

ORIGINAL CIVIL.

Before Mr. Justice Bayley.

NARRONJI BHIMJI AND OTHERS, PLAINTIFFS, v. MUGNIRUM
CHANDAJI, DEFENDANT.*

1880
December
14—21.

Limitation Act (XV of 1877), Secs. 9 and 13—Defendant's absence from British India—Computation of the period of limitation—Adjusted and signed account—Payments under Section 20 of the Limitation Act.

Sections 9 and 13 of Act XV of 1877 adopt the law of limitation in England, and they must be read together in computing the period of limitation.

Where the statutory period has once begun to run in respect of any cause of action, the subsequent absence of the defendant from British India will not stop it from running.

Where, subsequently to the adjustment of his account with the plaintiffs, the defendant had been credited with amounts of surplus proceeds of goods and of a *hundi*, held that such amounts were not payments within the meaning of section 20 of the Limitation Act.

The defendant adjusted and signed his account with the plaintiffs in Bombay on the 13th of January, 1871, and shortly afterwards went to reside out of British India, in the territories of His Highness the Nizam. There was no subsequent payment of interest *as such*, and no payment of any part of the principal.

Held that the plaintiffs' suit for the balance of the account was barred by the law of limitation, not having been brought within three years after the adjustment.

14th Dec.—THIS was a suit to recover from the defendant Rs. 29,415-8-0, with interest, being the balance due on an adjusted and signed account. By the adjustment, a sum of Rs. 30,092-2-0 had been found due. The plaintiff had in his hands certain goods belonging to the defendant, which he subsequently sold, giving the defendant credit for the proceeds.

The plaintiffs, who were merchants in Bombay, carried on business in the years 1870 and 1871 as commission agents of the defendant for the purchase and sale of goods in Bombay and shipment of goods for sale in England on his account. The defendant was described in the title of the suit as having "lately carried on business under the name and firm of Joharimul Mugnirum at Latton, in the territories of His Highness the Nizam of Hyderabad." The plaint was filed in the latter part of 1880.

*Suit No. 466 of 1880.

1880

NARRONJI
BHIMJIv.
MUGNIRUM
CHANDAJI.

In respect of the agency business the plaintiffs had a running account with the defendant. In their plaint (paras. 3 and 5) they stated—

“3. The said account was examined and adjusted by the defendant on the 7th of Posh Vad 1927 (13th of January, 1871), and a balance of Rs. 30,092-2-0 was then found due by the defendant to the plaintiffs, which said balance was acknowledged as correct by the defendant's *munim* in an entry signed by him in the plaintiffs' books.”

“5. The defendant, ever since the date of the said adjustment of accounts, has been and is now residing at Latton, in the territories of his Highness the Nizam, and the plaintiffs, therefore, submit that the time during which the defendant has been absent from British India should be excluded in computing the period of limitation applicable to this suit.”

The suit came on for hearing as a short cause, and was undefended.

It was proved in evidence that, at the time of the adjustment, the defendant was in Bombay; that, a few days afterwards, he left for the Nizam's territories; and that he had never returned to Bombay since that time.

Vicaji for the plaintiff.—We submit that, under section 13 of the Limitation Act (XV of 1877), the time during which the defendant has been absent from British India is excluded from computation, and that this suit is, therefore, not barred. Section 9 refers to cases of personal disability in the plaintiff. Section 13 must have been intended to give the plaintiff a special privilege in case of the defendant's absence, inasmuch as under the Civil Procedure Code (secs. 39, &c.), it is always possible to sue an absent defendant. The privilege given to him by section 13 is analogous to that which is given to plaintiffs by sections 12, 14, 15, 16, 17 and 18. In all these cases, although time has continued to run, yet certain periods are to be excluded, so as to preserve the plaintiff's right to sue. The Act makes a distinction between *stopping* the time which has once begun to run against him, and *excluding* certain periods of time from consideration.

1880

 NARRONJI
 BHIMJI
 T.
 MUGNIRUM
 CHANDAJI.

21st Dec.—BAYLEY, J.—This is an undefended suit brought upon a running account between the plaintiffs—who are carrying on their business as merchants in Bombay—and the defendant, who, until recently, traded at a place called Latton, in His Highness the Nizam's Dominions. The claim is for the balance of this account, namely, Rs. 29,415-8-0 and interest, due to the plaintiffs in respect of expenses incurred, commission earned, and moneys paid by them as commission agents of the defendant for the purchase, shipment and sale of goods on his behalf.

