

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.

RAM KINKAR BISWAS

v.

AKHIL CHANDRA CHAUDHURI.*

1907

Jan. 30.

Parties—Limitation—Civil Procedure Code (Act XIV of 1882), s. 32—Adding party to suit after period of limitation—Limitation Act (XV of 1877), s. 22.

Held (by the Full Bench), that a Court, acting under the second paragraph of section 32 of the Code of Civil Procedure, is bound by the provisions of s. 22 of the Limitation Act.

Grish Chunder Sasmal v. Dwarka Nath Dinda(1) and *Fakera Pasban v. Bibi Azimunnissa* (2) over-ruled.

Imam Ali v. Baij Nath Ram Sahu(3) approved.

Oriental Bank Corporation v. Charriol (4) explained.

REFERENCE to Full Bench by GEIDT J.

The Order of Reference was as follows:—

“The present suit was brought on a mortgage-bond, the defendants being (i) the original mortgagors, and (ii) persons into whose hands their interests have passed. The mortgage-bond was assailed as fraudulent and without consideration, but its validity has been established before both the lower Courts, who have decreed the suit, and that finding is not impugned on this appeal. A second plea, on which the plaintiff's claim was resisted, was that all incumbrances had been annulled, under section 167 of the Transfer of Property Act, and that the mortgage, therefore, no longer subsisted. This defence was also over-ruled on various grounds by the Lower Appellate Court and, although all the reasons advanced in its judgment may not be convincing, its decision in this matter appears to be right. The entire holding in this case was not brought to sale, but only a portion. Chapter XIV of the Bengal Tenancy Act, in which section 167 finds place, applies, in my opinion, only to sales of an

* Reference to Full Bench in Appeal from Appellate Decree, No. 232 of 1905, from a decision of Gobinda Chandra Dey, Subordinate Judge of Chittagong, dated Oct. 5, 1904.

(1) (1897) I. L. R. 24 Calc. 640.

(3) (1906) 10 C. W. N. 551.

(2) (1899) I. L. R. 27 Calc. 540.

(4) (1886) I. L. R. 12 Calc. 642.

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entire tenure or holding and the auction-purchaser of a portion of a holding is, therefore, not entitled to proceed under that section to annul incumbrances.

One further point remains for decision. The defendant No. 6 in his written statement, alleged--that he had sold a portion of this property to Ram Ratan Chaudhuri and the Court then directed the plaintiff to join Ram Ratan Chaudhuri as defendant No. 8. But this did not take place till more than twelve years after the date fixed in the bond for repayment and the objection was taken that, as regards Ram Ratan Chaudhuri, the suit was barred by limitation. This objection was over-ruled by the Munsiff in reliance on the decision of this Court in *Oriental Bank Corporation v. Charriol*(1) and the Subordinate Judge has held that the Munsiff was right in so doing. The question thus arises--whether the suit, as against defendant No. 8, was barred by limitation.

In *Griish Chunder Sasmal v. Dwarka Nath Dinda*(2) it was held that, where the Court, acting on information brought to its notice, adds a party, who, it thinks, is necessary for the disposal of the suit, no question of limitation arises. In *Fakera Pasban v. Bibi Azimunnissa* (3) the above ruling was interpreted as, meaning that section 22 of the Limitation Act does not apply, when the Court, acting of its own motion under section 32 of the Code of Civil Procedure, adds a person as a necessary party and that no question of limitation arises in such cases. These two decisions were dissented from in a recent case--*Imam Ali v. Baij Nath Ram Sahu*(4). It was, however, considered unnecessary to refer the matter to a Full Bench, because in the two earlier cases the Court had acted of its own motion in adding a new defendant, whereas in the last case the Court had proceeded on the application of the plaintiff. In all three cases, the addition of the defendant was made under the second paragraph of section 32 of the Code of Civil Procedure. By that paragraph, the Court is empowered at any time to add parties "either upon or without such application." These words do not appear to have been noticed by the judges, who decided the last case, and I think it is perhaps possible that, if they had been noticed, the distinction made between that case and the two earlier cases, would not have been drawn. But, however, that may be, the case before me is similar to the earlier cases in the very matter in regard to which the cases were distinguished, namely, the addition of the defendant No. 8 by the Court of its own motion. Those earlier cases, therefore, I must follow, unless I am prepared to express my dissent with a view to bring the matter before a Full Bench.

