

We are clearly of opinion that the order of the Subordinate Judge was one passed under Order XXI rule 90 of the Civil Procedure Code and was not a decree, and that therefore no second appeal lay to this Court. The order of the learned Judge in Chambers was an order passed on an application for revision and no appeal lies from it under the Letters Patent. The appeal is accordingly dismissed with costs.

C. H. O.

*Appeal dismissed.*

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**REVISIONAL CIVIL.**

*Before Justice Sir Henry Scott-Smith and Mr. Justice Martineau.*

NANAK CHAND-MUKANDI LAL (PLAINTIFF)

Petitioner,

*versus*

EAST INDIAN RAILWAY (DEFENDANT)

Respondent.

Civil Revision No. 56 of 1924.

*Parties to Suit—suit for damages against a Railway Company brought against the Agent of the Company—Amendment to Company's name after expiry of period of limitation—Misdescription.*

A suit for damages was instituted on 14th February 1922 against the Agent, E. I. Railway, and others. On 19th April 1922 the Attorney of the Railway applied to have *ex parte* proceedings set aside, and on 15th May 1922 he filed written pleas on behalf of the Railway. In these pleas no objection was taken to the description of the defendant. On 18th June 1923 plaintiff asked for permission to amend the plaint by changing the description of the defendant to "E. I. Railway, through the Agent." This amendment was made and the lower Court then dismissed the suit as time-barred, holding that the Railway was no party to the suit until the date on which the amendment was made.

1925

*Feb. 26.*

*Held*, that as the plaint showed that the plaintiff's claim was against the E. I. Railway as a Company and not against the Agent personally, and as the action of the Attorney of the Company showed that the company was substantially on the record, had notice of the claim, and pleaded thereto, the present case was very similar to that decided by the Bombay High Court in *Saraspur Manufacturing Co., Limited v. B. B. & C. I. Railway Co.* (1), and was consequently not barred by limitation.

*Sinehi Ram-Bihari Lal v. Agent, East Indian Railway Co.* (2), and *East Indian Railway Co. v. Ram Lakhan Ram* (3), distinguished.

*Application for revision of the order of Lala Shankar Lal, Judge, Small Cause Court, Ambala, dated the 8th October 1923, dismissing the claim.*

OBEDULLA, for Petitioner.

DALIP SINGH, Government Advocate, for Respondent.

The judgment of the Court was delivered by—

SIR HENRY SCOTT-SMITH J.—This is an application for revision of the order of the Judge, Small Cause Court, Ambala, dismissing the plaintiff's suit for damages against the East Indian Railway on the ground that it is barred by limitation. The suit was instituted on the 14th of February 1922, the defendants originally impleaded being as follows:—

1. The Agent, N.-W. R., Lahore.
2. The Agent, E. I. R., Calcutta.
3. The Secretary of State for India in Council.

On the 19th of April 1922 the special attorney of the East Indian Railway applied to have *ex parte* proceedings set aside and on the 15th of May 1922 filed written pleas on behalf of the Railway. In these

(1) (1923) I. I. L. R. 47 Bom. 785. (2) (1921) 64 I. C. 125.

(3) (1923) I. L. R. 3 Pat. 230.

1925

NANAK CHAND-  
MUKANDI LAL  
v.  
EAST INDIAN  
RAILWAY.

1925  
 NANAK CHAND-  
 MUKANDI LAL  
 v.  
 EAST INDIAN  
 RAILWAY.

pleas no objection was taken to the description of the defendant and it is quite clear that the special attorney for the East Indian Railway considered that the Railway itself was the defendant and not the Agent personally. On the 2nd of June 1922 the names of defendants 1 and 3 were struck out and the case proceeded against defendant No. 2 only. On the 27th of October 1922 arguments were heard and on the 17th of November a fresh issue was added. On the 18th of June 1923 plaintiff's counsel asked for permission to amend the description of defendant No. 2 and the description was amended as follows. 'The Agent, East Indian Railway, Calcutta,' being altered into 'East Indian Railway Administration, through the Agent, Calcutta'. This amendment was made after the expiration of the period of limitation for bringing a suit against the Railway.

The Judge, Small Cause Court, following the case of *Sinehi Ram-Bihari Lal v. Agent, East Indian Railway Co.* (1) has held that the suit is time barred as the East Indian Railway was no party to it until the date on which the amendment above-mentioned was made. That was a decision by a single Judge who remarked as follows:—

“ In law the Company is not a defendant to the suit and is not before the Court as defendant. The frame of the suit can only be amended by substituting the Company as defendant in place of the Agent, and it is a well-recognised principle that, however liberal the Court may be in allowing amendments in the interests of justice, an amendment will not be allowed which would prejudice the rights of the opposite party existing at the date when the proposed amend-

ment is to be made. At this stage the East Indian Railway Company has acquired a right by virtue of the Statute of Limitation and this right should not be prejudiced by any amendment at this stage.”

