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Special Appeal No. 346 of 1871.

JOITA'RA'M BECHAR ..... *Appellant.*
BA'I GANGA' ..... *Respondent.*

Limitation—Act XIV. of 1859, Sec. 14—Computation of Period of Limitation—Prosecution of Suit in wrong Court.

The question whether the plaintiff is entitled, in computing the period of limitation, to deduct the time occupied in prosecuting a former suit, depends in the first place upon the question whether the former suit was brought upon the same cause of action as the new suit. Where the plaintiff brought two suits, one against one branch of the family and the other against another branch, to recover a share of that portion of the property which was in the possession of each, and these suits were rejected on the ground of their having been improperly brought, it was held that in bringing a consolidated suit against all sharers for a general partition the plaintiff was not entitled to deduct the time occupied in prosecuting his former suits.

THIS was a special appeal from the decision of G. M. Macpherson, Acting Joint Judge of the District of Ahmedábád, in Appeal No. 318 of 1869, reversing the decree of the Munsif of Borsad.

One Motibá, the grandmother of the plaintiff, died in 1852, possessed of certain land, and leaving three daughters. In 1863 the plaintiff, a representative of one of the daughters, brought two suits for his third-share, one against the representatives of the second, and the other against the representatives of the third daughter. Each of these suits was rejected, on the ground that the plaintiff ought to have sued for a general partition in a consolidated suit against all the sharers, and that separate suits would not lie. A review was applied for, but was rejected; and the plaintiff, therefore, in 1866—that is, more than twelve years after the death of Motibá—brought the present suit for a general partition.

The defendants, *inter alia*, pleaded the Statute of Limitations. Their plea was disallowed by the court of first instance, but was allowed by the appellate court, which rejected the plaintiff's claim for the following reasons:—

"It is argued that the cause of action is the same, that the *bona fides* and due diligence required existed, and that

the parties are the same, for the defendants to the original actions have been united, and they were all represented in one or other of the former suits.

"Whether this argument as to the parties be right or wrong I need not inquire. The original suits were brought in the same court before which this one was brought, and it is the circumstances under which the original claim in appeal was dismissed that I have to consider. If the time is to be excluded from computation, the original suit must have been one in which the lower court's decision was annulled for want of jurisdiction, or any such cause.

"There have been very different opinions expressed as to the real meaning of the section (Sec. 14 of Act XIV. of 1859). Were it lawful for me to consider the Bill now before the Legislative Council on this subject, it would at once show the intention of the Legislature, but I cannot do so. It has been ruled in the High Court of Calcutta that the fact that the Lower Court was unable to decide on the claim must be one owing to no default or error on the plaintiff's part for which he could reasonably be held accountable. The subject is discussed at length in the case of *Chunder Madhub Chuckerbutty* v. *Bissessuree Debea and others* (*a*), and that of *Hurro Chunder Roy* v. *Shoorodhonee Debia* (*b*). I quote some of the opinions expressed in the former case. Chief Justice Peacock was of opinion that the words 'or other cause' must mean a cause of like nature as defect of jurisdiction. Now a defect of jurisdiction would be a cause that would not include any neglect on the part of the plaintiff either in stating his case or in other respects. His Lordship, with whom Mr. Justice Trevor concurred, went on to show that a court might often be unable to decide upon the cause of action, owing simply to the plaintiff's negligence. Again Mr. Justice Jackson says: 'It appears to me that the inability of the court must be either some unavoidable circumstance over which no one has any control, or something incidental to the court itself, and unconnected with the acts of the parties.' He thought the inability of the

(*a*) 6 Calc. W. Rep., Civ. R. 184. (*b*) 9 *Ibid.* 402.

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courts to decide the case must arise from some cause quite unconnected with the default or negligence of the plaintiff. On the other hand, it was argued that every act of neglect on the plaintiff's part was not fatal, as the mere fact that the case was instituted in a wrong court, not having jurisdiction, must necessarily be in the eye of the law an act of neglect of the plaintiff. Now in the present case the Munsif clearly had jurisdiction over the subject-matter of the action and over the parties; but from the way in which the plaintiff brought the case he could not properly decide the claim on its merits. To enable him to do so, the plaintiff had to sue for more than he had sued for, and to sue more people. Therefore, clearly any inability on the part of the lower court, and of the Senior Assistant Judge's court in appeal, was owing to neglect on the part of the plaintiff. This, according to the opinions above quoted, would be fatal to the exclusion of the time during which the case was being tried. The above would have been a good ground for the plaintiff's applying for leave to withdraw from the suit with leave to bring a fresh action. But in that case he would not have had any allowance made for the time during which the suit had been pending.

