APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Jusice Mya Bu.

1927

June 23.

NADESAN CHETTIAR

v.

SHANKARAN CHETTIAR.*

Limitation Act (IX of 1908), *s.* 14—*Same cause of action—Good faith—Suit on loan cannot be converted into one on a promissory-note.*

On the last day of limitation a suit was filed against the respondent on an alleged loan at Thônzè. The transaction, to the knowledge of the agent who verified the plaint, took place at Rangoon and was in fact a conditional guarantee by the respondent for the debt of another person. Respondent had signed a promissory-note in favour of the plainttiff's firm, but which was not sued upon. The plaint was returned to be filed in Rangoon. Plaintiff now purported to sue on the promissory-note and claimed exemption from the law of limitation.

Held, that the present claim of the plaintiff was totally a distinct cause of action from the former and could not be allowed, and as it was already barred he could not claim exemption under the provisions of section 14 of the Limitation Act, as it was not the same cause of action, and as the suit at Thônzè was based on statements of facts and of jurisdiction which were false to the knowledge of the person filing it.

Ma Shwe Mya v. *Mo Hnaung*, 4 U.B.R. 30 P.C.—*followed.*

Halkar—for Appellant.

Mani—for Respondent.

HEALD AND MYA BU, JJ.—The Chettiar firm of M.T.T.K.M. which was a partnership of three partners, namely, Somasundram, Arunachellam and the present appellant, Nadesan, carried on a money-lending business at Thônzè by an agent Ranganathan. It had made advances to one M. A. Mamsa of Rangoon and when accounts were settled between them it was found that Mamsa owed them Rs. 895. Respondent Shankaran Chettiar, who was clerk to a Chettiar firm

* Special Civil First Appeal No. 45 of 1926.

in Rangoon, guaranteed payment of this amount to the M.T.T.K.M. firm and gave their agent Ranganathan a document the effect of which was as follows:— "I promise to pay M.K.M. Ranganathan Chettiar the sum of Rs. 895 received by me in cash with interest at 1 per cent. per mensem from this date, namely the 14th of February 1921."

On the 14th of February 1924 Somasundram and Arunachellam, two of the three partners in the M.T.T.K.M. firm sued respondent to recover Rs. 895 with interest in respect of this transaction, their plaint being verified by Ranganathan. They instituted the suit at Tharrawaddy and they alleged that respondent had borrowed the sum of Rs. 895 from their firm at Thônzè, which is within the jurisdiction of the Tharrawaddy Court. In their plaint they did not refer to the document mentioned above but they mentioned it in an annexure to their plaint as one of the documents on which they relied. They filed the suit as two of the three partners in the M.T.T.K.M. firm and they impleaded the present appellant Nadesan, the third partner, as a formal defendant on the ground that the firm had ceased to do business and that he was unwilling to join as a plaintiff. The suit, as has been said, was filed on the 14th of February 1924, that is on the last day of limitation, and appellant, though he was a formal party, was not a plaintiff in the suit. On the 21st of March 1924 appellant appeared as a defendant and said that he was willing to be joined as a plaintiff. Somasundram and Arunachellam applied for leave to amend their plaint, and on the 1st of April 1924 an amended plaint, was filed in which all the three partners were made plaintiffs and the present respondent was made the sole defendant, the statement of claim being the same as in the earlier plaint. This

1927

NADESAN CHETTIAR v. SHANKARAN CHETTIAR.

HEALD AND MYA BU, JJ.

amended plaint was signed and verified by Ranganathan as agent for Somasundram and Arunachellam and by Vengadasalam as agent for appellant.

Respondent then filed a written statement in which he pleaded that the transaction which was the basis of the suit took place in Rangoon and not within the jurisdiction of the Tharrawaddy Court, that it was not true that he had borrowed Rs. 895 from the M.T.T.K.M. firm, but that the truth was that he had guaranteed that M. A. Mamsa would pay that sum to the firm and for that purpose had given to the firm the document mentioned in the list appended to the plaint. He said that it was agreed as a condition precedent to the attaching of any obligation under that document that the firm should first apply to Mamsa for payment, and he pleaded that because they had not applied to Mamsa he was not liable to pay the amount.

The Tharrawaddy Court framed a preliminary issue as to whether or not it had jurisdiction, that is as to whether the cause of action arose at Thônzè or at Rangoon.

