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28 C. 382.

judgment-debtor had no saleable interest, the purchaser must lose his money), should have no right to come in and object to the sale on this ground, and yet that a person whose interests are not affected should have the right to come in at a preliminary stage of the execution proceedings, and demand that the proceedings be stayed, until his claim has been enquired into and determined.

Rule made absolute.

28 C. 393.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Brett.

J. LAZARUS (*Plaintiff*) v. KRISHNA CHUNDER DE (*Defendant*).^{*}
[18th December, 1900.]

Limitation Act (XV of 1877), Schedule II, Arts. 60 and 64—Money payable on demand—Deposit as a trustee—Money found due on account stated.

A suit was brought by the plaintiff on the 28th June 1897 to recover a certain sum of money from the defendant, on the allegation that there was [394] a registered agreement between the parties, where by it was agreed that the plaintiff was to use a godown belonging to the defendant for the purpose of storing jute purchased by him, the defendant being promised a certain commission in return. There was also a verbal agreement to the effect that sums of money would be sent by the plaintiff to the defendant, who would hold the same in deposit as a trustee; that on demand the defendant would pay to the plaintiff the balance left after making the necessary payment for the purchase of jute; that on the 19th April 1894, the defendant submitted an account, which showed that a certain sum of money remained surplus in his hands; that the defendant, not having allowed the plaintiff to carry on the business in his godown in 1894, the plaintiff demanded the said sum of money in July 1894, which the defendant did not pay. The defence *inter alia* was that the suit was barred by limitation.

Held, that the defendant was not on the facts stated in the plaint an agent of the plaintiff, and that Article 60 (Schedule II) of the Limitation Act might apply to the case.

Ishur Chunder Bhaduri v. Jibun Kumari Bibi (1) referred to.

THIS appeal arose out of an action brought by the plaintiff to recover a certain sum of money from the defendant. The allegations of the plaintiff were that in the jute season of 1893-94 he, for his jute business, hired the defendant's jute godown at Paina for five years, on the stipulation that on the quantity of jute purchased the defendant would get a certain commission; that on the 10th July 1893 the defendant executed a registered agreement to that effect, and it was also verbally stipulated that the necessary amount for the purchase of jute would be sent by the plaintiff to the defendant, who would hold the same in deposit, as a trustee, and that on demand the defendant would pay to the plaintiff the balance left, after making the necessary payment for the purchase of jute; that according to the said stipulation he, from time to time, paid money to the defendant, who filed an account on the 19th April 1894, wherein he (the defendant) admitted that the sum of Rs. 700 Gas. 15 gundas was being held in deposit by him; that the defendant, notwithstanding the plaintiff's endeavour, did not allow the jute business to be

^{*} Appeal from Appellate Decree No. 2508 of 1898, against the decree of Babu Treguna Prasanna Bosu, Subordinate Judge of Dacca, dated the 6th of September 1898, reversing the decree of Babu Nobin Chunder Nag, Munsif of Dacca, dated the 20th of December 1897.

carried on in his godown in the month of July 1894, and therefore he (the plaintiff) was compelled in the said month to transact business by storing jute in another godown; that he in that [395] month demanded from the defendant the money which was in deposit with him and the defendant not having paid it the suit was brought on the 28th June 1897. The defence *inter alia* was that the suit was barred by limitation, and that it was not maintainable in the form it was brought. The Court of first instance having overruled the said objections decreed the plaintiff's suit. On appeal, the learned Subordinate Judge held that Article 64 of the Limitation Act applied to the case, and that, inasmuch as the suit was not brought within three years from the date of the submission of accounts, it was barred by limitation and dismissed the plaintiff's suit.

Against this decision the plaintiff appealed to the High Court.

Mr. *Gregory* (with him Babu *Joygopal Ghosha*) for the appellant.

Babu *Harendra Narayan Mitter*, for the respondent.

