Appellate Jurisdiction. (a)

Regular Appeal No. 50 *of* 1874.

RAJAH MANIKYA ROW LAKSHMAYYAH. ... *Appellant.*

RAJAH MANIKYA ROW VENKATA GOPAL ROW, and eight others ... ... } *Respondents.*

In 1874 plaintiff sued to recover certain property, or its value "dishonestly misappropriated" on the 21st January 1872 by 1st defendant, assisted by the other defendants. The Lower Court held that the right to sue did not accrue until the property had been demanded and refused; that the plaint contained no allegation of such demand and refusal; that the plaint could not be amended by the insertion of such an allegation after answer filed; and that, therefore, the suit could not be maintained:—

Held, reversing the decree, that even if the present case were one in which the provision as to demand could have any application at all, still the suit ought not to have been dismissed on that technical ground, when the defendant, by his answer, traversed the whole of the allegations in the plaint, and pleaded the Statute of Limitations.

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THIS was a Regular Appeal against the decision of W. Wilson, the Acting District Judge of Kistna, in Original Suit No. 1 of 1874.

The plaintiff sued to recover from defendants certain jewels, &c., or their value Rupees 9,985.

1st defendant is plaintiff's step-son and was a minor when his father died on the 20th July 1869. Plaintiff was appointed guardian to the 1st defendant by the Board of Revenue by their Proceedings, No. 64, dated 5th January 1870. From the time of this appointment plaintiff was in the habit of going to Rachur where 1st defendant resided, and 1st defendant also visited and stayed with her in the fort at Rapulli. On the 16th January 1872, plaintiff went, according to custom, to Rachur to look after 1st defendant's affairs, 1st defendant remaining behind at Rapulli. In the fort at Rapulli, in the room occupied by plaintiff, was deposited certain property, in silver, gold, jewels, ready money and other valuable articles belonging to herself, and also certain jewels the property of one Goverdhanaghiry Ramachendráyya, which were deposited for safe custody with plaintiff, the value of all the property being Rupees 12,000; the property was secured in locked boxes. In separate locked boxes were placed a few jewels, and the property belonging to 1st defendant who had brought them with him; all

(a) Present: Holloway and Kindersley, JJ.

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these boxes were placed in the same room, viz., that occupied by plaintiff, and she locked and sealed the door of the room and took the key with her. During her absence at Rachur, on the night of the 21st January 1872, the 1st defendant had the door of the room, containing the aforesaid property, broken open, and dishonestly misappropriated the whole of the property therein contained; the 1st defendant further dishonestly misappropriated the brass utensils belonging to himself and plaintiff which were placed in another room, and which were not mixed up, the plaintiff's with the 1st defendant's. Plaintiff immediately took criminal proceedings before the Police and the Magistrate, but these authorities refused to take cognizance of the matter, being of opinion that it was entirely of a civil nature. The plaintiff, therefore, prays to recover the property, or its value, Rupees 9,985, being the balance after deducting the amount regarding which claim was abandoned.

The 1st defendant answered denying plaintiff's claim; he pleaded that the suit was barred by the Limitation Act, and that the plaint did not disclose any cause of action. He never, as alleged in the plaint, stole the property specified by plaintiff, and never caused it to be stolen; and he never misappropriated it, and never abetted any one else in so doing. The plaintiff, joining Goverdhanaghiry Ramachendrayya, her sister's son, misappropriated his property, and thereby caused much loss to him. In the schedule filed with the plaint, the items of property were not described by shape or weight so as to admit of identification, and the items are not properly valued.

The 2nd, 3rd, 4th, 7th and 8th defendants answered, traversing all the allegations in the plaint, and praying that the suit should be dismissed as against them with costs.

The 5th, 6th, and 9th defendants answered in person and were examined by the Court; they support the plaintiff, and allege that 1st defendant caused to be carried away the boxes containing property from the apartment of plaintiff.

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On the 10th March 1874, the following issues, amongst others, were settled;

I.—What is the cause of action in this suit?

