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fixed for the hearing. This cannot have been intended. Section 561, Civil Procedure Code, must be construed according to its real purpose of giving the appellant timely intimation of proposed objections. In this case the day of hearing was fixed successively for the 15th March, 1882, and the 13th December, 1882. Either of these might as well be called the day fixed for the hearing as the first day when hearing was impossible because one of the respondents had not been served. On the 19th June, 1882, Rangildás applied to be allowed to file objections; and as the hearing of the appeal on its merits had not then been begun, nor even a day finally fixed for it, we think his application ought to have been granted(1). Had the hearing been begun, or a day fixed which was within seven days after his application, the case might be different. As it is, we reverse the decree of the District Court, and remand the case for retrial of the appeal after respondent Rangildás's objections have been filed within one month. Costs to follow the final decision.

Decree reversed and case remanded.

(1) Comp. *Gibbings* v. *Strong*, L. R., 26 Ch. Dio., 66.

ORIGINAL CIVIL.

Before Mr. Justice Birdwood.

HANMANTRA'M SADHURA'M PITY, PLAINTIFF, *v.* ARTHUR BOWLES, DEFENDANT.*

July 30.

Limitation—Cause of action—Bond—Payment by instalments—Liability for whole amount on failure of payment of instalment—Defendant's absence from India—Act XV of 1877, Secs. 9 and 13.

On the 20th August, 1879, the defendant being indebted to the plaintiff, gave his bond for Rs. 4,000. The bond provided for the payment of monthly instalments of Rs. 80 each, the first of such instalments to become due on the 4th September, 1879. The bond also contained the following clause:—"If the said Arthur Bowles shall—in default of payment of any one of such instalments, or in the event of default being made by him in payment of the premium money when and as the same shall become due in respect of the said policy, *if so required* by the said Hamantrám Sadhurám Pity, his executors, administrators or assigns—pay the whole amount which may then be due under and by virtue of these presents

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without deduction, then the above written bond or obligation shall be of no effect; otherwise the same shall be and remain in full force and virtue."

The defendant paid three of the said monthly instalments, the last of which was paid on the 2nd December, 1879, being that which had fallen due on the 4th November, 1879. No further instalments were paid, but no demand for payment of the entire sum secured by the bond was made by the plaintiff until the 30th January, 1884. The plaintiff filed this suit on the 28th April, 1884.

The defendant contended that the plaintiff's cause of action arose on the 4th December, 1879, when he (the defendant) failed to pay the instalment then due, and pleaded limitation. The plaintiff contended (1) that under the bond the cause of action did not arise until the date of his demand, *viz.*, on the 30th January, 1884; (2) that, even if the cause of action arose on the 4th December, 1879, the suit was not barred, the defendant having been absent from India for upwards of two years and three months out of the four years and four months which had elapsed between the date of the defendant's default and the date of suit.

Held that the suit was not barred. The language of the bond showed that it was the intention of the parties that, in case of default being made in payment of one instalment, the whole amount should become due only if a demand for such amount were made. The cause of action did not arise against the defendant until the date of demand, *viz.*, the 30th January 1884.

Held, also, dissenting from *Naronji Bhimji* v. *Mugnirám Chandáji*(1), that, even if the cause of action had arisen on the 4th December, 1879, nevertheless the suit was not barred, inasmuch as the period during which the defendant had been absent from India was to be deducted, in computing the period of limitation.

SUIT to recover Rs. 8,080 with interest on Rs. 4,000 at 24 per cent. *per annum* from 20th February, 1884.

On the 20th August, 1879, the defendant, being then indebted to the plaintiff in the sum of Rs. 3,250, received a further loan of Rs. 750 from the plaintiff, and gave his bond for the sum of Rs. 4,000. As a further security, the defendant insured his life for Rs. 5,000, and assigned the policy to the plaintiff, and also gave the plaintiff a first charge on the money receivable by the defendant in the event of his selling out of the army. After other recitals the bond proceeded: "Whereas it has also been agreed by the said Arthur Bowles that, in the event of default being made in repayment of the said sum of Rs. 4,000 and interest thereon at the rate, at the times, and in manner hereinafter mentioned, then and in that case the whole of the said sum of Rs. 4,000 and interest thereon, or so much thereof as shall then

(1) I. L. R., 6 Bom., 103.

