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sation; but here the Judge admits that he has not taken it into his consideration, and as it is an essential factor in the question we think he was bound to do so before arriving at a conclusion as to the amount of compensation, and that, too, without any argument being addressed to him on the subject. Question 11 should, therefore, be answered in the affirmative.

As to the claim for loss arising from the funeral expenses, the Judge has rightly refused it on the authority of *Walton* v. *S.-E. Railway Company*(1). In section 2 of the English Act the word "injury" is used instead of "loss;" but we do not think that this difference of expression affects the reason for the English decision, which was that funeral expenses were not an injury resulting from the death within the meaning of section 2 of the Act.

Question 12 should be answered in the negative. It is unnecessary to answer quesstion 13,

The plaintiff in person.

Attorneys for the defendants:—Messrs *Crawford, Burder, Buckland and Bayley.*

(1) 4 C. B. (N. S.), 296.

ORIGINAL CIVIL.

Before Mr. Justice Telang.

1891. *October* 9.

BHUGWA'NDA'S BAGLA AND OTHERS, PLAINTIFFS, *v.* HA'JI ABU AHMED AND OTHERS, DEFENDANTS.*

Practice—Civil Procedure Code (XIV of 1882), Sec. 54—Leave obtained to amend plaint within a certain time—Failure to amend within time allowed—Application for extension of time after expiry of time originally allowed.

On the 6th April, 1891, the plaintiffs obtained an order giving them leave to amend the plaint and proceedings in the suit. By the order this amendment was to be made on or before the 30th April, 1891. On the 18th August, 1891, the plaintiffs obtained a summons calling on the defendants to show cause why the time allowed for amendment should not be extended for a month and why the hearing of the suit should not be postponed.

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Held, making the summons absolute, that although the time originally fixed for amendment had expired, the Judge had a discretion to extend the time, and that, under the circumstances, the plaintiffs were entitled to the order asked for.

SUMMONS in chambers. The plaintiffs were the trustees for the creditors of the defendants under a trust deed dated 20th August, 1889, and they brought the suit to compel the defendants to hand over the property for the benefit of their creditors, &c. The suit was filed on the 10th October, 1890.

In the plaint as originally filed the name of the fourth plaintiff was stated to be Juggonáth Gordhundás. The third defendant was Zilkhabái, the wife of the first defendant Háji Abu Ahmed.

On the 6th April, 1891, upon a summons taken out by the plaintiffs, an order was made, giving the plaintiffs liberty to amend the plaint and proceedings by describing the fourth plaintiff as "Juggonáth Motilál Mohta trading in the name of, and commonly known by the name of Juggonáth Gordhundás," and by striking out the name of the third defendant Zilkhabái, and all reference to her in the said plaint and proceedings, and it was further ordered "that the said amendment be made on or before the 30th April, 1891."

On the 18th August, 1891, the plaintiffs took out the present summons, calling on the defendants to show cause why the time for amending the plaint and proceedings pursuant to the Judge's order of the 6th April, 1891, should not be extended for one month, and why the hearing of the suit should not be postponed.

Inverarity for the defendants 1 and 2 showed cause.

Lang (Acting Advocate General) for the plaintiffs, *contra*.

TELANG, J. :—The question which I have to decide on the present Judge's summons turns principally upon the construction of section 54 of the Code of Civil Procedure (Act XIV of 1882).

On the 6th of April, 1891, an order was made by Bayley, J., giving the plaintiffs liberty to amend the plaint in certain particulars therein specified, fixing one month as the time within which such amendment should be made, and ordering the plaint to be returned for such amendment. The amendment, however, was not made within the time fixed by the Court, and now nearly three and a half months after the expiry of the time so fixed, the

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present Judge's summons has been taken out by the plaintiffs, in order to obtain further time for the purpose.

The first question is, whether the Court has power to grant such further time *after* the expiry of the period originally fixed by the Court when permitting the amendment to be made. The case of *Máhant Ishwargar* v. *Chudásáma Manábhái* (1), which I mentioned in the course of the argument as affording a possible parallel, does not apply, because the question there was complicated by the consideration, that the order granting extension of time which the High Court reversed was made by a Court of execution which, of course, has always been held to have no jurisdiction to vary the decree in any particular. In that case, however, it is to be remarked, that the Court did not decide, that under special circumstances the time for payment of the mortgage-money could not be enlarged even after the time originally fixed in a redemption decree had expired. The case before the Privy Council in reference to awards which was mentioned by Mr. Inverarity—*Rája Har Náráin Singh* v. *Chaudhrain Bhagwant Kuar* (2)—also appears to me to be governed by different principles from the present case. There no extension of time sufficient to cover the date when the award was actually made had ever been applied for, and the award was in fact made after the expiry of the time allowed, and under those circumstances the Privy Council held that such an award, made after the time allowed by the Court to the arbitrators, was *ultra vires* and void under the express terms of section 521. But even there the Privy Council seemed to think, that an extension of time might be granted, even after the period originally fixed had expired, provided only that such extension was asked for and granted before the award was, in fact, made. That is the principle in accordance with which the present case should, in my opinion, be decided. And that principle has been laid down in even more distinct terms by the Privy Council in another recent case, *viz.*, *Badri Náráin* v. *Sheo Koer* (3). The words of the section of the Code, which the Privy Council had to construe in the last-mentioned case, *viz.*, section 549, are not in

(1) I. L. R., 13 Bom., 106. (2) I. L. R., 13 All., 300.
(3) I. L. R., 17 Calc., 512.

