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BANK OF CHETTINAD, LTD. v. MAUNG AYE.

SPARGO, J

prior mortgage in favour of the S.R.M.M.R.M. Firm and the Bank of Chettinad is entitled to rely on the prior mortgage to that firm to resist the plaintiffs' claim.

I agree that the judgment and decree of the lower Court must be set aside and the plaintiffs-respondents' suit must be dismissed with costs.

SPECIAL BENCH.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Ba U, and Mr. Justice Dunkley.

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May 9.

S.A.A. ANAMALAI CHETTYAR
v.
A FIRM OF ADVOCATES.*

Negligent act or omission of advocate—Knowledge of principal of the act or omission—Knowledge that act or omission is negligent—Cause of action on negligence constituting breach of contract—Limitation Act, s. 24 art. 90, Sch. 1.

Article 90 of the Limitation Act does not say that time begins to run when the cause of action for neglect or misconduct became known to the plaintiff, but when the neglect or misconduct became known. Once a plaintiff is acquainted with what has happened he cannot say that time does not run against him until he chooses to take the view that the omission of which he is aware is actionable neglect or that the act of which he is aware amounts to actionable misconduct.

Saw Hla Pru v. *Halkar*, I.L.R. 9 Ran. 575, approved and followed.

S. 24 of the Limitation Act does not apply in the case of negligence which constitutes a breach of contract. In such a case the cause of action ensues when the contract is broken and not when specific injury results therefrom.

Gany v. *Leong Chye*, C.R. Suit No. 2 of 1935, H.C. Ran., referred to.

Paget for the appellant. The suit was filed on the 24th July 1936 within three years from the date of the appellate Court's judgment (26th July 1933)

* Civil 1st Appeal No. 5 of 1938 from the judgment of this Court on the Original Side in C.R. Suit No. 251 of 1936

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but more than three years from the date the appeal was filed (2nd November 1932). Negligence came to be known when the appellate Court gave its judgment. A client asks a solicitor to invest his money in some property and the solicitor tells his client that he has examined the title and it was good. If the title is subsequently discovered to be bad, it is from the date of discovery that time begins to run.

[ROBERTS, C.J. In the case of the solicitor his action was known to himself alone, but here the appeal was filed and the fact was known to all concerned.]

Negligence is known only when a client has reason to know. Neglect is omission to do what ought to have been done. The client does not know that there has been neglect. A motor car is sold in which a defect is discovered later ; time runs only from the date of discovery.

[DUNKLEY, J. This is not a case of sale ; but of principal and agent.]

In art. 91 of Act IX of 1871 the words were "when the neglect or misconduct occurs." The Legislature has deliberately altered the law. See also art. 91 of the present Act. *Saw Hla Pru* v. *Halkar* (1) was based on English statutes and does not correctly represent the law in Burma. When it is first suggested to the plaintiff that there is negligence time begins to run against him. As soon as a Court decides that an agent has committed a negligent act time runs irrespective of what the appellate Court may decide.

(1) I.L.R. 9 Ran. 575.

The client must realize that there is a breach of duty before time can run against him. See *Ardikappa Chetty* v. *K.A.R. Kadappa* (1). If a client does not know that his advocate is advising wrongly, time does not run till he has knowledge that the advice is wrong.

Hay for the 1st and 2nd respondents. A man is presumed to know the law, and the appellant seeks to avoid it in the case of art. 90 of the Limitation Act. Is the Court to inquire as to when his belief or knowledge started ? If the act or acts constituting negligence are known, the article applies. In *Kishori Lal* v. *Janhari* (2) the Court rightly held that a principal could sue his agent for secret profits made within three years from the date the principal came to know about them. But this does not mean that the principal could sue within three years from the time he came to know that the law did not allow an agent to make secret profits. In the present case the date of occurrence of the act is the date from which time runs.

Doctor for the 3rd respondent. Neglect is omission, and misconduct involves a positive act ; these are the two limits of negligence. The starting point of limitation is when the act becomes known *i.e.* when the act comes to the knowledge of the party. What amounts to negligence is determined by the Court and not by the parties. The Court would ask what the facts are from which negligence can be inferred. The appellant knew on the filing of the appeal that it was filed against one party only, and not against two. See paragraphs 5 and 7 of his plaint. That is the starting point of limitation. Art. 90 contemplates only the knowledge of materials or facts which constitute negligence.

(1) 9 B.L.J. 130. (2) 25 A.L.J. 448.

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After the above arguments the Court raised the question whether s. 24 of the Limitation Act had any application to the case. Counsel on both sides agreed in stating that the section had no application. There were three classes of tort ; (1) where damage is the gist of the action, *e.g.* in case of slander, (2) the act complained of is lawful, but it occasions damage when only action arises, *e.g.* mining cases, (3) tort founded on contract. In the present case there is alleged a breach of duty, the breach being want of care. In such a case the cause of action is complete in itself.

Reference was made to *Howell* v. *Young* (1) ; *Smith* v. *Fox* (2) ; *Minus* v. *Davey* (3) ; *Darley Main Colliery Co.* v. *Mitchell* (4).

ROBERTS, C.J.—This appeal arises out of a suit brought by the appellant against a firm of advocates for neglect or misconduct in and about their duties as professional advisers to the appellant. The appellant had brought an action against the principals and agent of a Chettyar firm on a negotiable instrument and had obtained a judgment and decree against the agent only : being desirous of securing a decree against the principals he instructed the respondents to file an appeal, and the appeal was then filed by them—and filed against the principals only—on the 2nd November, 1932.

