

They are therefore of opinion that the appeal fails and should be dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitor for appellants, *T. W. Wilson & Co.*

Solicitor for respondents, *Ranken, Ford & Charters.*

*A. M. T.*

1928

CHUNNA MAL-  
RAM NATH

v.

MOOL CHAND-  
RAM BHAGAT

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**APPELLATE CIVIL.**

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*Before Mr. Justice Tek Chand and Mr. Justice Bhide.*

**EAST INDIAN RAILWAY CO., CALCUTTA**

(DEFENDANT) Appellant

*versus*

**RAHIM ULLAH-ELAHI BAKHSI (PLAINTIFFS)**

Respondents.

1928

*Feb. 13.*

**Civil Appeal No. 756 of 1925.**

*Civil Procedure Code, Act V of 1908, section 80—Indian Limitation Act, IX of 1908, section 15 (2)—Notice given to defendant under section 80 of the Code of Civil Procedure—whether plaintiff entitled to deduct that period from period of limitation in the suit—Single suit against several defendants—plaintiff entitled to deduct certain period from limitation against one—his right to deduct the same against others.*

Goods were delivered to Eastern Bengal State Railway on the 11th of August, 1920, for being carried to Katni on the East Indian Railway *en route* to Sabzimandi (near Delhi). Two days later the wagon containing the consignment arrived at a junction station of E. B. S. Railway, and four days later it started on E. I. Railway for Katni, reaching there a month later. The next day it was rebooked from that place to Sabzimandi (on the E. I. R.) and arrived there on 2nd of October 1920 in a rotten condition and the consignees (plaintiffs) refused to take delivery. The usual notices followed, including a notice under section 80 of the Code of Civil Procedure given by the plaintiffs to the Secretary of State for India in connection with the liability of

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State Railways. The present suit was instituted against both the railways on 1st of October, 1921. It was contended on behalf of E. I. Railway that the suit was barred by time and that the E. B. S. Railway was not a necessary party and the plaintiffs could not take advantage of the additional period of two months requisite for a notice to the Secretary of State under section 80 of the Civil Procedure Code.

*Held*, that the suit was clearly within time as it was instituted within 14 months of the despatch of the goods and as one of the defendants was a State Railway the plaintiffs were, under section 15 (2) of the Limitation Act, entitled to deduct the period of two months for notice under section 80 of the Civil Procedure Code.

That it was necessary for the plaintiffs to implead both the railways, as the E. B. S. Railway was the contracting party and that the plaintiffs could not at the time of the institution of the suit be sure where the loss had occurred and which of the defendants was really responsible for it.

*Held*, it is settled law that in a single suit properly brought against several defendants, if the plaintiff is entitled to deduct a certain period from the period of limitation in respect of one defendant, he is also entitled to the same period of limitation as against the other defendant, *vide B. N. W. Railway Co. v. Ramsarup Lal* (1), and *East Indian Railway Co., Ltd. v. Kedarnath Seth* (2).

*First appeal from the decree of Bhagat Jagan Nath, Senior Subordinate Judge, Delhi, dated the 16th December 1924, directing that the defendant No. 2, The East Indian Railway, do pay to the plaintiffs the sum of Rs. 6,000, etc.*

NAWAL KISHORE for MOTI SAGAR and BISHAN NARAIN, for Appellant.

KISHAN DAYAL AND BISHAN NARAIN, for Respondents.

#### JUDGMENT.

TEK CHAND J

TEK CHAND J.—The suit, which has given rise to this appeal, was instituted on the 1st of October, 1921,

(1) 1922, A. I. R. (Pat.) 549.

(2) 1927, A. I. R. (Pat.) 344.

by the firm Rahim Ullah-Elahi Bakhsh, fruit merchants, Sabzimandi, Delhi, against (1) the Secretary of State for India in Council as owning the Eastern Bengal State Railway and (2) the East Indian Railway Company, Calcutta, claiming the sum of Rs. 6,000, as damages for loss caused to the plaintiffs by "careless handling and detaining for an undue length of time" a consignment of 300 maunds of green cocoanuts despatched on the 11th of August, 1920, from Akra Railway Station on the E. B. S. Railway to Katni and thence rebooked to Sabzimandi (on the East Indian Railway) near Delhi. The cocoanuts admittedly arrived at Sabzimandi on the 2nd of October, 1920, in a rotten condition and the consignees (plaintiffs) refused to take delivery.

