

(1957) 09 KL CK 0032
In the High Court Of Kerala
Case No : A.S. No. 405 of 1954 (E)

Chacko Varkey

APPELLANT

Vs

Thommen Thomas

RESPONDENT

Date of Decision : 02-09-1957

Acts Referred:

Contract Act, 1872 — Section 25(3)
Limitation Act, 1908 — Article 64

Citation : AIR 1958 Ker 31

Hon'ble Judges : Koshi, C.J;M.S. Menon, J;Kumara Pillai, J

Bench : Full Bench

Advocate : K.P. Abraham and K.T. Ninan, for the Appellant; K.K. Mathew and G. Devaraja Iyer, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Menon, J.—The plaintiffs in O. S. No. 167 of 1124 of the District Court of Kottayam are the appellants before us. The suit was based on Ex. A, an unregistered chitty udampady executed by the defendant in favour of the 1st plaintiff on 7-11-1107. The chitty terminated on 15-7-1116. The suit was instituted on 20-8-1124. The date on which the cause of action arose was not specified in the plaint.

2. The lower Court found that the suit was barred by limitation. The learned counsel for the appellants concedes that the conclusion is correct but for Ex. A-1, an endorsement on Ex. A made by the defendant and signed by him on 18-10-1121. The endorsement reads as follows:

(Endorsement in Malayalam omitted.)

3. Section 19(1) of the Travancore Limitation Act (Act VI of 1100) provides:

"Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom

such property or right is claimed, or by some person through whom he derives title or liability, or by some person who is, either by operation of law or by contract, entrusted with the general management of the affairs of a family, in so far as such acknowledgment relates to transactions binding on such family, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed."

The claim, it is agreed, was barred by limitation, prior to 18-10-1121 and it is not contended that Ex. A-1 will provide a fresh period of limitation from the said date under the provisions of Section 19. The contention is that Ex. A-1 (earlier portion) amounts to an account stated and that a period of three years will hence be available from 18-10-1121 under Article 52 of the Travancore Limitation Act.

4. Article 52 of the Travancore Limitation Act (but for the addition of the Explanation) is in the same terms as Article 64 of the Indian Limitation Act, 1908:

"Description of suit.

Period of Limitation.

Time from which period begins to run.

52. For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.

three years

When the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf, unless where the debt is by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.

Explanation. ? The words agent duly authorised in this behalf shall include the Kar-navan of a Malabar Tarwad and the manager of an undivided Hindu family where the accounts stated relate to the Tarwad or family transactions."

In Shamlal v. Gulabchand AIR 1935 Nag 221 (A), Subhedar, A. J. C., dealing with a similar contention said:

"The question for determination then is if Ex. P-1 could be regarded as an account settled. In my opinion the answer to this must be in the negative. Although the document recites that an account was made and Rs. 375 were found due on an old sarkat, Ex. P-1, cannot be regarded as "accounts stated" within the meaning of Article 64 of the Limitation Schedule as on the face of it the document does not purport to contain accounts of that description."

5. Chitaley's summary of the decision is as follows:

"It was held that an "account stated" must on the face of it purport to contain account, and that a document containing an entry by the creditor: "Rupees 375 due on making accounts after repayments deducted," and an entry by the debtor

admitting such amount as due, is not an account stated within the meaning of this article." (The Indian Limitation Act, Vol. II, p. 1337).

We propose to assume, without deciding, that Ex. A-1 comes within the ambit of Article 52 of the Travancore Limitation Act.

6. In AIR 1934 147 (Privy Council) Lord Wright said:

"The essence of an account stated is not the character of the items on one side or the other, but the fact that there are cross items of account and that the parties mutually agree the several amounts of each and by treating the items so agreed on the one side as discharging the items on the other side pro tanto, go on to agree that the balance only is payable. Such a transaction is in truth bilateral, and creates a new debt and a new cause of action.

There are mutual promises, the one side agreeing to accept the amount of the balance of the debt as true (because there must in such cases be, at least in the end, a creditor to whom the balance is due) and to pay it, the other side agreeing the entire debt as at a certain figure and then agreeing that it has been discharged to such and such an extent, so that there will be complete satisfaction on payment of the agreed balance. Hence, there is mutual consideration to support the promises on either side and to constitute the new cause of action".

and:

"The authorities referred to above show that where an account has been settled, it is immaterial that some of the items were statute-barred. It has not been decided whether the same principle would be applied if all the items were statute-barred,"

7. The question as to what happens when all the items are barred by limitation (as in this case) arose for consideration in AIR 1942 92 (Nagpur) Grille, J., said:

"If the whole account is time-barred, then the ban imposed by Section 25(3), Contract Act, would apply."

This decision was followed in AIR 1949 229 (Nagpur) :

"In an account stated it does not matter if some of the items are time barred. It would be a different thing if all the items are time-barred, and we see no reason to depart from the view expressed on this point in AIR 1942 92 (Nagpur) ."

8. Section 26 of the Travancore Contract Act (Act X of 1115) corresponds to Section 25 of the Indian Contract Act, 1872. That section provides -- subject to strictly limited exceptions -- that an agreement made without consideration is void. One of the exceptions is:

"a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits."

Pollock and Mulla deal with the difference between Section 25(3) of the Indian Contract Act, 1872, and Section 19 of the Indian Limitation Act, 1908, as follows:

"The distinction between an acknowledgment u/s 19 of the Limitation Act and a "promise" within the meaning of this section is of great importance. Both an acknowledgment and a promise are required to be in writing signed by the party or his agent authorised in that behalf; and both have the effect of creating a fresh starting point of limitation. But while an acknowledgment under the Limitation Act is required to be made before the expiration of the period of limitation, a promise under this section to pay a debt may be made after the limitation period. After the period of limitation expires, nothing short of an express promise will provide a fresh period of limitation; an implied promise is not sufficient."

(The Indian Contract Act, Eighth Edition, p. 216)

It is agreed that Ex. A-1 will not amount to an express promise and that the suit cannot be saved u/s 26(3) of the Travancore Contract Act.

9. As pointed out by Wanchoo, C. J., in *Ran Bahadur Singh Vs. Hanuwant Singh*,

"An account stated is no more than an agreement."

and when the entire claim is barred as in this case prior to the date of the settlement the account stated cannot give rise to any cause of action unless it amounts to an express promise within the meaning of Section 26(3) of the Travancore Contract Act.

10. Explanation II to Section 26 of the Travancore Contract Act provides:

"An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy, of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given."

When the entire claim is not barred but only a portion thereof the maximum that can be said is that the consideration for the settlement is inadequate. The position however is different when the entire claim is barred; in such a case there is no consideration at all and the agreement will be void unless it is saved by Section 26(3) of the Travancore Contract Act.

11. In the light of what is stated above the appeal fails and it is hereby dismissed. The lower Court directed the parties to bear their respective costs. In the circumstances of the case there will be a similar order as to costs in this Court as well.

12. The learned counsel for the respondent drew our attention to the following passage in AIR 1934 147 (Privy Council)

"Indeed, it follows from the idea of an account stated that whatever the consideration for each item, every item must appear in terms of money, since

what is being agreed is matter of account."

and contended that Ex. A-1 will not amount to an account stated because it is not in terms of money but of paddy. In view of the conclusion we have reached it is unnecessary to consider this question and it is not considered in this judgment.