## APPELLATE CIVIL.

*Before Mr. Justice Dunkley.*

# M.S. CHETTIAR FIRM
*v.*
# S. E. BHOLAT.*

1934
*July 12.*

*Limitation—Seizure of movable property—Damages for wrongful seizure—Time taken in getting seizure removed—Continuing wrong—Suit barred on face of plaint—Waiver of plea of limitation—Limitation Act (IX of 1908), ss. 3, 14, 23, Sch. I, Art. 29.*

Article 29 of the Limitation Act applies to all cases where specific movable property is actually seized. The starting point of limitation is the date of the actual seizure, and the time expended in obtaining a declaration that the seizure is illegal either by way of appeal or in some other way cannot be deducted.

Such wrongful seizure is not a continuing wrong within s. 23 of the Limitation Act.

*Mullapandi* v. *Seethayya*, I.L.R. 50 Mad. 417 ; *Pannaji* v. *Senaji*, I.L.R. 53 Mad. 621—*followed.*

When on the face of the plaint it appears that the suit is barred by limitation, the Court is bound to consider the question and to come to a decision thereon, whether it is raised by the defendant or not. But where the question depends upon the determination of certain facts or the necessary facts are not proved or put in issue by the defendant, or he abandons the plea of limitation, the Court cannot decide it, and the defendant is precluded from raising it on appeal.

*Virayya* v. *Adenna*, 58 M.L.J. 245—*distinguished.*

On the 16th May 1929 the appellant filed an objection, under s. 4 of the Provincial Insolvency Act, to the attachment and seizure of certain goods which the respondent had caused to be attached as the property of his debtor whom he sought to adjudicate insolvent. Several creditors joined the appellant in objecting to the debtor's adjudication. On the 10th February 1931 the District Judge allowed the applications of the appellant and these creditors. The respondent appealed to the High Court against the dismissal of the insolvency petition, but the High Court dismissed the appeal on the 11th January 1932. The appellant filed a suit against the respondent on the 27th April 1932 claiming damages for unlawful attachment and seizure of his property. For the purpose of limitation the appellant claimed to deduct the period between the 16th May 1929 and the 11th January 1932.

*Held*, that the appellant could not do so, and that his suit was barred by limitation.

*P. K. Basu* for the appellant.

*Rafi* (with him *P. B. Sen*) for the respondent.

* Special Civil Second Appeal No. 173 of 1933 from the judgment of the District Court of Myingyan in Civil Appeal No. 22 of 1933.

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DUNKLEY, J.—In my opinion this appeal fails on the question of limitation, and therefore it is unnecessary to decide the other points which have been raised in the prosecution of the appeal.

The defendant-respondent, S. E. Bholat, filed a petition in the District Court of Myingyan on the 24th April 1929 for the adjudication as insolvent of his debtor, Ayakalai Nadar. On the 10th May 1929 he made an application, under section 21 (2) of the Provincial Insolvency Act, for the attachment by actual seizure of goods lying in his debtor's shop at Taungtha. This application was allowed and a warrant of attachment was issued, and it was executed and the goods seized on the same day.

On the 16th May 1929 the present appellant, M.S. Poonasawmy Pillai, made an objection, under section 4 of the Provincial Insolvency Act, to this attachment and seizure, alleging that the property seized had been sold to him sometime previously and was in his possession as his own property at the time of the seizure. At the same time he and some other creditors of the debtor, Ayakalai Nadar, joined with the latter in objecting to the latter's adjudication. The question of the adjudication of Ayakalai Nadar and the appellant's objection to the attachment and seizure of these goods were heard and decided together, and after a prolonged hearing, by a judgment dated the 10th February 1931, the learned District Judge rejected the respondent's petition to adjudicate Ayakalai Nadar, and also held that the property seized was the property of the appellant and ordered the removal of the attachment.

On the 8th May 1931 Civil Miscellaneous Appeal No. 70 of 1931 of this Court was instituted by the respondent. It was against the dismissal of his petition to adjudicate Ayakalai Nadar. The

present appellant was joined as a respondent in this appeal because he had objected to the adjudication. There was no appeal against the order of the learned District Judge holding that the property attached and seized was the property of the appellant and removing the attachment thereon. On the 11th January 1932 this appeal was dismissed by a Bench of this Court.

On the 27th April 1932 the appellant instituted Suit No. 9 of 1932 of the Subdivisional Court of Myingyan against the respondent, claiming damages for the unlawful attachment and seizure of these properties, and it is out of this suit that the present appeal arises. The appellant was partially successful before the Subdivisional Court, but on appeal to the District Court his suit was dismissed.

All the above dates, so far as they are relevant to the question of limitation, are set out in the appellant's plaint in this suit, and in paragraph 9 thereof, in order to prevent the operation of the provisions of the Limitation Act, he called in aid the proceedings, subsequent to the attachment and seizure of the goods, in the District Court and in the High Court, and set up that he was entitled to deduct the time spent in prosecuting these proceedings.

On behalf of the appellant a preliminary objection has been raised that the question of limitation could not be considered by the District Court on appeal, and also cannot be considered by this Court on second appeal, because the point was abandoned by the respondent in the original Court. No doubt, it is stated in the judgment of the learned Subdivisional Judge that the question of limitation in the suit before him was abandoned by the defendant, that is, the present respondent, but actually it was

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mentioned by the respondent in his written statement, and the question is included by implication in the first issue framed in the suit, which is "Is the suit maintainable?". But, however that may be, in my opinion the provisions of section 3 of the Limitation Act are applicable to the present case, and therefore it was incumbent upon the Sub-divisional Court, of its own motion, to consider the question of limitation, whether it was abandoned by the defendant or not. Consequently, even though the respondent did not argue this point before the original Court, it was open to him to raise it on appeal.

