

remanded to him, in order that it may be tried and decided anew with reference to the above remarks.

The appellants will get their costs of this appeal.

JACKSON, J.—I concur in the remarks of Mr. Justice Macpherson, and in remanding the case for a fresh decision.

1869
GANGA NARAYAN DAS
v.
SARODA MOHAN ROY CHOWDHRY.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Miller.

MOHAN CHAND KANDU (PLAINTIFF) v. AZIM KAZI CHOWKIDAR (DEFENDANT).*

1869
June 12

Suit against the Representatives of a Deceased Person—Limitation.

Where the defendants in a suit died before the plaint against him was filed, and the suit was sometime after carried on against his representatives, the time during which the suit was being prosecuted *bond fide* against the dead man, may be deducted in calculating the period of limitation against his representatives.

THE following case was submitted by the Judge of Small Cause Court of Jessore for the opinion of the High Court :—

“This was an action brought on a bond alleged to have been executed by the defendant on the 29th Falgun 1271, corresponding with 11th March 1865, for rupees 11, re-payable with interest at 37½ per cent. per annum in Magh 1272, corresponding with February 1866.

“The plaint was filed on the 8th February instant, and the trial was fixed for the 24th or 14th Falgun 1275, on which day it appeared, from the evidence of the peon who went to serve the summons, that the defendant had died about a year before the filing of the plaint, and the plaintiff’s pleader thereupon applied to the Court under section 104, Act VIII. of 1859, to substitute the legal representatives as defendants, but this I refused to do, as it appeared to me that the suit would be barred as against them under the ruling in the case of *Rajkishoree Dasse v. Bodunchunder Shaha* (1).

“It is urged by the plaintiff’s pleader, that as his client was not aware that the defendant had died before the filing of the plaint,

* Reference from the Judge of the Small Cause Court of Jessore.

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 MOHAN CHAND
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the Court should comply with the application, and that the suit ought not to be held barred by lapse of time against the legal representatives, as it was originally brought against the defendant within the period of limitation.

“I find that the case of *Sreekishen Chowdhry v. Ramkist o Bhattacharjee* (1), supports the contention of the pleader as in that case it was held by LOCH and GLOVER, JJ., that the suit against the heirs of the decree-holder, substituted as defendants, was not barred by lapse of time, as it was originally brought within the period of limitation against the decree-holder, of whose death plaintiff first learnt the news from the return made to the summons; and they drew a distinction between that case and the case of *Rajkishoree Dassee v. Bodunchunder Shaha* (2) on the ground that in the latter case the party substituted was not the heir of the party originally sued when the cause of action accrued.

“If it be held, that, when a person is substituted or added as a defendant under section 73 of Act VIII. of 1859, the suit is commenced against that person at the time he is made a defendant and not before, a similar reasoning is applicable to parties made defendants under section 104, and there seems to me to be no warrant for allowing such insertion to have retrospective effect, as it appears to me that sections 99 to 104 of Act VIII. of 1859 contemplate the case of parties who, being alive at the time of the filing of the plaint, die subsequently to its filing, and do not embrace a case like the present. I therefore think that the decision in *Rajkishoree Dassee v. Bodunchunder Shaha* (2) must govern the case.

“I also find that, in the case of *The representatives of Girendro Nath Tagore v. Hurro Nath Roy* (3), it was held by BAYLEY and MACPHERSON, JJ., that when a suit is instituted, and a decree is passed against a person who was dead at the time the suit was instituted, the decree cannot be executed against his legal representatives, as section 210 of Act VIII. of 1859 contemplates only the case of a person who, being alive when the decree is passed, dies before execution has been fully had.”

(1) 10 W. R., 317.

(2) 6 W. R., 298.

(3) 10 W. R., 455.

The opinion of the High Court was delivered by

PEACOCK, C. J.—We are of opinion that the defendant in the original suit having died before the filing of the plaint against him, the Court had no jurisdiction to decide upon the case. Under these circumstances the time during which the suit was being prosecuted *bonâ fide* and with due diligence against the dead man, may be deducted in calculating the period of limitation against his representatives. It will be for the Judge to determine whether the plaintiff was suing the deceased *bonâ fide* and with due diligence, or whether he was wanting in due care and caution in not ascertaining whether the party against whom he was proceeding was dead.

The case of *Rajkishoree Dasse v. Bodunchunder Shaha* (1) is not applicable to case like the present.

1869.

MOHAN CHAND
KANDU
P.
AZIM KAZI
CHOWKIDAR.

1869

June 15.

Before Mr. Justice Kemp and Mr. Justice Glover.

LALJI SING (DEFENDANT) v. SYAD AKRAM SER AND OTHERS
(PLAINTIFFS.)*

Admission of Unstamped Document in Evidence—Rejection on Appeal—Payment of Penalty—Act X. of 1862, ss. 15, 17—Act VIII. of 1859, s. 356.

When the Court of first instance admitted without objection unstamped receipts in evidence, but the Judge on appeal rejected the documents and reversed the decision of the lower court, *helt*, that the documents once received without objection were wrongly rejected, and the decision below wrongly reversed on appeal, as the irregularity was not one affecting the merits of the case under section 359, Act VIII. of 1859; and that the Court had no power to receive the documents on payment of the stamp duty and penalty under section 17, Act X. 1862.

Section 17 of Act X. of 1862 only applies to the reception of documents under section 15, which have been insufficiently stamped, not to documents on which there is no stamp. Such documents should not be received at all.

Baboo *Gopal Lal Mitter* and *Him Chandra Banerjee* for appellant.

Munshi *Mohammed Yusaff* for respondents.

* Special Appeal, No. 563 of 1865, from a decree of the Judge of Patna, dated the 18th December 1865, affirming a decree of the Deputy Collector of that district, dated the 6th October 1868.