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any way less strong than those of section 54. In both cases it is provided that, on the failure to comply with the Court's order within the time fixed by the Court, the plaint or appeal, as the case may be, "shall" be rejected; yet the Privy Council has distinctly decided, that even after the time fixed by the Court has expired, when the direction in section 549 that the Court shall reject the appeal has come into operation, it is still within the discretion of the Court to make a fresh order fixing a fresh period, and the rejection of the appeal is not imperative. It appears to me that that decision is conclusive in favour of the plaintiff in this case, and the earlier authorities—*Haidri Bái* v. *The East Indian Railway Company*(1), *Budri Náráin* v. *Sheo Koer*(2), *Shrajudin* v. *Krishna*(3)—which were mentioned to me by Mr, Hormasji last Tuesday—must be taken to have been overruled by the decision of the Privy Council. In truth, the decision in *Badri Náráin* v. *Sheo Koer*(4) was passed by the Privy Council on appeal from the decision of Garth, C. J., and Mitter, J., reported at I. L. R., 11 Calc., 716, and both this latter decision and that of *Shrajudin Krishna*(5) were expressly made on the authority of the case of *Haidri Bái* v. *The East Indian Railway Company* (6) the judgment in which was considered by the Privy Council when deciding the case of *Badri Náráin* v. *Sheo Koer* (7). I may add that the conclusion I have arrived at is in harmony with the rule which Scott, J., laid down in *Hormusji Cursetji Ashburner* v. *Bomanji Cursetji Ashburner* (8) in relation to the analogous case referred to by me during the argument, of the time fixed for a motion to vary the Commissioner's report.

If, then, I have a discretion to make the order now applied for, I think I ought, under the circumstances here existing, to exercise it in favour of the plaintiffs. Those circumstances do not, indeed, absolve the plaintiffs from all responsibility on the ground of laches and want of due diligence, but the penalty for such laches

(1) I. L. R., 1 All., 687.
(2) I. L. R., 11 Calc., 716.
(3) I. L. R., 11 Mad., 190.
(4) I. L. R., 17 Calc., 512.
(5) I. L. R., 11 Mad., 190.
(6) I. L. R., 1 All., 687.
(7) I. L. R., 17 Calc., 512.
(8) I. L. R., 9 Bom., 250. The case of *Narrottam Vizbhookandás* v. *Harichand Rámchand* (I. L. R., 13 Bom., 368) is not necessarily inconsistent with this.

as they have shown, should not, I think, be a rejection of the plaint when they are now, as they say, in a position to fully carry out the order of the Court. The Judge's summons, therefore, must be made absolute, but as it has been necessitated by the default of the plaintiffs, and the defendants are not in any way in the wrong, the plaintiffs must pay the defendant's costs of the summons, and I must certify for counsel.

Attorneys for plaintiffs:—Messrs. *Roughton and Byrne.*

Attorneys for the defendants:—Messrs. *Ardesir, Hormasji and Dinsha.*

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Parsons.

BHAGVANTRA'O, (ORIGINAL PLAINTIFF), APPLICANT, *v.* GANPATRA'O (ORIGINAL DEFENDANT), OPPONENT.*

1891. *June* 19.

Jurisdiction—Small Cause Court (Provincial)—Act IX of 1887, *Cl.* 38, *Sch. II—Suit for arrears of maintenance due under a bond or agreement—Maintenance.*

A suit for arrears of maintenance due under a bond or agreement is not cognizable by a Provincial Court of Small Causes under clause 38 of Schedule II of Act IX of 1887.

THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882).

The applicant was a Hindu widow. She sued to recover Rs. 80 from defendant on account of arrears of maintenance due under an agreement executed by the defendant in her favour on 16th June, 1887. The defendant being a sardár, the suit was filed in the Agent's Court for Sardárs in the Deccan.

The Agent returned the plaint for presentation to the proper Court, holding that he had no jurisdiction to take cognizance of the suit.

Thereupon the plaint was filed in the Court of Small Causes at Poona. That Court held that under clause 38 of Schedule II of Act IX of 1887 a suit for maintenance would not lie in a Mofussil Court of Small Causes. The plaint was, therefore, returned.

*Application under Extraordinary Jurisdiction, No. 216 of 1890.