(1866) 09 CAL CK 0006

Calcutta High Court

Case No: Special Appeal No. 3296 of 1865

Chunder Madhub Chuckerbutty		APPELLANT
	Vs	
Ram Coomar Chowdhry and Others		RESPONDENT

Date of Decision: Sept. 1, 1866

Judgement

Sir Barnes Peacock, Kt., C.J. and Trevor, J.

This is a case which was brought whilst Act XIV of 1859 was the Law of Limitation, and therefore that law is applicable to the suit. S. 14 enacts--"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 bona 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 appeal, if any, has been pending, shall be excluded from such computation." The first question is whether the time during which the plaintiff was prosecuting a suit in which he was non-suited comes within the words of s. 14 "the time during which the claimant shall have been engaged in prosecuting bond 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." It appears to me that, where a plaintiff is non-suited, he cannot be said to have prosecuted bond fide and with due diligence; further, I am of opinion that the words "or other cause" must mean a cause of like nature as defect of jurisdiction. Now a defect of jurisdiction would be a cause that would not include any neglect on the part of the plaintiff either in stating his case or in other respects. For instance, if the plaintiff should fail to appear or to produce his witnesses on the day fixed for the hearing, the Court would be unable to decide upon his cause of action. But that would not be a cause for which time ought to be deducted under the section, for it could not be said that the plaintiff was prosecuting his suit bond fide and with due diligence, or that the Court was prevented by want of jurisdiction or other cause not connected with the plaintiff''s own negligence from deciding upon the case.

2. I am of opinion that the time during which the plaintiff was prosecuting a suit in which he was non-suited ought not to be deducted. It was contended that the plaintiff was non-suited merely because he neglected to state the boundaries of his land, but if the uncertainty of what the plaintiff was suing for was such as to prevent the Judge from deciding upon the case in the first suit, it must equally prevent the Court in the second suit from determining whether the former suit was for the same cause of action. Suppose a person were to sue for damages, and state that he has sustained damage by some act, without specifying that which the defendant committed. Suppose the Judge were to say "I cannot discover what it is for which the plaintiff claims damages," and should dismiss his claims; I do not think that that would be a cause for deducting in a second suit, specifying the injury, the time occupied by the plaintiff in the former suit. Then, if the cause alleged in this case, namely, the non-statement of the boundaries of the land in question was such as to prevent the Judge from knowing really what the plaintiff was suing for, I do not see how it can be shown in the present case that this suit is brought for the same cause of action. If the ambiguity prevented the Judge from deciding that suit, how can it be said that the former and present actions were brought for the same cause.

3. For these reasons I am of opinion that the time during which the plaintiff was prosecuting his former suit ought not to be deducted.

4. Therefore, the question propounded may be answered thus, that the plaintiff is not entitled to deduct the time occupied by him in prosecuting the former suit in which he was non-suited. If the time occupied in prosecuting the suit cannot be deducted, it follows that neither the time occupied in appealing from that decision, nor the time occupied between the non-suit and the filing of the appeal can be deducted. It is said that this is a hard case. It appears, however, that deducting all the time occupied in prosecuting the former suit and appeal, with the exception of the short period between the time of the non-suit and the filing of the appeal, twelve years and eleven days elapsed between the accruing of the cause of action and the commencement of the present suit. In fact, more than sixteen years and a half intervened between the date of dispossession and the commencement of the present suit. The plaintiff has only himself to blame for the delay.

5. The appeal is dismissed with costs, and the decision of the lower Appellate Court affirmed with costs.

Loch, J.

6. It appears to me that the peculiar circumstances of this case must be considered. The case was instituted under the old procedure, and under that procedure, where boundaries were not given, the plaintiff was non-suited, and had to pay all the costs. That was considered the penalty for filing a defective plaint. During the pendency of that suit in

appeal the new law has been passed, and the party now tries to bring in his fresh action under the new law, and he finds that he is out of time, and he points to s. 14, Act XIV of 1859, and says:-- "Allow me the time which is mentioned in this section, and I shall be in time. I formerly prosecuted the suit bona fide in a Court having jurisdiction; but I was non-suited under the then existing rules of procedure, but that rule did not dismiss my claim."

