

(1927) 08 MAD CK 0049
In the Madras High Court

Ammalu Amma and Others

APPELLANT

Vs

Narayanan Nair and Others

RESPONDENT

Date of Decision : 16-08-1927

Acts Referred:

Limitation Act, 1963 — Section 17, 20

Citation : AIR 1928 Mad 509 : (1928) ILR (Mad) 549 : (1929) 29 LW 460

Judgement

1. The main question raised and argued in this second appeal is of some difficulty and altogether out of the common. The suit from which the second appeal has arisen was instituted by respondent 1 as plaintiff for the purpose of recovering from the tarwad of which he was also a member and all the other members of which were made parties defendants in the action, defendant 1 being the karnavan for the time being, the debts alleged to be due by the tarwad to one Theyyassan Nair, the former karnavan. The debts are said to consist of 21 items. The plaintiff claims to be entitled to recover those items on the ground of his having succeeded thereto under the will of Theyyassan Nair made in or about the year 1913. Theyyassan Nair died on 3rd October 1916, and the suit was instituted in or about September 1919. The learned Subordinate Judge in the trial Court practically held that the debts were not proved and further that the claim was barred by the law of limitation and dismissed the plaintiff's action. The learned Judge of the lower appellate Court, reversing the judgment of the trial Court, has granted a decree in favour of the plaintiff 1. Some of the defendants have preferred this second appeal on behalf of the tarwad to which they belong.

2. The first point which falls to be observed is that the case was conceived, framed, put into Court and argued till; now as on the footing of loans made by Theyyassan Nair in his personal capacity to himself as karnavan of the tarwad. Even before us it was the same view of the case that has been presented and pressed. If the suit should be regarded as one for the recovery of a loan or some loans, it must be regarded as based on a contract, that is a promise by the borrower to repay to the lender the amount borrowed with some interest or not, as the case may be. According to the true principles of the law of contracts there

must at least be two persons to conclude a contract, the promisor and the promisee and there is great difficulty in understanding the case laid on the basis of a contract concluded by a person with him-self. It must be in recognition of this difficulty, it would seem, that in the case of agents of principals who, :advance moneys or incur expenses in the course of that agency on behalf; of their principals the law gives them the right to indemnity and also a right of retainer. Similarly, in the case of trustees advancing their own money or incurring expenses in the due execution of the trust the law gives them the right of reimbursement. The same thing has been recognized in the case of guardians of minors and practically in the case of all persons acting in a fiduciary character. It would, therefore, no doubt, have been possible for Theyyissan Nair or the plaintiff here to have instituted a suit properly framed for reimbursement of moneys properly advanced or expended in the course of the management of the family tarwad. Though undoubtedly such a suit would lie, the very basis of such a suit must generally be that there was necessity for these advances to be made or expenses to be incurred; that such amounts were really advanced; that on the state of the accounts so much is still due and payable to him. and the amount due would have to be determined with reference to the balance as shown in the account. Such a suit would, therefore, mainly be based on a rendering of the accounts by the person who wishes to charge the other party for reimbursement to him of moneys properly advanced or incurred.

3. The learned Subordinate Judge seems to have had this clearly in view, because we find he has referred to it in one of the paragraphs of his judgments But this unfortunately is not such a suit. Probably, for reasons which are not very difficult to guess, this suit was not framed in that manner, nor was it so presented at any stage. No doubt, there is nothing at all in the plaint to show that it cannot be regarded as a suit for reimbursement of such moneys. But how can such a claim be established? It can be established only by the rendering of proper accounts and showing that as the result of the account-taking the plaintiff or the person through whom he claims is entitled to reimbursement of the particular amount. In this case it is in evidence that though certain accounts were kept by the deceased Theyassan Nair in the form of what are, called Kurippus and though the plaintiff admits that they came into his custody after Theyassan Nair's death he has not produced them. His own statement is that he has not even looked into them, and it is clear that in his evidence he has not been able to give even secondary evidence of its contents. The explanation that he has sought to give is that they have been eaten by white ants, the usual explanation generally attempted to be given by all litigants who fail to produce and prove proper account books in Court. However, whatever the reason may be, the fact is that the plaintiff's claim has not been sought to be established as a claim for reimbursement on the basis of any such accounts.

