
(1933) 04 CAL CK 0010
In the Calcutta High Court

Neerendrabhooshan Lahiri

APPELLANT

Vs

Berhampur Oil Mills, Ltd.

RESPONDENT

Date of Decision : 11-04-1933

Acts Referred:

Limitation Act, 1963 — Article 52

Citation : AIR 1933 Cal 914

Hon'ble Judges : Mukerji, J;Guha, J

Bench : Full Bench

Judgement

Mukerji, J.—This is an appeal by defendants 2 and 3 from a decision of the Fourth Additional Subordinate Judge of 24-Parganas, by which the plaintiffs' suit was decreed against them on contest and ex parte against defendants 1 and 4. The suit was for recovery of money due as balance of the price of two waggon loads of mustard oil alleged to have been supplied by the plaintiffs, a joint stock company with limited liability, from their place of business at Berhampur (District Murshidabad) to a firm styled S.B. Lahiri and Company carrying on business at Maniktala (District 24-Parganas), of which latter firm the four defendants were said to be proprietors. The two grounds, on which the decree of the Court below is assailed, are firstly that the suit was instituted beyond time; and, secondly, that defendant 2 is not a partner of the firm, but that the firm belongs to defendant 3 alone. So far as the first ground is concerned, the relevant facts are the following: The two consignments were delivered respectively on 20th December 1920, and 24th December 1920. The suit was instituted in the Court of the Subordinate Judge at Berhampur on 14th December 1923. On 19th April 1926, the Berhampur Court held that it had no jurisdiction to entertain the* suit and returned the plaint for presentation to the proper Court. From this order the plaintiffs took an appeal to this Court and with the memorandum of appeal they filed the plaint as an annexure. This Court dismissed the appeal on 26th May 1927, and the judgment that was given on that day concluded with the order: "Let the plaint-be returned to the plaintiff's forthwith." On 13th June 1927, the Deputy Registrar of this Court made an order-in accordance with which an officer

of the Court returned the plaint to the plaintiffs" advocate on that day with the following endorsement:

This plaint was filed along with the memorandum of the appeal in Appeal from Order No. 193 1926, of on 27th April 1926. It is returned to the vakil for the plaintiff appellant today in terms of the Court's order, dated 26th May 1927, passed in the above mentioned appeal.

2. The plaint was thus taken back. It was refiled in the Alipore Court, on the next day, i.e., 14th June 1927. If no other consideration applies to the case,, and the suit is governed by Article 52 of the Schedule to the Limitation Act, the suit,, when refiled, was, within time, if, u/s 14 of the Act, time is-taken to have run against the plaintiffs as from 13th June 1927, when the plaint was returned to their advocate, but not if it began to do so from 26th May 1927, on which date their appeal was dismissed and the order for the return of the plaint was pronounced. On the question of the applicability of Section 14 of the Act and the extent of such application, if any, the appellants" arguments resolve themselves into three heads. Firstly, it has been urged that good faith is an essential characteristic of the prosecution of the proceeding, though such prosecution may be in a wrong Court, in order to bring a case within the terms of the section and that in this case there was, in fact, no good faith, so that the case is at once taken out of the purview of the section. Secondly, it has been contended that with the pronouncement of its judgment by this Court on 26th May 1927, the proceedings "ended" within the meaning of Expl. 1 to the section, and therefore the plaintiffs were not entitled to exclusion of any time that elapsed since then. And, thirdly, it has been complained that the appellants were not allowed an opportunity which they were, in the circumstances of the case, entitled to, to rebut the evidence which the plaintiffs called without giving any previous notice or indication in any shape or form for explaining the period from 26th May 1927, the date on which the appeal was dismissed, and up to 13th June 1927, on which date the plaint was returned to them.