be due to the said Hanmantrám Sadhurám Pity under or by virtue of these presents shall at once become due and payable. *Now the condition of the above written bond* or obligation is such that if the above bounden Arthur Bowles, his heirs, executors, or administrators, shall duly and punctually pay the premium to become due and payable in respect of the said policy granted by the said Positive Government Security Life Assurance Society, Limited, as aforesaid, and which said policy is to be held by the said Hanmantrám Sadhurám Pity during the continuance of these presents, and shall also on sending in his papers, if these presents shall then continue, give a first lien to the said Hanmantrám Sadhurám Pity, his executors, administrators or assigns, to the extent of the moneys which may then be due hereunder on the commission money to which he, the said Arthur Bowles, shall then be entitled, and also if the said Arthur Bowles shall repay the said sum of Rs. 4,000 with interest thereon, or on so much thereof as shall from time to time remain unpaid at the rate of 24 per cent. *per annum* by monthly instalments each of Rs. 80 by orders on his pay to that amount to be paid to the said Hanmantrám Sadhurám Pity, his executors, administrators or assigns, through such person or persons as shall from time to time be authorized by the said Hanmantrám Sadhurám Pity in that behalf, the first of such instalments to become due on the 4th day of September next, and if the said Arthur Bowles *shall—in default of payment of any one of such instalments or in the* event of default being made by him in payment of the premium money when and as the same shall become due in respect of the said policy, *if so required by the said Hanmantrám Sadhurám Pity,* his executors, administrators or assigns—pay the whole amount which may then be due under and by virtue of these presents without deduction, then the above written bond or obligation shall be of no effect; otherwise the same shall be and remain in full force and virtue."

On 1st November, 1879, the defendant paid the plaintiff Rs. 160, being the amount of two instalments (due on the 4th September and 4th October), and on the 2nd December, 1879, he paid a sum of Rs. 80, being the third instalment, which had fallen due on the

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4th November. No further instalments were paid by the defendant.

Subsequently to the 2nd December, 1879, and before the date of filing the suit, correspondence had passed between the plaintiff and the defendant with reference to the loan, but no demand was made by the plaintiff for the payment of the entire sum secured by the bond until the 30th January, 1884.

The plaintiff filed this suit through his attorney on the 28th April, 1884, to recover the sum of Rs. 8,080, being the amount of the principal sum (Rs. 4,000) and interest at 24 per cent. *per annum*.

The defendant contended that the plaintiff's cause of action arose on the 4th December, 1879, when he (the defendant) failed to pay the further instalment, and pleaded limitation.

The plaintiff contended, first, that, under the bond, the cause of action did not arise until his demand was made on the 30th January, 1884, in which case there was no question of limitation, the suit having been filed shortly afterwards. Secondly, that, even if the cause of action arose on the 4th December, 1879, the suit was not barred, the defendant having been absent from India for upwards of two years and three months out of the four years and four months which had elapsed between the date of the defendant's default in paying the fourth instalment and the date of this suit. He contended that, under section 13 of the Limitation Act (XV of 1877), the time of the defendant's absence from British India should be excluded, in computing the period of limitation.

Hon. *C. F. Farran*, Advocate General (Acting) and *Russell* for the plaintiff.—They cited *Carter* v. *Ring*[1]; *Thorpe* v. *Berth*[2]; *Seagreen* v. *Knight*[3]; Addison on Contracts (el. ed.), 1191; *Topham* v. *Bruddock*[4]; *Jeaunissa Begam* v. *Mánikji Kharsetji*[5]; *Beak* v. *Davis*[6].

Kirkpatrick and *Inverarity* for the defendant.—They cited *In re Cheni Bash Shaha*[7]; *Ball* v. *Stowell*[8]; *Ahmud Ali* v. *Hafiza*

(1) 3 Camp. 459.
(2) Ryan & Moo., 388.
(3) L. R. 2 Ch., 628.
(4) 1 Taunt., 572.
(5) 7 Bom. H. C. Rep., O. C. J., 36.
(6) I. L. R., 4 All., 530.
(7) I. L. R., 5 Calc., 97.
(8) I. L. R., 2 All., 322.

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Bibi[1]; *Navalmal Gambhirmal* v. *Dhondiba*[2]; *Rágho Govind* v. *Dipchand*[3]; *Náranji Bhimji* v. *Mugnirám Chandáji*[4].

