Appellate Jurisdiction. (*a*)

Regular Appeal No. 98 *of* 1868.

SAIT GIRIDHARADOSS MANAKJI TADAHHAYI BIRZI MOHANDOSS, SOWCAR.... } *Appellant.*

RAJAH SURANENI LAKSHMI VENKAMMA ROW, ZEMINDAR and another..... } *Respondents.*

Regular Appeal No. 100 *of* 1868.

CALAPATAPU KRISTNAYYA and another.....*Appellants.*

RAJAH LAKSHMI VENKAMMA ROW and another.*Respondents.*

The plaintiff sued to recover a debt which became payable in 1843 by virtue of a razinamah and petition filed in Court. The razinamah had been from time to time proceeded on as a decree of the Court and process of execution enforced. In 1866 a further application for execution was rejected on the ground that no decree had been passed on the razinamah, in accordance with a previous decision of the High Court.

Held, that the suit was barred by the Limitation Act.

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THESE were Regular Appeals against the decision of G. D. Leman, the Acting Civil Judge of Guntoor, in Original Suit No. 1 of 1867 and the order of the said Court, dated 25th April 1868.

This suit was brought to recover Rupees 92,958-13-9 upon an agreement in Petition No. 389 of 1842 on the file of the late Provincial Court of the Northern Division by the sale of the Kykalur muttah of the Melavaram zemindary.

The petition was filed to postpone the execution of a razinamah, No. 12 of 1833 on the file of the aforesaid Court, and the suit is brought because in an order passed in review on Petition No. 191 of 1865 which prayed the Court to enforce the terms of the razinamah by execution, the Court refused to do so and rejected the petition.

The date of this order is 9th August 1866.

The postpone petition beseeches the Court to delay the sale of the Kykalur muttah mortgaged to plaintiffs for a debt of Rupees 37,000 for a period of 8 months, *i. e.*, till the 5th Palguna Sudham of Sobhacrutu.

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The person executing this petition agrees to pay the above sum within that time and to pay interest at one per cent. to plaintiff, who agrees to the terms.

1st defendant's father-in-law who died in 1849 executed this agreement, and it bears date July 28th, 1842.

The defendant pleaded that the suit was barred.

The Civil Judge gave judgment as follows:—

In the plaint and in his replies to the Court, the plaintiff's vakil alleges that the order of this Court rejecting his application for execution which was based on this postpone petition is his true cause of action, as that up to that time the Court had continued receiving and passing orders on his petitions and there was no apparent reason for bringing a suit.

But I cannot see this at all. The petition was rejected because the Court decided on the ruling of the High Court in page 305, Civil Petition No. 136 of 1864, Vol. II, Part II, that the petitioner's request could not be complied with. Had the petition been rejected on any other good ground, want of sufficient stamp for instance, it certainly would not have given him a cause of action, and I cannot see how, in this particular case, it can be taken to constitute one.

The suit is brought to enforce the payment of a debt due under the terms of a written agreement, and to me it appears that the cause of action must be considered to have arisen when those terms were broken, that is, as it was an agreement to pay within eight months that it arose March 28, 1843, the agreement bearing date July 28th, 1842.

In 1846, the Kykalur muttah was sold in satisfaction of the money secured in the petition, but the greater part of the proceeds were taken by Government in satisfaction of the arrears of revenue due by 1st defendant's father-in-law. In 1849 he died and the defendants succeeded to his estate, since which time continual applications had been made for execution up to the time of the last application in 1864 which was answered finally in the order on Review Petition of 1865, No. 191.

Now, if the cause of action as against the 1st defendant's father-in-law arose in 1842 and was kept alive up to 1849

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when he died, the cause of action as against his heirs arose on his death.

Such being the case, the plaintiff is barred by the Statute of Limitations, unless he can show that the parties, the defendants have made such admissions as would tend under Section 4, Act XIV of 1859, to revive the right to sue, or that Section 14 of the same Act is applicable.

Since 1st defendant's father-in-law's death, the defendants, while admitting that they did borrow money of the plaintiffs, have denied their liability to pay that debt, and have alleged that they are not responsible or liable to pay the amount which was secured to the plaintiff under this agreement, and in no case on the records of this Court does it appear that they have admitted their liability or given any such admission of their liability in writing as is requisite under Section 4.

I cannot find therefore that section will help the plaintiff.

I then come to the question is Section 14 applicable? The words of the section are "shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant or some person, whom he represents, &c.,&c."

Lord Coke's definition of a suit as given in Webster's Dictionary is that it includes execution, and it has been said that as plaintiff was applying for execution, therefore he was engaged in prosecuting his suit; his diligence and *bona fides* are not open to question. It has been ruled in the Calcutta Courts that the filing of miscellaneous petitions of which kind are these postpone petitions does not constitute a part of the process of prosecuting a suit, and that Section 14 is not applicable to such petitions, but without going into that question, it appears to me that it is inapplicable because this is a fresh suit against fresh defendants, and lastly because there has been no "defect of jurisdiction or other cause tending to prevent this court making a decision; nor has any decision of the Court been annulled on appeal."