7. Looking to the wording of s. 14, Act XIV of 1859, it appears to me that the words "other cause" are large enough to embrace the present case. The absence of boundaries was a defect which had, under the old procedure, its peculiar penalties attached to it, but the defect was not considered of so serious a nature as to deprive the plaintiff of the benefit of the time during which the case had been pending. In this case all the circumstances which warrant a Court under the present law in granting time appear to meet. The parties are the same as in the former case, the cause of action is the same, the former suit was brought in good faith, and prosecuted with due diligence, to a successful termination before the Principal Sudder Ameen, but in appeal the plain till was non-suited, not for want of jurisdiction in the Court, but from another cause, namely, the absence of boundaries in the plaint,--a defect which, under the former practice, was a sufficient ground for an order of non-suit with coats; but which carried no further penalty with it. The plaintiff was not prevented from bringing a fresh suit, nor did he lose the time while his former case was pending. It is difficult to understand the meaning to be attached to the words "other cause" if they be not applicable to cases such as the present. Under this view of the case, I think this suit is within time.

Jackson, J.

8. I concur with the Chief Justice in opinion. It appears to me that to entitle a plaintiff to the benefit of the terms of s. 14 of the Limitation Law, it must be shown that his suit had been prosecuted bona fide and with due diligence, and that the Court was unable to decide upon it from some cause quite unconnected with the default or negligence of the plaintiff. To hold otherwise would be inconsistent with the use of the words "bona fide" and "with due diligence." It does not by any means follow in every case that, because the Court have been obliged to refrain from deciding the case for want of jurisdiction, the party would have been entitled to avail himself of the time during which the suit was pending, because it might so happen that the party knew well that the Court in which his suit had been brought was not the Court to which he ought to go. In that case the suit was not bona fide, and he is not entitled to that time. It appears to me that the inability of the Court must be either from unavoidable circumstance over which no one has any control, or something incidental to the Court itself and unconnected with the acts of the parties.

Pundit, J.

9. I admit that the case of the appellant is to be guided and determined by Act XIV of 1859, but hold that, when the former case brought by the special appellant on the appeal

of the opposite party, the claim of the appellant was dismissed without a trial on the merits on the ground of the plaint being deficient in specifications of certain boundaries of the lauds claimed, the appellant is entitled to a deduction of the period for which the former case was pending.

10. When the Court hearing the appeal (in the former case) thought that the plaint in it was so defective that no decree could be passed upon it, the plaintiff is entitled to the benefit of s. 14 of Act XIV of 1859, because for want of boundaries the Appellate Court trying the former case had thought itself unable to try it on the merits. It is admitted that the deduction provided for in the above section of the law is not limited to cases dismissed without trial for want of jurisdiction, but is also intended to apply to many other cases decided without trial of merits for many other causes. Just as the institution of a case in a wrong Court not having jurisdiction must necessarily be in the eye of the law an act of neglect of the plaintiff, so the omission of boundaries by him is the effect of neglect. In fact, in most of the cases decided without trial of merits, the cause of the inability of the Courts to decide on merits must be the plaintiff''s fault. When plaintiff had in right earnest brought his former suit, and proceeded with it, the fact of a Court of Justice having considered itself unable to decide it on the merits owing to some mistake of the plaintiff would not be any good ground for denying to the said plaintiff the deduction allowed by the aforesaid section. The defendant did not object below that the present action is not for the same lands that the plaintiff had sued for before, and the details of both the claims distinctly show that the cause of action in both the cases was one and the same. Under the old law and practice, the mofussil Courts often non-suited plaintiffs for want of boundaries,--an accident not likely to happen under the present law, Act VIII of 1859. I admit that even, for cases dismissed for want of jurisdiction, the Court asked to make a deduction must be satisfied that the former case was a bona fide suit before it would be empowered to allow the deduction asked, but I am not prepared to rule that in this case, the Appellate Court trying the first case considered itself and was therefore able to decide that suit on the merits, or that the omission of boundaries shows that the suit was not bona fide we cannot in this case try whether that Appellate Court had rightly or wrongly non-suited the plaintiff, but cannot disavow the fact that that Court did not try the case on the merits. We must hold that legally this decision of that Court amounts to an admission of its inability to try it on the merits, and if it held so, it should be held for the purposes of this deduction asked, that that Court was unable to decide the suit on its merits. I would therefore allow the deduction asked.