BIRDWOOD, J.—In this suit the plaintiff seeks to recover the principal and interest, less certain payments, due on a bond executed by the defendant on the 20th August, 1879. The bond provides for the payment of the principal sum, amounting to Rs. 4,000, and of interest at 24 per cent. *per annum*, by monthly instalments of Rs. 80 each. The first instalment was to become due on the 4th September, 1879, and in default of payment of any one of the instalments, or in default of payment of the premium on his life policy (assigned by defendant to plaintiff as security) as the same became due, the defendant, "*if so required*" by the plaintiff, was to pay the whole amount which might then be due under the bond. Two instalments were paid by the defendant on 1st November, 1879, and a third on the 2nd December, 1879.

The defendant left India for England in August, 1879, and returned in March, 1880. For about four months in 1880, he was in Afghánistan. And in 1881-82 he was again absent from British India, on a visit to England for one year, four months and seventeen days. So that, during the period which elapsed between the date of default on the part of the defendant and the filing of this suit, he appears to have been absent from India for upwards of two years and three months.

On the 30th January, 1884, the plaintiff called upon the defendant to pay the amount due under the bond. The receipt of the plaintiff's letter was acknowledged by the defendant on 2nd February, 1884.

Correspondence ensued between the solicitors of the parties; and on the 4th March, while asking for time, the defendant's solicitor pointed out that the claim was barred by the Limitation Act.

The suit was filed as a short cause on the 28th April, 1884, by the plaintiff's constituted attorney, Gulábdás Dhanji, who obtained from the plaintiff the general power of attorney required by clause (*a*) of section 37 of the Code of Civil Procedure on the 2nd June, 1884, and filed it on the 28th idem.

(1) I. L. R., 3 All., 514.
(2) 11 Bom. H. C. Rep., 155.
(3) I. L. R., 4 Bom., 96.
(4) I. L. R., 6 Bom., 103.

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It is contended for the defendant that the cause of action arose on the 4th December, 1879, when default was made in payment of the instalment then due; that the whole amount then remaining due on the bond became at once payable; and that as a period of four years, six months and twenty-five days elapsed before the general power of attorney, granted by plaintiff, was filed, the suit is barred by article 75 of Schedule II of the Limitation Act, XV of 1877.

Between the 4th December, 1879, and the institution of the suit, the defendant was absent from British India for two years, three months and seventeen days. If, in computing the prescribed period of limitation, this time can be excluded under section 13 of the Act, then the suit will not be barred. The defendant relies on the ruling of Bayley, J., in *Narronji Bhimji* v. *Mugnirám Chandáji*[1] in which it was held that sections 9 and 13 of the Limitation Act must be read together, and that when the statutory period has once begun to run in respect of any cause of action, the subsequent absence of the defendant from British India will not stop it from running. If this ruling be followed,—that is, if the absence of the defendant from British India be held, as regards the plaintiff, to constitute an "inability to sue" within the meaning of section 9 of the Act, then time would not really have begun to run (assuming defendant's contention to be correct that cause of action was given on the default made in paying the instalment due in December, 1879) till the end of March, 1880, for the defendant was actually absent from British India in December, 1879; and if plaintiff was then unable to sue, no prescription could run against him. For, *contra non valentem agere nulla currit præscriptio*; and the defendant did not return toIndia till the end of March, 1880. But, even if time began only from the end of March, 1880, the suit would still be barred if the ruling in *Narronji* v. *Mugniram* [1] be followed.

The plaintiff contends (1) that cause of action was not really given till demand was made in January, 1884, for payment of the whole sum then remaining due on the bond; (2) that if cause of action was given in December, 1879, the Court ought to follow the

[1] I. L. R., 6 Bom., 103.

decision of the Allahabad High Court in *Beake* v. *Davis*[1], rather than the Bombay case. That was a decision by two Judges, and was later than the Bombay case, which is expressly referred to in it and dissented from.

Having regard to the language of the bond, I am of opinion that it was the intention of the parties that the defendant should be liable, on making default in payment of any instalment, for the whole amount then remaining due, only if demand were made for such amount. The words are "and if the said Arthur Bowles shall—in default of payment of any one of such instalments or in the event of default being made by him in payment of the premium money when and as the same shall become due in respect of the said policy, *if so required* by the said Hanmantrám Sadhurám Pity, his executors, administrators or assigns—pay the whole amount which may then be due under and in virtue of these presents without deduction, then the above written bond or obligation shall be of no effect, &c."

