ORIGINAL CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Candy.

1897. *January* 29.

FATMABAI AND ANOTHER (PLAINTIFFS) *v.* PIRBHAI VIRJI (DEFENDANT).*

Limitation Act (XV of 1877), Sec. 22—Suit by heirs of deceased Mahomedan—Suit originally filed in time by one heir—Another heir subsequently made co-plaintiff beyond time of limitation—Letters of administration obtained only by second plaintiff—Parties—Practice—Procedure.

The plaintiff as widow and heir of a Khoja Mahomedan sued on a promissory note, dated 21st October, 1892, passed by the defendant to her deceased husband. The suit was filed on the 9th October, 1895. Disputes subsequently arose between her and her father-in-law as to the succession to her husband's property and she applied to the High Court for letters of administration. On the 9th September, 1896, the plaintiff's father-in-law, on his application, was made a co-plaintiff in the suit. Subsequently the plaintiffs came to terms, and the widow withdrew her application for letters of administration, and her father-in-law applied for and obtained letters of administration instead. On the 14th November, 1896, the suit came on for hearing. The first plaintiff did not produce any letters of administration or certificate under the Succession Certificate Act VII of 1889. The second plaintiff produced the letters of administration obtained by him.

Held, that the suit was barred by section 22 of the Limitation Act (XV of 1877). When the second plaintiff was added as a party, the suit was barred as against him. If the letters of administration had been obtained by the plaintiff Fatmabai, her suit would not have been barred, and the Court could have passed a decree in her favour.

Section 22 of the Limitation Act (XV of 1877) in terms applies as well to plaintiffs suing in their representative capacity as in their personal capacity.

Held, also, that the second plaintiff was properly joined as party plaintiff. When one or more heirs sue, there is no objection to joining all to make the representation complete.

CASE stated for the opinion of the High Court by C. M. Cursetji, Third Judge of the Bombay Small Cause Court, under section 617 of Civil Procedure Code (Act XIV of 1882).

"The following are the facts of the case. The suit was originally filed by the first plaintiff Fatmabai alone on the 9th October, 1895, as the widow and heir and legal representative of Mahomed Jan Mahomed, deceased.

"The claim is on a promissory note of Rs. 500, dated 21st October, 1892, passed by the defendant to the said Mahomed Jan

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Mahomed. The summons in suit was not served till the 18th January, 1896.

"Meantime disputes having arisen between the said plaintiff Fatmabai and her father-in-law Jan Mahomed Jetha about the succession to the property of the said deceased, Fatmabai applied to the High Court for letters of administration. Pending such application the defendant appeared in this suit with his vakil Mr. Rele on the 25th March last; he admitted this claim to be due, but denied Fatmabai's right to recover the debt without letters of administration or certificate of heirship under Act VII of 1889. It was also urged by the defendant that Jan Mahomed Jetha claimed from him the same debt as heir and legal representative of his son the said Mahomed Jan Mahomed. This suit continued to be postponed from time to time pending the disposal of Fatmabai's application for letters of administration.

"On 9th September, 1896, Mr. Manchashankar, vakil, appeared on behalf of the said Jan Mahomed Jetha and applied that his client be made a co-plaintiff with the consent of the plaintiff Fatmabai. This application was granted and the summons was accordingly amended by making the said Jan Mahomed Jetha party-plaintiff with Fatmabai.

"On the 14th November, 1896, this suit coming finally on the board, the second plaintiff, the said Jan Mahomed Jetha, produced letters of administration to the estate of his son the said Mahomed Jan Mahomed obtained by him alone. The first plaintiff Fatmabai does not produce any such letters or any certificate under Act VII of 1889. It appears that the plaintiffs having come to terms the first plaintiff withdrew her application for letters of administration and allowed the second plaintiff to take out the same. She has, in fact, practically assigned over her claim and all interest in this suit to the second plaintiff. The plaintiffs are Khoja Mussalmáns. They are the only surviving heirs of the said Mahomed Jan Mahomed, deceased, and they and the said deceased had been living together as members of a joint family.

"The defendant now pleads that this suit is barred under section 22 of the Indian Limitation Act of 1877. The ques-

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tions which thus arise, and which I have the honour to refer, are :—

"(1st.) Is the plaintiff No. 2 properly joined as party plaintiff ? and

"(2nd.) If yes, then on the facts and under the circumstances above stated is this claim barred as against him ?"

As to the first question the learned Judge of the Small Cause Court was of opinion that the second plaintiff had been properly made a party and referred to *Chunder Coomar* v. *Gocool*(1).

As to the second question he thought the claim was not barred. He referred to *Sujut Singh* v. *Imrit Tewari* (2); *Ganpat* v. *Adarji*(3); *Boydonath* v. *Grish Chunder* ; *Saminatha* v. *Muthayya* (5) ; *Kasturchand* v. *Sagarmal* ; *Manni* v. *Crooke* (7); *Pragi Lal* v. *Maxwell* (8); *In re petition of Ramdas* (9); *Lachmin* v. *Ganga Prasad* (10); *Govindappah* v. *Kondappah* (11); *Janaki* v. *Hafiz Mahomed*(12).

