gone into at the trial and in my opinion there is nothing in the plaint from which any such inference must be drawn. The appeal is allowed, the decision of the preliminary point arrived at by the trial Court is set aside and the case is remanded under Order XXI, rule 23, of the Civil Procedure Code, to the trial Court for decision of the other issues in the case.

FOSTER, J.—I agree.

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