

**Kunja Behary Singh Vs. Surendra Kumar Basu**

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**Court :** Kolkata

**Decided On :** Jul-17-1900

**Reported in :** (1900)ILR27Cal814

**Judge :** Francis W. Maclean, K.C.I.E., C.J. and ;Banerjee, J.

**Appellant :** Kunja Behary Singh

**Respondent :** Surendra Kumar Basu

**Judgement :**

Francis W. Maclean, K.C.I.E., C.J.

1.Two points only have been raised upon this appeal. The question of whether or not the plaintiff and defendant were partners, has very properly not been pressed before us. The first point we have to determine is a question of limitation, and it arises in this way. There had undoubtedly been money transactions between the plaintiff and the defendant, and the former had undoubtedly lent the latter Rs. 1,000 for which he now sues, and on the 11th of June 1894 the defendant gave an acknowledgment in writing of the debt, which admittedly would take the case out of the Statute, if the suit were instituted within 3 years from that date.

2. The question then is, when was the suit instituted? The plaintiff says on the 7th June 1897, the defendant says on the 15th June 1897. If on the former date, the suit is not barred; if on the latter, it is. What then are the facts

3. On its face, the plaint purports to have been filed on the 7th June 1897 and this is what happened.. The plaint was undoubtedly presented in the Court of the Munsif on the 7th of June 1897, but it was insufficiently stamped. The plaint was not rejected but the Munsif made, as I think he had power to do, under Section 28 of the Court Fees Act, this order: 'The plaintiff to put in the deficit Court fee within 15 days.' The further Court fee was paid on the 15th June 1897. Which then is the date of the institution of the suit, the 15th or the 7th of June 1897? I am satisfied that the date must be taken to be the 7th June; not the 15th.

4. Various authorities have been cited to us upon the point, but there are two authorities, in this Court, which are distinctly in point, namely, the cases of *Huri Mohun Chuckerbutty v. Naimuddin Mahomed* (1892) I.L.R., 20 Cal., 41, and *Man Sahu v. Chhatri Das* (1892) I.L.R., 19 Cal., 780. I agree with the reasoning and the conclusion of these cases, and I propose to follow them. They are consistent with the purview of Section 28 of the Court Fees Act, with Section 54 of the Code, and I think I may add with common sense. The other cases in this Court do not deal with the precise question now under discussion, and I, therefore, do not think it necessary to deal with them in detail. I decide this point of limitation which apparently was not raised in the Court below against the appellant.

5. The second point is that the defendant ought not to have been charged with interest before suit and I think the appellant is right upon this point. It is clear that this case does not fall within Act XXXII of 1839, the debt does not fall within the description in the first alternative of the section, nor does it come within the second alternative, for there was no demand of payment made in writing, least of all was there any demand giving notice to the debtor that interest would be claimed from the date of the demand. The case, therefore, is not within the Act, nor has any argument been addressed to us based upon Section 73 of the Contract Act. It is difficult then, to see upon what ground interest has been allowed on the debt before suit, and it must be disallowed. The plaintiff, however, is clearly entitled to interest from the date of the institution of the suit, and this has not been disputed. The decree, therefore, of the Court below must be varied by omitting therefrom any order for payment of interest before suit.

6. As the victory is a divided one, there will be no costs in this Court. Each party will pay his own. In the lower Court the costs will be proportionate.

**Banerjee, J.**

7. I am of the same opinion. I only wish to add a few words with reference to the question of limitation. Of the eases in this Court bearing upon the point, the two that have been referred to in the judgment of the learned Chief Justice quite support the view in favour of the respondent, that Section 28 of Act VII of 1870 saves the case from being barred by limitation, as the second paragraph of that section provides, that upon a document insufficiently stamped having been received through mistake or inadvertence, if the deficiency in the stamp is supplied within a time to be fixed by the Court, the document and every proceeding relative thereto shall be as valid, as if had been properly stamped in the first instance. There is only one case in this Court which was referred to in the argument of the learned vakil for the appellant, namely, the case of Yakutunnissa Bibee v. Kishoree Mohun Roy (1891) I.L.R., 19 Cal., 747, as lending support to his contention. But that case is distinguishable from the present. That was a case in which a memorandum of appeal had been presented on insufficient stamp; then the deficiency was ordered to be supplied within a certain time; it was not supplied within the time first allowed; then an extension of time was granted; and the deficiency was supplied before the expiry of the extended time. But at the hearing of the case the Lower Appellate Court held that the memorandum of appeal was presented out of time. Against that decision there was a second appeal preferred to this Court; and this Court held, having regard to the circumstances of that case, and no doubt also to the fact of the Lower Appellate Court having held that the appeal was presented out of time, that the case did not come within either the spirit or the letter of Section 28 of the Court Fees Act. That case is no authority for saying that in this particular case in which the plaint was entertained in the first instance and the deficiency in the Court fee was allowed to be supplied, and the case was tried on its merits, we must hold in second appeal that the Courts below were wrong in entertaining the suit, and that the Lower Appellate Court was wrong in holding that the suit was not barred by limitation. That case was decided with reference to its own facts, and is not really in conflict with the two other cases to

which reference has been made by the learned Chief Justice. As for the case of Venkatramayya v. Krishnayya (1897) I.L.R., 20 Mad., 319, that also is distinguishable from the present, because there the plaint was returned in order that it might be presented again upon a proper stamp and the learned Judges held that the case was one that could not come within the scope of Section 28 of the Court Fees Act.

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