The decisions in *Griish Chunder Sasmal v. Dwarka Nath Dinda*(2) and in *Fakera Pasban v. Bibi Azimunnissa* (3) were founded on the judgment of Wilson J., in the *Oriental Bank Corporation v. Charriol*(1) and especially on the observations to be found at pages 650 to 652 of the report. These observations contain expressions, which may, perhaps at first sight, lend some support to the proposition, that section 22 of the Limitation Act does not apply to cases, where the Court acts of its own motion. In *Imam Ali v. Baij Nath Ram Sahu*(4) however, those observations have been interpreted as affirming the principle "that a Court in joining parties under section 32 of the Civil Procedure Code is untrammelled

(1) (1886) I. L. R. 12 Calc. 642.

(3) (1899) I. L. R. 27 Calc. 540.

(2) (1897) I. L. R. 24 Calc. 640.

(4) (1906) 10 G. W. N. 551.

by any question of limitation in respect of an application for such joinder, not that the joinder can be made in disregard of any question of limitation in respect of the suit itself as affected by such joinder."

The question—whether section 32 of the Code of Civil Procedure gives authority to a Court to add a plaintiff or a defendant after the period of limitation has expired, turns on the construction of the second and penultimate paragraph of that section. The words 'at any time, occurring in the second paragraph, are obviously placed in antithesis to the words 'on or before the first hearing, occurring in the first paragraph; on the other hand, the penultimate paragraph, appears to indicate that the provisions of the Limitation Act do apply to defendants added by the Court. "The proceedings as against the added defendants shall be deemed to have begun only on the service of the summons." These words introduce a slight modification into the first paragraph of section 22 of the Limitation Act.

Instead of the suit being deemed to have been instituted against an added defendant at the moment when he was added, (as would be the case when the addition is made by the plaintiff), the proceedings against a defendant added by the Court, are deemed to have begun only on the service of summons. This rule is made subject to the provisions of section 22 of the Limitation Act. On turning to that section, it will be seen that the reference to it can only serve to import its second proviso. The first paragraph of section 22 is slightly modified as I have just said, by the words which I have quoted from section 32 of the Civil Procedure Code; the second paragraph, containing the first proviso, deals only with the addition of a plaintiff and has no bearing on the present discussion; it is the third paragraph, containing the second proviso, which alone has application. The effect then of the penultimate paragraph of section 32 of the Code read with section 22 of the Limitation Act appears to be this, that there is ordinarily a difference between the time when the suit is deemed to have been instituted against an added defendant according as the addition is made by the plaintiff or is made by the Court. The suit is deemed to have been instituted in the former case, when the addition is made; in the latter case when the summons is served. But when a new defendant is substituted as the legal representative of a deceased defendant, there is no difference whether the substitution is made by the parties or is made by the Court; in either case the suit as against him is deemed to have been instituted, when it was instituted against the deceased defendant.

These considerations lead me to the conclusion that there is nothing in section 32 of the Civil Procedure Code, which frees the Court, when acting of its own motion, from the restrictions of the Limitation Act. This conclusion is opposed to the view enunciated in two former decisions of this Court and I, therefore, refer to a Full Bench the consideration of the questions—(i), whether a Court, acting under the second paragraph of section 32 of the Code of Civil Procedure is bound by the provisions of the Limitation Act; and (ii), whether the cases of *Grish Chunder Sasmal v. Dwarka Nath Dinda* (1) and *Fakera Pasban v. Bibi Azimunnissa* (2) have been correctly decided. As this is a Second Appeal, it must, under the rules of this Court, be disposed of by the Full Bench."

(1) (1897) I. L. R. 24 Calc. 640.

