Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice L. S. Jackson, and Mr. Justice Macpherson.

1868
Sept. 3.

KALI KRISHNA PAL CHOWDHRY (PLAINTIFF) *v.* SRIMATI JAGATTARA AND ANOTHER (DEFENDANTS.)*

Limitation—Account—Cause of Action—Act XIV. of 1859, *s.* 1, *cl.* 16.

The representatives of a gomasta, who had, for the last four years of his life taken the moneys of his employers in advance for the purposes of the business were sued for the balance of account of such moneys after giving credit for the amount of the gomasta's annual salary. *Held* that the suit, being brought in less than six years from the date of the gomasta's death, was not barred by the provisions of Act XIV. of 1859.

THIS was an appeal to the High Court, under section 15 of the Letters Patent.

The suit was instituted on the 4th April 1866 (7th Chaitra 1272), in the Court of the Principal Sudder Ameen of Dacca, to recover Rs. 1,085, 14 annas, 15 gundas. The defendants were the represntatives of one Mathuranath Pal Chowdhry, deceased, who had acted as the plaintiff's gomasta up to 23rd Baisakh of the Mahajani 1269, corresponding to 1862, the date of his death. The sum claimed was for monies of the plaintiff taken by Mathuranath Pal, in advance, for the purposes of the business, from the year 1265, corresponding to 1858, and for which he had not accounted at the time of his death, after crediting the amount of his yearly salary from the same date, which had not otherwise been paid to him.

The Principal Sudder Ameen dismissed the plaintiff's claim for all sums drawn out by the deceased Mathuranath more than six years before the institution of the suit, in taking the account, and debited the plaintiff with the salary due to the deceased only for the period within six years prior to the institution of the suit.

On appeal the Judge upheld the Principal Sudder Ameen's decision.

* Appeal No. 3 of 1868, under section 15 of the Letters Patent of 28th December 1865, from a judgment of Mr. Justice Kemp, prevailing against the judgment of Mr. Justice E. Jackson, dated the 29th February 1868, in Special Appeal No. 1615 of 1867, from a decree of the Zilla Court of Dacca.

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The plaintiff then appealed specially.

E. JACKSON, J.—The plaintiff sues to recover the aggregate amount of certain sums of money from time to time taken by his gomasta, from the year 1265, corresponding to 1858, to the date of his death, deducting therefrom the total amount of salary due to the gomasta. The defendants are the heirs of the gomasta. The fact of the money being taken, and of the salary being due, has been found by the lower Appellate Court, but it is said that the lower Appellate Court has erroneously applied limitation to the sums taken by the gomasta in the years 1265 and 1266, A. D. 1858 and 1859. That Court has held that whatever was due at the end of the year 1266, is barred, and must be deducted from the claim. For plaintiff it is contended that that sum is not proved, as the salaries for the following years should have been set off against that sum.

It appears to me that this Court should not, in any way, favor the plea of limitation. When the law applies, it must have its course, but if, upon the ordinary system of taking accounts between master and servant, the salary of each year, as it fell due, would have been set off against the sums appropriated by the gomasta, it would be more consonant with equity to adopt that course of account than to hold that the salary of each year was to be set off only against the debt of each year, and thus allow a large portion of the debt to be barred from recovery.

There does not appear to have been any misappropriation. The gomasta was allowed, from time to time, whatever sums of money he required from the treasury of his master. These had to be repaid; and it seems to be admitted that the first item given, which the master would repay himself, was the servant's salary. It seems to me that there was, in fact, a running account between the master and servant; and that if the servant had overdrawn, what was due for his salary in the year 1266, the sum which was due for his salary at the end of 1267, would be credited at the end of that year against what had been overdrawn at the end of 1266; and if a balance still remained, that the amount due for the salary of the year 1268, would, at the end of the year 1268, be credited against that balance; and similarly if a balance still

remained, the salary for the year 1269 would, at the end of that year, be also credited against that balance; and similar credits of salary due at the end of each year, or whenever the salary fell due, would continue to be made against the oldest standing debts. If this is the correct view of the law, the manner in which the lower Appellate Court has taken the account is erroneous. The principle in law upon which I think this is the correct mode of taking the accounts, is the right of the creditor to appropriate sums, however paid, in reduction of debt, to whatever portion of the debt he pleases, so long as the debtor does not distinctly state that the sums so paid are paid against a particular debt. I would reverse the Judge's decision, and, on the account as I hold it should be taken, would find that no portion of the gomasta's debt is barred by limitation; and, therefore, I would decree the plaintiff's claim with all costs.

As there is a difference of opinion in law, the opinion of Mr. Justice Kemp must prevail, and this appeal be dismissed.

KEMP, J.—I cannot concur in the judgment of my learned colleague. I would confirm the decision of the lower Appellate Court, which, I may observe, confirms that of the Court of first instance.

The view taken by Mr. Justice E Jackson of the application of the Statute of Limitations to the facts of this case, as admitted between the parties, or substantiated by reliable evidence, is wholly different from the plea raised by the plaintiff, special appellant, in the lower Appellate Court.

I proceed to state briefly the nature of the suit as gathered from the pleadings, which I have consulted in the original vernacular. The plaintiff is a mahajan; he sues the heirs of a deceased gomasta, by name Mathuranath Pal, on the allegation that the said gomasta overdrew from the funds of the three *gadis* under his charge, at various dates, from the year of his appointment in 1265, corresponding to 1858, to the date of his death in 1269 corresponding to 1862, an aggregate sum of Rs. 1,645, omitting fractions from this sum, the plaintiff gives credit on account of salary during the whole period of the deceased gomasta's incumbency, Rs. 560; and his claim is for

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the balance of Rs. 1,272. In his plaint, the plaintiff states that, as there was no stipulation within which the sums so overdrawn were to be repaid, his cause of action for the whole sum so overdrawn, which ranges over five years, arose on the day after the death of the gomasta, or on the 25th Baisakh 1270.