"But there seems to me to be one word in Sec. 14 of Act XIV. of 1859 which deserves attention. It does not say that the plaintiff can exclude any time spent in prosecuting a suit the decision in which shall in appeal be reversed. The word used is much stronger, 'annulled.' This is not a word used to express a simple reversal of a decision. It implies something essentially wrong in the original decision, and affecting the power of the court to try the case, not because of some defect in the manner in which it is brought before it, but because of some fatal inability on the part of the court. This, however, may seem to be too technical a distinction. For instance, in Sec. 350 of Act VIII. of 1859 the word 'annul' is not used even when the matters affecting the jurisdiction of the court are referred to. This makes it the more remarkable that in Sec. 14 of Act XIV. of 1859 the word 'annulled' is used. I cannot but conclude from the use

of this word that the intention was to restrict the exception to cases affecting jurisdiction or some such thing. Sec. 350 says that no decision is to be reversed or modified on account of any matter not affecting the merits of the case or the jurisdiction of the court. In this case there was no doubt of the jurisdiction of the court, but it was impossible, owing to circumstances, to decide the case on its merits, and these circumstances resulted from the plaintiff's negligence or ignorance. Again, if the plaintiff were to be allowed to exclude the time he wishes to exclude from calculation in this suit, on the same principle it might happen that when the plaintiff in a suit found his mistake, and obtained leave to withdraw from it under Sec. 97, he might barely be in time to bring another suit, while if he had gone on with the suit and obtained a decree, which after some time was reversed in appeal because the case was not properly before the court, he could exclude from calculation all the time occupied in the trial of the case in both courts."

Upon rejection of the plaintiff's claim by the appellate court on these grounds, he filed a special appeal, which was heard by MELVILL and KEMBALL, JJ., on the 27th of November 1871.

Shántárám Náráyan, for the special appellant:—The question is whether, under the 14th section of the Limitation Act of 1859—the plaintiff is entitled to deduct the time occupied in prosecuting his two previous suits. This section was framed with the special object of protecting those parties who sue in the wrong court. It says: "In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bonâ fide*, and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded

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from such computation." The Bengal High Court have ruled in the case cited by the Judge that the words "or other cause" mean "other cause similar to defect of jurisdiction." In the absence of any ruling of this High Court, the Judge has followed that ruling. In the first place I submit that the Calcutta ruling is incorrect; in the second place, even if it be correct, the circumstances of this case fall within the meaning of that ruling. There is no reason why words not in the Act should be imported into it, so as to put a less liberal construction upon the other words already in it. Even the express language of a Limitation Act should be liberally construed: *Karuppan Chetty* v. *Veriyal* (*c*), *Mohun Chunder Koondoo* v. *Azeem Gazee Chowkeedar* (*d*), *Maharajah Jugutendur Bunwaree* v. *Din Dayal Chatterjee* (*e*). But this suit is within limitation even if the Calcutta interpretation be held to be correct. The plaintiff brought two suits against two parties, and the court held that it could not try the plaintiff's claim in two different suits. It had no jurisdiction to try the claim in that shape, and it, therefore, directed that a consolidated suit should be brought. This is a cause of the same nature as á defect of jurisdiction.

Nagindás Tulsidás, for the special respondents:—That the Legislature intended by the words "or other cause" other cause of a like nature as the defect of jurisdiction, is clear from their inserting those words in Sec. 15 of the new Limitation Act (No. VII. of 1871). That which was judicially implied has now been expressly enacted. Limitation Acts should not be liberally construed.

MELVILL, J.:—We think we should decide the question raised in this case according to the same principle on which we have to-day decided a similar point of law raised in R. A. No. 59 of 1860.

The question whether the plaintiff is entitled, in computing the period of limitation, to deduct the time occupied in prosecuting his former suits, depends in the first place

(*c*) 4 Mad. H. C. Rep. 1. (*d*) 12 Calc. W. Rep., Civ. R. 45.
(*e*) 1 *Ibid.* 310.

upon the question whether these suits were brought upon the same cause of action as the present suit. We are of opinion that they were not.

The two former suits were brought, one against one branch of the family, and the other against another branch, to recover a share of that portion of the property which was in the possession of each branch. The claims were rejected on the ground that they were improperly brought, and that the plaintiff's proper course was to sue all the sharers for a general partition. The so-called cause of action in the former suits was the plaintiff's supposed right to be put in possession, previously to a general partition, of a definite share of each and every portion of the family property in the possession of any of the co-sharers. This was in reality no cause of action at all, for, to quote the words of the Judicial Committee of the Privy Council (*f*), "according to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share." The plaintiff now sues on what was and is his only real cause of action, namely, the right of one member of a Hindú family to enforce a general partition of the whole property by a suit brought against all the sharers.

On this ground we affirm the decree of the Joint Judge, with costs on the appellant.

Decree affirmed.

(*f*) *Approvier* v. *Rama Sabba Aiyan*, 11 Moo. Ind. App. 89.