APPELLATE JURISDICTION *(a)*

Regular Appeal No. 73 of 1870.

HIRADA BASAPPA.....*Appellant.*

GADIGI MUDDAPPA.....*Respondent.*

The effect of Section 9 of Act XIV of 1859 is to enact that nothing in an account of mutual dealing between merchants and traders is to be barred, provided that there is one item, indicating the continuance of such dealings, proved to have occurred within the period of limitation.

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THIS was a Regular Appeal against the decree of O. B. Irvine, the Acting Civil Judge of Bellary, in Original Suit No. 11 of 1869.

The facts of this case are fully stated in the judgment of the Civil Judge, which was as follows :—

"The plaintiff sued to recover Rupees 6, 914-15-6, which he claimed to be due as principal and interest on account of mutual dealings carried on between him and the defendant from 25th March 1864 to 13th January 1867. The plaint set forth that the sum claimed was found to be due upon a settlement of accounts between the parties on 25th January 1867.

The defendant denied dealings between the parties as alleged in the plaint, and pleaded that the suit was barred by Clause 9, Section 1 of the Limitation Act, the different items in the accounts showing the alleged transactions to have taken place upwards of three years before the suit was brought, with the exception of a few items which referred to transactions of which the dates were barred, but which were improperly entered in the plaintiff's accounts for the year 1867. The defendant denied that the dealings carried on between him and the plaintiff were mutual, and referred to Original Suit No. 4 of 1868, formerly instituted by the plaintiff's father against this defendant and his brothers, as relating to dealings of a similar character to the present, and which this Court and the High Court on appeal had pronounced to be not mutual dealings, and therefore not governed by Section 8 of the Limitation Act.

The plaintiff directed the Court's attention to three previous suits decided, which he pronounced to be of a similar

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nature to the present claim. With reference to these suits I observe that the two first are not applicable to this suit, because decided before the present Limitation Act was in operation, and the last related to partnership dealings, and is, therefore, not of a similar nature to the present suit.

Having heard vakils for both parties and perused the accounts filed in the suit, I am clearly of opinion that the dealings herein specified are not of the nature of mutual dealings to which Section 8 of the Act is applicable.

The plaintiff's accounts show that the plaintiff made advances to the defendant, which were refunded by the latter at different times and in different sums. The plaintiff's vakil admits this, but urges that each party should be regarded as having made loans to the other, and that therefore the dealings were strictly mutual dealings, and so not barred.

I think there is nothing in this suit to indicate mutual dealings within the meaning of Section 8, Act XIV of 1859, and that, therefore, Clause 9, Section 1, must be held applicable. The suit not having been brought till 1869, the items bearing date 1864 and 1865 are all barred, as well as those which appear at the close of the account, and dated 1867, but referring to transactions of the year 1864.

From the few items under the head of receipts and disbursements which appear in the accounts for the year 1866, the Court cannot conclude that the defendant is indebted to the plaintiff, and therefore in respect of these there is no cause of action.

For the foregoing reasons, I dismiss the suit and direct the plaintiff to bear the defendant's costs.

The plaintiff appealed on the ground that the suit was not barred by the Law of Limitations.

Mayne, for the appellant, the plaintiff.

Gould, for the respondent, the defendant.

The judgment of the Court was delivered by

HOLLOWAY, Acting C. J :—This is a question upon the construction of Section 8 of the Limitation Act. There are three requisites for the applicability of the exception.

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1. The suit must be for balance of accounts current.
2. The persons must be merchants or traders.
3. They must have had mutual dealings.

Now the plaint, truly or falsely, alleges such dealings; it also claims a balance on current accounts, and the accounts filed contain entries within 3 years plus the period to expire of the current year of the entry :—

It seems impossible, therefore, to say that the suit could properly be dismissed upon anything which at present appears. As to the vakil's supposed admission, it seems to amount to an inference from an argument, and it would not be safe to bind parties by assuming as true every matter of fact which must exist to make an argument tenable. The present section does not use the words "their factors or servants" which were part of the exception in the Statute of James. The mutual dealings, therefore must be of merchants and traders. To be mutual there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. It appears to us that the effect of this clause is to enact that nothing in an account of mutual dealings is to be barred, provided that there is one item indicating the continuance of such dealings proved to have occurred within the period of limitation. This is the construction finally put upon the English exception, in accordance with the final opinion of Lord Hardwick in (*Wilford* v. *Liddel*, 2 Ves., 400.) The provision had been found so mischievous in England that it was abolished by Section 9 of the Mercantile Amendment Act. A slight consideration of the circumstances of this country would have effectually prevented its introduction here, even without the lessons of that experience. We are of opinion that the original decree must be reversed and the case remitted for the trial of the Issues :—(1) Whether there were mutual dealings as merchants or traders? (2) Whether one such dealing has taken place within three years plus the fragment of the year in which such dealing took place?

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The year must be reckoned according to the mode of reckoning adopted in the accounts, if that mode adopts other than the ordinary year.

If these issues are found in the affirmative, it will be necessary to take an account of the dealings and decree the balance due. The costs of this appeal should be provided for in that decree.

Suit remanded.

APPELLATE JURISDICTION (*a*)

Special Appeal No. 573 *of* 1869.

N. A. CHERUKOMEN *alias* GOVINDEN NAIR ..... } *Special Appellant.*

V. ISMALA and 2 others...*Special Respondents.*

It is not law that every right may be renounced. The general rule is power of renunciation, but there are two marked classes of exceptions :—There can be no renunciation of rights and consequent destruction of relative duties prescribed by an absolute law; nor of rights interest in man as man. A man may renounce a concrete right, but not one resulting from a natural condition.

Semble, a karnavan cannot part, by contract, so as to be unable to resume them, with the privileges and duties which attached to his position as karnavan.

1871. *February* 14. *S. A. No.* 573 *of* 1869.

THIS was a Special Appeal against the decision of J. W. Reid, the Officiating Civil Judge of Calicut, in Regular Appeal No. 50 of 1869, confirming the decree of the Court of the District Munsif of Shernád, in Original Suit No. 136 of 1867.

The suit was brought by plaintiff, under alleged authority given by the acknowledgment original karnavan of the tárwad, to set aside the sale of certain lands, yielding annually Rupees 249, effected in execution of a judgment in No. 985 of 1861 on the file of the Munsif of Shernád. Plaintiff produced certain documents, purporting to have been executed by 1st defendant in favor of Kelu Nair, the karnavan by seniority of plaintiff's family, and plaintiffs, as trustees of a pagoda, the family property, making over the lands, sale of which in execution of Original Suit No. 985 of 1861 was sought by this suit to be set aside.

The 1st defendant did not plead.

(*a*) Present : Holloway, Ag. C. J. and Innes, J.