

CALCUTTA HIGH COURT

Atul Kristo Bose

Vs

Lyon and Co

(Wilson and O'Kinealy, JJ.)

17.03.1887

JUDGMENT

Wilson and O'kinealy, JJ.

1. The facts found by the learned Judge of the Small Cause Court are not, we think, sufficient to enable us to say from what date the period of limitation should be reckoned. What is found is that, on the 15th November 1882, the plaintiff paid the price of a consignment of goods which he had ordered from the defendants, and that on the 22nd November the case, purporting to contain the goods ordered, was opened and certain of the goods found to be missing. And we are asked whether limitation in respect of a suit to recover back the sum overpaid is to be reckoned from the 15th or the 22nd November. We can only say, assuming, as is probably correct, that article 62 applies to such a case, not necessarily from either. The money paid by the plaintiff was not, at the time he parted with it, received by the defendants for his use but for their own. It was when the consideration failed that, by operation of law, the money became money received to his use, and that, we think, is the date from which in such a case limitation runs. The consideration failed when the short delivery took place; and as the date of delivery is not found the material date is wanting, and we cannot answer the first question.

2. The second question is one of considerable importance. The facts bearing upon it are thus found: Mr. H.J. Joakim was general agent for the defendants in Calcutta, that is to say, he would receive orders in the form of indents from constituents in Calcutta, forward them to the defendants, who would ship the goods, which would eventually come to Mr. Joakim's godowns. The defendants J. Lyon and A. P. Lyon carry on business under the style of Jeremiah Lyon & Co., at 4, Lombard Court, Grace church Street, London. Both defendants had at times visited Calcutta and were known to Joakim, but neither had been in Calcutta since the 2nd May 1882, the date the order was given. They did not carry on business here personally, their visits being only temporary with a view to look after their own interests. In consequence of the defendants not being in Calcutta, leave was, before suit was instituted, obtained by the plaintiff to sue in this Court. "The cause of action arose either wholly or in part in Calcutta. The question we are asked is " Is the suit barred by limitation under Section 13 of the Indian Limitation Article 1877?

3. Section 13 says : "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." This section

occurs in Part III of the Article, which deals with the computation of the period of limitation, and the language of the section corresponds to its position. It has to do not with the persons for or against whom limitation shall run but with the calculation of the time. In the present case the question is whether, between the accruing of the cause of action and the riling of the suit, the defendants were absent from British India. They were certainly not present in British India, and therefore it would seem they must have been absent, for apparently there can be nothing intermediate between presence and absence. But it has been contended that the word "absence" should be understood as applicable only to such persons as have been present, or would ordinarily be present, or may be expected to return. Thus the learned Judge of the Small Cause Court thinks that "absence implies some previous presence, and having regard to the general purport of the Act some presence after the time that limitation began to run." In argument before us various other restrictions upon the meaning of the word "absence" were suggested; that it should be held applicable only to persons who ordinarily reside in India; or, again, to persons who are temporarily absent and intend to return.

4. But the section in question is not intended to define the persons for or against whom limitation shall run but to direct the mode of computing time. And if we were to attempt to restrict the meaning of "absent" in such ways as are contended for, there is probably no limit to the number of suggestions that might be made and, as far as we can see, no reason for accepting one suggestion in preference to another. It may be worth noticing that the case, to which alone the learned Judge of the Small Cause Court would limit the operation of the section, is the precise case to which it was once held that it did not apply-*Narronji Bhimji v. Magniram Chandaji*¹ though that case may be considered as overruled; *Beake v. Davis*² *Hanmantram Sahdhurain Pety v. Bowles*³

5. The decisions upon corresponding sections in English Acts strongly support the broader construction. The Statute 21 Jas. I.C. 16, Section 7, dealing with the case of plaintiffs, and 4 and 5 Anne, c. 3, Section 19 (revised Statutes), provided that, if the one or the other was "beyond the seas" when the cause of action accrued, an action might be brought within the limited period after the "return from beyond seas" of the one or the other as the case might be. The word "return" used in those Acts afforded at least as strong ground for some restriction upon the operation of the sections as anything in the Act now before us. But it was never held that that word imported a previous presence and departure. For this it is enough to refer to the decision of the Privy Council in *Ruckmaboye v. Lulloboye Mottichund*⁴

6. That was an appeal from the Supreme Court of Bombay and was decided on demurrer, so that the facts as alleged in pleading must be taken to be correct. The plaintiff described the plaintiff as "of Malwa," and alleged a conversion of her goods by the defendant in Bombay. The defendant pleaded limitation, relying on the Statute of James. To this there was a replication that, at the time when the cause of action accrued and till within six years before suit, she was residing in Malwa, outside the territories subject to the East India Company, and outside the jurisdiction of the Court. The Privy Council having first held that the Statute of James did apply to a suit in the Supreme Court, and that Malwa was within the meaning of the technical phrase "beyond seas," went on to decide that the replication was good. They thus applied the saving clause to a person resident in a foreign State, who was in foreign territory when and for years after the cause of action accrued. Another case was cited during the argument to which we think it right to refer that of *Harrington v. Gonesh Roy* 10 C. 440. In that case limitation was pleaded, and in reply the

plaintiff relied on Section 13 of the Limitation Article, on the ground that the defendant had been in England ever since the cause of action accrued. Nottingham and Norris, JJ., who heard the case, held that Section 13 did not apply, on the ground, if we understand the decision aright, that "it seems, however, that Mr. Harrington (the defendant) is represented in this country by Mr. Crowdy, who, in the first instance, was made a defendant in the case as manager and mukhtear of the Bhagwan-pore Factory." That case does not bear directly upon the present, for the learned Judge of the Small Cause Court finds that "there is nothing to show whether Joakim's position was such that a summons could have been served upon him." But the case does bear upon the method of construction to be applied to the section. And we think that, if the question there dealt with should arise again, that decision may have to be reconsidered. The case was not argued for the respondent. Attention does not seem to have been drawn to the fact that the words in the corresponding section of Act IX of 1871 (as in earlier Acts)-"unless service of a summons to appear and answer in the suit can, during such absence, be made under the Code of Civil Procedure" have been omitted in the present section; and the judgment of the Privy Council, in the case already cited, does not appear to have been referred to. In that case, to the replication of absence from British India, there was a rejoinder to the effect that, throughout the period in question, the plaintiff had carried on trade in Bombay, having a shop or house of business there under a munim or gumastha. Their Lordships held that rejoinder to be no answer, and it is not easy to see why the reasons given for so holding, at page 260 of the report, should not apply to the case of a defendant under the present Article.

7. It was pointed out in argument that, according to the construction which we place upon the Article, a man who was in England when a cause of action against him accrued, and has remained there ever since, may be liable after an indefinite time to be sued in a Calcutta Court. And it was contended that this was something absurd, something that the Legislature could not have intended, and that we ought to adopt some construction which would avoid it. The answer given by the Privy Council to a somewhat similar objection in the case already cited is sufficient. The words of the section are express, and the case is within them. Moreover there is no more hardship than in the converse case of a man resident in Calcutta, who there incurs a liability to another person resident in Calcutta, who remains in Calcutta long enough for any suit against him to be barred by the law prevailing in Calcutta as well as ordinarily in England, who then goes to England and finds himself liable to be sued there any time within six years. And this is exactly what happened under the Statute of Anne in *Williams v. Jones* 13 East. 439.

8. We answer the second question in the negative. The remaining questions it is unnecessary to answer.

9. Attorneys for the defendants: Messrs. Dignam and Co.

Cases Referred.

16 B. 108

24 A. 530

38 B. 561

45 M.I.A. 234