

## ORIGINAL CIVIL.

*Before Mr. Justice Fletcher.*

RAMDEO DASS

v.

GONESH NARAIN.\*

1908  
June 11.

*Jurisdiction—Leave to withdraw suit with liberty to bring fresh suit—Civil Procedure Code (Act XIV of 1882) ss. 373, 374—Leave to sue—Letters Patent, 1865, cl. 12—Limitation—Limitation Act (XV of 1877) s. 13.*

Where a suit was originally instituted in this Court, with leave under clause 12 of the Charter obtained from the Registrar, and subsequently the plaint was returned to the plaintiffs, leave being given to them by the Court to withdraw the suit and to file a fresh suit on the same cause of action, and the plaint was presented again.

*Held*, that the order giving leave to withdraw the suit was *ultra vires* and could only be regarded as one directing the plaint to be returned to the plaintiff.

*Watson v. The Collector of Rajshahye* (1) followed.

Section 373 of the Code of Civil Procedure does not apply except to cases where the suit is properly proceeding in the Court, in which the leave was granted.

*Held* further, that the suit was covered by section 14 of the Limitation Act, and not barred.

THIS was a suit for the recovery of the sum of Rs. 6,801 due on an account stated and signed on behalf of the defendants on the 15th December 1902.

The plaint was filed on the 11th December 1905 in this Court with leave under clause 12 of the Charter, such leave having been obtained from the Registrar. The defendants in the suit were Gonesh Narain, Baijnath and Mohadeo, the last named being an infant. The adult defendants appeared and filed a written statement denying adjustment and submitting that the suit should be dismissed.

By an order dated the 15th April 1907, a guardian *ad litem* was appointed of the infant defendant.

On the 27th March 1907 it was decided by a Special Bench in *Lalteshwar Singh v. Rameshwar Singh* (2) that leave to sue

\* Original Civil Suit No. 493 of 1907.

(1) (1869) 13 Moo. I. A. 160.

(2) (1907) I. L. R. 24 Calc. 619.

under clause 12 of the Charter granted by the Registrar was bad in law. The form of order to be passed on an application for the withdrawal of a suit so instituted and for leave to file a fresh suit was subsequently settled by three Judges of this Court in the following terms:

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“Leave granted to the plaintiff to withdraw the suit with liberty to file a fresh suit on the same cause of action, but on the following terms, viz., (i) that he do file the plaint in this suit as the plaint in the fresh suit, (ii) that all proceedings had and orders made in this suit be taken as had and made in the fresh suit with liberty to the defendant to file a supplementary written statement therein, if so advised, (iii) the costs incurred in this suit be taken as having been incurred in the fresh suit, (iv) that if the plaintiff do not file a fresh suit within one week from the date of withdrawal, he be ordered to pay the defendant his costs of this suit now ordered to be withdrawn, (v) that the plaint and written statement and all papers filed in this suit be returned to the parties, by whom they were respectively filed, to be filed again in the fresh suit at the cost of the plaintiff, (vi) that the plaintiff do pay the costs of this application for withdrawal to the defendant.”

Accordingly the plaintiffs applied on summons to the defendants for leave to withdraw the suit and file a fresh suit on the same cause of action, and by an order of the 8th May 1907, it was ordered in terms of the form set out above that “the plaintiffs be at liberty to withdraw the suit with liberty to them to file a fresh suit on the same cause of action, etc.” On the same date the plaint was presented again. Subsequently the suit was settled, the defendants agreeing to pay the plaintiff’s claim and costs by instalments of Rs. 500 a year. A petition for a consent decree in these terms was drawn and signed by the adult defendants and the guardian *ad litem* of the infant defendant.

On the suit coming on for hearing the plaintiffs presented the petition and applied for a decree in the terms therein contained. The Court raised the question whether the suit had not become barred in view of sections 373 and 374 of the Civil Procedure Code.