The words "if so required, &c.," give the plaintiff the option of either demanding payment of the whole amount on default being made in payment of one instalment, or of waiving the benefit of the provision which enables him to make the demand. In such a case, the mere forbearance to make a demand would amount to a waiver. It would, indeed, be a deliberate omission to realize the condition on which the whole amount became payable, and by such forbearance the plaintiff would deprive himself, so long as he continued it and had the right to do so, of the right to maintain an action for the whole amount. It would, of course, be otherwise if the whole amount of the bond had become payable, irrespective of any demand, as soon as default was made in the payment of any one instalment. In that case, although plaintiff would have the option of suing for the whole amount at once or of waiting, yet his forbearance to sue would not affect the defendant's liability to a suit from the time of the default. To such a case, the words of Lord Denman, C.J., in *Hemp* v. *Garland*, quoted in *Navalmal* v. *Dhondiba* [2], would be applicable. "If he (the plaintiff) chose to wait till all the instalments became due, no

(1) I. L. R., 4 All., 530. (2) 11 Bom. H. C. Rep., at p. 158.

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doubt he might do so; but that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time the plaintiff had a right to maintain it." Now, in the present case, the liability of the defendant being by the bond, as I read it, (*i.e.*, by the intention of the parties) made dependent on a preceding demand, the defendant could not, till such demand was made, have considered the action as accruing against him since the default made in December, 1879. The case must, therefore, be distinguished from *Cheni Bash Shaha* v. *Kadum Mundal*[1], and other similar cases, in which the provision in the instalment bond for the payment of the whole debt, on default of payment of one instalment, was not conditional on any demand. In that case the plaintiff had allowed time to run on unnoticed. There was clearly no waiver of the provision made for his benefit, such as there would have been if he had received an instalment after its due date, instead of insisting on payment in full. He had slept on his rights. But that is not the case here, for the present plaintiff could, under the bond, have exercised the option of delaying his demand for payment of the whole sum remaining due under it at any time so long as any monthly instalment remained in respect of which default could be made; and it is not alleged that, at the time when demand was made in January, 1884, the last instalment had become already overdue for more than a month, and that the whole amount had, therefore, become payable irrespective of any demand; for the making of which, indeed, no opportunity would thereafter have remained. Assuming, therefore, that so late as in January, 1884, an instalment was payable—an assumption which can safely be made, without entering into any exact calculation of the time when the last instalment would become due, inasmuch as fifty monthly payments would be required to clear off the principal debt alone,—I hold that it was only in January, 1884, that cause of action was given. The plaint was admitted on the 28th April, 1884, on which date the suit must be held to have commenced, although the general power of attorney given by the plaintiff was not filed till June. The suit was not, therefore, barred by any article of Schedule II of the Limitation Act.

(1) I. L. R., 5 Calc., 97.

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But if the view I have expressed as to the intention of the parties be wrong, and if cause of action was really given in December, 1879, still I am not prepared to follow the previous ruling of this Court in *Narronji* v. *Mugnirám*[1]. It is necessarily with reluctance that I dissent from a reported decision of a Division Bench of the Court, but it is open to me to do so for sufficient reason, if the ruling is not that of the Appeal Court or of a Full Bench[2]. And it seems to me that there are strong grounds for adopting the decision of the Allahabad High Court in the case of *Beake* v. *Davis*[3], in which Straight and Mahmood, JJ., held that section 13 of the Limitation Act was in no way affected or qualified by section 9, and that its obvious scope and intention was to save "creditors, subsequently suing their debtors, the period during which such debtors have been absent from British India." If it were otherwise, a debtor by leaving India immediately after his debt became payable could deprive his creditor of his legal remedy by merely staying away for three years. That is, he could do so, if, during his absence, the plaintiff could not sue him; and it is on that understanding that the decision in *Narronji* v. *Mugnirám*[1] seems to be based. It could not, surely, have been intended by the Legislature that the debtor should thus be able to defeat his creditor. Indeed, section 89 of the Code of Civil Procedure provides for the case of a defendant, residing out of British India, who has no agent in British India empowered to accept service of the summons. In such a case the summons must be addressed to the defendant at the place where he is residing, and forwarded to him by post, if there be postal communication between such place and the place where the Court is situate. A suit against a defendant whose residence out of British India is known is evidently possible, and the words "inability to sue" in section 9 of the Limitation Act seem, therefore, to be inapplicable to a plaintiff in reference to an absent person against whom he has a right of action. The words "disability or inability to sue" in that section must be read with the immediate context. In section 7 certain legal disabilities of plaintiffs, namely, minority, insanity and idiocy, are provided for. It is to such personal disability on the

(1) I. L. R., 6 Bom., 103. (2) Cf. I. L. R. 8 Bom., 388.
(3) I. L. R., 4 All., 530.

