APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Sen.

SAW HLA PRU

v.

S. S. HALKAR AND ANOTHER.*

1931

July 14.

Advocate's negligence—Requisite skill and prudence—Omission from compromise-petition of client's claim for mesne profits—Belief that mesne profits could be claimed subsequently—Court's decision to the contrary—Limitation Act (IX of 1908, Sch. I, Art. 90—Knowledge of negligent act.

Under the terms of a compromise, drafted by the plaintiff's advocates and embodied in a decree of the Court, the plaintiff was declared entitled to one-third of the joint interest of himself and his wife (both Burmese Buddhists, and now divorced by mutual consent) in the estate of her late father as at the time of the father's death. The plaintiff's advocates omitted from the petition any reference to the plaintiff's claim for mesne profits, as there was some uncertainty as to his exact share therein and the advocates were of opinion that he could recover the mesne profits in a subsequent proceeding. In an administration suit brought by the plaintiff against his wife and others, the trial Court, as well as the appellate Court, held that upon a true construction of the compromise-decree the plaintiff was not entitled to claim any mesne profits. The plaintiff then sued his advocates for damages for negligence. The suit was filed more than three years after the date of the compromise-decree, but within three years from the date of the judgment in the administration suit.

Held, that an advocate in the exercise of his profession is bound to exercise reasonable skill and prudence, but is not expected to be infallible. The construction put by the plaintiff's advocates on the compromise-decree not being so unreasonable that it could be said that no skilled advocate would advise his client in that sense the plaintiff's claim failed.

Held also, that the plaintiff's claim was barred under Article 90 of the Limitation Act. Limitation began to run from the time when the plaintiff came to know of the defendant's negligent act, and not from the time when the plaintiff first realized or concluded that the act was negligent.

The facts of the case are set out in the judgment.

Leach with *Kyaw Zan* for the appellant. The question of limitation was not governed by Article 36, but by Article 90 of the Indian Limitation Act, under which time commenced to run when the

* Civil First Appeal No. 66 of 1931 from the judgment of the Original Side of this Court in Civil Regular No. 141 of 1930.

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agent's negligent act came to be known to the principal. An advocate was an agent within Article 90. The appellant was not aware that the advice he had received from the respondents was erroneous until after he had received independent advice, and the Court of Appeal had decided that under the terms of the compromise he was not entitled to any share of the mesne profits. The suit was filed within three years from the time when the appellant discovered the respondents' negligence. The respondents ought to have known, having regard to the terms of the compromise-petition that the appellant would not be entitled to any share in the mesne profits. The appellant in the ordinary course would have been entitled to mesne profits, and in not warning him beforehand as to the effect of this compromise-petition the respondents had acted negligently.

Burjorjee with *Loo Nee* for the first respondent.

Hay for the second respondent. The act constituting the negligence is the cause of action and time runs under Article 90 from the date when the plaintiff had knowledge of the act, and not from the date when he conceived that that act amounted to negligence. The alleged negligent act was admittedly known to the plaintiff more than three years before the commencement of the action, and the suit is barred.

Counsel was not called upon to argue on the facts of the case.

PAGE, C.J.—In this case the plaintiff seeks to recover damages from two advocates of the High Court upon the ground that in the course of their duty as advocates they were guilty of negligence whereby he has suffered damages. The suit was

dismissed with costs by my brother Das, J. The plaintiff has preferred the present appeal.

In my opinion the suit is misconceived, and must fail both upon the law and the facts. It appears that the plaintiff went through a course of training in law in England, and has held the post of Township Judge and Township Magistrate. He married Ma Wa, whose father, a wealthy Burmese gentleman, died in 1923 leaving an estate valued at some 20 lakhs. The share of Ma Wa in her father's estate amounted to Rs. 4,70,000 and under the customary law of the Burmese Buddhists to which Ma Wa and her husband were subject the plaintiff became entitled to a vested interest in one-third of the share that Ma Wa inherited from her father. It appears, however, that the acquisition of this property by the plaintiff and his wife resulted not in happiness but in discord, and after a number of matrimonial disputes in 1925 the plaintiff brought two suits, No. 265 of 1925 against his wife Ma Wa for restitution of conjugal rights, and No. 266 of 1925 against his wife and her brothers for an injunction to restrain the defendants from interfering with the one-third share which the plaintiff claimed in the property that his wife had inherited from her father. Ma Wa in the same year brought a suit, No. 337 of 1925, against the plaintiff for divorce on the ground of his cruelty. The three suits were heard together, and on the 28th of May 1926 a compromise putting an end to the whole litigation was entered into by the plaintiff and Ma Wa. The compromise-decree was in the following terms:

(1) That the parties have compromised Civil Regular No. 337 of 1925 as follows:

(2) That there be a decree for divorce as by mutual consent between the parties.