4. We have no doubt at all that it was not so laid merely because the difficulty was appreciated, as is must have been, at a very early stage, of making the claim on any such basis, and the parties naturally thought that it would be easier

to refer to particular items as loans advanced by the person who was the karnavan of the tarwad. Treating the case, therefore, as one for recovery of loans the fact that such loans were advanced, when they were advanced and for what purpose, must, generally speaking, be proved satisfactorily, more especially in cases where the borrower and the lender happen to be, as is now contended, the same person. IF it should have become necessary for us to come to any decision with regard to the question whether, 01 the evidence adduce by the plaintiff, it could be held that the debts were satisfactorily proved, we might have had great difficulty in accepting the conclusion of the learned Judge in the Court below. But, on the face of it, it is a question of fact and in any case, in the view we have taken of the main question in this case with regard to the point of limitation, it is unnecessary to discuss this matter any further. In the plaint as laid three matters were alleged by the plaintiffs as saving the claim from the bar of limitation. The first was that the loans were claimed to be not mere loans of money but deposits of money, apparently contended to be deposits payable on demand so as to bring the transaction under a different article. The second matter that was alleged was that till the death of Theyyassan Nair from the income of the tarwad he was appropriating to himself the interest in respect of these loans, and as he died only in October 1916 the claim is not barred by the law of limitation. The third point is also no doubt indicated in the plaint itself, namely, that to such a case as this, "namely, where the borrower and the lender happen to be the same person, the law of limitation is not applicable. The learned Judge in the Court below has not dealt with the contention regarding the saving of limitation by reason of payment of interest.

5. The plea on the ground of the loans being deposits may "be summarily considered. There is absolutely no evidence on the record to show that there were any moneys which could be regarded as having been deposited by Theyyassan Nair in his individual capacity with the tarwad. In fact, we have only to glance at the various allegations in the plaint by which many of these debts are alleged to have resulted to see that the circumstances were such that it could not possibly be claimed that these loans, if they were loans, were really in the nature of deposits. Further, it is not sufficient that they should merely be deposits; but to bring the transaction under Article 60, Lim Act it is necessary for the purpose of that article to show, not only that there was a deposit, but that the deposit was under an agreement that it shall be payable on demand. There is absolutely no evidence with regard to any such agreement in this case and no argument has been addressed to us even here by the learned vakil for respondent 1 to show how the present transaction should be regarded as falling under that article.

6. Then, as regards the claim on the ground of payment of interest: it is also curious that in the plaint the plea that was put forward was not even in terms sufficient to bring the case under the provisions of Section 20, Lin. Act. The plea is not, even in terms, of payment of interest as such. The expression used is that:

Theyyasaan Nair appropriated to himself as interest the income from the tarwad.

7. There are three circumstances to be considered with regard to this contention. The first is whether, as a matter of fact, it has been established to the satisfaction of the Court that from the income of the tarwad Theyyassan Nair took anything for interest on the loans which he claimed to be due to him from the tarwad. No doubt, when a creditor comes into Court with a claim which is capable of being regarded as a stale or time-barred claim, it is to his interest to make allegations which would save the claim from the bar of limitation. Having this in view, the mere fact that the statement of receipt of interest is against the pecuniary interest of the person making the admission cannot be regarded as of great weight. Before the Court can hold that there were these payments of interest it must be satisfied that those payments were actually made. As already indicated, the learned Judge in the Court below has not given any finding with regard to it, for the simple reason that on some other ground he has held the claim not to be barred.