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part of the plaintiff that reference is evidently made in section 9. No mere inability, apart from such disability, is treated of in any other section of Part II of the Act; but, having regard to the context, the inability referred to in section 9 must, I think, be held also to be a personal inability affecting the plaintiff himself, and having reference to his condition or state or position, and not to the circumstances of the person against whom he is entitled to institute a suit.

Section 13 occurs in a different part of the Act, and its provisions seem to me to be unrestricted by section 9, and to be distinctly imperative(1). If section 13 is to be applied to the case, then the facts already stated as to defendant's absence show that the suit is not barred, even if cause of action was given in August, 1879. The defendant admits the correctness of the account attached to the plaint, except as to the calculation of interest. While interest is charged on the whole of the principal sum, no deduction is made on account of interest on the three instalments paid in November and December, 1879. The defendant must clearly be allowed interest on those payments at 24 per cent *per annum*. The account should be made up to the present date, and the decree will be for the sum so found due.

The defendant to pay the costs of this suit.

The plaintiff is to restore to the defendant, on the latter satisfying the decree within six months from this date, the policy of

(1) In two of the cases relied on in *Narronji* v. *Mugnirám*(1), *viz.*, *Duroure* v. *Jones*(2) and *Cotterell* v. *Dulton*(3), the disability, on the cessation of which time began to run, seems to have been disability on the part of the plaintiff of the kind provided for in section 7 of the Indian Limitation Act, the plaintiff in each case having been an infant. The case of *Cotterell* v. *Dulton* was decided with reference to the express provisions of the Statute of Limitation (21 Jac. I, c. 16). In the case of *Rhodes* v. *Smethurst*(4), also relied on in *Narronji's* case, it was held to be no answer "to a plea of the Statute of Limitations, that, after the cause of action accrued, and after the statute had begun to run, the debtor, within the six years, died, and that (by reason of litigation as to the right to probate) an executor of his will was not appointed until after the expiration of the six years, and that the plaintiff sued such executor within a reasonable time after probate granted." That decision also was one based on the express provisions of the same statute.

(1) I. L. R., 6 Bom., 102.
(2) 4 T. R., 300.
(3) 4 Taunton, 826.
(4) M. & W., 351.

insurance assigned to him by defendant, together with the six positive promissory notes deposited with him by the defendant. Two of these notes are not forthcoming. If they are not found within the aforesaid time, the plaintiff is to make them good.

If the decree is not satisfied within six months, the plaintiff is to be at liberty to sell the policy of insurance and the said notes, and the proceeds thereof are to be applied to the satisfaction of the decree.

As a high rate of interest has been provided for by the bond, and has, therefore, been granted, up to the date of the decree, and as the consideration for the bond itself was made up largely of interest due on a former bond, and as the cash actually received by the defendant on both bonds amounted only to Rs. 3,750, and as the defendant paid Rs. 2,050 as interest, I make no order for the payment of interest on the judgment.

Judgment for plaintiff.

Attorney for the plaintiff.—Mr. *E. Wilkin.*

Attorney for the defendant.—Mr. *A. F. Turner.*

MATRIMONIAL JURISDICTION.

Before Mr. Justice Hart.

ARTHUR BOWLES, PETITIONER, *v.* MARY J. BOWLES, RESPONDENT AND ANOTHER (CO-RESPONDENT).*

August 2.

Practice—Procedure—Staying suit until costs of a previous suit in a foreign Court have been paid.

The Courts in India have no power to stay proceedings in a suit instituted therein, because the costs of a previous suit between the same parties brought in the High Court of Justice in England have not been paid.

SUMMONS obtained by the respondent calling on the petitioner to show cause why the petitioner should not pay the respondent, or her attorney on her behalf, the sum of £63-16, being the amount of the respondent's taxed costs in the suit brought by the petitioner in the High Court in England in the Probate Divorce and Admiralty Division against the respondent, and which suit

* Suit No. 76 of 1884.