

APPELLATE CIVIL

Before Mr. Justice Bhagwati and Mr. Justice Dixit.

KARIM ISMAIL GHARE (ORIGINAL DEFENDANT), APPELLANT v. ABDUL RAHIMAN MAHOMED SALE KHOT (ORIGINAL PLAINTIFF),
RESPONDENT.*

1952
July 14.

Indian Limitation Act (IX of 1908), s. 4—Suit filed in wrong Court on the re-opening of that Court after vacation—Whether suit barred by limitation.

The benefit of s. 4 of the Indian Limitation Act, 1908, can be claimed only when the proceedings are instituted in a Court in which they ought to have been instituted.

Maqbul Ahmad v. Onkar Pratap Narain Singh,⁽¹⁾ followed.

Basvanappa v. Krishnadas,⁽²⁾ treated as overruled.

Mukund Ram v. Ramraj,⁽³⁾ *Ummathu v. Pathumma*,⁽⁴⁾ *Dharman Ram-Ladha Ram v. Ganga Ram*,⁽⁵⁾ *Firm Buja Mal-Gaında Mal v. Mukta Parshad*,⁽⁶⁾ *Anil Prokash v. Dharendra Nath*,⁽⁷⁾ and *Wamanrao v. Umrao*,⁽⁸⁾ referred to.

FIRST APPEAL against the decision of C. P. Fernandes, Civil Judge (S. D.), Alibag.

The facts are set out in the judgment.

K. V. Joshi, for the appellant.

R. B. Kotwal, for the respondent.

DIXIT J.—This appeal arises from a suit filed by the plaintiff-respondent to recover from the defendant-appellant a sum of Rs. 6,900. The suit is based upon a hand-loan, dated May 23, 1944. The defence to the suit was that there was no hand-loan given by the plaintiff to the defendant but that the sum of Rs. 10,000 paid by the plaintiff to the defendant was towards the dues owing by him to the defendant. This defence did not prevail in the trial Court and the learned trial Judge passed in favour of the plaintiff a decree for the amount claimed with interest and costs as set out in the order. The defendant has come up in appeal.

Upon this appeal Mr. Joshi for the defendant-appellant contends that the plaintiff's suit giving rise to this appeal was barred by the law of limitation. It is to be noted that in the

* First Appeal No. 169 of 1949.

⁽¹⁾ (1935) 37 Bom. L. R. 533, P. C. ⁽²⁾ (1920) 45 Bom. 443.

⁽³⁾ [1916] A. I. R. All. 222. ⁽⁴⁾ (1921) 44 Mad. 817.

⁽⁵⁾ (1929) 11 Lah. 12. ⁽⁶⁾ [1937] A. I. R. Lah. 464.

⁽⁷⁾ (1937) 41 Cal. W. N. 956. ⁽⁸⁾ [1937] A. I. R. Nag. 215.

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trial Court the plea of limitation was not taken by the defendant, but that makes no difference because s. 3 of the Indian Limitation Act provides that "subject to the provisions contained in ss. 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence". It is accordingly necessary to consider the plea, though raised in appeal.

Now, the facts having a bearing upon the question of limitation are these. The transaction sued on is a hand-loan of May 23, 1944, the amount of the hand-loan being a sum of Rs. 10,000. In order to recover this loan the plaintiff would have, without anything more, to bring the suit within three years from May 23, 1944, so that the plaintiff must bring his suit on or before May 23, 1947. It so happened, however, that on that day the Court of the Civil Judge at Alibag in which the suit came to be instituted was closed owing to the Summer Vacation of the Court and it appears that the suit was instituted in the Court of the Civil Judge at Alibag on June 9, 1947 after the re-opening of that Court after its Summer Vacation. It is not in dispute that the Summer Vacation of the Court was over on June 8, 1947, and that the Court re-opened on June 9, 1947 when the plaint was presented. It appears that thereafter the plaint was examined and the learned trial Judge took the view that he had no jurisdiction to entertain the suit and by his order July 11, 1947, he returned the plaint for presentation to the proper Court. The plaint was returned on July 11, 1947 at 4 p.m. The ground upon which this order was made was that the original jurisdiction of the learned Civil Judge was to try suits up to Rs. 7,500 but only such suits in which the cause of action had arisen in the taluka of Alibag. In the present case, according to the averment made in the plaint the cause of action for the suit arose on May 23, 1944, within the special jurisdiction of the Court at Khaire, taluka Roha, and it is not in dispute that the Court of the Civil Judge at Alibag would have no jurisdiction to try suits in respect of causes of action arising within the Roha taluka. The plaint was accordingly filed in the Court of the Civil Judge, Senior Division, Thana on July 12, 1947 and in that Court the suit bore special jurisdiction suit No. 38 of 1947. It appears that the suit was subsequently transferred to the Court of the Civil Judge, Senior Division, at Alibag and was received by that Court on December 1, 1947. Upon its transfer to

the latter Court the suit proceeded in that Court and the learned Judge gave the plaintiff a decree for the amount claimed on November 30, 1948.