(2) (1899) I. L. R. 27 Calc. 540

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*Babu Havendra Narain Mitra*, for the appellants, the defendants Nos. 4, 6 and 8. Section 32 of the Code of Civil Procedure is expressly made subject to the provisions of section 22 of the Limitation Act, so that in the case of an addition of a new defendant the suit must be deemed to have been instituted against him, when he was so made a party, and, if at that date the suit is barred by limitation, the suit must be dismissed: section 4, Limitation Act. As pointed out in *Gurwayya v. Dattaraja*(1) and *Imam Ali v. Baij Nath Ram Sahu*(2), the cases of *Grish Chunder Sasmal v. Dwarka Nath Dinda*(3) and *Fakera Pasban v. Bibi Azimunnissa*(4) were decided on a misapprehension of certain observations of Wilson J. in *The Oriental Bank Corporation v. Charriol*(5); and the observation in *Khadir Moideen v. Rama Naik*(6) is erroneous. A Court may add a party, but it may be obliged to dismiss the suit as against him as barred by limitation. *Imam-ud-din v. Liladhar*(7).

*Babu Nilnadhav Bose*, for the plaintiff-respondent. Section 32 of the Code of Civil Procedure gives power to the Court to add at any time a party, whose presence is necessary, for effectually deciding the points raised in the suit, and it can add a party, even after the period of limitation; but the power would be useless, if it were the law that, having added a party, the Court must dismiss the suit as barred by limitation. There is no limitation against the act of the Court. *The Oriental Bank Corporation v. Charriol*(5); the cases of *Grish Chandra Pasban v. Dwarka Nath Dinda*(3); *Fakera Pasban v. Bibi Azimunnissa*(4) and *Khadir Moideen v. Rama Naik*(6) were rightly decided. Moreover in a mortgage suit against a subsequent purchaser of the mortgaged property the period of limitation ought to run from the date of plaintiff's becoming aware of his interest: S. 85, Transfer of Property Act. At all events the decree against the original defendants must stand.

*Babu Havendra Narain Mitra* in reply: The decree ought to be as in *Imam Ali's case*(2) for a proportionate amount.

(1) (1903) I. L. R. 28 Bom. 11.

(4) (1899) I. L. R. 27 Calc. 450.

(2) (1906) 10 C. W. N. 551.

(5) (1886) I. L. R. 12 Calc. 642.

(3) (1897) 10 I. L. R. 24 Calc. 640.

(6) (1892) I. L. R. 17 Mad. 12.

(7) (1892) I. L. R. 14 All. 52

against the properties other than that belonging to the added defendant.

[MACLEAN C.J. You are dismissed from the suit on your own application: You have no right to be heard as to what would be the proper decree to make.]

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MACLEAN C. J. I think it is sufficient, if we say upon the second question submitted to us that in our opinion the cases of *Grish Chunder Sasmal v. Dwarka Nath Dinda* (1) and *Fukera Pasban v. Bibi Azimunnissa* (2) have not been correctly decided. Those cases were dissented from by a Division Bench of this Court in the case of *Imam Ali v. Baij Nath Ram Sahu* (3), a decision to which I was a party, and I see no reason to differ from the conclusion, at which we then arrived, after a careful review of all the authorities upon the point.

I only desire to add, that we dealt in that case with the observations of Mr. Justice Wilson in the case of the *Oriental Bank Corporation v. Charmin* (4), and it is not strictly necessary to add anything to what we then said. I should, however, like, for my own part, to make it clear that, if it is thought that the language of Mr. Justice Wilson intended to convey that, although the Court might exercise its powers under section 32 of the Code of Civil Procedure, of adding parties, the party so added could not avail himself of the benefit of the Statute of Limitation, say for instance, of section 22, I am unable to agree in that view. But I do not think that that is what Mr. Justice Wilson intended to decide.

All that we can do upon this Reference and upon the appeal before us is to hold that the suit is barred as against defendant No. 8. As regards the question now suggested as to the distribution of the mortgage-debt over the several properties, that question has not been raised on this appeal, and we express no opinion upon it. The decree of the Lower Appellate Court will stand, except as regards defendant No. 8, as against whom the suit must stand dismissed on the ground of limitation.

(1) (1897) I. L. R. 24 Calc. 640.

(3) (1906) 10 C. W. N. 551.

(2) (1899) I. L. R. 27 Calc. 540.

(4) (1896) I. L. R. 12 Calc. 642.

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The appeal of defendants Nos. 4 and 6 must be dismissed with costs. Defendant No. 8 must have his costs in all the Courts, including the costs of this Reference.

HARINGTON J. I agree.

BRETT J. I agree.

MITRA J. I agree.

GEIDT J. I agree.

S. M.