It has been said that as the Court led plaintiff astray in taking his petitions and filing and passing orders on them, therefore the Court ought now to assist him, and if it be necessary so to do to put an equitable construction on the Act, and

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admit the plaint, but this is entirely out of the question as it is most strictly laid down that no such construction can be placed on the wording of this Act.

On other point it is to be noticed, mentioned by the vakil for the plaintiff, that the Court must look upon the postpone petition in the light of a decree as the Court did prior to the order of the Court, dated 9th August 1866, but manifestly I cannot do that; were it a decree, this suit could not be brought at all.

I therefore think I must dismiss this suit with costs. I have been asked to leave the point to be argued hereafter and to settle the issues and permit the suit to go on, but holding the opinion I do, this would be a mere waste of time and also useless expense to the parties.

The plaintiff appealed to the High Court against the decree of the Civil Judge for the following reason :—

Because the suit is not barred by the Statute of Limitation.

The Advocate General, for the appellant, the plaintiff.

Mayne, for the respondents, the defendants in No. 98 of 1868.

Miller and *Kuppuramasamy Sastry,* for the appellants, the plaintiffs.

Mayne, for the respondents, the defendants in No. 100 of 1868.

The Court delivered the following judgments :

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This is an appeal from the decree of the Civil Court of Guntoor dismissing the suit on the ground that it was barred by the Act of Limitations. The cause of action set forth in the plaint is the non-payment of Rupees 92,958-13-9 alleged to be the balance of the principal sum and the interest thereon remaining due under an agreement evidenced by a razinamah and petition filed in a suit in the same Court, the former in 1833, and the latter in 1842. There is no doubt, nor has it been disputed, that such alleged cause of action arose at the latest when the debt became payable under the terms of the petition, and that was on the 28th March 1843. The suit

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therefore which was instituted on the 1st December 1866 was then barred, unless the plaintiff was entitled to exclude from computation so much of the intervening time as would leave a less period than six years, and it is on this ground that it is sought to avoid the bar.

The contention on behalf of the plaintiff has been that under Section 14 of the Act of Limitations the whole period from the 28th March 1843 to the institution of the suit should be excluded from computation, because throughout that period the razinamah had been from time to time proceeded upon as a decree of the Court and enforced by process of execution. This appears to have been so and was an improper course of proceeding which existed in some of the Mofussil Courts without objection on the part of the Sadr Court and was not put an end to until this Court decided that process of execution could not issue to enforce a razinamah filed in a suit until a decree had been passed in the suit embodying its terms. See 2, *Madras High Court Reports*, 305. The facts are:—that several applications by the plaintiff were duly heard and given effect to before 1864, but an application for execution in that year against the sons of the judgment debtor was rejected by an order in 1865 on the ground that it was necessary for the plaintiff to show that the debt had been contracted with the consent of the sons or for family purposes. That order was reviewed in 1866 and considered unsound, but another order was made on the authority of the decision of this Court rejecting the plaintiff's application on the ground that no decree had been passed on the razinamah.

These facts, we are of opinion, do not warrant the contention on behalf of the plaintiff. The time which Section 14 requires to be excluded from computation is such time as may have been spent in proceedings in a Court "which, from "defect of jurisdiction or other cause, shall have been unable to "decide upon it, or shall have passed a decision which on "appeal shall have been annulled for any such cause." In the present case the plaintiff's proceedings were given effect to in the ordinary course of execution except the last in 1864, and we need not stop to consider how much of the time between that application and the institution of the suit should be excluded; for, if the whole of the interval were excluded, it would not avail to avoid the bar.

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The plaintiff has certainly been placed in a position of some hardship, but the hardship lies in his being prejudiced by a recent decision taking away the remedy by process of execution after the razinamah had been given effect to as a decree of the Court under an acknowledged but improper rule of procedure. The bar under the Act of Limitations would equally apply to the suit if it could be viewed as brought upon a decree. But it cannot, for Section 11 of Act XXIII of 1861 prohibits such a suit. If the plaintiff can now have relief at all, it must be through a renewed application for execution, but we do not intend by this observation to intimate any opinion as to the success of such an application. For these reasons the decree of the Civil Court must be affirmed, but we think that it should be affirmed without costs.

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This case is entirely governed by our judgment in Regular Appeal No. 98 of 1868 and in accordance therewith the order of the Lower Court must be affirmed and this appeal dismissed.

Appeal dismissed.

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Civil Miscellaneous Regular Appeal No. 108 *of* 1869.

MUTTEALAUMMAL and another.....*Petitioners.*

CHELLAYAMMAL.....*Counter-Petitioner.*

A Civil Court has no power to stay execution in cases where an appeal has been made to the Privy Council against a decree of the High Court.

1889. *November* 11. *C.M.R.A.No.* 108 *of* 1869.

THIS was an appeal against the order of C. F. Chamier, the Civil Judge of Salem, dated the 22nd February 1869, passed on Civil Petition No. 95 of 1869.

The facts sufficiently appear from the following

JUDGMENT :—The appellants in this case seek to rescind the order of the Civil Court staying the execution of the decrees obtained by them in the Civil Court and in this Court, during the pendency of the appeal which has been preferred from the decree of this Court to Her Majesty in

(a) Present : Scotland, C. J. and Innes, J.