ORIGINAL CIVIL.

Before Sir Basil Scott, Chief Justice, and Mr. Justice Batchelor.

1909. *March 2,*

THE FIRM OF GUNNAJI BHAWAJI, APPELLANTS AND PLAINTIFFS, *v.* MAKANJI KHOOSALCHAND AND OTHERS, RESPONDENTS AND DEFENDANTS.*

Civil Procedure Code (Act XIV of 1882)—Amendment of plaint by referring to document not included in list of documents relied on.

At the hearing of a suit brought by the plaintiff for the recovery of a sum due at the foot of an account the defendant raised a plea of limitation. The plaintiff thereupon applied for leave to amend his plaint by setting out an acknowledgment in writing signed by the defendant within the period of limitation. The lower Court refused the application.

On appeal:—

Held, that the amendment should have been allowed.

APPEAL from the judgment of Russell, J., dated 21st August 1908.

The plaintiffs filed this suit on 15th October 1907 against the defendants who were partners to recover a sum of Rs. 6,671 due to the plaintiffs on agency accounts and interest thereon. The plaint stated that the accounts were adjusted and settled on the 18th September 1899 when a sum of Rs. 8,501 was found payable to the plaintiffs by the defendants for which sum the defendants signed an acknowledgment undertaking to repay it with interest at 6 per cent. At the hearing of the suit when it came on as a short cause a written statement was put in raising several defences, but the only one relied on was that of limitation; and upon that being done counsel for the plaintiff applied for leave to amend the plaint, because he sought to rely upon another document, namely, a letter of 20th of March 1902, which amounted to an acknowledgment of liability within the meaning of section 19 of the Limitation Act. Russell, J., declined to allow the amendment on the ground that the letter was not referred to in the list of documents relied on by the plaintiffs and dismissed the suit with costs. Against this decision the plaintiffs appealed.

* Appeal No. 48 of 1908.

Setalvad for the appellants:—The amendment should have been allowed. The suit is brought under the Code of 1882. We submit that if the suit was barred on the face of it as the lower Court thinks it is the plaint ought under section 54 (*a*) to have been rejected at the time of presentation and not taken on the file. Had this been done the plaintiffs might have filed another suit while there was yet time, whereas now owing to the period that has passed between the date of admission of the plaint and now they would be hopelessly out of time. Section 54 does not apply to the case but section 53 and the Court ought to have given leave to amend the plaint. The object of a suit being to get at the rights of parties any amendment which may be required for that purpose should subject to general principles be allowed, see Bowen L. J. in *Cropper* v. *Smith*[1]. In *Mohummud Zahoor* v. *Mussumat Thakooranee*[2] the Privy Council allowed an amendment on the ground that if the plaintiff was left to bring a fresh suit it might be met by a plea of limitation. By allowing the amendment the character of the suit would not be altered. The cause of action would have remained the same; the defendant could still have pleaded the same defence of limitation, all the amendment could do would have been to give the plaintiff greater facility to meet the defences.

Strangman, Advocate General, and *Inverarity* for the respondents.

The lower Court was right in disallowing the amendment. A gross injustice would be done to the defendants by allowing it. See *Steward* v. *North Metropolitan Tramways Company*[3]; *Weldon* v. *Neal*[4]; *Clarapede & Co.* v. *Commercial Union Association*[5].

SCOTT, C. J.:—In this case we cannot agree with the learned Judge of the Court below that an amendment such as was asked for would convert the suit into a suit of different and inconsistent character. The suit would remain the same based upon exactly the same cause of action except for the addition of one

(1) (1884) 26 Ch. D. 700 at p. 711.
(2) (1867) 11 Mco. I. A. 468.
(3) (1886) 16 Q. B. D. 556.
(4) (1887) 19 Q. B. D. 394.
(5) (1883) 32 W. R. (Eng.) 262.

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allegation. We think, therefore, that the amendment should be allowed as shown in paragraph 1 of the memorandum of appeal, but as the controversy has arisen entirely through the negligence of the plaintiffs we direct that they must pay the costs of the appeal and of the first hearing in the Court below including the costs, if any, of the hearing of the judgment. Leave granted to defendants to file a supplemental written statement, if so advised.

Attorneys for the appellants:—*Messrs. Mehta and Dalpatram.*

Attorneys for the respondents:—*Mr. N. M. Cama.*

B. N. L.

APPELLATE CRIMINAL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1909.
August 4.

MUNICIPAL COMMISSIONER OF BOMBAY, COMPLAINANT, *v.* THE AGENT, G. I. P. RAILWAY COMPANY, ACCUSED.*

Indian Railways Act (IX of 1890), sec. 7—City of Bombay Municipal Act (Bom. Act III of 1888), sec. 394—Use by Railway Company of its premises for storing timber—License from the Municipal Commissioner for the use not necessary.

The Agent of the G. I. P. Railway Company having been charged in the Presidency Magistrate's Court at the instance of the Bombay Municipality under section 394 (1) (*d*) of the City of Bombay Municipal Act (Bom. Act III of 1888) with having used the Company's premises for storing timber without a license granted by the Municipal Commissioner, the Presidency Magistrate recorded evidence and referred the following question under section 432 of the Criminal Procedure Code (Act V of 1898):—

"Do the statutory powers given to the Railway Company (section 7 of the Indian Railways Act IX of 1890) preclude the necessity of obtaining a license from the Municipal Commissioner, to use premises in such a manner as is necessary for the convenient making, altering, repairing and using the Railway?"

Held, that no such license was necessary. Section 7 (1) of the Indian Railways Act (IX of 1890) authorizes the Railway Administration to do all acts necessary for the convenient making, maintaining, altering, repairing and

* Criminal Reference No. 67 of 1909.