The defendants resisted the suit on various grounds, pleading *inter alia* that the suit was barred by time and that the consignment having been booked under Risk Notes A and B, they were protected from liability. The plaintiffs in their replication did not admit the execution of the Risk Notes and traversed the other pleas raised by the defendants.

The Subordinate Judge decreed the claim in full against the East Indian Railway, holding that the execution of the Risk Notes had not been proved, and that the loss resulted from the negligence of this defendant. He found that the E. B. S. Railway, being the contracting party, was technically liable, but he dismissed the suit against it, as the goods had left its jurisdiction within four days.

The East Indian Railway has appealed and the case has been fully and ably argued before us by Mr. Nawal Kishore for the appellant and Mr. Kishan Dayal for the respondents.

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TEK CHAND J.

The first contention raised before us is that the suit is barred by time, being governed by Article 30 and not Article 31 as held by the lower Court. It has also been argued that the E. B. S. Railway was not a necessary party, and the plaintiffs cannot take advantage of the additional period of two months requisite for a notice to the Secretary of State under section 80 of the Civil Procedure Code. There is no controversy now as to the facts bearing on the question of limitation. It is admitted by both counsel that the goods were delivered to the E. B. S. Railway at Akra on the 11th of August, 1920, for being carried to Katni on the East Indian Railway. On the 13th of August the wagon containing the consignment arrived at Naihati Junction and on the 15th of August, 1920, it started on the East Indian Railway for Katni, reaching there on the 15th of September, 1920. The next day it was rebooked from Katni to Sabzimandi in accordance with the telegraphic instructions sent by the plaintiffs beforehand. The wagon reached Delhi Junction on the East Indian Railway on the 29th of September and as it was found in a damaged condition, the goods were transhipped into another wagon which arrived at Sabzimandi on the 2nd of October, 1920. It is admitted that the cocoanuts were in a rotten condition and the plaintiffs refused to take delivery. The usual notices followed and the suit was instituted against both the railways on the 1st of October 1921.

On these facts, I am of opinion that the suit is clearly within time. It was instituted within 14 months of the despatch of the goods and as one of the defendants was a State Railway the plaintiffs were under section 15 (2) of the Limitation Act entitled to deduct the period of two months required for notice

to the Secretary of State for India in Council under section 80 of the Civil Procedure Code. Mr. Nawal Kishore contends that the E. B. S. Railway was not a necessary party as the consignment had left the jurisdiction of the E. B. S. Railway within four days of its despatch and that the telegram (Ex. D. 5) sent by the plaintiffs to the East Indian Railway on the 15th of September, 1920, indicates that the plaintiffs knew that the loss had occurred on the line of the latter railway. In my opinion, this contention is devoid of all force. In view of the fact that the E. B. S. Railway was the contracting party and that the plaintiffs could not at the time of the institution of the suit be sure as to where the loss had occurred and which of the defendants was really responsible for it, it was necessary for them to implead both the railways. The circumstance that ultimately the Court found that the E. B. S. Railway was not guilty of any undue delay or negligence in carrying the goods or that the loss occurred when the goods were in the possession of the East Indian Railway, cannot deprive the plaintiffs of the benefit of section 15 (2) of the Limitation Act. It is settled law that in a single suit, properly brought against several defendants, if the plaintiff is entitled to deduct a certain period from the period of limitation in respect of one defendant, he is also entitled to the same period of limitation as against the other defendants. If authority were required for this proposition it will be found in *B. N. W. Railway Co., v. Ramsarup Lal* (1) and *East Indian Railway Co., Ltd. v. Kedarnath Seth* (2). In this view of the case it is not necessary to decide whether Article 30 or 31 governs the suit as brought. I hold that the suit is not barred by limitation.

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(2) 1927, A. I. R. (Pat.) 344.

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TEK CHAND J. B.

The next question to be decided is whether the goods were booked under Risk Notes A and B and if so, whether the Risk Notes covered the entire journey or only the portion between Akra and Katni. The appellant relies upon Exs. D. 1 and D. 2 which are respectively Risk Notes in the approved Forms A and B, purporting to have been signed by one Abdul Ghaffar Khan, who had delivered the goods to the station master at Akra for despatch to Katni. Abdul Ghaffar Khan was admittedly the agent of the plaintiffs and if the signatures are proved to be his, the plaintiffs are clearly bound by the Risk Notes. *Ardeshir Bhicaji v. The Agent, G. I. P. Railway Co.* (1).