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*Mr. B. C. Mitter (Mr. Hyam with him) for the plaintiffs.* If section 373 of the Civil Procedure Code applies, undoubtedly this suit is barred by virtue of section 374. But I submit that section 373 does not apply. Section 373 implies the exercise of judicial discretion and would only apply to an order in a suit, over which the Court had jurisdiction. "Court" in section 373 must mean "Court having jurisdiction." This is the interpretation of the term "Court" in section 233, given in *Durga Charan Mazumdar v. Umotara Gupta* (1). Now the order of the 8th May 1907 was made in a suit over which the Court had no jurisdiction: see *Laliteshwar Singh v. Rameshwar Singh* (2). No question of waiver of jurisdiction can be raised here as in *King v. Secretary of State for India* (3): Moreover there is an infant defendant. The only bar against bringing a fresh suit on the same cause of action is provided by sections 13 and 374 of the Civil Procedure Code, both of which sections presume that the Court hearing the first suit had jurisdiction. The present case has not been contemplated in the Code. The Code was not intended to be, and is not exhaustive. See *Hukum Chand Boid v. Kamalanand Singh* (4) and *Gurdeo Singh v. Chandrikah Singh* (5). [FLETCHER J. The Privy Council has held in *Watson v. The Collector of Rajshahye* (6) that there is no such thing as a non-suit in the Indian Courts.] This is not a case of non-suit. A non-suit failed not for want of jurisdiction, but of evidence. See Chitty on Pleading, 7th edition, vol. I pp. 219, 220; The Annual Practice, Order 26, rule 1, and *Fox v. Star Newspaper Company* (7). In *Laliteshwar Singh v. Rameshwar Singh* (2), the Special Bench must have contemplated either the withdrawal of the first suit and the institution of a fresh suit on the same cause of action, or the institution of a fresh suit, while the first suit was still pending. [FLETCHER J. If you had applied to have your first suit dismissed, you would have been covered by section 14 of the Limitation Act. What would have then prevented you from bringing a fresh suit?] Undoubtedly

(1) (1889) I. L. R. 16 Calc. 465.

(4) (1905) I. L. R. 33 Calc. 927.

(2) (1907) I. L. R. 34 Calc. 619.

(5) (1907) 5 C. L. J. 611.

(3) (1908) I. L. R. 35 Calc. 394.

(6) (1869) 13 Moo. I. A. 180.

(7) [1898] 1 Q. B. 636.

that course could have been pursued. But I took the order in the form settled by the Judges and should be relieved, if the form is not correct in law. See *Lakhan Chunder Sen v. Madhusudan Sen*(1), *Pultenoy v. Warren*(2), and *Rodger v. The Comptoir D'Escompte de Paris*(3). [FLETCHER J. The position is, the first suit is pending, as it has not been dismissed and the present suit has been instituted under the order of the 8th May 1907, which is either an order under section 373 or is bad.] I take it that the first suit is pending, but the Court has power to return a plaint under section 57 of the Code. Although the order of the 8th May purported to be under section 373, in fact it was not. Further, although I took the order of the 8th May 1907, this present suit does not purport to be instituted by virtue of that order. Quite apart from that order I have the capacity to bring this suit. I cannot be deprived of this right by the mere fact of having obtained that order. Section 14 of the Limitation Act covers this case, and this suit is not barred by Limitation. See *Chunder Madhub Chuckerbutty v. Bissessuree Debea*(4), and *Narasimma v. Muttayan*(5).

*Mr. H. N. Sen* for the guardian *ad-litem* of the infant defendant.

*Mr. Khoda Buksh* for the defendants *sui juris*.

*Cur. adv. vult.*

FLETCHER J. This suit was originally instituted on the 11th December 1905, leave being taken from the Registrar under clause 12 of the Charter.

I ought to say the suit was then within time by four days, for the purpose of computing the period of limitation. Subsequently, following the practice laid down under a new ruling relating to cases, where leave to sue was granted by the Registrar under clause 12 of the Charter, the plaint was returned to the plaintiffs, leave having been given to them to withdraw the

(1) (1907) I. L. R. 35 Calc. 203.

(2) (1801) 6 Ves. 78, 92.

(3) (1871) L. R. 3 P. C. 465, 475.

(4) (1866) 6 W. R. 184.

(5) (1890) I. L. R. 18 Mad. 451.

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suit and file a fresh suit on the same cause of action. Now for the purpose of considering the question of limitation it is material to consider whether the leave to withdraw the suit and institute a fresh suit on the same cause of action was granted under section 373 of the Civil Procedure Code, because, if it is so, it is admitted that under section 374 of the Code the present suit is barred by limitation.

Section 373 of the Civil Procedure Code provides :—

“If at any time after the institution of the suit the Court is satisfied on the application of the plaintiff (a) that the suit must fail by reason of some formal defect or (b) there are sufficient grounds for permitting him to withdraw from the suit, or to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit.”

It has been decided in the case of *Watson v. The Collector of Rajshahye* (1) that there is no general jurisdiction in this Court to permit a suit to be withdrawn and a fresh suit to be instituted on the same cause of action.

Now, is the order made in this suit giving leave to the plaintiff to withdraw the suit and to institute a fresh suit *ultra vires*, or not? In my opinion section 373 does not apply, except to cases where the suit is properly proceeding in the Court in which the leave was granted. It follows, therefore, that the order giving leave to withdraw the suit is *ultra vires* and the order can only be regarded as one directing the plaint to be returned to the plaintiff.

In these circumstances I am of opinion that the present suit comes within time, having regard to the provisions of section 14 of the Limitation Act.

Attorney for the plaintiffs: *K. M. Rukhit.*

Attorneys for the defendants: *Manuel and Agarwallah.*

J. C.

(1) (1869) 13 Moo. I. A. 160.