1864.
Sep. 13.

Special Appeal No. 665 of 1863.

SA'LU'JI' KESRA'JI' and another ..... *Appellants.*
RA'JSANGJI JA'LMSANGJI ..... *Respondent.*

Limitation, Law of—Court receiving Plaint—District Court—Special Appeal—Act VIII. of 1859, Secs. 26, 32, 123, 139 142, 334, and 354—Reg. V. of 1827, Sec. II., Cl. 1.

Sec. 32 of Act VIII. of 1859 imposes upon the court of first instance the duty of taking any legal objection apparent on the face of the plaint: and the fact that the portion of the claim is evidently barred by the law of limitation, from which no ground of exemption is stated, is an objection which ought to be noticed by the court when receiving the plaint: or if not taken notice of then, it may be at any subsequent stage of the suit.

The Judge in appeal is bound to decree according to the law of limitation applicable to the case as stated by the plaintiff himself, although the objection may not be raised in the grounds of appeal; and his omitting to do so is an error or defect in the decision of the case on the merits, and a ground of special appeal.

THIS was a special appeal from the decision of the Senior Assistant Judge of the Ahmedábád District, in Appeal Suit No. 140 of 1862, confirming the decree of the Munsif of Kapadvanj, in Original Suit No. 3752 of 1861.

Dhirajlál Mathurádás for the appellants.

Nánábhái Haridás for the respondent.

The facts, as well as the proceedings in the case, are sufficiently stated in the judgment delivered this day by

COUCH, J.:—The respondent in this case sued the appellants with others for a grain *hak*, for twelve years before the suit, amounting to 720 *man* of grain; and admitting that he had received 38 *man* 12½ *sher*, claimed the remainder, which he valued at Rs. 681-15-0. The defendants denied their liability.

The Munsif, who tried the suit, decided in favour of the respondent; and allowed the full claim against the defendants who are now appellants, but disallowed it against the others; and the Judge, on appeal, confirmed the decree.

Against this decree the defendants have appealed to this court, on the following grounds:—

"(1) That the decision of the Senior Assistant Judge is opposed to law, in awarding the claim for the produce of the village for more than six years, since the award of rent, or the hak, which is not supported by any documentary evidence, is illegal; (2) that the Senior Assistant Judge has left undecided a material question at issue between the parties, viz., has the plaintiff proved a prescriptive title to the hak; (3) that the mere fact that the hak was formerly drawn by the plaintiff will not entitle him to demand it in future from the appellants, unless he proves his title to receive the same, either by documents or by prescription, which he has failed to do; and (4) that the claim is barred by the law of limitation."

We are of opinion that the second and third grounds of appeal have failed; and that the decree of the Judge, so far as it declares the respondent entitled to recover the hak, must be confirmed. It then becomes necessary for us to consider, whether the decree shall stand for the whole amount awarded; or be modified, by limiting the amount to the arrears due for the six years previous to the filing of the suit.

The law applicable to the demand is Reg. V. of 1827, Sec. III., Cl. 1, which provides that "in all civil suits for debts not founded upon, or supported by, an acknowledgment in writing, and in all suits for damages other than those in the preceding section, it shall be a sufficient defence that the cause of action arose more than six years before the suit was filed.

The suit was commenced after Act VIII. of 1859 came into operation. The Munsif was not at liberty, when the plaint was presented, to reject it, under Sec. 32 of that Act, because as to part of the claim the right of action was not barred by lapse of time; but I think he ought to have ordered it to be amended, and the claim to be limited to six years before the filing of the suit. His omission to do this ought not to prejudice the defendants, who

1864.
SA'LO'JI KESRA'JI v. RA'JSANGJI JA'LAMSANGJI.

were not present at the presentation of the plaint, and had no opportunity then of objecting to it. Sec. 32 directs that if, upon the face of the plaint, or after questioning the plaintiff, it shall appear to the Court that the subject-matter of the suit does not constitute a cause of action, or that the right of action is barred by lapse of time, the Court shall reject the plaint. The words are imperative, and appear to impose upon the Court, before the defendant is called upon to state his defence, the duty of taking any objection that may exist in point of law to the plaintiff's claim, not merely apparent on the plaint, but which may be elicited by questioning the plaintiff.

This provision indicates very strongly the difference between the new system of procedure and the old, under which the parties were required to state, by way of regular pleadings, the case of the plaintiff, and the answer or defence to it; and if it was the duty of the Court, on the presentation of the plaint, to take notice that a portion of the plaintiff's claim was barred by lapse of time, it would seem to be still its duty to do so at any subsequent stage of the suit, unless the defendant expressly abandons the objection.

The defendant may, at the first hearing, tender a written statement; but this is to be confined, as much as possible, to a simple narration of the facts which he believes to be material to the case, and which he will be able to prove: Sec. 123. The object, apparently, is to inform the Court of the facts, and not to raise any formal answer or defence by way of pleading. At the first hearing of the suit (Sec. 139) the Court is to inquire and ascertain upon what questions of law or fact the parties are at issue; and is thereupon to frame and record, not the issues of law and fact which the parties may themselves have selected, but those on which the right decision of the case may depend; and, if the lower court shall have omitted to raise or try any issue, or to determine any question of fact which shall appear to the appellate court essential to the right determination of the suit upon the merits, the appellate court may frame an issue for trial by the lower court: Sec. 354. The decision of the suit upon

issues agreed upon by the parties is provided for by Sec. 142. The rule that the parties were in general considered as having mutually put the fate of the cause upon the questions which they had by their pleading elected for decision, does not appear to be applicable to the present system of procedure.

