APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Harington and Mr. Justice Fletcher.

1907
Dec. 6.

LAKHAN CHUNDER SEN
v.
MADHUSUDAN SEN.*

Limitation—Limitation Act (XV of 1877) s. 14—Suspension of right of action.

In 1872, a Hindu died intestate leaving three sons B. M., M. M., and C. L. C. L. died in 1881. On the 18th January 1892 M. M. and the sons of C. L. were dispossessed of their share in certain property. In 1896 the sons of C. L. instituted a suit against B. M. and M. M. for possession and account, and in 1897 on the death of B. M. and M. M. their sons were brought on the record. The sons of M. M. supported the sons of C. L., and an issue was raised as between the co-defendants as to whether the sons of M. M. were entitled to a certain share. A decree dated the 20th April 1903, was passed in favour of the plaintiff, and it was further declared that the defendants, the sons of M. M., were entitled to the share they claimed. The sons of B. M. appealed. On the 22nd February 1904, the Appeal Court confirmed the decree in favour of the plaintiffs, and set aside the decree so far as it related to the sons of M. M. Thereupon, on the 14th November 1904, the sons of M. M. instituted the present suit against the sons of C. L. and of B. M. for possession, partition and accounts:—

Held, that the right of the plaintiffs to bring an action to recover the property was suspended between the 20th April 1903 and the 22nd February 1904, and that in consequence the suit was not barred by limitation.

Ranee Surno Moyee v. *Shooshee Mokhee Burmonia*(1), and *Prannath Roy Chowdry* v. *Rookea Begum* (2), followed. *Pulteney* v. *Warren*(3), and *East India Company* v. *Campion* (4) referred to.

Quære: whether section 14 of the Limitation Act covers the case.

APPEAL by the plaintiffs, Lakhan Chunder Sen and others, from a judgment of BODILLY J.

In the year 1872, one Guru Charan Sen, a Hindu governed by the Bengal School of Hindu Law, died intestate leaving a widow, Sreemutty Sarat Kumari Dasi, and three sons Beni

* Appeal from Original Civil, No. 1 of 1907, in suit No. 826 of 1904.

(1) (1868) 12 Moo. I. A. 244.
(2) (1859) 7 Moo. I. A. 323.
(3) (1801) 6 Ves. 73.
(4) (1837) 11 Bli. (N. S.) 158.

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Madhab Sen, Moni Madhab Sen and Chuni Lall Sen. The last named died in 1881. Up to the 18th January 1892, Moni Madhab and the sons of Chuni Lall had participated in the use and enjoyment of their shares in certain premises, but on that date owing to a quarrel with Beni Madhab and Sarat Kumari Dasi, they were dispossessed and Beni Madhab alone collected the rents and profits of the premises to the exclusion of Moni Madhab and the sons of Chuni Lall.

In the year 1896, the sons of Chuni Lall instituted a suit, being suit No. 882 of 1896 against Beni Madhab and Moni Madhab, praying that their shares in the property may be ascertained and declared, for possession, an account and incidental relief. In 1897 both Beni Madhab and Moni Madhab died and their sons and legal representatives were brought on the record in their place. In that suit the position of the sons and legal representatives of Moni Madhab was the same as that of the plaintiffs and they supported the case of the plaintiffs. An issue was raised at the instance of the representatives of Beni Madhab as between themselves and the representatives of Moni Madhab co-defendants, as to whether the latter were entitled to a $\frac{1}{2}$ share in the premises. The suit was heard by Henderson J. and by a decree dated the 20th April 1903, the plaintiffs were declared entitled to a $\frac{5}{6}$ share in the scheduled properties and it was expressly declared that the sons and legal representatives of Moni Madhab were jointly entitled to $\frac{1}{3}$ part of the property in dispute, and it was directed that quiet possession be given them of the share to which they had been declared to be entitled.

The representatives of Beni Madhab appealed against this judgment, and on the 22nd February 1904 the appellate Court, while confirming the decree in favour of the plaintiffs, set aside the decree so far as it related to the representatives of Moni Madhab Sen.

Thereupon, on the 14th November 1904, the sons and legal representatives of Moni Madhab instituted the present suit against the sons and representatives of Chuni Lall and Beni Madhab, praying that the plaintiffs' share in the disputed property should be ascertained and declared, for possession, partition, account, and incidental relief. Bodilly J. held that the action

was barred by limitation and dismissed the suit in the following terms:—

BODILLY J. This is an action brought by the plaintiffs to obtain a declaration of the share in certain property, which he alleges to be joint family property, for partition, mesne profits and other reliefs.