Whether, as contended for the plaintiff, the mere wrongful act of the defendants is the cause of action, or whether, as contended for the defendants, no cause of action arises until possession of the property, alleged to have been dishonestly misappropriated, has been demanded and refused.

II.—Whether the omissions in the plaint of a distinct allegation of demand by plaintiff, and refusal by defendants, of the property alleged to have been dishonestly misappropriated, can be supplied from the oral examination of the pleader for the plaintiff.

III.—Whether if the 1st and 2nd issues be found for the defendants, this suit can be entertained.

IV.—Whether if the 1st and 2nd issues be found for the plaintiff, this suit is barred under this Limitation Act.

The remaining four issues related to the property, its alleged removal, and the liability of the 2nd to 9th defendants.

On the 25th March 1874, the following judgment was delivered by Mr. W. Wilson, the Acting District Judge.

"These are issues of law, and amount, in brief, to whether the action is maintainable, and if maintainable, whether it is barred. It is contended for the defendants, relying on the provisions of Clause 48 of the schedule annexed to the Limitation Act IX of 1871, that the action cannot be maintained, because the plaint, while alleging that the property, sought to be recovered, had been dishonestly misappropriated by the defendants, contains no allegation that it had been demanded and refused, that the limitation for an action coming within the terms of Clause 48, runs from the time 'when the property is demanded and refused,' and that prior to that time there is no right to sue, because limitation runs from the time that the right to sue accrues: it is further argued for the defendants that should it be held that the cause of

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action is the wrong itself, then the suit is barred, as the act of the defendants falls within Clause 26 of the schedule, which prescribes one year's limitation for the taking of moveable property, running from the time when the taking occurs. The plaintiff relies upon Clauses 34 and 40 and 118 of the schedule, by the first two of which two years limitation is provided, and by the last, six years; it is argued further, that even under Clause 84, on which the defendants rely, the suit is not barred as that gives a period of three years limitation. The plaintiff contends that the cause of action is the wrongful act of the defendants, and that with the cause of action, accrued the right to sue, without the necessity of demanding the restoration of the property; he argues, however, that the plaint sufficiently discloses the fact of demand and refusal; he contends that the criminal proceedings taken before the Magistrate amount to a demand; he alleges however, that demand was made in express terms after the occurrence of the wrong. He argues that the omission from the plaint of one express allegation of demand and refusal, is not, as argued for the defendants, fatal to the maintenance of the action, because the omission can, under the provisions of Section 139, Code of Civil Procedure, be supplied from his statements now, and the plaint amended. I am of opinion that none of the clauses of the schedule, quoted by either of the parties, is applicable to this case."

The learned Judge held that the case came within Clause 35, and that, under that clause "the period of limitation runs from the period when the property is demanded and refused. The period of limitation runs from the time when the right to sue accrues, because there can be no limitation till an action can be brought.

"The plaintiff argues that the right to sue accrues with the wrong, which is her cause of action. Generally speaking, it must be conceded that this is the case, but it is not so in every case; for instance 'in felonies, the remedy for the private injury by action at law is suspended until the sufferer fulfilled his duty to the public by prosecuting the offender for the public crime,' Stephen's(*a*) Vol III, 454.

(*a*) Stephen's Blackstone's Commentaries.

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Again the law may impose a condition precedent to the right to sue. This is the case under Clause 35 of the schedule annexed to the Limitation Act IX of 1871. The right to sue under that, undoubtedly accrues 'when the property is demanded and refused.' 'Demand and refusal' is, therefore, a condition precedent to the right to sue. This plaint contains no allegation of demand and refusal; it is urged that the criminal proceedings taken by plaintiff before the Magistrate amount to a demand. They certainly do not; the demand must be addressed to, and the refusal made by, the person against whom the subsequent action is brought. The main and primary object of criminal proceedings is punishment, but they may be, and ordinarily are, taken without any demand addressed by the complainant to the defendant.

