

## FULL BENCH.

*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Harington, Mr. Justice Brett, Mr. Justice Mitra, and Mr. Justice Geidt.*

1907  
March 23.

ABDUL RAHMAN

v.

AMIR ALI.\*

*Limitation—Parties, substitution of—New plaintiff—Assignment—Assignee substituted after period of limitation—Civil Procedure Code (Act XIV of 1882) s. 372—Limitation Act (XV of 1877) s. 22.*

In a suit brought within the period of limitation the name of the assignee of the original plaintiff was, after expiry of the period, substituted for that of the latter which was struck off the record :—

*Held*, that section 22 of the Limitation Act was applicable, and that if a person who has not been on the record is substituted as a plaintiff in the place of the original plaintiff under section 372 of the Code of Civil Procedure, the person so substituted must be taken to be brought on the record subject to the law of limitation applicable to the case. That section does not exclude the operation of section 22 of the Limitation Act and, except in the case of the legal representative of a deceased party, the person substituted as plaintiff must be regarded as a new plaintiff within the meaning of the latter section.

*Harak Chand v. Deonath Sahay*(1) approved. *Suput Singh v. Imrit Tewari* (2) disapproved and distinguished.

REFERENCE to Full Bench by Rampini and Mookerjee JJ.

This reference was made in a second appeal preferred by Sheikh Abdul Rahman and another. The following statement of facts is taken from the order of reference :—


“ This appeal arises out of a suit brought on a mortgage bond. The suit was instituted by the mortgagee on the 3rd March 1902, *i.e.*, 11 days before the expiry of the period of limitation. On the 21st January 1904, *i.e.*, long after the expiry of the period of limitation, the plaintiff by a deed of sale assigned his right under the mortgage bond to Dr. Abdul Rahman and Sheikh Yad Ali. An application was then made to the Court to substitute their names for that of the original plaintiff. This was allowed on the 4th February 1904, and the name of the original plaintiff was

\* Reference to Full Bench in Appeal from Appellate Decree, No. 2107 of 1904.

(1) (1897) I. L. R. 25 Calc. 409,

(2) (1880) I. L. R. 5 Calc. 720.

struck off. Both the Courts below have held on the authority of the case of *Harak Chand v. Deonath Sahay*(1) that the suit cannot proceed at the instance of the new plaintiffs. They have held it to be barred by limitation and have dismissed it."

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The second appeal came on for hearing before RAMPINI and MOOKERJEE JJ., and their Lordships referred the case to the decision of a Full Bench.

The order of reference, after stating the facts, proceeded as follows :—

"The substituted plaintiffs appeal and contend that they were substituted under section 372 for the old plaintiff and the suit was allowed to be continued at their instance. Hence, the appellants are not new plaintiffs and their suit should not have been dismissed. It has further been argued that though there is no express order on the subject, the substituted plaintiffs obtained the leave of the Court to carry on the suit. This contention is raised to distinguish this case from that of *Harak Chand v. Deonath Sahay*(1), the cases of *Suput Singh v. Imrit Tewari*(2), *Chunni Lal v. Abdul Ali Khan*(3), and *Janhabi Chowdhurani v. Brojo Mohini Chowdhurani*(4) are cited in support of the appellant's case.

"On the other hand, it is pointed out that the provisions of section 372 of the Code of Civil Procedure do not exclude the operation of section 22 of the Limitation Act, and that the terms of section 22 of the Limitation Act do not make any exception in favour of an assignee of a plaintiff or defendant, as they do in favour of a representative of a deceased plaintiff or defendant; the case of *Fatmabai v. Pirbhai Virji*(5) has also been quoted in support of the decisions of the lower Courts.

"It appears to us that there is a conflict of decision between the case of *Harak Chand v. Deonath Sahay*(1) on the one hand, and of *Suput Singh v. Imrit Tewari*(2) on the other. The case of *Janhabi Chowdhurani v. Brojo Mohini Chowdhurani*(4) is not strictly speaking in point, as it is not the case of an assignment of any interest in the suit.