For the purpose of this judgment, it is only necessary that I should very briefly deal with the facts as they have been very fully dealt with in the judgments of Mr. Justice Henderson and of the Court of Appeal to both of which I shall have later to refer, and they are not of importance in deciding the point. I now have to consider, which is in the nature of a preliminary objection, that no action will lie, inasmuch as from the pleadings it appears, that the action is barred by the Limitation Act.

One Guru Charan Sen died in the year 1872 leaving a widow and three sons Beni Madhab Sen, Moni Madhab Sen and Chuni Lall Sen. The present plaintiffs are the descendants of Moni Madhab, and the defendants are the widow and the descendants of the other two brothers.

Guru Charan was, during his life-time, the owner of considerable immoveable property in this city and elsewhere, but he got into pecuniary difficulties and it is alleged, that for the purpose of protecting his property from the hands of his creditors, he dealt with his properties in various ways, which are very particularly dealt with in the judgment of Mr. Justice Henderson in the suit of *Gobind Chunder Sen* v. *Srimutty Nettomoni Dasi*(1) and in the appeal from that judgment to the Court of appeal. That was a suit by the descendants of the youngest brother, Chuni Lall Sen, in ejectment in respect of the properties now in dispute and for a declaration as to their rights and shares. The plaintiffs succeeded and were held entitled to a five-sixth share. In that suit the present plaintiffs were made defendants, and in their written statement they supported the claim of the plaintiffs and asked that a declaration should be made in their favour, that they were also entitled to a share in the disputed properties. The learned Judge made a decree in their favour declaring that they were entitled to ⅓ share in the disputed properties—this portion of the decree was, however, set aside by the Court of Appeal on the ground, that inasmuch as the action was one in ejectment and not a partition suit, relief could not be given as between two co-defendants, and their Lordships said that the present plaintiffs must, if so advised, bring a separate action to establish their rights and that the present defendants would be at liberty to raise any defence that might be available against them and which was not available as against the plaintiffs in the former suit.

The plaintiff's present action is to establish those rights. After the case had been opened by the counsel for the plaintiffs, Mr. S. R. Dass, the counsel for the defendants, Mr. C. R. Dass, raised a preliminary objection that inasmuch as by paragraph 22 of the plaint, it is admitted that the plaintiffs were dispossessed on January 18th 1892 and as the present action was not started until November 14th 1904, more than twelve years had elapsed between the dispossession and the bringing of the action, and the claim was barred by section 9 of the Limitation Act.

(1) Unreported.

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Mr. S. R. Dass, on behalf of the plaintiffs, in answer to the objection, says that inasmuch as the judgment of Mr. Justice Henderson was given in favour of the present plaintiffs on April 20th 1903, that there was a satisfaction of the plaintiffs' present cause of action at that time, and that having regard to the decision of the Privy Council, in the case of *Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia*(1), when that decision was reversed a new cause of action arose at the date of the reversal, and alternatively, he says that, even if a new cause of action did not arise, still the statute did not run against his clients during the time the decree in their favour remained unreversed, which was not, until February 22nd 1904, and that, therefore, he is in time.

Mr. S. R. Dass has cited in his argument several cases in addition to the one I have named above and noticeably amongst them, are the case of *Bassu Kuar* v. *Dhum Sing*(2), and the case of *Dindayal Paramanik* v. *Radhakishori Debi*(3) and several others, but I think that they are all distinguishable from the present case and I will deal with them briefly later on, as I think, they should be only dealt with as being subsidiary to the first point and only arising in case I am wrong in the decision, to which I have come in respect of that point. The point is, was the decision of Mr. Justice Henderson a decree in a suit between two parties to the suit who would be bound by his decree? I do not think it was. A decree is defined in section 2 of the Civil Procedure Code as being "the formal expression of an adjudication upon any right claimed" "when such adjudication" "decides the suit" and a decree-holder is said to be "any person in whose favour a decree or order capable of execution has been made."

The Court of Appeal having held that inasmuch as the suit, in which the decree was passed, was a suit in ejectment, Mr. Justice Henderson's judgment cannot stand, it being a decree as between two co-defendants. They have held, in my opinion, that the decree is not a valid decree and is one, that Mr. Justice Henderson had no jurisdiction to make, and that it is not merely a question of his wrongly having adjudicated as between the parties, for the case that he had before him, being one in ejectment, the mere fact that one defendant raises an issue in his written statement against another defendant, does not make it a "suit" as between those parties which the Court has jurisdiction to try, and therefore in my opinion, the decree was *ultra vires*.