The plaintiffs, however, deny that the signatures on Exs. D. 1 and D. 2 are those of Abdul Ghaffar Khan and the lower Court has found in their favour on this point. Mr. Nawal Kishore has addressed us at length on the evidence but after giving full consideration to his arguments I am of opinion that the finding of the lower Court must be sustained. Abdul Ghaffar Khan, the person who is alleged to have signed the Risk Notes, is dead and the appellant in order to prove that the Risk Notes in question were signed by him, has relied on the testimony of Narendra Nath Bannerjee, station master, Akra, who booked the goods. He gave evidence  $2\frac{3}{4}$  years after the alleged execution of the Risk Notes and cannot be expected to remember who had actually signed them. The lower Court has given good reasons for rejecting his evidence and I do not think it necessary to recapitulate them. The other witness Abdul Wahid admittedly was not present when the Risk Notes were signed and his evidence is of no assistance in coming to a deci-

sion on this point. The plaintiffs have, on the other hand, produced three persons Fakir Muhammad, Abdul Ghani and Ahmad Hussain, who were acquainted with the handwriting of Abdul Ghaffar Khan and who stated that the alleged signatures are not his. I have examined the signatures on the Risk Notes and also the admitted signatures of Abdul Ghaffar Khan and agree with the lower Court in holding that they appear to be in a different handwriting.

The appellant's counsel next relied upon the document, Ex. D. 3, which is the forwarding note of the consignment in question. This document has not, however, been proved. The proper person to prove it was Narendra Nath Bannerjee, the station master of Akra, and though this document was sent to the local Commissioner at Calcutta, who examined that witness, no question was put to him in respect of it. After fully considering the evidence, I agree with the lower Court in holding that the execution of the Risk Notes by Abdul Ghaffar Khan has not been proved.

This finding is sufficient to dispose of the appeal, but I may point out, however, that even if the Risk Notes D. 1 and D. 2 had been found to be duly executed by the plaintiffs, the appeal would still have failed. The Risk Notes covered the journey between Akra and Katni and could have protected the Railway only if the loss had occurred between these two stations. The learned counsel for the appellant has admitted that there is no proof that any Risk Note was executed by or on behalf of the plaintiffs when the goods were rebooked from Katni to Sabzimandi. He has also conceded that there is no evidence on the record to show that the loss occurred between the two stations covered by the Risk Notes in question.

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TEK CHAND J.

In my opinion, the suit has been rightly decreed and I would dismiss the appeal with costs.

BHIDE J.

BHIDE J.—I concur.

A. N. C.

*Appeal dismissed.*

### APPELLATE CIVIL.

*Before Mr. Justice Tek Chand and Mr. Justice Bhide.*

ROOP CHAND (PLAINTIFF) Appellant

*versus*

SARDAR KHAN AND OTHERS (DEFENDANTS)

Respondents.

1928

*Feb. 15.*

Civil Appeal No. 31 of 1924.

*Civil Procedure Code, Act V of 1908, Order XXII, Rule 4—Abatement—suit against several defendants including a dead person—order dismissing the suit—whether amounts to a decree—Dismissal of the suit—Propriety of—proper order in such a case—abatement—question of—whether arises—where defendant dead at the time of institution of suit.*

In a suit for a declaration that he was not a *malik-gabza* but was entitled to a share in the *shamilat deh*, the plaintiff impleaded 1,288 persons as defendants. On 4th December, 1923, it was pointed out to the Court that defendant No. 25 had died, about sixteen months before the institution of the suit. The Court thereupon held that the "suit should abate" and later, on 6th December, the Court passed an order stating that the word "abate" had been incorrectly used in the order of the 4th December, 1923, in lieu of "dismissal" and that what it had intended to do was to "dismiss the suit", the usual decree sheet being directed to be prepared accordingly. In appeal against that decree a preliminary objection was raised that the appeal was incompetent as the order of 4th December did not amount to a decree and that of the 6th December did not really decide any matter in controversy between the parties.

*Held*, that the order passed by the Court on the 4th December, as explained by the order of the 6th December,