Both the lower Courts have held that clause 16, section 1, Act XIV. of 1859, applies to that suit, and that on the date of institution of suit, *i. e.* the 17th Chaitra 1272, B. S., the monies overdrawn in 1265 and 1266 were barred by lapse of time. A decree was given in part of the sum claimed, or for sums overdrawn in the years 1267, 1268, and 1269, after deducting the salary due to the late gomasta for these three years up to the date of death.

In appeal to the Judge, the plaintiff, special appellant, appealed on one ground alone, which I have translated from his petition of appeal in the vernacular, *viz.* :—" It is not customary to recover in each sum overdrawn by a gomasta as long as he is in the service. Mathuranath Pal was in service up to the date of his death, *ergo* my cause of action arose from the date of his death. The Principal Sudder Ameen has overlooked this, and has calculated the period from which limitation runs from the date of each item overdrawn."

Before us the pleader of the special appellant abandons this plea altogether, and raises an entirely new one, which has found favor with my l[illegible] the debt to b[illegible]e. I am clearly of opinion that as there was not app[illegible]ion between the parties that the salary of the deceased gomasta was to be set off at all against the items overdrawn by him, much less that the salary due for the whole period of his service was to be set off against the oldest claim in point of date on account of sums overdrawn by him, so as to evade the statute of Limitations, the concurrent opinion of the lower Courts, which is based upon the pleadings and allegations before them, is the correct one. I would dismiss this appeal with costs and interest.

From this judgment the plaintiff appealed under section 15 of the Letters Patent.

Baboo *Ramesh Chandra Mitter* for appellant.

Baboo *Kali Mohan Doss* for respondents.

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The judgment in appeal was delivered, as follows, by

PEACOCK, C. J.—In order to decide whether this case is barred by limitation, we must ascertain what is the cause of action. It is admitted, I think on both sides, that the deceased was the general agent of the plaintiff in the management of his business, and that he did, in fact, draw out of the business moneys which belonged to the plaintiff. I do not think that it would lie in the mouth of the representatives of the agent to say that he drew that money without any authority, and that he was merely embezzling the money, nor was it so contended on the part of the plaintiff or of the defendants. We must, therefore, look upon the moneys which the agent drew out in the same light as if they were moneys advanced by the plaintiff to him for the general purposes of the business.

In such a case the cause of action would not accrue immediately the money was advanced. There would be an obligation on the agent to render an account of his agency, and to account for the moneys in question. In using the word "account," I use it in its legal sense as not confined merely to rendering an account of what he has done with the money, but as including the payment of any balance which might be found due from him upon taking the accounts. The agent died before he was requested to account for, or to render an account of the moneys; and, then, I apprehend a cause of action accrued against his representatives so far as they had assets to repay to the principal any balance, which, upon the adjustment of the accounts, might appear due from the agent.

It appears to me, therefore, that the period of six years must be computed not from the time when the agent drew the moneys, but from the time of his death. That period not being six years before the commencement of the suit, it appears to me that the plaintiff is entitled to recover the full amount what, upon the taking of accounts, may appear to have been overdrawn by the agent. The result, therefore, is that, according to the view taken by Mr. Justice E. Jackson, the plaintiff's claim as laid is decreed; but considering that the case has not been clearly presented to the various Courts before which it has been brought, and that if

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the claim had been so presented, a different result might have been come to, it appears to us that the plaintiff ought to have his costs in the first Court, and that each party should bear his own costs in the lower Appellate Court and in this Court. There will be a decree for the plaintiff for Rs. 960, with costs in the first Court on that amount, and the defendant will obtain costs in that Court, calculated on Rs. 125.

Before Mr. Justice Kemp and Mr. Justice E Jackson.

1868 Dec. 22.

SRINATH GANGOPADHYA AND OTHERS (DEFENDANTS) v. SARBAMANGALA DEBI (PLAINTIFF.)*

Stridhan—Unbetrothed Daughter—Succession.

A Hindu directed his wife to settle certain property after his decease upon their daughter. She did so by deed of gift (Hibbanama), giving it to their daughter "to be enjoyed by her, her sons and grandsons, &c., one after another, the other heirs not to have any concern with it." *Held*, that the the plaintiff as the daughter's daughter had no right to share therein with her brothers, the daughter's sons.

A betrothed daughter is not entitled at her mother's death to share in her stridhan, but the unbetrothed daughters alone inherit with the sons.

When stridhan has once devolved as such upon an heir, it does not continue to devolve as stridhan, but afterwards devolves according to the ordinary rules of Hindu law.

THIS was a suit to recover possession of certain movable and immovable properties left by the plaintiff's mother, Durgamani Debi, upon the allegation that Sadasib Roy Chowdry, the maternal grandfather of the plaintiff, gave permission to his wife, Bimala Debi, the maternal grandmother of the plaintiff, to make a gift of all immovable properties to Durgamani, the mother of the plaintiff. That accordingly Bimala granted to Durgamani, by a Hibbanama, the parcel of property No. 1; that some of the other properties in dispute were obtained by gift or purchase by Durgamani; that the rest were purchased during the time the plaintiff and her brothers lived in commensality; that Durgamani being possessed of the property as her stridhan, departed this life, leaving her surviving a married

* Regular Appeals, Nos. 8 and 15, from the decrees of the Principal Sudder Ameen of Rungpore, dated the 19th September 1868.