Appellant then filed an application for the examination of the partner Somasundram and the agent Ranganathan on commission at Devakota, they having left Burma and gone to that place. The commission was issued and Ranganathan, who it will be remembered had himself verified both the plaints said that while he was agent of the M.T.T.K.M. firm the present respondent undertook to pay to the firm Rs. 895 due by another (clearly Mamsa), and gave him the document, which was written in Rangoon. He said however that the money was payable at Thônzè. On Ranganathan's admission that the document was given in Rangoon, coupled with the evidence of respondent and his witnesses, the Tharrawaddy

Court found that the cause of action arose in Rangoon and that it had no jurisdiction to try the suit.

The plaint and the amended plaint were accordingly returned to the plaintiffs, that is to the three partners, for representation in the proper Court. They were presented in the Small Cause Court of Rangoon without delay, but before the case came on for trial there appellant filed an amended plaint in which he claimed to sue alone, as one of the partners of the M.T.T.K.M. firm, on the basis of the document as a promissory-note. He claimed exemption from the law of limitation on the ground that he had been in good faith prosecuting against the respondent another suit on the promissory-note in the Tharrawaddy Court.

An issue was raised as to whether or not appellant was entitled to the benefit of section 14 of the Limitation Act, and the learned Judge held that because the cause of action in the Tharrawaddy Court and that in the Rangoon Court were not the same, the one being an alleged loan and the other a claim on a promissory-note, and because the suit was not prosecuted in the Tharrawaddy Court with due diligence and in good faith since Ranganathan who filed it knew that there was no question of a loan and knew also that the transaction took place in Rangoon, appellant was not entitled to the benefit of section 14 of the Act. He accordingly dismissed appellant's suit.

Appellant appeals on the grounds that the cause of action was the same throughout and that the date which ought to have been considered for purposes of limitation was the date on which the suit was filed in the Tharrawaddy Court.

In view of the fact that there was no delay between the return of the plaints and their being

1927

NADESAN CHETTIAR v. SHANKARAN CHETTIAR.

HEALD AND MYA BU, JJ.

filed in the Small Cause Court, we are of opinion that if it could be held that appellant was prosecuting the suit or proceedings in the Tharrawaddy Court with due diligence and in good faith from the 14th of February 1924, that is from the date on which the period of limitation for the suit came to an end, and if the cause of action was the same in the Tharrawaddy Court as it was in the Rangoon Court, then appellant would be entitled to the benefit of section 14.

As a matter of fact appellant did not actually become a plaintiff in the Tharrawaddy Court until the 1st of April 1924, that is until some considerable time after the expiry of the period of limitation for the suit, and therefore it would be difficult to regard him as having been prosecuting the suit from the 14th of February 1924, but supposing that it is possible to regard the suit which was instituted on the 14th of February 1924 as a suit by the partnership, and to regard appellant as having been added as a plaintiff on the 1st of April 1924 merely as an additional representative of the partnership, even then it would in our opinion be impossible to regard a suit which was instituted by two other partners on the last day of limitation and in which appellant was not at that time a plaintiff as having been prosecuted by appellant with due diligence and in good faith so as to give appellant the benefit of section 14 after the two other co-partners had withdrawn from the suit, as apparently they did, in a case where the suit was based on a statement of facts which was false to the knowledge of the person who filed it, and was filed in the Tharrawaddy Court when the person who filed it knew that the cause of action arose in Rangoon, and when further the present cause of action, which is based on the document as a

promissory-note, was not the cause of action in the suit as originally instituted.

We are of opinion that the Small Cause Court was right in holding that appellant's present claim to sue on the document as a promissory-note was barred by limitation at the time when it was made, and we may add that in our view the amendment which appellant proposed to make by his latest plaint was an amendment which he was not entitled to make since, as their Lordships of the Privy Council said in the case of *Ma Shwe Mya* v. *Mo Hnaung* (1), " no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change by means of amendment the subject-matter of the suit." The claim which was embodied in the original plaint and in the first amended plaint has now been abandoned and could not have succeeded and since the claim which appellant now wishes to make is long time-barred and is a claim which in any case he ought not to be allowed to make in the suit, we have no hesitation in finding that his suit was rightly dismissed and we dismiss the appeal with costs.

(1) (1920) 4 U.B.R. 30.