
(1924) 08 BOM CK 0006
In the Bombay High Court

Girjabai Shivdeorao Vinchurkar

APPELLANT

Vs

Narayanrao Ganpatrao Vinchurkar

RESPONDENT

Date of Decision : 08-08-1924

Acts Referred:

Trusts Act, 1882 — Section 94

Citation : 88 Ind. Cas. 975

Hon'ble Judges : Lallubhai Shah, Acting C.J.; Fawcett, J

Bench : Division Bench

Judgement

Lallubhai Shah, Acting C.J.

1. After stating the facts the judgment proceeded: First, it has been urged that a certificate under the Pensions Act is necessary in view of the provisions of Section 4, and that a suit cannot be entertained without such a certificate. It is contended that the suit, so far as it relates to these four items, relates to a grant of money conferred by the British Government within the meaning of Section 4. The learned Judge overruled this objection on the ground that this was a suit for Recounts generally of various items, and that a suit of this nature cannot be said to relate to pension or grant of money within the meaning of the section. There are no doubt conflicting considerations; one favourable to the contention and the other against it. In the present case, it is urged on behalf of the respondent that really in virtue of the two arrangements, one in 1860 and the other in 1897, the defendant must be taken to be in the position of a person who, as soon as the money was received, held the money for the other sharers so far as those sharers were concerned and that the money then ceased to be a grant from the Government. The decisions bearing on this point which have been referred to are Damodar y. Satyabhamabai 31 B. 512 : 9 Bom. L.R. 889 on the one hand, and Raghavendm, Ayyaji Desai v. Gururao Raghauemira Desai 19 Ind. Cas. 882 : 37 B. 442 : 15 Bom. L.R. 362 on the other. Looking at the point for the moment, apart from the decisions, it is difficult to say that the suit, so far as these four items are concerned, does not relate to the grant of money by the British

Government within the meaning of Section 4. It is true that there was an arrangement between the parties, whereby the defendant's husband was to receive the money and then distribute it among the sharers according to their respective shares. But that by itself does not afford a sufficient basis for holding that the suit does not relate to those four items. The judgment of Chandavarkar, J., in *Damodar v. Satyabhamabai* 31 B. 512 : 9 Bom. L.R. 889 in which the earlier decisions on this point have been referred to, is very ripe on this point, and, though there are observations to the contrary in *Raghavendra Ayyaji Desai v. Gururao Raghavendra Desai* 19 Ind. Cas. 882 : 37 B. 442 : 15 Bom. L.R. 362 I think that the contention of the defendant on this point must be allowed. It is true that the section must be strictly construed but we cannot ignore the plain meaning of the words used. This conclusion necessitates giving time to the plaintiff to produce the necessary certificate. But it would not be necessary in any way under the circumstances of this case to delay the further proceedings in this suit. There is at present only a preliminary decree for taking accounts, and it can be provided in the decree of this Court that after the accounts are taken, before any decree in respect of these four items is passed, the plaintiff must produce the necessary certificate under the Pensions Act, and, if he fails to do so, he cannot get any relief in respect of these items.

2. The next point relates to limitation. As regards that question the learned Judge has overruled that plea on the ground that 1 the suit would be governed either by Article 120, in which case the period of six years would apply or Article 89 in which case no doubt the period would be three years; but it would run from the termination of the agency or from the date of the refusal to render accounts. In the present case it is not suggested that there was any demand and refusal to render accounts, and preferably it seems to me that Article 89 would apply having regard to the terms of the agreement between the parties. It may be said, however, that when Shivdeorao died in 1918, the arrangement of 1897 came to an end. Without expressing any opinion as to whether or not in virtue of that very arrangement Shivdeorao's widow was in the position of an agent within the meaning of Article 89, as the suit is brought within three years from Shivdeorao's death, it is clearly not barred.

3. It has been urged further in connection with this point, that as after 1890 there has been no rendering of accounts and no payments made by the defendant in respect of those items, the plaintiff's right to recover those items is extinguished. In the first place, though this point is mentioned in the plaint, no issue as to exclusion to the knowledge of the co-sharer for over twelve years from enjoyment of certain Immovable property was raised. It is assumed by the defendant for the purposes of this argument that these shares should be treated as Immovable property, and it is urged that the right of the plaintiff is extinguished. This point would require investigation on different lines altogether, and without allowing the plaintiff a further opportunity to adduce evidence on the point, it could not possibly be decided as desired by the defendant. There is no reason why such further opportunity should be allowed, and having regard to the

facts in the case, it seems to me that the point is without any substance. I have already referred to the various suits, in which the right was asserted by one branch or the other and either allowed by the Court or compromised by the parties. Under the circumstances it would be difficult to hold that there has been exclusion. The letter written by the defendant's kul mukhtyar on July 26, 1920, to the present plaintiff is sufficient to negative the suggestion of such exclusion.