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(3) That there be a declaration that Maung Saw Hla Pru (the defendant) is entitled to one-third of the joint interest of the said Maung Saw Hla Pru and Ma Wa in the estate of U Sa Ye and Daw Sein at the time of the said U Sa Ye's death.

The compromise-petition was signed by U Mya Bu and Dr. Ba Maw on behalf of the plaintiff, by Mr. Halkar and U Hla Tun Pru on behalf of the defendant, and also by the plaintiff and his wife Ma Wa personally.

Whether or not the plaintiff would be entitled to succeed in a suit for negligence against Mr. Halkar and U Hla Tun Pru, who had acted for him throughout this litigation, depended upon the construction of the third clause of this compromise-decree. In a subsequent suit, No. 460 of 1926, which was brought by the plaintiff against Ma Wa and others for the administration of the estate of Ma Wa's father, it was held both by the learned trial Judge and also by this Court on appeal that upon a true construction of clause 3 of the compromise-decree the plaintiff was debarred from claiming any mesne profits accruing in respect of the plaintiff's one-third share of the property that Ma Wa had received by way of inheritance from her father. For the purpose of the present suit it must be taken that the construction placed upon clause 3 of the compromise-decree in Civil Regular No. 460 of 1926 was correct. It is not disputed that the plaintiff in the course of conferences with the learned advocates whom he had employed, had expressed his desire to claim mesne profits in respect of his share in the property inherited by Ma Wa, and it must be taken that his right to claim these mesne profits was

excluded by clause 3 of the compromise-decree. It follows, therefore, that if the view taken by the defendants that upon a true construction of clause 3 the plaintiff's right to claim mesne profits was not excluded was a construction so unreasonable that no skilled legal adviser would advise a client in that sense then, no doubt, in a suit which is otherwise maintainable the plaintiff would be entitled to recover damages for negligence against the defendants.

Now, the construction which the defendants were of opinion should be placed upon clause 3 was that it gave the plaintiff a right to a third share of the interest of his wife in the estate of her father as at the time of her father's death, and that it was clear that as from the time of Ma Wa's father's death that third share must be treated as belonging to the plaintiff, he would be entitled to recover, in proceedings filed in that behalf, such mesne profits in respect of the third share as had accrued since that date. In the view that the defendants took it could not be held, having regard to the terms of clause 3, that Ma Wa would be entitled to receive the profits accruing in respect of the plaintiff's one-third share from the time when the share had been allotted to him under the compromise-decree. An advocate of this Court in the exercise of his profession is bound to exercise reasonable skill and prudence, but he is not expected to be infallible, and unless the Court is satisfied that the construction put upon clause 3 by the defendants was not such a construction as could reasonably be placed upon that clause by an advocate exercising reasonable skill and care, the plaintiff's suit for negligence against the defendants must fail. In my opinion it cannot be held that the construction which the defendants put upon the compromise-decree was so unreasonable as to render

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them liable to damages for negligence in a suit filed by the plaintiff in that behalf.

The case, however, does not rest there, because, in my opinion, the plaintiff's suit is also barred by limitation. This suit, in which damages for negligence are claimed by a client against an advocate of this Court, is governed by Article 90 of the First Schedule of the Limitation Act (IX of 1908) which runs as follows :

> " 90. Other suits by principals against agents for negligence or misconduct . . . . 3 years . . . . when the neglect or misconduct becomes known to the plaintiff."

Article 90 is not happily worded, for the law knows nothing of negligence or misconduct in the abstract, and no cause of action can exist, and no suit will lie, that is founded on negligence or misconduct as such. A suit for negligence in Article 90 means a suit in respect of some negligent act or omission, and in the third column where it is prescribed that limitation shall run from the time when the neglect becomes known to the plaintiff, these words mean from the time when the negligent act or omission becomes known to the plaintiff. Whether the act is negligent or not does not depend upon the knowledge of the plaintiff for the act or omission as a matter of fact is negligent or not negligent whether the plaintiff was or was not aware of it.