As authority for the proposition that the point could not be raised on appeal because it had been abandoned in the original Court, learned counsel for the appellant has cited the case of *Muddana Virayya* v. *Muddana Adenna* (1), but this case is clearly distinguishable from the present case, for the question of limitation there depended upon the determination of certain issues of fact and the allegations of fact necessary to show that the case was out of time were not proved by the defendant; in the present case, on the contrary, all the relevant dates necessary to determine the question of limitation are set out in the pleadings. When on the face of the plaint it appears that the suit is barred by limitation, the Court is bound to consider the question of limitation and to come to a decision thereon, whether it is raised by the defendant or not; but where it may appear, on the evidence adduced in the case on either side, that the suit is out of time, if the plea of limitation is not taken and the facts necessary for the determination of the

(1) 58 M.L.J. 245.

question are not pleaded and consequently are not in issue, in such a case the Court is not in a position to see that the matter is out of time, and, therefore, if the plea is not raised or is abandoned by the defendant, the Court cannot act upon it, nor can it be taken up on appeal.

It is admitted that the Article of the Limitation Act relevant to the present suit is Article 29 of the First Schedule, which is as follows:

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| For compensation for wrongful seizure of moveable property under legal process. | One year. | The date of seizure. |

One argument which has been raised on behalf of the appellant is that the attachment of property is a continuing wrong and that therefore time does not begin to run until the attachment ceases, but it seems to me that there is no force at all in this argument, for the date from which time begins to run is not the date of the attachment, but the date of the seizure. In this case the date of the seizure was the 10th May 1929, and the suit was not instituted until the 24th April 1932, and, therefore, the suit of the plaintiff-appellant was, on the face of it, out of time by a period of nearly two years.

However, on behalf of the appellant it is urged that he is entitled to deduct the period from the date of his objection to the attachment, that is, the 16th May 1929, to the date of the final order of this Court in Civil Miscellaneous Appeal No. 70 of 1931, that is, the 11th January 1932. It is admitted that the provisions of section 14 of the Limitation Act, which is the section of the Limitation Act under which the time spent in the prosecution of

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another proceeding can be excluded, are not applicable to the facts of the present case, but it is urged that when the matter out of which the plaintiff's cause of action arises is the subject-matter of any proceeding before the Courts, then limitation is suspended during the pendency of that proceeding.

The cases on which learned counsel for the appellant relies as authority for this proposition are: *Mussumat Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia and others* (1), *Mussamat Basso Kuar and others* v. *Lala Dhum Singh* (2), *Lakhan Chunder Sen* v. *Madhusudan Sen* (3), *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (4), and *Ma Hnit* v. *Fatima Bibi and another* (5). In my opinion, however, the facts of all these cases are plainly distinguishable from those of the present case, and they are no authority for holding that a cause of action is suspended while the plaintiff is seeking to prove in other proceedings the facts upon which his cause of action depends, and that is the argument which has been advanced on behalf of the appellant in this case.

In *Mullapandi Satyanarayana Brahmam and two others* v. *Maganti Seethayya* (6) it has been held that no equitable grounds for suspension of a cause of action can be added to the provisions of the Limitation Act, and in *Pannaji Devichand Firm* v. *The Firm of Senaji Kapurchand at Bellary* (7) it has been held that Article 29 of the Limitation Act applies to all cases where specific movable property is actually seized, and that the starting point of limitation is the date of actual seizure and the time taken in getting the seizure declared illegal either on

(1) (1868) 12 Moo. I.A. 244.
(2) (1888) 15 I.A. 211.
(3) (1907) I.L.R. 35 Cal. 209.
(4) (1916) I.L.R. 43 Cal. 660.
(5) (1927) I.L.R. 5 Ran. 283.
(6) (1926) I.L.R. 50 Mad. 417.
(7) (1930) I.L.R. 53 Mad. 621.

appeal or by other means cannot be deducted. This last authority definitely concludes the case against the appellant.

But, whatever view may be taken as to the suspension on equitable grounds of the appellant's cause of action, it appears to me to be clear that such period of suspension must in any event have ended on the 10th February 1931, when the learned District Judge passed his order declaring the appellant to be the owner of the property seized and ordering the removal of the attachment. In *Juscurn Boid* v. *Pirthichand Lal Choudhury* (1) their Lordships of the Privy Council observed that under Indian law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal. The case of *Martand Mahadev Dunakhe* v. *Dhondo Moreshwar Dunakhe and another* (2) is to the same effect. Moreover, the correctness of the learned District Judge's decision as regards the removal of the attachment of the appellant's property was not raised in Civil Miscellaneous Appeal No. 70 of 1931, and for this reason also the time spent in prosecuting this appeal cannot be deducted. Consequently, even allowing that the argument on behalf of the appellant, regarding the suspension of his cause of action, is wholly correct, the appellant's suit was out of time, for, at the latest, time began to run from the 10th February 1931, and his suit was not instituted until the 27th April 1932.

This appeal, therefore, fails, and is dismissed with costs, advocate's fee in this Court ten gold mohurs.

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(1) (1918) I.L.R. 46 Cal. 670 at p. 679. (2) (1920) I.L.R. 45 Bom. 582.