"It is argued for the plaintiff that the omission from the plaint of an express allegation of demand and refusal may be supplied under the provisions of Section 139(*b*). That section gives the Court power to frame the issues on allegation of facts made by the parties at the first hearing, different from the allegations of facts contained in the written pleadings. But in this case there was no allegation of fact at all as regards demand and refusal, and the absence of the allegation is itself the ground of an issue as to whether the suit can be maintained. It is argued, for the plaintiff, that the fact of demand and refusal is a matter of evidence, and undoubtedly it would be, if the fact were alleged by the one party and denied by the other, but the question here is, whether, after objection taken by the defendants as to plaintiff's right to sue, the plaintiff is entitled to amend her plaint by supplying the omission on which the objection is found.

"The only provisions of the law relating to the amendment of plaints are contained in Sections 29 and 32 of C. C. P.

"The former provides for amendment when the plaint does not contain the particulars prescribed by Section 26, &c. In this case the plaint contains everything that Section 26 requires. Section 32 provides that the plaint may be amended "if upon the face of the plaint or after questioning the plaintiff, it appears to the Court that the subject-matter

(*b*) Of Act VIII of 1859.

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of the plaint does not constitute a cause of action, or that the right of action is barred by lapse of time. The section provides, therefore, for patent defects, but there is nothing of this nature on the face of this plaint: the defect is latent, discovered by the objection of the opposite party.

The plaintiff argued that under Section 32 the plaint might be amended at any stage of the suit, because it provides that 'the Court may in any case allow the plaint to be amended.' This proviso is however only a counterpoise to the former part of the section which directs the rejection of a plaint which, on the face of it, discloses no cause of action, or is barred; besides the whole procedure as to amendment is prior to registry, and therefore lies only between the plaintiff and the Court. I am of opinion that no amendment can be made to the plaint, when the amendment proposed is the result of an objection made by the defendant, especially when that objection questions the very right to sue. The plaint cannot therefore be amended by inserting in it an express allegation of demand and refusal, with the date thereof. The right to sue does not accrue till the property has been demanded and refused; the action is therefore not maintainable. The suit is dismissed but without costs; but for the decision on the point of law, the plaint disclosed a good cause of action."

From this decision the plaintiff appealed on the following grounds:—

1. The Lower Court was in error in holding that an omission in the plaint to insert an express allegation of demand and refusal warrants the dismissal of the suit.

2. The criminal proceedings taken by the plaintiff before the suit was brought, and the 1st defendant's answer thereto, render a demand unnecessary.

3. The nature of the defence set up by the defendant herein obviates the necessity for a demand.

4. The institution of the suit is itself a demand.

5. Even if such an allegation is considered necessary, the plaintiff ought to have been permitted to amend the plaint when he applied for it.

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Anandacharlu and *Kamasam*, for the appellant, the plaintiff.

Bálági Rau, for the 1st, and *Karunakara Menon*, for the 2nd to 4th, and 7th and 8th respondents, the defendants.

The Court delivered the following

JUDGMENT:—In this case the Judge has drawn from the innovation as to prescription running from demand the inference that no suit can be maintained until demand. This is not a permissible inference. The departure from legal principle based upon the notion almost entirely exploded that something more than the existence of a right is required to clothe it with an action, creates a discrepancy between the period at which a man *may* sue, and the period at which he *must* sue to avoid prescription. This, however, is an anomaly and must be limited to the special purpose for which it has been introduced. A debtor to whom money has not been lent for a fixed term is not *in morâ*, if he does not pay until demand. A creditor who sues before demand would justly be deprived of costs, and, if the suit was not resisted, perhaps properly be made to pay the defendant's. To say, however, that a right of demand is not clothed with an action because, in consequence of special provisions, the action will not be subject to destruction by prescription until something more happens, is to make this legal anomaly the means of creating a perfectly existent legal right uninvested with legal protection—a monster. If it were otherwise, we should not have approved of the dismissal of this suit on this technical ground when, on the answer coming in, it appeared that the whole matter was denied, and, moreover, the Statute of Limitations pleaded.

It is unnecessary, therefore, further to consider whether the present case is one of those in which this provision as to demands could have any application at all.

The decree must be reversed and the case remitted for decision. The costs of this appeal will be provided for in the final decree.

Appeal allowed.