8. If we were disposed to consider that the evidence in this case with regard to this matter was so complicated, or that the interests of justice could be served by sending this case back to the lower Court for a finding with regard to that issue, we have done so. But having regard to the fact that the only evidence in this case with regard to the matter is that of the plaintiff, and the evidence with regard to this matter is confined to a few sentences therein, we did not deem it necessary to remand the case for any finding. The evidence, such as it is, even accepted in its entirety, will not amount to proof of actual payment of any interest, or even of any actual appropriation of any income of the tarwad towards the interest. The evidence that he gives is admittedly hearsay. He has not produced the accounts, which, according to him came into his possession. He has not chosen to call any other person for the purpose of proving the same. In these circumstances, no Court of law could hold that payment of interest has been proved by the best evidence on behalf of the plaintiff. Further, having regard to the manner in which the plea was set out in the plaint, namely, that the income was appropriated towards interest, there are clear difficulties in the way in which Section 20, Lim. Act has been worded. That section seems to contemplate a person liable to pay the amount and the interest, making the payment and paying it for interest as such. It has been repeatedly held by all the Courts in this country that if a general payment should be made by a debtor, and a creditor should appropriate a portion of it towards interest, that would not amount to any payment by the debtor of interest as such and. would not have the effect of saving the claim from the bar of limitation. If it should, therefore, be necessary for us to find whether this appropriation by the same person, of certain income received by him from the tarward towards the interest due to him, could amount to payment of interest as such within the meaning of Section 20, Lim. Act, we might have experienced considerable difficulty. But there is no satisfactory proof even of any appropriations, not to speak of payments, and so it has become unnecessary for us to express any final opinion with regard to this

matter. Mr. T.R. Ramachandra Ayyar, the learned vakil for respondent 1, referred us to the case of *Topham v. Booth* [1887] 35 Ch. D. 607. The decision proceeded on the terms of the English statute which is not identical with the terms of Section 20, Lim. Act. Further, as pointed out by the learned Counsel for the appellants, such a case would obviously be covered by the proviso to Section 22 in the Indian Act itself. However, it is unnecessary to discuss that decision at any great length because that can apply only to a case where there have been actual payments made and, in view of the finding we have already arrived at, namely, that no payments or appropriations have been satisfactorily proved, it becomes unnecessary to discuss it further,

9. The last ground on which it is contended that the claim is not barred by the law of limitation is that to such a case as this the law of limitation has no application or that the Court must hold, whatever may be the actual terms of the article of the Limitation Act that may apply, that the cause of action with regard to such a suit did not arise till the death of Theyyassan Nair,- it is doubtful whether in his capacity as creditor or debtor, but we may take it that it was on his ceasing, on his death, to hold both the characters. The learned Judge in the Court below has referred to the terms of Article 57, Lim. Act, as the proper article and was inclined to think that ordinarily that would be the article applicable. But in the discussion of the case that follows the learned Judge came to the conclusion that the cause of action itself for the suit did not arise till the death of Theyyassan Nair. The Limitation Act, being the enactment of the legislature which has dealt with all matters connected with the limitation of actions, applications, appeals and so on, is really in the nature of a Code, and it has been held by their Lordships of the Judicial Committee that the essence of a Code is its completeness. It has provided for all cases, conditions and contingencies prescribed for the starting of the period, for the exclusion of certain periods in the computation of the period of limitation and so on. Having regard to all the provisions contained in the Limitation Act, it seems to us that, on a proper interpretation and construction of the statute, no Court would be entitled to invoke any principle for the purpose of holding the claim as not barred by the law of limitation which is not contained or necessarily implied in any of the sections or articles of the Limitation Act.

10. We have been referred to several cases in which it has been held by learned Judges that, having regard to certain circumstances, the cause of action should be deemed not to have arisen till a particular point of time; but, on examination as we shall show later on, all those cases turn out to have proceeded merely on a construction of the terms of the sections or of the particular article concerned. Take, for instance, the third column of any article containing the expression "cause of action" as the time from which the period is to be computed. No doubt it would be open to the Court on a consideration of the facts of the case to come to the conclusion that the cause of action in that particular case did not arise till a "particular date. But if, as the learned Judge in the Court below seems to have thought, Article 57 of the schedule to the Limitation Act was the proper article