3. So far as the first of these contentions is concerned, we think it is sufficient for us to say that we are not satisfied that the institution of the suit in the Berhampur Court or the prosecution of the proceedings in that Court or in this Court was not bona fide made. The causa of action was sought to be made out, as having arisen in Berhampur upon an allegation-which, though it finds no place in the plaint, was nevertheless attempted to be proved in evidence-that the defendants would send the price of the consignments to the plaintiffs" registered office in Berhampur. The proof offered in support of the allegation was not considered satisfactory and so the attempt failed. But it would be far from reasonable to infer want of bona fides from such failure or to attribute any bad faith to them for that reason. As an answer to the second contention, and for the purpose of establishing that a consideration of it is unnecessary, it has been urged on behalf of the respondents, i.e., the plaintiffs, that they hold in their hands an acknowledgment which in any case would save limitation It is a letter,

Ex. 2 (1), bearing the signature of "Sudhir Bhusan Lahiri & Co." and dated 10th January 1921. If this letter as construed as an acknowledgment, as it may well be construed if it is read along with the letter of the plaintiffs (Ex. D) of 8th January 1921, to which it is the reply, no question of limitation would arise. We are not however of opinion that the said letter Ex. 2 (1) has been proved to have been signed by defendant 2 because we do not consider the evidence of P.W. 4, Jyotirmay Ray Chaudhuri, to be sufficient for that purpose. That witness, upon his own evidence, has seen defendant 2 sign "Sudhir Bhusan Lahiri & Co." in letters four or five times only, and that is all the opportunity he has had of knowing about the writing of defendant 2.

4. The second contention of the appellants therefore would turn upon the meaning of the expression "the day on which the proceedings therein ended," that is to be found in Expl. 1 to Section 14. In the case of *Abhoya Churn Chuukerbutty v. Gour Mohun Butt* (1875)24 WR 26, a bond suit was filed in a Munsif's Court on the day on which the Court reopened after the "Dusserah" vacation, during which the period of limitation expired as regards the payment of the debt for which the suit was brought. The Munsif decreed the suit, but the Subordinate Judge on appeal found that the Munsif had no jurisdiction to entertain "the suit and he ordered the return of the plaint. This was done on a subsequent date and the plaint was filed in the proper Court on the same day. One of the questions that arose in that case was whether the plaintiff was entitled to a deduction of the interval between the date of the order of the Subordinate Judge and the date on which the plaint was actually returned by the Munsif. The High Court observed:

Here the proceedings ended with the judgment of the Subordinate Judge in appeal. The plaintiff might have then and there asked to have his plaint returned to him, or he might and apparently ought to have had a fresh plaint engrossed.

5. These observations obviously give rise to a difficulty, because they may be read as suggesting that when the order of return is made, the law does not contemplate that the plaintiff should wait for the return of the plaint and that, on the other hand, a more proper course for the plaintiff is to file a, fresh plaint. This difficulty does not appear to have been noticed in any of the decisions in which the case itself has been noticed, but the fact that, if the observations are literally accepted as correct, an amount of hardship may be caused which the law never intended, seems to have been fully appreciated. For, in the case of *Mohendra Prosad Singh v. Nanda Prosad Singh* (1913) 20 IC 183 where a plaint which was filed in a wrong Court on the last day of limitation, was subsequently ordered to be returned for presentation to the proper Court, but was not actually returned till three days later and was filed in the proper Court the day following, it was held that the suit was not barred by limitation, the plaintiff being entitled to a deduction of the three days during which the plaint had not been returned. In this case the learned Judges distinguished *Abhoya Churn Chuckerbutty's* case (1875)24 WR 26 upon a reason which I confess I do not exactly appreciate,

namely, that in that case a strong presumption arose that the order for the return of the plaint, which was the judgment of an appellate Court, was "made known to the plaintiff on the date the judgments was signed," whereas in Mohendra Prosad Singh's case (1913) 20 IC 183

no such presumption could be made as the order was probably passed in chambers and may have been promulgated later.