In the present case no statement of fact by the defendant was necessary to show that the law of limitation applied to part of the claim : as it appeared on the plaint ; and if there was any ground, upon which the plaintiff claimed exemption from the law, he ought to have stated it : Sec. 26, Cl. 3. Nor was there any question of law, as the law was clear and positive.

All that the defendant, or his pleader, could have done, would have been to state, that he relied upon the law of limitation as to part of the claim. I find no provision in the Civil Procedure Code requiring him to do this ; and the opinion that the statute of limitations is not a fair plea, and is to be regarded differently from other defences, has been long exploded in England : *Maddocks* v. *Holmes* (*a*). Indeed the provisions in Act VIII. of 1859, which I have noticed, may be considered as a legislative declaration that the defence is a fair one, and going to the merits of the case. In *LeBret* v. *Papillon* (*b*), Lord *Ellenborough* says: "The Court may and ought *ex officio* to give such judgment on the whole record as ought to be given, without regard to the issues found, or to any imperfection in the prayer of judgment made on either side ;" "and there is no difference between the office of the Court in this particular in a court of error, and in the court of original jurisdiction which gives the judgment in the first instance." This rule has been constantly acted upon by the courts in England ; and is equally applicable to courts in India. Indeed, some of the provisions of the Code of Civil Procedure appear to recognise it.

I am, therefore, of opinion that the Munsif, in making his decree, was bound to notice the law of limitation, and

(*a*) 1 B. & P. 128. (*b*) 10 East 508.

1864. SÍLU'JI KESHA'JI v. RA'JSANGJI JA'LAMSANGJI.

ought to have awarded only six years' arrears of the hak. I have gone thus fully into the reasons for this opinion, in consequence of doubts that have been expressed by other members of the Court.

On the appeal to the Judge, the defendants did not, in the grounds of appeal, raise the objection of the law of limitation; and the Judge did not notice it, but simply affirmed the Munsif's decree. But Sec. 334 expressly provides that the Court, in deciding the appeal, shall not be confined to the grounds set forth by the appellant; and I think the Judge was bound, equally with the Munsif, to pronounce a decree according to the law of limitation, which was applicable to the case, as stated by the plaintiff himself; and his omitting to do so has produced an error or defect in the decision of the case on the merits, and is a ground of special appeal.

This view of the case is in accordance with the judgment of the Privy Council in *Maha Raja Dheeraj Mahatab Chund Bahadoor* v. *The Government of Bengal* (*c*), where an objection raised for the first time at the hearing of the appeal before the Privy Council was sustained; and is not opposed to the decision in *Massumat Imam Bhandi* v. *Hurgovind Ghose* (*d*,) the ground of which is stated to be that, the objection not being raised, the appellants had no opportunity of meeting it by evidence.

In *Narasu Reḍḍi* v. *Krishṇa Padayáchi* (*e*), *Scotland*, C. J., says that in that court, on special appeal, the plea of the statute of limitations cannot for the first time be set up, unless, indeed, the facts which raise the plea and appear in the case are admitted by the plaintiff. In the present case the facts are stated by the plaintiff himself; and our decision will be in accordance with the practice of that court.

The hak claimed and proved was sixty *man* of grain a year, and the grain appears to have been valued by the plaintiff at one rupee per *man*. The decree must, therefore,

(*c*) 4 Moo. Ind. App. 466. (*d*) *Ibid.*, p. 403.
(*e*) 1 Mad. H. C. Rep. 358.

be modified by deducting Rs. 360 from the sum awarded, and in other respects be confirmed.

As the appellants have failed upon the other grounds of appeal, and the objection of the law of limitation was not taken on appeal in the court below, I think each party should pay his own costs of this appeal.

TUCKER, J.:—I have been compelled, though not without reluctance, by the cogency of the reasoning of my learned colleague, to assent to the doctrine which he has enunciated, namely, that the Code of Civil Procedure has imposed on a civil court the duty of examining whether the whole or any portion of a claim is barred, under any existing law, by lapse of time, and of deciding in accordance with such law; and that, consequently, if it be manifest, from the declaration in a plaint, that the recovery of a portion of a claim is barred by a particular statute, the omission to notice this circumstance, even if it should not have been specifically urged in defence, is an error in law, for the correction of which a special appeal will lie.

This opinion is opposed to former decisions of this court, which appear to have been founded on the old rule of procedure, the alteration of which I regret. I may quote one case, viz., Special Appeal No. 61 of 1863, *Dutaji bin Narayan* v. *Wamonrao and another* (*f*), to the decision in which I was a party. On more mature consideration of the question, I am bound to say I am of opinion that the ruling of the Court in that case was not correct.

PER CURIAM:—The Court modify the decree of the Senior Assistant Judge, by awarding to the plaintiff Rs. 321-15-0 only, and confirm the decree in other respects; and order that each party pay his own costs of this special appeal.

Decree amended.

(*f*) 1 Bom. H. C. Rep. 15.