1925  
 NANAK CHAND-  
 MUKANDI LAL  
 v.  
 EAST INDIAN  
 RAILWAY.

Counsel for the petitioner relies upon the case of *Saraspur Manufacturing Co., Ltd. v. B. B. and C. I. Railway Co.* (1) in which the above decision of the Judge of the Patna High Court was dissented from. That was a case against the B. B. & C. I. Railway Co., to recover damages for loss of goods. The defendant was described in the plaint as follows: “The Agent, B. B. & C. I. Railway Co.” It was held that there was only a misdescription in the title of the railway company and that the plaintiff should in the circumstances be given leave to amend the title by omitting the words ‘the Agent.’ Macleod C.J. in discussing the Patna ruling stated as follows:—

“With all due respect I cannot agree with this reasoning. It seems to me in the interests of justice that if it can be said that there has been a misdescription of a party in the title of a plaint the necessary amendment ought to be allowed, if otherwise the rights of the parties would be prejudiced. If the defendant Company could be considered as having had no notice that these suits had been brought against it by the plaintiffs, then undoubtedly limitation would be considered as running up to the date when the defendant Company had notice of the claims by being made a party to the suits. In my opinion, the fact that the word ‘Agent’ preceded the name of the Railway Company in the description of the defendant amounted merely to misdescription.”

(1) (1923) I. L. R. 47 Bom. 735.

1925  
 NANAK CHAND-  
 MUKANDI LAL  
 v.  
 EAST INDIAN  
 RAILWAY.

The point again came before a Division Bench of the Patna High Court in the case of *East Indian Railway Company v. Ram Lakhan Ram* (1), where the previous decision of the Single Judge in *Sinchi Ram-Bihari Lal v. Agent, East Indian Railway Co.* (2) was referred to and approved and the case of *Saraspur Manufacturing Co., Ltd. v. B. B. & C. I. Railway Co.* (3) was distinguished. The distinction drawn was that in the Bombay case, though the title of the defendant was entered in the plaint as the Agent, B. B. & C. I. Railway Company, Ltd., the prayer was that the defendant Company should pay the amount sued for.

Now in the present case though the final prayer in the plaint was that a decree be passed in favour of the plaintiff against the defendants or such of them as might be found liable, still in paragraph 3 it was distinctly stated that either the East Indian Railway Administration as the booking line or the North-Western Railway Administration as the Railway which delivered the consignment to the plaintiff or both of them are legally responsible as bailee of the goods to compensate the plaintiff for the loss suffered. A reading of the plaint therefore clearly shows that the plaintiff's claim was against the East Indian Railway Administration as a Company and not against the Agent personally. If it was against the Agent at all it was against him as representing the Company. It is also clear by the action of Mr. McReddie, special attorney, East Indian Railway Co., that the latter was substantially on the record, had notice of the claim, and pleaded thereto. Under these circumstances we

(1) (1923) I. L. R. 3 Pat. 230.

(2) (1921) 64 I. C. 125.

(3) (1923) I. L. R. 47 Bom. 785.

are of opinion that the present case is very similar to that of *Saraspur Manufacturing Co., Ltd. v. B. B. & C. I. Railway Co.* (1), and we agree with the decision of the Bombay High Court.

We, therefore, allow the revision and setting aside the order of the Judge, Small Cause Court, remand the case to him for decision on the merits.

C. H. O.

*Revision accepted.*

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**APPELLATE CRIMINAL.**

*Before Justice Sir Henry Scott-Smith and Mr. Justice Zafar Ali.*

THE CROWN—Appellant,

*versus*

DINA—Respondent.

Criminal Appeal No. 72 of 1925.

1925

April 2.

*Indian Penal Code, 1860, section 408—Criminal breach of trust by servant—Actual conversion not necessary to constitute the offence.*

Accused was engaged as a tonga driver on the 22nd July 1924 by S. R. on a monthly salary of Rs. 15 to drive his tonga on hire within the limits of Ludhiana Municipality. He was to bring the tonga back each evening and pay over his earnings. He did not return on the evening of that day and on the following day was pursued and arrested some 36 or 37 miles from Ludhiana driving the tonga rapidly away from Ludhiana. Accused at first stated in his defence that the tonga had never been made over to him by S. R. but then said that a Hindu of Ludhiana had asked him to take the tonga to his shop at Malerkotla; he produced no evidence in defence. Accused was convicted of an offence under section 408, Penal Code, by the trial Magistrate but acquitted

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(1) (1923) I. L. R. 47 Bom. 785.