The cases of *Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia*(1) and *Bassu Kuar* v. *Dhum Sing*(2) that have been quoted by the learned counsel for the plaintiff, in my opinion, do not apply to this case, even if I am wrong in the conclusion to which I have just come, for the question in both these cases, which are the leading cases in point, was—did the decree or order for the time being in force, "satisfy" the plaintiff's cause of action?

In *Ranee Surnoo Moyee* v. *Shooshee Mokhee Burmonia*(1) the facts were shortly these:—The plaintiff was a zemindar and she granted putnee talooks to the defendants who failed to pay their rents, and consequently she put up the talook for sale under the Regulation then in force, the purchase price greatly exceeded the amount of the rent due and she was paid in full the amount of rent due. The

(1) (1868) 12 Moo. I. A. 244. (2) (1888) I. L. R. 11 All. 47.
(3) (1872) 8 B. L. R. 536.

sale was eventually set aside on the ground of irregularity and she had to refund the amount of the purchase price to the purchaser, she then sued to recover the arrears of rent and it was held that the cause of action accrued at the time the sale was set aside, and that she could not have sued for the rent before, as she had chosen to adopt the procedure under the Bengal Regulation VIII of 1819, and although the sale was held to be invalid, owing to an irregularity, still until it was set aside and while she held the proceeds of it "she was in the position of a person whose claim had been satisfied and the suit might have been successfully met by a plea to that effect.

In *Bassu Kuar* v. *Dhum Sing*(1), the same principle is, I think, applied. The defendant in that case owed money to the plaintiff on an account stated, and an arrangement was come to between them, that the defendant should sell certain land to the plaintiff, and in respect of the purchase price, should give credit for the amount due from him to the plaintiff.

The defendant refused to complete his bargain and a suit for specific performance having been brought failed, although it succeeded in the Court of first instance. In an action for the money due on the account stated instituted after the decree in the suit for specific performance had been set aside, the defendant desired to avail himself of the defence of the Statute of Limitation, but unsuccessfully, for the Privy Council held that, whilst the contract was in existence between the parties, the plaintiff was in a position of a person whose claim was satisfied and he could not, during that time, have sued to recover the money.

There are other cases that have been cited to me, but they do not, in my opinion, vary the principle that has been laid down by the Privy Council in these two cases, *i. e.*, that it is only where as between the two parties to a suit the claim has been satisfied in such a way that a plea to that effect would be a bar to the action, that the Statute of Limitation ceases to run.

In the present case there was, in my opinion, no such satisfaction. All Mr. Justice Henderson did was to make a declaration as to the nature of the plaintiffs' rights but no execution could have issued on such declaration and the plaintiff was not in the position of a decree-holder within the provisions of section 2 of the Code of Civil Procedure. He might have brought an action for partition, as he has done now, and the fact that he had obtained the declaration from Mr. Justice Henderson could not, in my opinion, have been pleaded in bar of such suit, and therefore it does not come within the principle of the cases relied upon by the plaintiffs.

The second point raised by the plaintiffs as to there being a period between the time of the decision of Mr. Justice Henderson and its reversal by the Court of Appeal during which the statute did not run, depends upon the same principles and must fail on the same grounds.

I, therefore, hold that this action is barred by the Limitation Act and must fail. The defendants who appear, will have costs on Scale No. 2 including the reserved costs.

From this judgment the plaintiffs appealed.

(1) (1888) I. L. R. 11 All. 47

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Mr. Garth (*Mr. S. R. Das* with him), for the appellants. This suit was not barred by limitation. The period of limitation is 12 years from the date of dispossession, *i.e.*, from the 18th January 1892. It is true this suit was instituted on the 14th November 1904, but the period betwen the judgment of Henderson J. on the 20th April 1903, and the reversal of that judgment by the Appellate Court on the 22nd February 1904, must be excluded: in which case, we would be within time by seven days. Our rights must be taken to have been suspended between those dates. Our claims were completely satisfied by the judgment of Henderson J., and we were surely justified in not instituting other proceedings as long as that decree stood. The facts here come within the principle enunciated by the Privy Council in *Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia*(1) which has been followed in *Dindayal Paramanik* v. *Radhakishori Debi*(2), *Bassu Kuar* v. *Dhum Singh*(3), *Surjiram Marwari* v. *Barhamdeo Persad*(4), *Gobind Chunder Koondoo* v. *Taruck Chunder Bose*(5), and *Shadal Khan* v. *Amin-ul-lah Khan*(6). A claim can be prosecuted just as well by one co-defendant against another as by a plaintiff against a defendant: see *Prannath Roy Chowdry* v. *Rookea Begum*(7). The facts in this suit are covered by section 14 of the Limitation Act. The following cases were also referred to: *Rajah Enayet Hossein* v. *Sayud Ahmed Reza*(8) and *Maharajah Jugutendur Bunwari* v. *Din Dyal Chatterjee*(9).