6. The learned Judges preferred to follow the decision in the case of Bisheshar Singh v. Ram Daur Singh (1887) AWN 302, in which it was held that in such circumstance the proceeding did not terminate until the plaint was returned. In the case of Ramapurath Varioth Krishna Variar Vs. Iringaloor Taravath Kunji Taravanar, , which was the case of a dismissal of an appeal from an order returning a plaint for presentation to the proper Court, the actual return of the plaint taking place some days later than the dismissal of the appeal, it was held, following Abhoya Churn Chuckerbutty's case (1875)24 WR 26, that the time contemplated by Section 14, Lim. Act, ended on the day the order of the appellate Court was pronounced. It seems to me that the observations in Abhoya Churn Chuckerbutty's case (1875)24 WR 26, to which reference has been made above, were made upon the state of the law as it then was. The case was decided in 1875, The power to return a plaint on the ground of want of jurisdiction on the part of the Court in which it had been presented was contained in Section 33, Act 7 of 1859 and thereafter in Section 3, Act 23 of 1861, by which the Code of 1859 was amended. It was a limited power, which could be exercised in respect of suits for land or other immovable property; whereas the suit in Abhoya Churn Chuukerbutty's case (1875)24 WR 26 was a suit on bond. The case therefore was one in which no return of the plaint was obligatory, and this circumstance accounts for the observations to which a reference has been made above. In 8. 57 of the Code of 1882, also the exercise of the power was restricted to certain classes of suits and also in certain specified circumstances. In Sections 20 and 21 of the Code of 1882 there was a provision for stay of suits and return of plaints under certain specified conditions, and in a case coming within those provisions, Gurappa Chetti v. Pullayya Chetty (1893) 3 MLJ 270 it was held, following Abhoya Churn Chuckerbutty's case (1875)24 WR 26, that the time between the date of the order staying the proceedings and the date of the return of the plaint cannot be deducted, and it was observed:

The reason for not so including that interval is that u/s 21, Civil P.C., the plaintiff is not chargeable with any court-fee when the suit is re-instituted under an order u/s 20, Civil P.C. * * * It is argued by respondents' pleader that by Section 20, Civil P.C., a right to ask for a return of the plaint is conferred on the plaintiff. This is true, but the right so conferred is not intended to extend the period of limitation, for by Section 21, Civil P.C., liberty is reserved to him to re-institute the suit without producing the original plaint or paying any additional court-fee. There is nothing, I think, unreasonable in this. With reference to Section 57, Civil

P.C., the same view was taken by this Court in *Ramapurath Varioth Krishna Variar Vs. Iringaloor Taravath Kunji Taravanar*, and by the Calcutta High Court in *Abhoya Churn Chuckerbutty v. Gour Mohan Dutt* (1875) 24 WR 26.

7. Sections 20 and 21 of the Code of 1882 have been omitted in the Code of 1908, and Section 57 of the Court of 1882 has been re-enacted in the Code of 1908 in perfectly unrestricted terms. Under the Code of 1882, it used to be held that, even though a case might not come within the three clauses of Section 57, the proper procedure was to return the plaint: see *Ladhaji v. Hari* (1899) 23 Bom 679. This was made clear in 1908 by making the words of Order 7, Rule 10, perfectly general. In such circumstances, it is not necessary, under the present Code, to feel pressed by the observations in *Abhoya Churn Chuckerbutty's* case (1875)24 WR 26. The words of the rule are imperative, and there is a point in making an endorsement of the dates of presentation and return and in returning the plaint to be presented to the Court in which the suit should have been instituted, because, unless the same plaint is refiled, it would not be possible to find out so easily whether it was the same suit that was being refiled, a matter which is pertinent for the application of Section 14. Lim. Act. It is possible that, if the loss of the original plaint is sufficiently explained, a fresh plaint, which is its duplicate, may be allowed to be filed; but that is not the question we are considering here. The return of the plaint with an endorsement on it is a part of the Court's duty, and until, at all events, an endorsement is made and the plaint is ready for return, the proceedings cannot be considered to be at an end.