The judgment of the High Court (BANERJEE and BRETT, JJ.) was as follows:—

In this appeal, which arises out of a suit for recovery of a certain sum of money, the only question that arises for consideration is whether the Court of Appeal below is right in holding that upon the plaintiff's own showing the suit was barred by limitation as being governed by Article 64 and not by Article 60 of the 2nd Schedule of the Limitation Act. We are of opinion that this question must be answered in the negative. The facts stated in the plaint, which bear upon the question of limitation, are those to be found in the 2nd paragraph of that document, and, as we understand the plaint, they are shortly these: That there was a registered agreement between the plaintiff and the defendant whereby it was agreed that the plaintiff was to use a godown belonging to the defendant for the purpose of storing the jute purchased by him, the defendant being promised a certain commission in return; and that there was in addition to this agreement in writing registered, a verbal agreement to the effect that sums of money would be sent by the plaintiff to the defendant, who would hold the same in deposit as a trustee, and that on demand the defendant would pay to the plaintiff the balance left after making the necessary payments [396] for the purchase of jute, those payments for the purchase of jute being, as the plaint shows, evidently intended to be made to the plaintiff's agent; for it is stated in the same paragraph of the plaint, as a reason for the verbal agreement, that the officers in the godown appointed on behalf of the plaintiff for the purchase of jute could not be trusted with large sums of money. Upon the statements contained in the plaint, it could not then be said that the defendant was necessarily an agent for the plaintiff, and not the holder of the money sent to him by the plaintiff as a deposit, within the meaning of Article 60 of the 2nd Schedule of the Limitation Act. It is quite possible that the position of the defendant was only that of an agent. But the Court of Appeal below has not found that as a fact upon the evidence, nor indeed has it come to any finding of fact; and all that we have now got to deal with is the question whether the facts; stated in the plaint are such, that the defendant must be taken to have been an agent of the plaintiff. Upon the plaintiff's own showing, as the Court of appeal below seems to think, we think the answer to this question must be in the negative. The view of the Lower

1900
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28 C. 393.

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APPELLATE
CIVIL.
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Appellate Court, therefore, that on the plaintiff's own showing his claim comes, not under Article 60, but under Article 64 of the 2nd Schedule of the Limitation Act, cannot in our opinion stand. The view we take is in accordance with that taken by this Court in the case of *Ishur Chunder Bhaduri v. Jibun Kumari Bibi* (1). That being so, the decree of the Lower Appellate Court dismissing the plaintiff's claim on the ground of limitation, without going into any of the facts necessary to be found in order to dispose of the question of limitation, must be set aside, and the case must be sent back to that Court, in order that it may deal with the question of limitation and any other question arising in the case, after taking into consideration the evidence in the case.

The costs of this appeal will abide the result.

Appeal allowed, case remanded.

28 C. 397.

[397] CRIMINAL REFERENCE.

Before Mr. Justice Ameer Ali and Mr. Justice Stevens.

QUEEN-EMPRESS *v.* SURENDRA NATH SARKAR (*Accused*).^{*}
[17th, 18th and 22nd January, 1901.]

Accused—Improper discharge of—Commitment—Power of Sessions Judge and District Magistrate to order commitment, instead of directing fresh enquiry—Code of Criminal Procedure (Act V of 1898), ss. 209, 307, 436, 437 and 532.

Under s. 436 of the Code of Criminal Procedure in cases exclusively triable by the Court of Session the Sessions Judge and District Magistrate have co-ordinate powers to order a commitment upon the evidence already taken, instead of directing a fresh enquiry by the inferior Court, which has improperly discharged the accused.

Queen-Empress v. Krishna Bhat (2) referred to.

AT 2 A.M. on the morning of the 21st April 1900, a chowkidar at Mankar hearing groans issuing from the hut of one Assam Baisthabi, a prostitute, called together a number of the neighbours and proceeded to her hut. On entering the hut they found Assam lying murdered on the *pira* of the hut, and it was alleged that the accused was seen running out of the hut through a door opening to the north. The accused was afterwards arrested and put upon his trial before a Deputy Magistrate, who discharged him under s. 209 of the Code of Criminal Procedure. Subsequently the District Magistrate, upon going through the record and coming to the conclusion that the accused had been improperly discharged, called upon him under the provisions of s. 436 of the Code to show cause, why he should not be committed to the Court of Session and, after hearing his pleader, directed his commitment. The accused was thereupon tried on a charge of murder under s. 302 of the Penal Code by the Sessions Judge of Burdwan and a jury, and was unanimously acquitted by the jury. The Sessions Judge, however, disagreeing with their verdict, referred the case to the High Court under s. 307 of the Code of Criminal Procedure.

[398] The Deputy Legal Remembrancer (Mr. Gordon Leith) for the Crown.

Mr. P. L. Roy (with him Babu Jadu Nath Kanjital) for the accused.

^{*} Criminal Reference No. 44 of 1900 made by Kumar Gopendra Krishna Deb, Sessions Judge of Burdwan, dated the 1st of December 1900.

(1) (1838) I. L. R. 16 Cal. 25.

(2) (1885) I. L. R. 10 Bom. 319.