
(1961) 02 KAR CK 0007
In the Karnataka High Court
Case No : Second Appeal (B) No. 6 of 1957

Balappa Venkat Rao Desai and Others	APPELLANT
Vs	
Waman Krishna Mutalik Desai	RESPONDENT

Date of Decision : 28-02-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144
Limitation Act, 1908 — Section 109, 120

Citation : AIR 1962 Kar 235

Hon'ble Judges : S.R. Das Gupta, C.J;H. Hombe Gowda, J

Bench : Division Bench

Advocate : K.S. Savanur, for the Appellant; N.H. Naik, for the Respondent

Judgement

Das Gupta, C.J.

(1) The facts leading upto this appeal may be shortly stated as follows:

(2) The plaintiff and his ancestors have been sub-inamdars under the defendant and his ancestors from a long time. In the year 1922 the defendant filed a watan case being case No. 15/22-23 before the Collector of Mohole for recovery of possession u/s 11 of the Watan Act. On 14-4-27 order for possession was made by the Collector and possession of the lands in question was made over to the defendant by the Collector. Thereafter the plaintiff filed an appeal to the Court of the Commissioner. That appeal was not disposed of until the year 1946. On 8-10-46 the decision of the Collector was reversed and an order for restoration of possession was made in favour of the plaintiff. In 1947 the plaintiff obtained possession of the suit lands. Thereafter the defendant filed a petition for revision to the Resident of Kolhapur and obtained a stay order. But the said revision petition was ultimately dismissed on 14-4-47. One more fact I should have mentioned and that is this. After obtaining an order for possession from the Collector on 14-4-27 the defendant filed a suit being Civil Suit No. 72/1927-28 against the plaintiff for mesne profits for three years prior to the said suit and got a decree for Rs. 1000/- for such mesne profits and Rs. 128-8-0 as the costs

and executed the said decree and realized the total amount of Rs. 1143-15-3. This suit has been filed by the plaintiff on 6-8-1952 for an account against the defendant of the profits realized by him during the period between 1927 and 1947 and for the recovery of the amount which had been realized by the defendant from the plaintiff in execution of the decree obtained in suit No. 72 of 27-28 with interest. Before instituting the suit, and on 15-6-49 the plaintiff had applied to the debt adjustment Court under the Bombay Agricultural Debtors' Relief Act. On 28-3-52 that application was dismissed on the ground that the defendant was not a debtor. It was after such dismissal that the present suit was filed.

(3) The trial Court disallowed the claim in respect of the monies realized in execution of the decree obtained in suit No. 72/27-28 and disallowed interest in respect of the said claim. In respect of the other claim, the trial Court passed a decree for the consolidated sum of Rs. 2500/-. Both the parties filed appeals against the said decision. The lower appellate Court decreed the suit in terms of the prayer of the plaint except in respect of the claim for interest which was disallowed. It is against this decision of the lower appellate Court that the present appeal has been filed.

(4) Mr. Savanur appearing on behalf of the appellant contended before us that the claim of the plaintiff so far as it relates to suit No. 72/27-28 is not maintainable. He contended that there was a valid decree passed in the said suit which has not been set aside in appeal and so long as the decree stands it is operative. The plaintiff, according to him, cannot file a suit for the recovery of the amounts realized in execution of that decree without having the said decree set aside, or without getting a declaration to the effect that that decree, in the events which have happened, is no longer operative. He pointed out to us that in the plaint no prayer has been made either for setting aside the decree or for a declaration that the decree is not operative and binding upon the plaintiff. That being so, the present suit so far as it relates to the said suit No. 72/27-28 is not maintainable.

(5) In my opinion, this contention is sound. Strictly speaking, the plaintiff ought to have prayed that the decree passed in suit No. 72/27-28 be set aside, or for a declaration that the said decree is not binding upon him. In the absence of any such prayer the present suit so far as it relates to that part of the claim is not maintainable. The learned Advocate for the respondent also abandoned that portion of his client's claim. Thereafter this appeal proceeded only for determination of the question as to how far the present suit so far as it relates to the other claim is maintainable.

(6) Mr. Savanur contended before us that this suit is not maintainable in view of the provisions of sections 6, 9 and 81 of the Bombay Hereditary Offices Act, 1874. In other words, his contention was that an application under the said Act was the only remedy open to the plaintiff. In support of that contention he relied on the said sections 6, 9 and 81 of the said Act. We have been taken through the

said sections and I have no hesitation in holding that none of those sections supports the contention of Mr. Savanur.

