

1873.  
March 26.

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[APPELLATE . CIVIL JURISDICTION.]

*Regular Appeal No. 31 of 1872.*

KÁ'VASJI SORA'BJI ..... *Appellant.*

BARJORJI SORA'BJI and BA'PUJI SORA'BJI... *Respondents.*

*Suit against the representatives of a deceased person—Substitution of parties—Limitation—Sec. 14, Act XIV. of 1859.*

Where a plaint is filed before the expiration of the period of limitation prescribed by Act XIV. of 1859, against persons whom the plaintiff erroneously supposes to be the representatives of his deceased debtor, and after such period has expired, obtains leave to amend his plaint by substituting the true representatives as defendants ;

*Held* that his claim is barred.

**T**HIS was a regular appeal from the decision of Mukundrai Monirai, First Class Subordinate Judge of Surat, in Original Suit No. 1571 of 1869.

Kávasji Sorábji brought this suit against Dosábháí Barjorji and Mánikji Bápuji, two minors (the present defendants Barjorji Sorábji and Bápuji Sorábji being named in the plaint as guardians merely) to recover Rs. 8,830 being principal and interest due on an agreement of compromise entered into between the plaintiff and Sorábji Mánikji, grandfather of the minors and father of the guardians Barjorji and Bápuji. The plaintiff laid his cause of action on

Act XIV. of 1859, Sec. 14: "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 from such computation."

the 9th December 1866, and alleged that he sued the minors Dosábhái and Mánikji, because Sorábji had appointed them as his heirs (residuary legatees) by a will.

The guardians, Barjorji Sorábji and Bápuji Sorábji. answered that the minors were not Sorábji Mánikji's heirs, and produced two wills, dated, respectively, the 22nd January 1867 and the 13th November 1867; showing that although under the former will the minors Dosábhái and Mánikji had been appointed Sorábji's heirs (devisees), that will was revoked by the subsequent one of the 13th November 1867, by which the guardians Barjorji and Bápuji were appointed heirs (devisees). The plaintiff thereon applied on the 22nd February 1870 to the Court that the guardians Barjorji Sorábji and Bápuji Sorábji should be made defendants in substitution for the minors. The Court, on the 4th April 1870, ordered them to be so substituted as defendants. Barjorji and Bápuji objected that their substitution was illegal, and that the claim was barred as against them, inasmuch as the claim must be considered to have been instituted against them on the 4th April 1870, when their names were ordered to be substituted, that the cause of action accrued on the 9th December 1866, and a period of more than three years had elapsed since that date. The Subordinate Judge, although he rejected the claim on the merits, decided the issue of limitation in the plaintiff's favour. The following are his reasons:—

“ There is no dispute about the plaint having been presented within the time allowed by the law of limitation, but the defendants rest their objection on the ground that the time from the date on which the debt became due, to the day on which the plaintiff presented the petition, substituting their names, is more than three years, and that therefore this claim as against them is barred. From the circumstances of the case, as they are at present, the plaintiff does not appear to have been aware of the second will. Had he known, at the time he presented the plaint, that such a document was in existence, he would have at once sued the defendants, and

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there would have been no necessity for his applying for the substitution of the defendants' names. The time, therefore, during which he was promptly prosecuting his claim should be equitably allowed him. (*Vide* the case of *Mohan Chand Kandu v. Azim Kazi ow Chkidar (a)*.)”

The appeal was argued before WESTROPP, C.J., and KEMBALL, J.

*Farran* (with him *Nánábhái Haridás*) for the appellant.

*Anstey* (with him *Khanderáv Moróji*) for the first respondent.

*Vásudev Jagannáth* for the second respondent.

WESTROPP, C.J. :—The plaint was originally filed against the infant sons of the present defendants under the erroneous supposition that those minors were the representatives of the alleged debtor, Sorábjí, then deceased, and were so constituted by his will, dated 22nd January, 1867. They were, however, only legatees under that will, of which two other persons (not the present defendants) were appointed executors. By a subsequent will, dated 13th November 1867, which had the effect of revoking the previous will, Sorábjí constituted the present defendants “his two heirs after his decease,” of which will probate was granted to the defendant, Bápuji, after the date of the filing of the plaint. The cause of action is laid as having accrued on the 9th December 1866. The plaintiff, on the 22nd February 1870, applied to have the present defendants (who, in the title of the plaint, as originally filed, were described as guardians of the minors) substituted as defendants in lieu of their infant sons. This substitution was made on the 4th April 1870. Under these circumstances, the present defendants say that they ought not to have been made defendants by substitution, and that even if it were right so to make them and not to put the plaintiff to file a new suit against them, yet the suit is barred by Act XIV. of 1859, as it cannot be regarded

(a) 3 Beng. L. R. A. C. J. 233

as instituted against them until the 4th April 1870, or at the soonest, the 22nd February 1870, and they rely on *Kaj Kishoree Dossee v. Budden Chunder Shaha* (b), and *Chunder Madhub Chuckerbutty v. Bissessuree Debea* (c).

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The plaintiff, on the other hand, relies on *Mohan Chand Mohun v. Azeem* (d), *Kandu v. Azim Kazi Chowkidar* (e), and on Section 14, Act XIV. of 1859. We, however, think that this case neither falls within the authority of the case last cited nor within the 14th Section of Act XIV. of 1859. The suit was originally brought against the infants, the present defendants being only named as guardians, and, therefore, cannot be considered as a suit brought against the same defendants, and it is not a suit brought against some person whom the present defendants now represent, but against some persons (viz., the minors), whom the present defendants were formerly erroneously supposed by the plaintiff to have represented, and, moreover, against persons who did not in fact represent the deceased debtor Sorábjí. Under these circumstances we think that were we to apply Sec. 14 to the present case for the benefit of the plaintiff, we should be adding words to that section not now to be found in it. On this ground, we hold that this suit cannot be maintained against the present defendants, and it is unnecessary for us to enter upon the question of *bona fides* and due diligence, which might arise hereunder the same section, if the suit were to be considered as originally instituted against persons whom the defendants represent. We dismiss the appeal with costs. Only one set of costs, however, is to be allowed to the defendants, as they ought to have appeared and defended the appeal jointly and not separately.

*Decree affirmed.*

(b) 6 Calc. W. R. Civ. R. 298.

(c) Ibid 184.

(d) 12 Ibid 45.

(e) Beng. L. Rep. A. C. J. 233.