Now, if the learned Civil Judge, Junior Division, at Alibag had no power to try this suit, it is clear that the suit was instituted in the wrong Court and in this connection two periods of time have to be considered. The first of the two periods is between May 23, 1947 and June 8, 1947 and in this connection the plaintiff relies upon s. 4 of the Indian Limitation Act. The second period is between June 9, 1947 and July 11, 1947, when the suit was pending in the Alibag Court and in this connection the plaintiff relies upon s. 14 of the Indian Limitation Act. It is not necessary to consider the last of the periods which is between July 12, 1947, and December 1, 1947 because the suit was pending in the right Court during that period. Mr. Kotwal for the respondent says that he is entitled to exclude the period between June 9, 1947 and July 11, 1947 under s. 14 of the Indian Limitation Act and Mr. Joshi for the appellant does not dispute that this period has got to be excluded. But then Mr. Kotwal argues that he is entitled to exclude the period between May 23, 1947 and June 8, 1947. In our opinion, Mr. Kotwal is wrong in saying that he is entitled to take into consideration the period between May 23, 1947 and June 8, 1947. S. 4 of the Indian Limitation Act runs as follows:

"Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens".

It is apparent from the language of the section that under s. 4 there is no question of any period being excluded. What s. 4 provides is that if a suit cannot be instituted in the Court during the period when the Court is closed, the suit may be instituted on the day on which the Court re-opens. In this case the plaintiff would be required to file the suit on May 23, 1947, if there was no Summer Vacation of the Court intervening. But since the Court was closed owing to its Summer Vacation, the plaintiff was entitled to institute the suit on June 9, 1947. But in order to successfully rely upon s. 4, the plaintiff would be required to institute the suit in the right Court. It is true that s. 4 does not use the expression "the right Court". S. 4 merely refers to "the Court". But it seems to me that it is implied in the section that when a suit is to be instituted in the Court when the Court is closed, the suit must be instituted in

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the Court in which the suit must be brought i. e. the right Court.

Now, on the facts which have been proved in this case, it is clear that the Court of the Civil Judge at Alibag had no jurisdiction to entertain the suit because the suit was one which arose out of a cause of action which arose within the jurisdiction of the Roha taluka. The suit would, therefore, be required to be instituted in the Court of the Civil Judge, Senior Division, Thana. But the plaintiff by mistake instituted the suit in the Court of the Civil Judge at Alibag and if the construction of s. 4 is right that the suit must be instituted in the right Court, then the plaintiff is not entitled to the consideration of the period between May 23, 1947 and June 8, 1947, so that s. 4 will not help him. If s. 4 does not help him, it is clear that the plaintiff's suit would be barred by the law of limitation.

But then Mr. Kotwal argues that the suit was rightly instituted in the Court at Alibag but was presented to a wrong Judge. It is not easy to understand this argument because, according to O. IV, r. 1 of the Code of Civil Procedure, every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf, so that a suit has to be instituted by the presentation of a plaint to the Court and in this instance the plaint was presented in the Court of the Civil Judge at Alibag. There is no doubt that the pleaders who presented the plaint in that Court were under the impression that the Alibag Court had power to entertain the suit because the Judge concerned had power to try claims exceeding Rs. 5,000 and less than Rs. 7,500 and the plaintiff's suit was to recover Rs. 6,900. But that will not confer upon the Civil Judge at Alibag the power to try this suit because the Civil Judge at Alibag would be still a Civil Judge, Junior Division, having power to try original suits and proceedings of a civil nature up to the limit of Rs. 7,500. That does not make the Civil Judge, a Judge of the Senior Division because, according to s. 25 of the Bombay Civil Courts Act.

"A Civil Judge, Senior Division, in addition to his ordinary jurisdiction, shall exercise a special jurisdiction in respect of such suits and proceedings of a civil nature as may arise within the local jurisdiction of the Courts in the District presided over by Civil Judges, Junior Division, and wherein the subject-matter exceeds the pecuniary jurisdiction of the Civil Judge, Junior Division, as defined by s. 24".

Mr. Kotwal is, therefore, not right in saying that the plaint was presented in the right Court but to a wrong Judge.

This view of s. 4 is in accordance with the decision of their Lordships of the Privy Council reported in *Maqbul Ahmad v. Onkar Pratap Narain Singh*.⁽¹⁾ It is enough, I think, to reproduce here a part of the head-note which runs as follows:

"The expression 'on the day that the Court re-opens' in s. 4 refers to the proper Court in which the application etc. ought to have been made. In other words, the benefit of s. 4 can be claimed only when the application etc. is made in the proper Court on the day on which that Court re-opens".

It may be noted that a contrary view was taken in the case of *Basvanappa v. Krishnadas*⁽²⁾ upon which Mr. Kotwal relied. But with reference to this case this is what their Lordships observed at page 538 of the report:

"Their Lordships only desire to add one other word, and it is this, that the decision which has been referred to in the case of *Basvanappa v. Krishnadas*,⁽²⁾ cannot, in their view, be supported, having regard to the provisions of ss. 3, 4 and 14 of the Indian Limitation Act".

Their Lordships' decision in *Maqbul Ahmad's* case would be enough, apart from anything else, to dispose of this point in favour of the defendant-appellant. However, this view of s. 4 has been taken by the Indian Courts also in several cases. It may be enough to refer to the following: See *Mukund Ram v. Ramraj*,⁽³⁾ *Ummathu v. Pathumma*⁽⁴⁾ *Dharman Ram-Ladha Ram v. Ganga Ram*,⁽⁵⁾ *Firm Buja Mal-Gainda Mal v. Mukta Parshad*,⁽⁶⁾ *Anil Prokash v. Dhirendra Nath*,⁽⁷⁾ and *Wamanrao v. Umrao*.⁽⁸⁾

For the above reasons we think that the plaintiff's suit is barred by the law of limitation and the decree appealed from cannot, therefore, be supported.

Appeal allowed.

K. B. S.

⁽¹⁾ (1935) 37 Bom. L. R. 533.

⁽³⁾ [1916] A. I. R. All. 222.

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