(7) Section 6 provides that the Collector may institute legal proceedings for the protection of a watan, Section 9, upon which Mr. Savanur mainly relied, empowers the Collector to declare certain alternations made before the date of the Act null and void. The said section inter alia provides as follows:

"Whenever any watan or any part thereof or any of the profits thereof, whether assigned as remuneration of an officiator or no, has or have, "before the date of this Act coming into force", passed otherwise than by virtue of, or in execution of, a decree or order of any British Court and without the consent of the Collector and transfer of ownership in the Revenue records, into the ownership or beneficial possession of any person not a watandar of the same watan, the Collector may, after recording his reasons in writing, declare such alienation to be null and void". (The underlining (here into is mine) This section, as it would appear from the terms thereof, applies to cases where before the date of the Act coming into force a watan or any part thereof has passed into the ownership of a person, not a watandar of the same watan. The Watan Act came into force in the year 1874 and the proceedings between the parties started long after that date. It was in 1927 that the defendant for the first time instituted a suit for the revere of possession of the watan land against the plaintiff. That being so, section 9 can possibly have no application to the present case.

(8) The position is also the same so far as section 81 is concerned. Section 81 provides that all recoveries of profits from land, assessments, emoluments or penalties under this Act may be made as provided by any law for the time being in force relating to the recovery of the land revenue. The said section merely indicates the mode in which the revere of profits from lands have to be made. I do not see how this section can be of any avail to Mr. Savanur in support of his present contention. This contention of Mr. Savanur must, therefore, fail.

(9) There being no provision in the Act itself which enables the plaintiff to make an application to obtain the reliefs claimed in this suit, this suit, in my opinion, would be maintainable.

(10) Mr. Savanur then contended before us that this suit is barred by limitation. It should be noted once again that the present suit was filed in the year 1952 and that between 15-6-49 and 28-3-52 the plaintiff had been proceeding with his application filed before the debt adjustment Court under the Bombay Agricultural Debtors' Relief Act. The contention of Mr. Savanur is that Article 109 of the Limitation Act would be applicable to the present cases and not Article 120 as has been held by the lower appellate Court.

(11) In my opinion, this contention has also to be rejected. Article 109 as it now stands reads as follows:-

Description of Suit. Period of Limitation. Time from which period

begins to run.

109. For the profits of immovable Three years When the profits are property belonging to the received.

plaintiff which have been wrongfully received by the defendant.

It should be mentioned that the said article as it stood under the Act of 1877 reads as follows:-

109. For the profits of immovable property Three years When the profits are received, or,

belonging to the plaintiff which have where the plaintiff has been dispossessed been wrongfully received by the possessed by a decree afterwards defendant. set aside on appeal, when he recovers possession.

In the new Act the portion appearing in the third column i.e., "or, where the plaintiff has been dispossessed by 6 a decree afterwards set aside an appeal, when he recovers possession" has been deleted. In my opinion, this deletion indicates the intention of the Legislature that Article 109 would not be applicable to a suit for restitution. It should also be noted that in a Privy Council decision, on which Mr. Savanur relied, viz. AIR 1939 178 (Privy Council) , their Lordships in dealing with this question observed that the omission from Column 3 of those words was due to the provisions of section 144 of the Code of Civil Procedure. When we turn to section 144 of the CPC we find that it is stated therein that where and in so far as a decree is varied or reversed the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place to the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose, the Court may make any orders, including orders for their fund of costs and for payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(12) In my opinion, it is because of the introduction of the provisions of this section 144 that those words appearing in the third column of Article 109 came to be deleted. Section 144 by its very terms makes it clear that when a decree is varied or reversed the party has to be substituted to the same position which he would have occupied but for the decree or part thereof. If that is so, then the principle on which restitution can be had is, to my mind, not the same principle on which mesne profits, as is commonly known, can be recovered from a wrongful occupier of a property. It is not necessary to discuss this point in

greater detail for this appeal. It would be sufficient for me to hold that as a result of the deletion of the portion to which I have referred appearing in the third column of Article 109 of the Limitation Act, suits for restitution were excluded from the operation of the said Article. The present suit is a suit for restitution with all its consequential reliefs. The claim for mesne profit's is a consequential relief and is not governed by Article 109. At this stage I should observe that it is not disputed before as that the plaintiff could not avail himself of section 144 and make an application under the said section. The only thing which the plaintiff could do in order to obtain restitution was to file a suit and the plaintiff has filed this suit for that purpose. The principle underlying section 144 of the CPC would also govern such a suit.