In my opinion limitation begins to run from the time when the plaintiff came to know of the negligent act, and not from the time when the plaintiff first realized or concluded that the act was negligent. Now, assuming for the purpose of construing Article 90, that the defendants were guilty of negligence in omitting to make any reference

to the plaintiff's claim to mesne profits in clause 3 of the compromise, it is common ground that the plaintiff was fully aware of the negligent conduct of the defendants on the 28th May 1926 when the compromise was entered into. The advocates concerned in this litigation on both sides were uncertain whether the plaintiff was entitled to one-half or one-third of the mesne profits accruing in respect of the property inherited by his wife. It depended upon a question of Buddhist law which was not free from difficulty. It was considered, therefore, advisable not to postpone the settlement of this litigation by delaying the compromise until it had been determined whether the plaintiff was entitled to a half or third share in the mesne profits, and although it was common ground that the plaintiff normally would be entitled to a one-third interest in the property inherited by his wife after their marriage, it must be borne in mind that if Ma Wa's suit for divorce had succeeded the plaintiff would not have obtained any share or interest in her property. No doubt, the learned advocates appearing on behalf of the plaintiff and the defendant respectively bore in mind all the circumstances obtaining at the time when the compromise was effected, and the advocates who represented the plaintiff were most anxious that no mention should be made of the claim to mesne profits in the compromise-decree. The plaintiff, however, desired that his right to mesne profits should be set out specifically in the compromise-decree. He was present at the time when the compromise was effected, and in the course of his evidence he stated that it was Mr. Halkar, one of the defendants, who had urged the second defendant, who was the junior advocate appearing for the plaintiff, to insert in clause 3 the

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words "at the time of the said U Sa Ye's death". He stated that when Mr Halkar "made this suggestion, I protested at once to Halkar not to add these words". Notwithstanding his protest, however, it was pointed out by Mr. Halkar that in his opinion the terms in which clause 3 was couched did not prevent the plaintiff from recovering such a share of the mesne profits as ultimately it would be ascertained that he was entitled to receive, and the plaintiff then consented to the omission of any reference to the mesne profits. In his evidence the plaintiff added, "according to me there was no compromise as regards the mesne profits. We left that question as an open question". It is quite obvious that on the 28th of May 1926, when the compromise was effected, the plaintiff was fully aware of the action of his advisers in deliberately leaving out of the compromise any reference to his claim for mesne profits. I am of opinion that the finding of fact to that effect by the learned trial Judge concludes the question of limitation against the plaintiff; for, in my opinion, if the plaintiff knew that his advisers were deliberately leaving out of the compromise-decree any reference to his claim for mesne profits, and their conduct in so doing in fact amounted to negligence, on the 28th of May 1926 the plaintiff became aware of the negligent conduct of the defendants, and inasmuch as the present suit was not filed until the 14th of March 1930, that is to say more than three years after the date on which the plaintiff first knew of the negligence of the defendants, by reason of Article 90 of the Limitation Act, the plaintiff's suit is barred by limitation.

The learned advocate on behalf of the plaintiff, however, contended that upon a true construction of Article 90 limitation does not commence to run until

the plaintiff first comes to know that the act was a negligent act. Such a construction, to my mind, would result in defeating the very object for which Article 90 was enacted. For instance, suppose in the present case that no suit had been brought after the compromise-decree had been passed, and for many years the parties had assumed that the compromise was effected without negligence on the part of the plaintiff's advocates, notwithstanding the fact that no reference therein had been made to the plaintiff's claim to mesne profits, and then after ten years the plaintiff, who all along had been aware of the circumstances in which the compromise had been effected, came to the conclusion that the action of the defendants in omitting any reference in the compromise-decree to his share of the mesne profits was negligent conduct on their part, could it be contended that limitation would begin to run only from the time when he came to the conclusion that the defendants' action was negligent? Or again, suppose Chari, J., had held that the terms of clause 3 of the compromise-decree debarred the plaintiff from obtaining mesne profits, it might reasonably be held that the plaintiff, at any rate after Chari, J.'s judgment, must have known that the defendants were guilty of negligence; but suppose on appeal that the Court had come to the conclusion that there had been no negligence on the defendants' part because the failure to refer to mesne profits in clause 3 did not preclude the plaintiff from recovering these mesne profits in a subsequent suit; what would be the position of the plaintiff? Would he then be held to know of the defendants' neglect, or must he be taken to have forgotten the knowledge which he acquired when Chari, J., passed his decree? Or again, suppose the case was taken to the Privy

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Council, and the Privy Council restored the decree of Chari, J.; when could it be said that the plaintiff came to know that the defendants' act in omitting any reference to the mesne profits in the compromise-decree was a negligent act? According to the plaintiff's testimony in the present suit, he was not satisfied even after the judgment of Chari, J., that his right to mesne profits had been excluded from the compromise-decree, and that he concluded that the act was a negligent act only after his application to the High Court for a review of the judgment of the High Court had been refused. A mere statement of the facts of the present case, and the difficulties that would arise if the construction for which the learned advocate for the appellant contends should be placed upon Article 90 were accepted, are sufficient, in my opinion, to show that his contention is unsound and untenable.

For these reasons, in my opinion, both upon the law and upon the facts the appeal fails, and is dismissed with costs.

SEN, J.—I agree.