8. *Abhoya Churn Chuckerbutty's* case (1875)24 WR 26 was distinguished in *Mira Mohidin Rowther v. Nallaperumal Pillei* (1913) 36 Mad 131 as having been a case in which there was negligence on the part of the plaintiff in not applying for the return of the plaint as soon as the appeal was decided. This last mentioned decision was followed in *Seshagiri Bow v. Vajra Velayudam Pillai* (1912) 38 Mad 482. Time, up to date of return of the plaint, was allowed to be deducted in *Gopiseti Narainswami Naidu v. Venkatasubrayudu* (1911) 9 IC 642 In *Basvanappa, v. Krishnadas* AIR 1921 Bom 379 at p. 445 (of 45 Bom), Macleod, C.J., (Fawcett, J., concurring) observed:

Clearly when a party is ordered to take back his plaint and present it in the proper Court the proceedings do not end until the party gets back his plaint.

9. The same learned Chief Justice also made similar observations (Shah, J., concurring) in a later case:

In any circumstances a party cannot always get back his plaint on the same day as an order is made that the plaint has been filed in the wrong Court; and as long as the plaintiff has exercised ordinary diligence in pursuing his claim, there is no reason why the period up to the day when he gets back his plaint should not be taken into account: *Nagindas Kapurchand v. Manganlal Punachnd* AIR 1922 Bom 160.

10. In both the aforesaid cases, the original Court had made the order for return

of the plaint, but the actual return did not take place till some days later. In the case of *Maneklal Mansukhbhai v. Suryapur Mills Co., Ltd.* (1913) 20 IC 183 at pp. 490 and 494 (of 52 Bom.), the plaintiffs, after the order for return was made, allowed the plaint to remain in Court and delayed in taking it back and, in the meantime, was taking legal advice as to whether they should prefer an appeal from the order returning the plaint. In that case, Marten, C.J., referring to the said two last mentioned decisions, observed:

There was no question of the defeated party having been guilty of any delay. He had come to the Court and had endeavoured to obtain the the plaint, but the Court had declined to give it up as it was wanted for being copied, and for making certain entries in the Court Register. Under those circumstances it was very naturally held by this Court that the party in question was entitled to rely on Expl. 1 to Section 14, Lim. Act, and that within the meaning of that explanation the proceedings had not up to that time ended. On the other hand, I am not prepared to hold that in every suit the plaintiff, whoso plaint has been directed to be returned to him, can allow the plaint to remain in Court and yet count all the subsequent period as being allowed to him u/s 14.

11. And Crump, J., referring to the said two decisions said:

It may be that there were certain ministerial acts left to be performed after that order was made. That we do not know. All that we do know is that those acts might have required some time, and if that time was necessary for the purposes of the Court then I should be prepared to exclude that period also following the decision of Sir Norman Macleod in *Basvanappa v. Krishnadas* AIR 1921 Bom 379 and *Nagindas Kapurchand v. Maganlal Punachand* AIR 1922 Bom 160. But I do not think that those decisions lay down as a broad proposition that any time that elapses between the order directing the return of the plaint, and the actual withdrawal of the plaint from the Court should be excluded. To hold anything of that kind would be to allow a party to delay indefinitely and to take the advantage of his own delay.

12. In *Hamida Bibi Vs. Fatima Bibi*, , the plaintiff refused to take back the plaint for three months after the order for its return was made and then applied in revision for setting aside that order and it was held that these three months could not be excluded. In *Haridas Ray v. Sarat Chandra Dey* (1913) 18 IC 121 and *Ganga Charan Das v. Akhil Chandra Shaha* (1916) 35 IC 595 it has been held that an order made by a Court, which orders the return of a plaint, granting a specified time to the plaintiff to file the plaint in the proper Court is a nullity. This being the state of authorities on this subject, the correct view, in my judgment, to take of the matter is that the proceedings cannot be regarded as having ended until the Court, in whom the duty lies of conforming to the provisions of Order 7, R.10, Civil P.C., is in a position to carry out the order of return of the plaint. Till that point of time, no question can possibly arise as regards the plaintiff not being entitled to exclusion of time u/s 14. When that point of time is reached, the question whether the plaintiff would or would not be

entitled to a further deduction of time thereafter would depend upon various factors.