4. The next question relates to the merits of the plaintiff's claim. As regards item No. 12 the lower Court has disallowed the plaintiff's claim as it was admitted by the plaintiff's father in an earlier proceeding that he had given up the claim to that item. In spite of the contention of the respondent against this conclusion, it is clear it must be accepted. The admission of the plaintiff's father is unequivocal, and there is no reason why the decree on this point should be altered. Apart from that, the learned Judge has considered in his judgment the different items in respect of which various arguments were urged, and has come to the conclusion on a consideration of the two documents, Exs. 48 and 92, that all these babs really belonged to the family, and that all the members of the family were interested therein. The wording of the letter written by the defendant's kul mukhtyar in July 1920 affords corroboration of the plaintiff's claim and indeed in the evidence of the defendant's kul mukhtyar, it has been practically admitted that all the suit babs are the private properties of the Vinchurkar family, that they are their ancestral properties, and that they belonged to three brothers Raghuathrao, Krishnarao and Madhavrao. It is urged on behalf of the defendant, as against the statement of his own kul mukhtyar, that, that was a mistaken statement as the witness was speaking without reference to the account books. That does not appear to me to afford sufficient ground for not accepting the statement of the witness. It is hardly necessary to deal with all these babs separately. It seems to me that in spite of the contentions urged before us on behalf of the defendant, the conclusion of the Trial Court on this point must be accepted. I only desire to add with reference to this point that these babs are of such a nature that it is possible that some of them may be found to be non-existent on taking accounts, or they may have existed, only for as time during the period in respect of which the accounts are to be taken. That, however, will be taken into consideration when the accounts are taken. All that we decide now is that any items in respect of these babs, if received by the defendant, should be accounted for.

5. In the result, therefore, I would confirm the decree of the Trial Court, subject to the reservation that on taking accounts no decree in respect of anything payable in respect of items Nos. 14, 19, 26 and 33 should be passed in favour of the plaintiff, unless he produces the necessary certificate under the Pensions Act before that time.

6. The appellant to pay the costs of the respondent in this appeal. The cross-objections are dismissed with costs.

Fawcett, J.

7. I concur in the judgment just delivered. With regard to the objection raised under the Pensions Act, the terms of Section 4 of that Act are very wide, and in view of the ruling of this Court in *Damodar v. Satyabhamabai* 31 B. 512 : 9 Bom. L.R. 889 and similar rulings such as *Babaji Hari v. Raja-Ram Ballal* 1 B. 75 : 1 Ind. Dec. 50 I do not think we can possibly say that this suit, so far as it relates to the four items Nos. 14, 19, 26 and 33, does not fall u/s 4.

8. In regard to the points of limitation which have been urged, the first question to consider is the nature of the relations between the plaintiff and the defendant. So far as the defendant, as the eldest representative of the family, collects the whole revenue, of which the three brothers were tenants-in-common there, clearly, in my opinion, is a relationship of principal and agent, the defendant being the agent of the plaintiff in respect of the recovery of the particular portion of that revenue, in regard to which he has a one-third share, and if that is the case, then Article 89 of the Indian Limitation Act, and not Article 62, is the proper Article to apply. In support of that I may refer to the ruling of this Court in *Gabu Naroba v. Zipru Ramsing* 59 Ind. Cas. 357 : 45 B. 313 : 22 Bom. L.R. 1289. But supposing that the relationship of principal and agent was broken by the arrangement of 1897, under which the plaintiff's father and the defendant's husband Shivdeorao agreed that the plaintiff might collect his share of certain items of revenue direct, then, if in contravention of that arrangement the defendant has collected the revenue that the plaintiff might have collected on his own account, the relationship becomes one of the defendant being a constructive trustee u/s 94 of the Indian Trusts Act. The defendant in that case would be practically in the position of a trustee de son tort by intermeddling and collecting this revenue; and her obligation to account still remains u/s 94 of the Indian Trusts Act. It is not open to her to say that she is a mere trespasser, and, therefore, not liable to account. In support of that I may refer to *Dhanpat Singh v. Mohesh Nath Tewari* 57 Ind. Cas. 805 : 24 C.W.N. 752. If in regard to certain items of the revenue the relationship is that of a trustee and cestui que trust, then the right Article to apply would, it seems to me, be Article 120 and not Article 62. Here, again, I may refer to rulings in cases similar to this, *Muhammad Habib-ullah Khan v. Safdar Husain Khan* 7 A. : A.W.N. (1884) 219 : 4 Ind. Dec. 254 and *Subba Row v. Rama Row* 32 Ind. Cas. 899 : 40 M. 291 : 2 L.W. 192 : 19 M.L.T. 134 : (1916) 1 M.W.N. 188 : 30 M.L.J. 341. But in my opinion it does not necessarily follow that the relationship of principal and agent that was originally between the parties was broken by the arrangement of 1897. There is a presumption of the continuance of the former relationship of principal and agent, and before we can conclude that, that relationship has been broken, some more definite acts than the mere passing of this agreement of 1897 are necessary. The actual facts are consistent with the continuation of the previous relationship by the mutual consent, no real effect having been given to the agreement of 1897, so far as it intended to alter the previous arrangement. Accordingly I hold that Article 89 of the Indian Limitation Act is the proper Article to apply to this suit, and I understand it has been so applied by this Court in previous litigation

between Shivdeorao and the representatives of the second branch of the family. That being so, the claim is not barred, and even if Article 120 is applied it would only knock off about one year.

9. I do not think there is any substance in Mr. Thakor's main contention that there had been exclusion of the plaintiff, which would bar his claim altogether. It seems quite clear that there have been prior claims of this nature, and the defendant's kul mukhtyar in his evidence admitted that some of these claims have been successful. For instance, with regard to the suit of 1906, he says that a decree was passed in his favour by arbitrators; in regard to this suit of 1914 there was a compromise, no doubt for a small sum, but still it goes against the theory of exclusion, and, as I have already said, the defendant cannot take advantage of the arrangement of 1897 and say she is not liable to account, if as a matter of fact she acts against that arrangement and herself collects the whole revenue.