(13) If, therefore, Article 109 of the Limitation Act is not applicable to the present suit then the question which would arise is what is the other Article which can be said to apply to such a suit. The learned Advocate for the appellant could not point out to us any other Article which can be said to apply to the present case. If that is so, then the residuary Article, i.e., Article 120 would be applicable to such a suit.

(14) Mr. Savanur referred us to certain decisions including two decisions of the Privy Council in support of his contention. But none of these cases for restitution. The said two Privy Council decisions on which Mr. Savanur relied are clearly distinguishable. The case reported in AIR 1939 178 (Privy Council) on which Mr. Savanur relied is also not case for restitution. It was in that case that Sir George Rankin, who delivered the judgment of the Board, made the observation to which I have already referred, viz. that the words " Where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession" were omitted from Column 3 of Article 109 due to the provisions of section 144 of the Code of Civil Procedure.

(15) The case reported in AIR 1945 5 (Privy Council) , on which Mr. Savanur laid considerable emphasis in the course of his arguments, also, in my opinion, does not support his contention. In that case the plaintiff had filed a suit for declaration and possession and obtained a temporary injunction which was subsequently confirmed by the decree restraining the defendant from interfering with his possession. The defendant was also not to cause obstruction in any way to the plaintiff in removing the crops grown by him or in accepting or recovering the amount of rent of the said lands from the tenants. This decree was ultimately set aside in appeal by the Privy Council. The defendant then instituted a suit for possession. It was held that the defendant's suit which was instituted after 12 years from the date of his dispossession was barred by limitation. The ratio decided of that decision is that the injunction order did not prohibit the defendant either expressly or even impliedly from instituting a suit for possession. That being so, their Lordships held that the defendant not having filed a suit within the period of 12 years from the date of his dispossession, such a suit filed by him after the period of 12 years will be barred by limitation. No question as to what

Article of the Limitation Act would apply in a suit for restitution came up for consideration before their Lordships of the Judicial Committee in that case. The present point with which we are concerned in this case was not the point which their Lordships had to consider in the said case. In my opinion, therefore, this case is also distinguishable.

(16) Mr. Savanur then contended before us that even if Article 120 applies to the present case, the period upto which the plaintiff would be entitled to get mesne profits would be six years prior to the date of suit. I am also unable to accept this contention. In a recent decision of this High Court in *Thakurdas Narayandas v. Khalilulla Saheb* 1961 Mys LJ 150 : AIR 1962 Mys 16 the same contention was urged before his Lordship Mr. Justice Somnath Iyer who heard and decided the said case. It was also contended before his Lordship that the plaintiff was not entitled to mesne profits for a period exceeding six years preceding the date of institution of the suit, even if Article 120 applied. This contention was negatived by his Lordship. His Lordship held that it was not possible to uphold the contention that in every suit for mesne profits governed by Article 120 of the Limitation Act, the right to sue accrues at the end of each year for which the mesne profits are claimed. The date on which the cause of action accrued in such cases has, according to his Lordship to be fixed with reference to the circumstances and facts of each case. On the facts and circumstances of this case it is clear that the date on which the cause of action accrued was the date on which the order of the Collector was set aside. The suit has no doubt to be instituted within six years from that date, but it does not follow therefrom that the plaintiff is entitled to mesne profits only for six years prior to that date. That would be so if the right to sue accrue at the end of each year. But as held by Somnath Iyer, J., with whom I agree, it is not possible to hold that in every suit for mesne profits the right to sue accrued at the end of each year and the date on which the cause of action accrued will have to be determined in each case with reference to its own facts and circumstances. In this case the cause of action accrued only on the date on which the order of the Collector was set aside.

(17) There is however another principle on which the view taken by the lower appellate Court can be upheld. I indicated before that the principle of section 144 of the CPC is that the plaintiff should be put back into the same position which he would have occupied but for the decree which was passed against him and which was ultimately reversed with all the consequential reliefs. On that principle, it is clear to my mind, the plaintiff would be entitled to claim mesne profits for the entire period between 1927 and 1947. The result, therefore, is that this contention of Mr. Savanur fails.

(18) In the result, the decree passed by the lower appellate Court except with regard to the claim for the recovery of the amount realized by the defendant in execution of the decree passed in Suit No. 72 of 19207-28 will stand. The said claim for the amount realized in execution of the decree passed in Suit No. 72 of 1927-28 is dismissed and the decree of the lower appellate Court in respect

thereof is set aside. Each party will bear and pay its own costs of this appeal.

Hombe Gowda, J.

(19) I agree.

(20) Order accordingly.