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GIBBS, J.—I concur. With regard to the case of *Nasserwanji v. Narayan (supra)* in which we held that the institution of the suit, which had lasted for more than two years, might be held to be a sufficient notice to quit, the facts were very peculiar. There, the agent of an *inamdar* gave lands *on suti* tenure without the consent of the *inamdar*, and it was found by us that the agent was guilty of fraud. It was urged there also that there was no notice to quit, but the tenants were considered *participles criminis*, I think, and therefore, we thought they might be turned out without any notice.

Couch, C. J.—If so, the tenants were not entitled to any notice to quit, seeing that they had got the land from an unauthorized person.

Decrees reversed.

March 2.

Special Appeal No. 629 of 1867.

Narotamdas Bhagtandas, ... *Appellant.*

Dayabhai Ichhachand. ... *Respondent.*

Insurance Policy—Notice of loss—Limitation—Act XIV. of 1859, sec. 1 cl. 10—Mercantile usage.

A suit for the recovery of the amount due on a Policy of Marine Insurance falls under cl. 10 of sec. 1 of the Limitation Act.

In such cases the limitation (in the absence of a custom allowing a certain time of grace) begins to run from the date when the defendant has notice of the loss and refuses, or neglects, to pay.

This was a Special Appeal from the decision of C. G. Kemball, Judge of the District of Surat, in appeal suit No. 118 of 1866, confirming the decree of Lallubhai Gopaldas, Munsif of Surat.

The Special Appeal was argued on the 28th January 1868 before Tucker and Warden, J.J.

The facts appear from the judgment of the Court.

Shantaram Narayan for the Appellant.

Dhirajlal Mathuradas for the Respondent.

Cur. adv. vult.

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TUCKER, J.—This is a Special Appeal from a decision of the District Court at Surat given on an appeal from a decree of a Musif's Court in that city.

The action was brought on two policies of insurance, which had been subscribed by the defendant's firm on the 13th of May and 3rd of June 1861 respectively, by which the said firm had assured for definite sums certain cargoes of merchandize which were to be shipped on certain specified vessels on a voyage from Bombay to Surat. The plaint alleged that the goods had been shipped and a portion of them lost during the voyage, and by the perils covered by the policy, and the plaintiff claimed to recover Rupees 2,121-6-1 on account of the said loss, with interest on the above sum aggregating Rs. 521 4-2. Total amount sued for Rs. 2,642-10-3.

The defence was—(1) that the claim was barred by the law of limitation: (2) that, though the policies had been signed by the defendant's firm, yet no suit could be maintained on them ; (3) that there was no stipulation in the policies that the defendants were to be responsible for such goods as were described in the plaint; (4) that, if the plaintiff proved the actual shipment of any goods described in the policy and their loss by the perils assured against, the defendants would pay such loss; (5) that the plaintiff was not entitled to interest.

The suit was instituted on the 28th of July 1864.

Both the lower Courts decreed for the defendants, as they held that the maintenance of the suit was barred by Act XIV of 1859, sec. 1, cl. 10, inasmuch as more than three years had elapsed from the date when the plaintiff first heard of the loss of the goods, which the District Judge and the Munsif both considered to have been the time when a cause of action first accrued to him.

It has been contended for the Special Appellant (plaintiff) that a wrong clause of the limitation Act has been applied to the case, as the suit was not to recover money lent or

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interest or for the breach of any contract, and consequently it did not come within clause 9 or 10 of sec. 1 of Act XIV. of 1859, that it was a suit for which no term of limitation had been expressly provided, and so, under cl. 16 of sec. 1 of the same Act, it could be instituted within a period of six years from the time when the cause of Action arose; further that it had been stipulated in the policies that, in a case of any loss by the perils assured against, the custom of Bombay in the matter of English policies was to be followed, and, consequently, the agreement was subject to a custom which allowed to the underwriters a term of six months from the date on which they were advertised of the loss, till the expiration of which they could not be compelled to discharge their obligation; that this custom should have been taken into account, and that the plaintiff's cause of action would not have accrued till after the lapse of six months from the date when the defendants received notice of the loss.