applicable, the third column prescribes the date of the loans as the date from which the period prescribed by the second column begins to run. If so, how any construction or interpretation of the words could possibly have the effect of expanding or putting off the time it is impossible to see. The mere ground, however, on which the learned Judge has proceeded would appear to be this: Theyassan Nair, who was both the lender and the borrower, had all the moneys of the tar-wad in his hands and it was not a case of any third person who was liable to pay moneys to him and who could be regarded as having neglected to pay the amount promptly. It seems to have been thought that, having regard to the general principle of the Limitation Act, that it is intended merely for the purpose of preventing the claims which have failed to be enforced by parties within a reasonable time, it could not be regarded that there was any such negligence in this case where both the lender and the borrower are the same person. And for this purpose the learned vakil for respondent 1 has referred us to a number of cases both Indian and English. As already observed, having regard to all the provisions in the Limitation Act, it seems to us, with all respect, that it is against all principle of statutory construction to invoke for the purpose of the determination of the question any principle or provision not included in the Limitation Act itself or necessarily implied in any of its provisions. Apart from that altogether, even on a careful examination of all the cases cited, it seems to us that it cannot be held that any of the principles on which those cases were decided are applicable to the present case.

11. The first case relied upon was the case of *Devasikamani Annamalai Desikar v. Govinda Rao* AIR 1923 Mad. 461. That was a case in which a receiver appointed in respect of a temple filed a suit for the recovery from defendant 1, who had been the previous trustee of the temple and was also the head of a mutt, to recover the melwaram payable by the mutt in respect of certain lands. The same person having been the head of the mutt and also the trustee of the temple, it was contended that, as the trustee of the temple, he could not file a suit against himself for the recovery of the melwaram and that, therefore, the principles of the Limitation Act were not applicable to him. That was a case clearly, as the learned Judge held, where, according to the view taken by the learned Judges, it was not competent to the trustee of the temple to institute a suit against himself as the head of the mutt for the recovery of the amount, and in any case the learned Judges seem to have taken the view that, having regard to the terms of the article applicable, that is, "when the arrears become due," it was only after the removal of the defendant from his office of trusteeship that the rent became due and could be set off. As we shall show later, the present case cannot possibly be regarded, in any event, as one in which it was impossible for Theyyassan Nair to institute a suit for the purpose of recovering the debts alleged to be due to him.

12. The next case that was relied on for respondent 1 was the case of *Burrell v. The Earl of Egremon* 49 E.R. 1043. The decision in that case really proceeded on the equitable principles of subrogation and was also based upon the

interpretation of the particular terms of the English statute with regard to which it was held that it really contemplated the existence of separate persons within the meaning of the statute before it can be held that the bar of limitation operated. As the statute required that there must be a person having a present right to receive the amount before the period of limitation began to run, as in that case there was no such person, the learned Master of the Rolls held that the contention with regard to limitation could not be sustained. The case of *Murray v. E.I. By. Co.* 106 E.R. 1167, was next relied upon. That was an action upon a bill. The bill had not been accepted during the lifetime of the deceased, and when it was accepted as payable to the deceased he had died, and there was in existence no legal representative in whom the cause of action could be said to have become vested. That was clearly a case comprehended within the terms of Section 17, Lim. Act. The Act itself has given effect to the principle underlying that decision and there is, therefore, no question or principle in that case which can be regarded as applicable to the case before us.

13. The learned vakil for respondent 1 also cited *Binns v. Nichols* [1866] 2 Eq. 256. That was a case with regard to the payment of a legacy and proceeded on a construction of the terms of the English statute already referred to. It was also relied upon in that case that there was no possibility of the person entitled to the amount being capable of instituting any suit during the period. It may, however, be observed generally with regard to that and other cases that such actions are really in the nature of administration actions, and the Court of Chancery, in distributing the estate, has reference to well-accepted equitable principles, and there was no question there of any claim becoming barred by the law of limitation. In the case of *Palaniyandi Malavarayan v. Vadamalai Ooddayan* 18 Ind.Cas. 373, no doubt, Mr. Justice Sundara Iyer, who delivered the leading judgment in the case, was of the opinion that there was no bar of limitation against a temple during the period when there was no proper trustee appointed for the temple. But Mr. Justice Sadasiva Iyer, though he did not wish, formally to dissent from that view, had grave doubts about the correctness of the decision. In any case the point to be observed is that the decision there proceeded on the interpretation of the words "adverse to the plaintiff" and, if there was no plaintiff at all with reference to whom the possession of the office could be held to be adverse, the learned Judges were entitled to hold that, according to the proper construction of the words in the third column of the article, the period began to run only from a later date when by the appointment of a trustee the possession of the defendant became adverse to him.