On the 13th of January, 1871, it appears that the agency account was adjusted between the parties, showing a balance of Rs. 30,092-2-0 in favour of the plaintiffs, and on that day the defendant also signed an entry for that sum in the plaintiffs' books. The evidence goes to show that the defendant was in Bombay at the time of the adjustment, that he left for Latton very soon afterwards, and that he has never since returned to Bombay. The plaintiffs in their plaint say that "after the date of the adjustment, they continued to act as the commission agents of the defendant, and incurred expenses, and paid and received moneys on his account"; and the plaintiffs' *mumim* has said in his examination that the balance of Rs. 29,415-8-0 became due on the 1st of Kartuck Sud 1928 (13th of November, 1871), and he has shown in detail how the amount of the adjustment was reduced to that sum. He stated that there had been no dealings since and no payments on account. There is no further evidence offered. I am of opinion that there is nothing special in this case to defer the plaintiffs' right to sue after the date of the adjustment. The period of limitation began to run from that moment or that day. Mr. Vicaji relied on section 13 of the Limitation Act (XV of 1877), which enacts that, "in computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded." But that section ought to be read in connexion with section 9, which provides that, "when once time has begun to run, no subsequent disability or inability to sue stops it." These two sections adopt, in fact, what had long before been the law of limitation in England. In *Doe d. Duroure v. Jones* (1) it was held by the King's Bench in 1791 that

(1) 4 T. R. 300.

1880

NARRONJI
BHINJI
v.
MUGNIREM
CHANDAJI.

“when once five years, allowed to an infant to make an entry for the purpose of avoiding a fine, begin, the time begins to run notwithstanding any subsequent disability.” In *Cotterell v. Dutton*⁽¹⁾, which was a real action upon a writ of *formedon*, it was held that the demandant was barred by the Statute of Limitation (21 Jac. I, c. 16). *Chambre, J.*, said: “The ten years do not run at all while there is a continuance of liabilities, but they run without intermission from the time that the disabilities first cease” (p. 830). *Gibbs, J.*, said: “When once the statute begins to run, nothing stops it.” In *Rhodes v. Smethurst*⁽²⁾, decided in the Exchequer Chamber, it was held that “when time has once begun to run, no subsequent interruption to the (plaintiff’s) right of suing, even from causes beyond his control, will stop it.” I hold, therefore, that the period of three years allowed by the Act began to run in this case from the date the account was adjusted.

There has been no subsequent adjustment or acknowledgment in writing given after the defendant went to reside at Latton; nor is there any payment of interest, *as such*, or of the principal, since the defendant went to reside there. Hence it is clear there is nothing to bring the case within section 20 of the Limitation Act. The particulars of demand state the credit items of the account as consisting of “moneys received by surplus proceeds of bales of cotton shipped and sold” in “England and of the proceeds of a *hundi*.” These amounts are not “payments” within the meaning of section 20. If there had been payment, there might have been a question as to which Limitation Act—that of 1871 or 1877—would apply to the present claim. The plaintiffs’ case, so far as regards the credit items in the account, is not unlike that of *Hanmantal Motichand v. Rambabai*⁽³⁾. Neither the early part of section 20 as to interest, nor that relating to part payment of the principal, applies here; because the fact of payment does not appear to be in the handwriting of the person making the same.

The law of limitation is a law relating only to procedure⁽⁴⁾, and applying section 9 of Act No. XV of 1877, I hold that the claim, so far as this Court is concerned, is time-barred. I will

(1) 4 Taunton, 826.

(2) 6 M. & W. 351.

(3) I. L. R. 3 Bom. 198.

(4) *Ruchmaboye v. Lulloobhey Motichund*, 5 Moo. I. A. 234.

however, allow the plaintiffs to elect between a dismissal of this suit or a withdrawal of it under section 373 of the Code of Civil Procedure, to enable them, if so advised, to proceed against the defendant in the Nizam's territories, where the law of limitation may not be the same as that of British India.

1880

NARRONJI
BHIMJI
v.
MUGNIRUM
CHANDAJI.

[The latter course being chosen, the suit was allowed to be withdrawn, with liberty to the plaintiffs to bring a fresh suit, if so advised, in respect of the same subject-matter.]

Attorneys for plaintiffs.—Messrs. *Jefferson, Bhaishanker, and Dinsha.*

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

GOPAL NARHAR SAFRAY, A MINOR (ORIGINAL PLAINTIFF), APPELLANT, v.
HANMANT GANESH SAFRAY AND ANOTHER (ORIGINAL DEFENDANTS),
RESPONDENTS.*

1881

July 20.

*Review—Delay—Adoption of daughter's son—Custom—Breaches of Custom—
Practice—New case set up in special appeal.*

An application for review was presented to the High Court more than eighteen months after time, the applicant alleging that, soon after the decision sought to be reviewed, he was engaged in collecting instances of the special custom relied upon by him in support of his claim. The special custom was not set up in the Courts below, but an objection was taken for the first time in special appeal that an issue regarding it should have been raised in the lower Courts. No instance of such special custom had been given in evidence. It was urged that the applicant was a minor until shortly before the making of the High Court decree, and was only represented by his adoptive mother as his guardian.

The High Court considered that there was no sufficient excuse for the delay, and rejected the application, observing that, unless upon very strong grounds and under very special circumstances, the Court would hesitate to permit a party at such a stage of his suit to set up a case which was not set up for him in the Courts below, where his professional representatives must have been well aware whether such a case could be legitimately set up, and abstained from any attempt to do so.

THIS was an application by the appellant, Gopal, praying for a review of the decree passed by the High Court (Westropp, C. J., and Kemball, J.) on the 14th April, 1879 (1). The following (*inter alia*) were the grounds on which the review was asked:—

* Review in Special Appeal No. 259 of 1874.

(1) See I. L. R. 3 Bom. 273.