(1) (1897) I. L. R. 25 Calc. 409.

(3) (1901) I. L. R. 23 All. 331.

(2) (1880) I. L. R. 5 Calc. 720.

(4) (1903) 7 C. W. N. 817.

(5) (1897) I. L. R. 21 Bom. 580.

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“The strict terms of the law are in favour of the decision in the first of these cases and it appears to us to make no substantial difference whether the suit is or is not allowed by the Court to proceed at the instance of the assignee. Whether the leave of the Court be given or not, the assignee is strictly speaking a new party and, unless he is or can be regarded as the representative of the assignor, the terms of section 22 of the Limitation Act would appear to apply to him.

“If the name of the original plaintiff is not struck off the record, and the name of the assignee is merely added, there is of course no difficulty, but in the cases above referred to as in this case, this course was not adopted.

“This conflict of decision cannot fail to result in great uncertainty in the state of the law. We, therefore, consider it necessary to refer this case to a Full Bench, which we accordingly do, and the questions on which we would invite their decision are :—

- (i) Whether when the name of an assignor is removed from the record of a suit, and that of an assignee is substituted in its place, the provisions of section 22 of the Limitation Act are applicable?
- (ii) Whether the case of *Harak Chand v. Deonath Sahay*(1) or that of *Suput Singh v. Imrit Tewari*(2) has been correctly decided?”

*Maulvi Syed Shamsul Huda* (*Maulvi Mahomed Ishfak* with him), for the appellants. Section 22 of the Limitation Act has no application to the present case. In cases of assignment, under section 372 of the Code the suit is continued with leave of the Court; so that the old suit as instituted by the original plaintiff continues: *Suput Singh v. Imrit Tewari*(2) where also the name of the original plaintiff was ordered to be struck out, as would appear from p. 722 of the report. That case cannot be distinguished from the present and it was rightly decided. The assignee continuing the suit is not a new plaintiff within the meaning of section 22 of the Limitation Act: *Chunni Lal v.*

(1) (1897) I. L. R. 25 Calc. 409.

(2) (1880) I. L. R. 5 Calc. 720, 724.

*Abdul Ali Khan*(1), *Janhabi Chowdhurani v. Brojo Mohini Chowdhurani*(2). The cases of *Harak Chand v. Deonath Sahay*(3) and *Fatmabai v. Pirbhai Virji*(4) are against me.

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*Babu Boidya Nath Dutt* (*Babu Sarat Chandra Roy Chowdhury* with him), for the respondents. The language of section 22 of the Limitation Act is clear ; it saves only the case of a legal representative who may be brought on the record after the death of a party. The case of *Chunni Lal v. Abdul Ali Khan*(1) is distinguishable as there the name of the assignee was added and the original plaintiff's name was retained on the record ; *Janhabi Chowdhurani v. Brojo Mohini Chowdhurani*(2) is also distinguishable on the same ground. The cases of *Harak Chand v. Deonath Sahay*(3) and *Fatmabai v. Pirbhai Virji*(4) are exactly in point.

*Maulvi Syed Shamsul Huda*, in reply.

*Cur. adv. vult.*

MACLEAN C.J. The question submitted to us are the following : (i) "Whether when the name of an assignor is removed from the record of a suit, and that of an assignee is substituted in its place, the provisions of section 22 of the Limitation Act are applicable ? (ii) Whether the case of *Harak Chand v. Deonath Sahay*(3), or that of *Suput Singh v. Inrit Tewari*(5) has been correctly decided ?" I think that the first question ought to be answered in the affirmative, and that as between the two cases referred to in the second question, the decision in *Harak Chand v. Deonath Sahay*(3) ought to prevail. If a person who has not been on the record is substituted as a plaintiff in the place of the original plaintiff under section 372 of the Code of Civil Procedure, the person so substituted must be taken to be brought on the record subject to the law of limitation applicable to the case. There is nothing in section 372 of the Code to exclude the operation of sec. 22 of the Limitation

(1) (1901) I. L. R. 23 All 331.