14. The case of *Muthu Korakkai Chetti v. Madar Ammal* [1920] 43 Mad. 185, was also referred to and relied upon. That was a case in which the question arose with regard to the date on which a sale should be held to have become absolute according to the terms used in the third column of the particular article. The learned Judge held, having regard to the circumstances that the sale should be regarded as having been finally confirmed only after the final decision in the petition for setting aside the sale. That again clearly proceeded, not on general

principles applicable to questions of limitation apart from the sections in the Limitation Act, but only on the construction adopted by the learned Judges of the particular terms of the article. In the case in *Narrondds v. Narrondas* [1907] 31 Bom. 418 Mr. Justice Russell, sitting as a single Judge, held in a suit for the recovery of certain moneys from the executors that the executors were express trustees within the meaning of Section 10, Lim. Act. The other observations of the learned Judge were merely by way of obiter dicta. The last case referred to, and relied upon on behalf of respondent 1, was the case of *Lakhan chandra Sen v. Madhusuddan Sen* [1908] 35 Cal 7 209. No doubt in the course of the judgment in that case there was some reference to the suspension of the right of action having regard to the particular circumstances in that case of the very right which was subsequently sued for having been accorded to the very persons in a previous litigation. It was no doubt a very hard case, but, at the same time, the principle of that decision might be supported by the view that, on the rights originally granted to the parties being taken away by a subsequent reversal of the decree or decision, what arises is really in the nature of a new cause of action.

15. It is, however, impossible to regard that or any of the other cases already referred to as laying down a principle that, apart from the terms of the Limitation Act, reference can be made to any rules or principles which could be invoked for the purpose of holding that a claim is not barred by the law of limitation. In this case it was very strenuously contended that Theyyassan Nair, during his lifetime even if he had wanted to do so, could not possibly have instituted a suit for the purpose of recovering debts due to him. That contention was based on what was said to be the recognized procedure in all oases or suits or claims against tarwads being instituted merely against the karnavan as representing the tarwad. It is unnecessary to refer to all the cases which have been cited to us where it has been laid down that the karnavan of a tarwad might be sued on behalf of the tarwad. That is so; but we have not been shown any decision which has gone the length of holding that it is not possible to institute a suit against all the members of the tarwad making all of them parties to the action either as plaintiffs or defendants. In fact the very principle of the thing seems to show that a karnavan is merely representing the tarwad and that there could possibly be no objection to all the members of the tarwad being made parties to the action if it so desired. In fact this very case instituted by "the plaintiff first respondent was a suit not against the karnavan, but against all the members of the tarwad, and, having regard to that, it seems to us that the contention cannot be upheld, that, except against the karnavan as the sole defendant in the case, no suit can be instituted or claim enforced in a Court of law if the property, with reference to which the decree will be obtained, is the property of the tarwad and it was intended by the plaintiff to bind all the members of the tarwad by the adjudication. There is no principle or rule of procedure preventing all the members of the tarwad from being made parties to the suit and afforded an opportunity to plead to the particular claim. If so, it seems to follow clearly that

Theyyassan Nair, during his own lifetime, might have instituted a suit making all the other members of the tarwad parties defendants in the action and claiming these amounts either as debts or by way of reimbursement.

16. We are not satisfied by the argument that has been addressed to us that such an action was incompetent to Theyyassan Nair. If so, then, it follows that all the decisions in which the ground of decision has been stated to be the impossibility of an action being maintained by the claimant, because the only defendant to the action would have to be himself, are not applicable to the present case. The conclusion which we have, therefore, arrived at is that there is no warrant for the principle on which the learned Judge in the Court below has come to the conclusion that, though the article applicable is Article 57 of the schedule to the Limitation Act, the claim is not barred by the law of limitation, because Theyyassan Nair was also the karnavan of the tarwad for the time being. We must, therefore, hold that the claim in this case is, as laid, barred by the law of limitation, and the appeal should be allowed and the decree of the Court of first instance restored. The appellants will have their costs throughout from respondent 1.