Mr. Sinha (*Mr. C. R. Das* and *B. C. Mitter* with him), for the respondents. It has not been pleaded (nor was it argued in the Court of first instance) that section 14 of the Limitation Act applied. The appellants cannot claim exemption now: see *Jogeshwar Roy* v. *Raj Narian Mitter*(10). The ground hitherto taken has been that a new cause of action arose on the judgment of the Appeal Court. During the time the previous suit was before the Appeal Court, the present appellants did nothing.

[FLETCHER J. Did they not appear on the appeal, and does not that amount to prosecuting their claim?]

(1) (1868) 12 Moo. I. A. 244.
(2) (1872) 8. B. L. R. 536.
(3) (1888) I. L. R. 11 All. 47.
(4) (1905) 1 C. L. J. 337.
(5) (1877) I. L. R. 3 Calc. 145.
(6) (1881) I. L. R. 4 All. 92.
(7) (1859) 7 Moo. I. A. 323.
(8) (1858) 7 Moo. I. A. 238.
(9) (1864) 1 W. R. 310.
(10) (1903) I. L. R. 31 Calc. 195.

The appellants must shew that they were *bonâ fide* prosecuting a claim *and* in a court which had no jurisdiction to try the claim. Now the Appeal Court did have such jurisdiction and in fact held that their claim was bad. The real point is whether a new cause of action arose on the decision of the Appeal Court. To come within the principle of *Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia*(1), the appellants must shew that we having been dispossessed by the judgment of Henderson J., possession was restored to us under the decree of the Appeal Court. No such case can be made. Similarly, the effect of the decision in *Bassu Kuar* v. *Dhum Singh* (2) was the creation of a new obligation to pay. It must also be noticed that the above cases, as also *Dindayal Paramanik* v. *Radhakishori Debi* (3) were decisions under the Rent Act. The principle has been explained by the Privy Council in *Huro Pershad Roy* v. *Gopal Das Dutt* (4). See also *W. Sheriff* v. *Dina Nath Mookerjee* (5), *Burna Moyi Dassee* v. *Burma Moyi Chowdhurani* (6), *Mahomed Majid* v. *Mahomed Ashan* (7). It is necessary for the appellants to show that on the reversal of the judgment of Henderson J., a new cause of action accrued to them. The decision of Henderson J. did not satisfy their claim. It did not direct partition but joint possession of an undivided share. The authorities on this point are collected in Mitter on Limitation, 4th edition, pp. 1152, 1153. Again, any relief sought in a suit must be set out in the plaint and hence a defendant cannot claim any relief. It is only by way of a set-off that a defendant can be said to prosecute a claim: see *Hafizunnessa Khatun* v. *Bhyrab Chunder Das* (8).

Mr. Garth, in reply.

Cur. adv. vult.

MACLEAN, C.J. The only question we have to deal with on this appeal is whether the suit is barred by limitation. The facts of the case, so far as are material, are as follows: It appears that in the year 1896 the sons of one Chuni Lall Sen instituted

(1) (1868) 12 Moo. I. A. 244.
(2) (1888) I. L. R. 11 All. 47.
(3) (1872) 8 B. L. R. 536.
(4) (1882) I. L. R. 9. Calc. 255.
(5) (1885) I. L. R. 12 Calc. 258.
(6) (1895) I. L. R. 23 Calc. 191.
(7) (1895) I. L. R. 23 Calc. 205.
(8) (1883) 13 C. L. R. 214.