This appeal was dismissed since it was held that the appellant had elected to stand by the decree against the agent. The appellant accordingly sued the respondents for negligence and such a suit would be barred by Article 90 of the First Schedule to the Limitation Act (IX of 1908) if the neglect or

(1) 5 B. & C. 259.
(2) 17 L.J. Ch. 171.
(3) I.L.R. 11 Ran. 47.
(4) 11 A.C. 127.

misconduct complained of became known to the plaintiff before the 24th July, 1933.*

The act of neglect or misconduct relied on was the omission to join the agent in filing the appeal on the 2nd November, 1932, but the appellant says in effect,

"We knew of this at the time, but we only knew it was neglect or misconduct and actionable as such when we lost our appeal on the 26th July, 1933 : we brought our suit two years eleven months and twenty-nine days later and we were therefore in time."

It is conceded that the point for determination is covered by the Bench decision of this Court in *Saw Hla Pru* v. *S. S. Halkar* (1) : but Mr. Paget asks us to say that that case was wrongly decided. He contends that it is not merely that facts which intrinsically amount to the neglect of his agent come to the knowledge of the principal which starts time running against him ; time cannot run, he urges, until the legal consequences of those facts have been ascertained.

Now, the starting point of limitation is the knowledge that something has been omitted or done. This knowledge must be the knowledge of all the facts ; if the plaintiff is lulled into a sense of security by being led to believe that something was done which was not in fact done, or that something was not done which was in fact done, clearly time cannot run against him. But, in my judgment, once he knows the true facts, it is for him to judge of their legal consequences, and he cannot afterwards say that he did not know what those legal consequences might be.

* In their written statement the defendants admitted that the appeal was dismissed but they denied that it was rightly dismissed. They denied any want of skill or diligence on their part. This question was not gone into, as both the trial Court and the appellate Court in the present case dismissed it on the preliminary ground of limitation—*Ed.*

(1) (1931) I.L.R. 9 Ran. 575.

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ROBERTS, C.J.

Article 90 does not say that time begins to run when the cause of action for neglect or misconduct became known to the plaintiff, but when the neglect or misconduct became known. I do not think that once a plaintiff is acquainted with what has happened he can sit still and say that time does not run against him until he chooses to take the view that the omission of which he is aware is actionable neglect or that the act of which he is aware amounts to actionable misconduct.

It has been conceded that section 24 of the Limitation Act does not apply to the present case ; for in the case of negligence which constitutes a breach of contract, the cause of action ensues when the contract is broken and not when specific injury results therefrom.

Accordingly, in my opinion, this appeal must be dismissed. One set of costs for all three respondents, advocates' fees ten gold mohurs.

BA U, J.—I agree with my Lord the Chief Justice. As I explained in *V.M. Gany* v. *Leong Chye* (1), section 24 applies only to suits based on tort. As the present suit arises out of negligence based on a contract between a principal and an agent, the appropriate article is, in my opinion, Article 90 of the First Schedule to the Limitation Act.

DUNKLEY, J.—Counsel for the appellant argues that " neglect " means an omission to do something which ought to be done, and that time does not begin to run, under Article 90, until both the omission to do the act and the fact that it ought to have been done are known to the plaintiff. This is clearly an untenable proposition. The fact that the act ought to have been done is intrinsic in the act itself, and ignorance of the legal consequences of the omission cannot extend the

(1) Civ. Reg. No. 2 of 1935, H.C. Ran.

time. I consider that the reasoning in *Saw Hla Pru* v. *S. S. Halkar* (1) is impeccable. Any other construction of the Article would involve insuperable difficulties in applying it. I, therefore, agree with my Lord the Chief Justice that the appeal fails and must be dismissed.

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DUNKLEY, J.

APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Braund.

M.M.K. KUTTAYAN CHETTYAR AND ANOTHER v. V.E.R.M.K. KRISHNAN CHETTYAR.*

1938

June 3.

Execution of decree of Indian State in British Burma—Notification No. 4395 1/A, dated 8th December 1904 of the Government of India—Amendment of s. 44, Civil Procedure Code—Continuance of the notification—Adaptation of Laws Order, paragraph 9—Government of Burma Act, ss. 148, 149.

The law in force in Burma immediately before the commencement of the Government of Burma Act, so far as the power of the Courts to execute a decree of a Native Prince or State in India is concerned, arises from the notification No. 4395 1/A, dated the 8th December 1904 of the Government of India, under s. 44 of the Civil Procedure Code as it existed before separation, and in view of paragraph 9 of the Adaptation of Laws Order and ss. 148 and 149 of the Government of Burma Act continues in force because it has not been altered, repealed or amended by the legislature or other competent authority.

A decree of an Indian State to which the notification applied can therefore be executed after separation in British Burma, notwithstanding that such State may not be a State within the meaning of s. 44 of the Civil Procedure Code as amended and since separation.

Hay for the appellants. It has already been held by a Bench of this Court that a Court in Burma has no jurisdiction, since separation, in the absence of a Notification under section 44A of the Civil Procedure Code, to execute a decree of a British Indian Court.†

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(1) (1931) I.L.R. 9 Ran. 575, 582, 583.

* Civil First Appeal No. 68 of 1938 from the order of the District Court of Bassein in Civil Ex. Case No. 7 of 1937.

† See [1938] Ran. 355—*Ed.*