

## APPELLATE CIVIL.

( 43 )

*Before Mr. Justice West and Mr. Justice Pinhey.*1879  
January 16.SHETH KAHANDAS NARANDAS (ORIGINAL PLAINTIFF), APPELLANT,  
v. DAHIABHAI (ORIGINAL DEFENDANT), RESPONDENT.\**Hundi—Rights and liabilities of Drawer, Drawee and Payee—Limitation Act IX  
of 1871, Section 15.*

Plaintiff, as payee of an order drawn by defendant at Ahmedabad, where he (defendant) resided, on a firm at Bangkok in Siam and dishonoured on presentation, sued defendant and an agent of the Bangkok firm who resided at Surat, in the Subordinate Judge's Court at Surat. Permission to proceed with the suit against the defendant (the drawer) having been refused by the High Court, plaintiff withdrew his plaint and filed his suit in the Court at Ahmedabad against the drawer alone. The Subordinate Judge rejected the claim as barred by limitation.

*Held* by the High Court in appeal that, under section 15 of the Limitation Act (No. IX of 1871), a deduction might properly be made of the time during which the suit was pending in the Court at Surat, and that the deduction on this account was to run from the filing of the plaint to the final refusal of the High Court to allow the suit to proceed at Surat against the drawer (defendant).

*Held*, also, that plaintiff ought not to have joint the drawer (defendant) and the Bangkok firm as defendants in the same suit.

Immediately on failure of payment of a draft at sight, whatever may be the real state of the account between the drawer and drawee, the former becomes liable to the payee for the amount which would place him at the stipulated time and place in the same position as if the money had been duly paid. Where there is no acceptance, no cause of action can arise to the payee against the drawee. Nor is the legal relation between the drawer and the payee altered by a partial acceptance, the contract being in its nature indivisible; much less can any mere promise to pay part at a future time in any way satisfy the payee's claim, or postpone his right to reimbursement of his loss from the drawer.

THIS was an appeal from the decision of Mukundrai Manirai, First Class Subordinate Judge at Ahmedabad.

*Macpherson* (with him *G. N. Nàdkarni*) appeared for the appellant.

*Nānabhai Haridas* appeared for the respondent.

The facts of the case appear from the following judgment of the Court:—

WEST, J.—In this case the ground of action set forth by the plaint is that an order for 6,700 *tikals* drawn by the defendant

in favour of the plaintiff on a firm at Bangkok in Siam was dishonoured on presentation there.

The order, it is set forth, was drawn at Ahmedabad, where the defendant resides; but the Bangkok firm having an agent at Surat, the plaintiff chose to bring his suit in the Subordinate Judge's Court at that city against both the drawees and the drawer of the alleged order. Permission to proceed with the suit against the present defendant, (the drawer,) having been refused by the High Court, the plaintiff withdrew his plaint, and then filed his present suit in the Court at Ahmedabad against the drawer alone.

The Subordinate Judge has rejected the claim as barred by limitation, and the present appeal is against that decision.

The first question is as to whether the plaintiff can claim a deduction on account of the time during which he was proceeding ineffectually in the Subordinate Court at Surat, and if he can, of how much time.

It is clear that the plaintiff ought not to have joined the present defendant and the Bangkok firm as defendants in the same suit. Immediately on the failure of payment of a draft at sight, whatever may be the real state of the account between the drawer and the drawee, the former becomes liable to the payee for the amount which would place him at the stipulated time and place in the same position as if the money had been duly paid. Where there has been no acceptance, no cause of action can have arisen to the payee against the drawee. Nor is the legal relation between the drawer and the payee altered by a partial acceptance, the contract being in its nature indivisible; much less can any mere promise to pay part at a future time, such as was made in this case, in any way satisfy the payee's claim or postpone his right to reimbursement of his loss from the drawer.

The defendant Dahiabhai, therefore, ought to have been sued alone, and sued in the Court having local jurisdiction over him and over the transactions through which, as alleged, his liability had arisen. But on the part of the plaintiff it is pressed on us that the proceedings in the Court at Surat, however mistaken and

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ineffectual, were really taken in perfect good faith; that they did not at the time seem unreasonable; and that the Subordinate Judge thought the suit was properly brought in his Court, as he applied for leave to try it, or for such direction as this Court might think fit to give. Had the permission been given, he would have had jurisdiction. It was refused, and his jurisdiction thus failed. Hence it is contended the case is one of the kind contemplated by section 15 of Act IX of 1871.

On the other hand, the case of *Nilmadhub Surmokar v. Kristo Das Surmokar*(1) has been relied on as showing that a former suit against some of the defendants in a suit, though pursued in good faith, will not serve as a basis for any deduction in the case of those who were not joined. This seems to be merely an application of the principle that each person sued is entitled to the benefit that limitation may give to him unaffected by anything that took place before he was called on to answer a claim.

In the case of *Sham Kant Banerjee v. Baboo Gopallal Tagore*(2) a division bench say that no deduction can in any case be allowed for the pendency of an action in the wrong Court, but this would go to deprive the saving clause of the Limitation Act of its whole effect, and cannot now, we think, be applied. Whether a suit was pursued *bond fide* and with diligence, must in almost every case be more less question of degree, and the same course of action which on the part of a plaintiff in Bombay within reach of skilled advice would indicate bad faith or want of diligence might be consistent with both good faith and diligence in a Mufassal community unfamiliar with the refinements of the mercantile law and practically *inops consilii* on such matters. There is no reason to suppose the defendant Dahiabhai has in this case suffered any prejudice by the erroneous proceedings. He was, according to the plaintiff's statement, informed of the dishonour of the draft, and he was aware of the suit against him. Without laying down any general rule therefore, and without saying that a similar indulgence ought to be allowed in any future case, we think that a deduction may properly be made of the time during which the suit was pending in the Court at Surat. There was no

(1) 5 Calc. W. R. (Civ. Rul.) 231. (2) 1 Calc. W. R. (Civ. Rul.) 333.

apparent motive for going there except in perfect good faith, and though the plaintiff entirely misconceived his legal position the loss entailed by it has fallen entirely on himself.

The deduction on this account is to run from the filing of the plaint to the final refusal of the High Court to allow the suit to proceed at Surat against Dahiabhai.

The date of the cause of action is loosely set forth to the plaint as the 6th March and as the 12th April 1873. It is possible and even probable that the plaintiff in his ignorance thought that his cause of action against Dahiabhai had arisen at the earlier date when Dahiabhai drew the order; whereas, according to the analogy of *Whitehead v. Walker*(1) and similar cases, it arose only on dishonour and notice consequent thereon. It is obvious that until he could verify a plaint alleging non-payment at Bangkok, the plaintiff could not sue the defendant effectually, and had no cause of action which a Court could recognize. This was not earlier than the 12th April 1873, that being the date of the letter of the Bangkok firm announcing their non-payment, or, at least, no earlier date is in evidence.

Taking the 12th April 1873 as the date of the cause of action, and deducting for the pendency of the suit at Surat the time from the 28th February 1876 to the 15th March 1877, when the matter was disposed of by this Court, the suit filed at Ahmedabad on the 12th April 1877 was brought within three years from the date of the cause of action. It was not barred by limitation, and the Subordinate Judge's decision on that point being reversed, he will proceed to dispose of the case on its merits.

Costs to follow the final decision.

*Order accordingly.*

(1) 9 M. & W. 506.

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