He passed a decree for the amount claimed and costs in favour of the second plaintiff contingent on the opinion of the High Court.

Lang (Advocate General) for the defendant. He referred to the Limitation Act (XV of 1887), section 22; Succession Certificate Act (VII of 1889), section 4; *Sheetanath* v. *Promothonath*(13); *Ramsebuk* v. *Ramlall*(14).

Anderson for the second plaintiff:—He cited *Pragi Lal* v. *Maxwell* (8); *Kasturchand* v. *Sagarmal* (6); *Kalidas* v. *Nathu Bhagvan* (15); *Subodini* v. *Cumar Ganoda* (16); *Krishnaji* v. *Vithu* (17).

FARRAN, C. J. :—We think that the second plaintiff was properly joined as party plaintiff. Section 4 of Act VII of 1889

(1) I. L. R., 6 Cal., 370.
(2) I. L. R., 5 Cal., 720.
(3) I. L. R., 3 Bom., 312.
(4) I. L. R., 3 Cal., 26.
(5) I. L. R., 15 Mad., 417.
(6) I. L. R., 17 Bom., 413.
(7) I. L. R., 2 All., 296.
(8) I. L. R., 7 All., 284.
(9) I. L. R., 10 Bom., 107.
(10) I. L. R., 4 All., 485.
(11) 6 Mad. H. C. Rep., 131.
(12) I. L. R., 13 Cal., 47.
(13) I. L. R., 6 Cal., 303.
(14) I. L. R., 6 Cal., 815.
(15) I. L. R., 7 Bom., 217.
(16) I. L. R., 14 Cal., 400.
(17) I. L. R., 18 Bom., 505.

does not preclude the heirs of a deceased Khoja from filing a suit to recover a debt due to his estate, but only prevents the Court from passing a decree in favour of such heirs except on the production of probate or a certificate of the nature referred to in the section. When one or more heirs sue, there is no objection to joining all to make the representation complete so far as it can be complete without probate or certificate.

The answer to the second question depends substantially upon this: whether an heir of a deceased Mahomedan added as a party in a suit to recover a debt due to the deceased is a "new plaintiff" within the meaning of section 22 of the Limitation Act. If he is, it follows that when the plaintiff Jan Mahomed was added as a plaintiff, the suit was barred as regards him, and the fact that he subsequently obtained letters of administration to the estate of the deceased cannot, we think, operate to remove that bar. If the letters had been granted to Fatmabái, her suit clearly would not have been barred, and the Court could have passed a decree in her favour. It is, it must be allowed, a curious anomaly that the result of the suit should depend, in so far as limitation is concerned, upon which of the plaintiffs took out letters of administration to the estate of the deceased; but though we cannot help regretting the result, we feel constrained to hold that the section in terms applies as well to plaintiffs suing in their representative as in their personal capacity. The proviso to it shows, we think, that plaintiffs suing in their representative capacity are plaintiffs within the contemplation of the Legislature. As to that particular class of plaintiffs when the action has been instituted in the lifetime of the deceased, it shall as regards them be deemed to have been instituted when the deceased filed it. There is no special provision for representatives suing after the death of their intestate or testator. The same reasoning seems to us to apply to them as was held to apply to the joint surviving co-parceners in a Hindu family in *Kalidas* v. *Nathu*[1].

When it is once allowed that representative plaintiffs are within the scope of the section, it seems to us to follow that the adding of a plaintiff in his representative capacity (the suit being filed after the death of the intestate) is the adding of a

(1) I. L. R., 7 Bom., 217.

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new plaintiff within the section. The representatives are the plaintiffs who sue. The estate is not a *persona* capable of filing a suit.

Counsel for the plaintiffs relied on the ruling in *Subodini Debi* v. *Cumar Ganoda*[1] and from it asked us to draw the deduction that when the only change made in a suit is in adding or substituting parties for the purpose of more correctly representing the right originally asserted, the change is not within the scope of the section. It is not, however, easy to reconcile that decision with the exact wording of section 22 of the Limitation Act, and it would be unsafe to rely upon any general deductions drawn from it. The cases of *Kasturchand* v. *Sagarmal*[2] and *Pragi Lal* v. *Maxwell*[3] were also relied on, but they were decided upon the ground that all the partners in the firm sued were impliedly made defendants in the suit brought against the firm sued in its own name and are obviously not authorities upon the question before us.

To prevent hardship it might be desirable to lay down the law in the sense contended for by Mr. Anderson, but it seems to us that if we were to do so, we should be making and not interpreting the law. If the law is too stringent, it is for the Legislature and not for the Courts to mitigate its severity. Its provisions do appear to us to operate harshly as well in the case of the representatives of a deceased person as in the case of joint promisees ; but in the former case any plaintiff by taking out letters of administration to the estate of the deceased can relieve himself of the apparent hardship.

We answer the second question in the affirmative. Costs costs in the case.

Attorneys for the plaintiffs :—Messrs. *Ardesir, Hormusji and Dinsha.*

Attorneys for the defendant :—Messrs. *Payne, Gilbert and Sayani.*

(1) I. L. R., 14 Cal., 400. (2) I. L. R., 17 Bom., 410.
(3) I. L. R., 7 All., 284.