13. Ordinarily no further time would be excluded. But it is not inconceivable that in exceptional circumstances, even subsequent to such point of time, the proceedings may have to be regarded as still continuing. And, in determining whether they should be so regarded or not, the question of the plaintiff's diligence or otherwise may have to be considered. But with such exceptional circumstances we are not concerned in the present case. It is perfectly clear from the Deputy Registrar's endorsement, which bears date 13th June 1927, that the plaint was not ready to be returned before that date. Before that date, then, the proceedings can, in no conceivable view, be regarded as having ended. It is not possible to suggest that the delay between 26th May 1927, on which date the appeal was dismissed and 13th June 1927, on which date the plaint was actually returned, was due to any action or inaction on the part of the plaintiffs. Indeed it must be assumed, on the other hand, that enough circumstances must have been in existence which stood in the way of the High Court office complying, at any earlier date, with the order for return which the Court had made while dismissing the plaintiff's appeal.

14. It has been argued on behalf of the appellants that, while this may not, having regard to the provisions of Order 7, Rule 10, Civil P.C., be an unreasonable view to take in cases in which the order for return is made by the original Court or by an appellate Court in the first instance, such a view should not be taken in cases of the present nature, in which the appeal of the plaintiff, being dismissed, the order for return made by the original Court is merely upheld and no fresh order for return is called for, the provisions contained in Order 7, Rule 10, Civil P.C., having already been exhausted and there being no room for its further application. The answer to this argument however is that, in practice, as the Deputy Registrar's endorsement itself shows, the provisions of Order 7, Rule 10, Civil P.C., are applied even to cases of the present nature. And even if such a procedure be unnecessary, that cannot deprive the plaintiff of the benefit of the exclusion provided for in Section 14, Lim. Act. The test, as I have already said, is whether the Court is ready to part with the plaint; if not, the proceedings cannot possibly be regarded as ended. In the above view of the matter, it is not necessary for us to consider the third branch of the appellants' arguments on the question of exclusion of time u/s 14. We think the learned Judge should have allowed the defendants' prayer for time to produce such evidence as they wanted in order to rebut the evidence of the advocate, whom the plaintiffs examined all of a sudden. And if we had to rest our decision on the evidence of that witness we would have found it necessary to give defendants such an opportunity now, even though we ourselves can see nothing wrong or unreasonable in what the witness has said. But on the view we have already expressed, and quite independently of the evidence of the witness, we hold that time could not possibly run against the plaintiffs before 13th June 1927 on which date the endorsement of the Deputy Registrar was made, This was sufficient to

save the suit from the bar of limitation.

15. As regards the second ground, namely, on the question of defendant 2's concern with the firm, we consider the evidence to be overwhelming. The entries in the plaintiffs' credit bill book (Ex. 1/1) and ledger book (Ex. E), it is true, stand in the name of defendant 3; but we think they have been sufficiently explained, and that upon the evidence which the plaintiffs have adduced, it is quite clear that defendant 2, far from not having any concern with the business, was doing everything in connexion with it and was at its head. P. Ws. 3 and 4 have given very clear and detailed evidence as regards the complicity of defendant 2 in the transactions which form the subject-matter of this suit. P.W. 2 has proved that the defendants lived jointly in premises No. 25/1, Tarak Chatterji Lane, and that the arhat at Belgachia belongs jointly to all of them. The documentary evidence, scanty though it is, lends support to this conclusion. The evidence which defendants 2 and 3 themselves have given is very unconvincing. The account books of the business, which would have been the best evidence on the point, have been withheld, the explanation offered for their non-production not being worthy of acceptance. The alleged working partner of defendant 3, who is alleged to be the sole owner of the business has not been called. The story of the business having been started by defendant 3 alone with his own private funds, which it is alleged he had got from his father's life insurance money, is a story which is not corroborated by any reliable evidence. The signboard which is said to have borne the name of defendant 3 alone as its sole proprietor is not forthcoming. We think we should agree in the conclusion of the learned Judge that the business is the joint family business of all the three defendants and that all of them are liable for the plaintiffs' dues. The result is that, in our judgment, the appeal fails. It is, accordingly, dismissed with costs-hearing-fee being assessed at five gold mohurs.

Guha, J.

16. I agree.