(3) (1897) I. L. R. 25 Calc. 409.

(2) (1903) 7 C. W. N. 817, 820.

(4) (1897) I. L. R. 21 Bom. 580.

(5) (1880) I. L. R. 5 Cal. 720.

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Act, and if we look at the latter section we find that if a new plaintiff is substituted,—which must mean a person who has not before been a plaintiff—“the suit shall, as regards him, be deemed to have been instituted when he was made a party.” The language of the section is perfectly clear and unequivocal. The only exception is that contained in the two provisos which refer to the legal representatives of a deceased plaintiff or defendant, as the case may be. There is no exception in the case of an assignee. By the provisos the Legislature has pointed out that the legal representative of either a deceased plaintiff or defendant shall not be regarded as a new plaintiff or defendant: this, by implication, indicates, that in all other cases the person substituted is to be regarded as a new plaintiff. As the case of an assignee does not fall within the provisos, I think that section 22 of the Limitation Act is applicable, and that the question should be answered in the manner I have indicated.

HARINGTON J. In this case a suit was instituted on a mortgage bond 11 days before the expiry of the period of limitation.

Long after the period of limitation had expired, the plaintiff assigned his rights under the mortgage bond to Dr. Abdul Rahman and Shaikh Yad Ali and their names have been substituted for that of the original plaintiff which has been struck off the record.

The question is—Are the substituted plaintiffs barred by limitation?

Under section 22 of the Limitation Act when after the institution of a suit a new plaintiff is substituted, the suit shall as regards him be deemed to have been instituted when he was so made a party. But it is contended for the plaintiff that “new plaintiff” in this section means a plaintiff who can set up a new case, and that inasmuch as they are bound by the case set up by their assignor and are carrying on by leave of the Court the suit instituted by him, they are not new plaintiffs.

If this argument were sound there would be no need for the proviso to section 22 which declares an exception to the rule laid down in the first paragraph of the section. It enacts that

when a plaintiff dies and the suit is continued by his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted by the deceased plaintiff. The personal representative of a deceased plaintiff is just as much bound by the original plaintiff's case as is an assignee—and if an express proviso was necessary to take the personal representative out of the section—then an express proviso was equally necessary to take the assignee out of the section.

Next it is argued, that section 372 of the Civil Procedure Code overrides section 22 of the Limitation Act. No intention that it should override section 22 Limitation Act, is expressed—and a comparison of the other sections shows that it does not.

For example, section 365 lays down the procedure to be followed in case of the death of a plaintiff and directs that the Court shall enter on the record the name of the legal representative in place of the deceased plaintiff, and proceed in the suit.

This section clearly does not override section 22; if it did, there would have been no need for the proviso. *A fortiori* section 372 which provides that a suit may be continued with the leave of the Court by the assignee cannot be said to override it.

In effect, the plaintiff contends that an assignee is *quod* section 22 of the Limitation Act in the same position as the representative of a deceased plaintiff. This cannot be, as the proviso to that section which saves limitation in the case of the personal representative of a deceased plaintiff does not confer that benefit on an assignee.

For these reasons, I am of opinion that the suit is barred by limitation, and I think that the case of *Harak Chand v. Deonath Sahay*(1) was rightly decided. The case of *Suput Singh v. Imrit Tewari*(2) is not inconsistent with that case—because in it the plaintiffs were added, not substituted, for the original plaintiff. The suit therefore could not be dismissed as barred by limitation, for the original plaintiffs, who *ex-hypothesi* had sued within time, remained upon the record. The case, therefore, is distinguishable from *Harak Chand's* case(1).

(1) (1897) I. L. R. 25 Cal. 409.

(2) (1880) I. L. R. 5 Cal. 720.

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BRETT J. I agree in answering the questions in the manner in which the learned Chief Justice has answered them and for the reasons given in his judgment.

MITRA J. I agree.

GEIDT J. So do I.

MACLEAN C.J. The result is that the appeal must be dismissed with costs including the costs of this reference.

*Appeal dismissed.*

S. CH. B.