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a suit in this Court, being suit No. 882 of 1896 against, amongst others, the present appellants or their predecessors in title and the present respondents or their predecessors in title, and, the object of that suit was to have their shares ascertained in certain property, for possession, an account and incidental relief. The present appellants, are the sons and heirs of one Moni Madhab Sen, who was an original defendant in that suit but died during its pendency and the present appellants were brought on the record as party defendants in the place of their deceased father. In that suit, an issue was raised as between themselves and the sons of Beni Madhab Sen who were the really contesting defendants in that suit and who are the respondents on the present appeal, as to whether the sons and heirs of Moni Madhab Sen were entitled to a $\frac{1}{3}$ share in the premises scheduled to the plaint in that suit; and, they supported the case of the plaintiffs. It would appear from paragraph 17 of the written statement in the present suit that this issue was actually invited by and raised at the instance of the heirs and representatives of Beni Madhab Sen, the present respondents. The position of the present appellants in the previous suit was the same as that of the plaintiffs in that suit. In that suit the present appellants and their mother, Sreemutty Munjari Dassi, were declared entitled to a $\frac{1}{3}$ share in the scheduled property and entitled to obtain possession of the share to which they were held to be so entitled. That suit was a long and expensive one and was fought out with the result I have stated, the plaintiffs in that suit being declared entitled to $\frac{2}{3}$ of the scheduled properties. By the decree in that suit which is dated the 20th of April 1903, it was expressly declared that the present appellants were jointly entitled to one-third part or share of the property in dispute and the present respondents were to deliver to them "quiet possession of the shares of the said premises to which they have been declared entitled as aforesaid." No doubt, in strictness the present appellants ought to have been transferred from the category of defendants and joined as co-plaintiffs. But, as now appears, the issue I have referred to, as to the rights of the present appellants to a one-third share of the scheduled property, was, at the invitation of the present respondents decided in that suit. The

present respondents or their predecessors in title appealed against that judgment; and, on the 22nd of February 1904, the Appellate Court confirmed the decree in the main but set aside the decree so far as it related to the present appellants. Whether the Appellate Court would have arrived at that conclusion if it had then known, as this Court now knows, that the question as to the right to the one-third share was raised and decided in the previous suit at the instance of the present respondents or their predecessors in title, is to say the least (I say so because I was a party to the judgment) probably open to doubt. But no doubt the decree was reversed and we must deal with the matter on the footing of that reversal. In this state of circumstances, the learned Judge in the Court of first instance held, that the suit was barred: and the plaintiffs in the present suit have appealed. Their case is that their rights must be taken to have been suspended between the 20th of April 1903, the date of the decree in the first suit, and the 22nd of February 1904, the date of the reversal of that decree: and, it is conceded that if this period be excluded on the ground that their rights were so suspended, the present suit is within time. It is also contended that section 14 of the Limitation Act covers the present case. As to the latter point, we feel grave doubt whether the case falls within that section: but it is unnecessary to decide that point, as we think the present appellants are entitled to succeed upon the other point.

It is clear that under the decree of the 20th of April 1903, the present appellants with others were declared entitled to a one-third share in the property and that the present respondents were ordered to deliver up quiet possession to them of this share. It is perfectly true that that decree was passed in a suit which *qud* the position of the parties may be said not to have been properly framed. No doubt if the attention of the Court, when it passed that decree, had been called to this, it would, in the circumstances, have transferred the present appellants from the category of defendants into that of co-plaintiffs. It seems to us, however, that this was a decree which, so long as it stood undischarged, was susceptible of execution at the hands of the present appellants, and whilst that decree existed, it was not open to them in the

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circumstances to institute a fresh suit for the attainment of the very object which had been successfully attained by them in the previous suit. We think, therefore, in these circumstances that the right of the plaintiffs to bring an action to recover the property was suspended between the 20th of April 1903 and the 22nd of February 1904, and that the case falls within the principle laid down by the Judicial Committee of the Privy Council in the cases of *Ranee Surnomoyee* v. *Shooshee Mokhee Burmonia*(1) and of *Prannath Roy Chowdhury* v. *Rookea Begum*(2). It is conceded that at the time of the institution of the first suit, the plaintiff's claim was not barred.

In this connection the language of Lord Eldon in *Pulteney* v. *Warren*(3), has some application: "If there be a principle, upon which courts of justice ought to act without scruple, it is this; to relieve parties against that injustice occasioned by its own acts or oversights at the instance of the party, against whom the relief is sought. That proposition is broadly laid down in some of the cases." This view was approved of by the House of Lords in *The East India Company* v. *Campion* (4).

For these reasons, we are unable to concur in the view taken by the learned Judge in the Court of first instance. The appeal must be allowed with costs both here and in the Court below, and the case must be remitted to be tried out on the merits if, after the contest which took place in the previous suit, the present respondents think that there are still any merits to be discussed.

HARINGTON J. I agree.

FLETCHER J. I also agree.

Appeal allowed.

Attorneys for the appellants: *S. C. Mitter.*

Attorneys for the respondents: *S. C. Dutt, R. C. Bose.*

J. C.

(1) (1868) 12 Moo. I. A. 244.
(2) (1859) 7 Moo. I. A. 323, 357.
(3) (1801) 6 Ves. 73, 92.
(4) (1837) 11 Bli. (N. S.) 158.