On the other hand it has been urged for the Special Respondant that the foundation of the action was an alleged breach of contract by the defendants, and that, consequently it had been rightly held by the District Judge that it fell within cl. 10 of Sec. 1 of Act XIV. of 1859; that further, the District Judge had found that the plaintiff had failed to establish the custom he alleged, namely, that it was the usage of Bombay with reference to English policies of insurance that the underwriters should not be required to pay till six months after they had received notice of loss, and, consequently, the plaintiff was bound to sue when his cause of action first arose, *i. e.* when he, plaintiff, first received notice of the loss.

We are of opinion that the Law of Limitation, which governs this suit, is cl. 10 of sec. 1 of Act XIV. of 1859. The action was instituted to compel the performance of a contract of insurance, and it comes within the definition of a suit for the breach of a contract, inasmuch as it was the defendant's refusal to perform his part of the contract, after he had received notice of the loss of the goods which had been insured, which formed the foundation of the action. The

lower Courts have, therefore, applied the right clause of the Limitation Act to the case, but they appear to have erred in deciding that the statute began to run against the plaintiff from the date when he (the plaintiff) first heard to the destruction of the goods. On the point we entertain a different opinion, as we consider that the defendants were under no obligation to pay till they had received notice of the loss, and that the plaintiff's rightof action did not accrue till the defendants had received this notice, and had refused or neglected to make good the loss which had been notified to them. Now, it may be remarked that the date when the fact of the loss was communicated to the defendands has nowhere been stated, nor indeed does the plaint mention the precise date when the loss was first heard of by the plaintiff, as has been erroneously declared by the Judge; all that is said in the plaint is that the loss took place *subsequent* to Vaishakh Vadya 11th, Samvat 1917 (4th June 1861). As the date thus mentioned is the day following the date on which the second policy was signed, it seems probable that the news of the loss may have reached the plaintiff some time later; but both the lower Courts have, without first questioning the plaintiff, assumed that he heard of the loss on that day, and have held that he forthwith acquired a right to sue on that date. This is, on our opinion, a mistake, and, before it can be determined whether the maintenance of the suit is barred or not, it must be ascertained when the defendant had notice of the loss and repudiated his obligation, and the last of these dates will be the date when the plaintiff's cause of action first arose, unless indeed there should have been any such custom as has been alleged on behalf of the plaintiff, by which the underwriters were allowed a term of six months for the discharge of their obligation. It was stipulated in the contract that, if a loss occurred, the settlement was to be in accordance with the custom of Bombay with reference to English policies; and, consequently, if there was custom of this description among English or Native merchants at Bombay with respect to English policies, the defendants would have been able to claim the benefit of this custom; and the plaintiff could not have sued to recover payment

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till the term had expired. The Court of first instance raised no issue as to the existence of such a custom and gave no decision on the point. The District Judge has declared that in his opinion the plaintiff has failed to establish that there was any rule of the kind among English merchants, but he has come to this conclusion without noticing that the Court of Original Jurisdiction had omitted to raise the question or to take evidence with respect to it. Under these circumstances we must reverse the decrees of the District Judge and Munsif and remand the cause to the Court of first instance that the dates we have mentioned may be ascertained, and the existence of the custom inquired into, and that the issue respecting limitation may be determined with reference to the principles which we have laid down. If the decision on this issue be ultimately in favour of the plaintiff, the Court of first instance must then proceed to dispose of the remaining points in dispute between the parties, and pass a new decree on the merits, in which costs, including the costs of this Special Appeal, shall be apportioned.

Civil Petition.

Jan. 7.

Panamchand valad Surajmal.....*Petitioner.*

Bhivraj valad Dashrat.....*Opponent.*

Limitation—Decree payable by Instalments—Execution—Act XIV. of 1859. Sec. 20.

Where the decree of a Court is made payable by instalments, the time barring the execution of such decree under sec. 20 of the Limitation Act does not commence to run until the first instalment becomes payable.*

The petitioner obtained a decree, upon the 22nd of January 1863, against the opponent for payment of the amount thereof by instalments. The first instalment became payable on the 1st of February 1864.

On the 26th of January 1866, the petitioner applied for the execution of the decree, but the Munsif of Nevasa rejected the application, on the ground that it had not been presented within three years from the date of the decree sought to be executed.

* *See post No. 45.*