

(1952) 08 BOM CK 0009
In the Bombay High Court
Case No : First Appeal No. 15 of 1949

Hubli Panjarapole and Others

APPELLANT

Vs

Saraswatevva Bayappa Kala Ghatki

RESPONDENT

Date of Decision : 29-08-1952

Acts Referred:

Civil Procedure Code, 1882 — Section 30
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8
Limitation Act, 1908 — Section 22

Citation : AIR 1953 Bom 334 : (1953) 55 BOMLR 227 : (1953) ILR (Bom) 789

Hon'ble Judges : Gajendragadkar, J;Chainani, J

Bench : Division Bench

Advocate : B.M. Kalagate, for the Appellant; P.V. Vaze, for the Respondent

Judgement

Gajendragadkar, J.

(1) This is an appeal by defendants 1 and 9 to 12 against the decree passed by the Civil Judge (S.D.), Hubli, directing them to deliver possession of the properties in suit to the plaintiff. The plaintiff is the daughter of Rayappa and her case was that after the death of her mother Chandawa she was entitled to the properties in suit. These properties are two fields Section Nos. 42 and 43 situated at Agrahar Timasagar and a house. These properties belonged to Rayappa who died leaving behind him three sons and four daughters. The last surviving son was Chandrappa. He died a minor. During his minority Rayappa's widow Chandawa alienated these properties as guardian of her minor son. On 25-9-1900, she mortgaged, all the three properties to Tejappa for Rs. 1,000. The interest agreed to be paid was 18 per cent, per annum & the period stipulated for repayment was six months. On 18-5-1904, Chandawa sold the two lands to Tejappa for Rs. 1,000 and in consequence the house which had been mortgaged by her along with the lands was released from mortgage. It appears that some time before the sale-deed was executed Chandrappa had died by plague. On 29-7-1905, Tejappa made a gift of these two lands to the Hubli Panjarapole, In

the present suit Saraswatevva the last surviving daughter of Rayappa claims to be the reversioner of the properties of her brother Chandrappa and she alleges that the alienations effected by Chandrawa were not binding on her and so she claims to recover the possession of the three properties in suit. Chandrawa died on 4-3-1932, and the present suit has been filed on 3-3-1944. Her claim with regard to the house has been dismissed. But she has succeeded in regard to the two lands, and it is with these two lands that we are concerned in the present appeal.

(2) The principal point which has been urged before us by Mr. Kalagate on behalf of the appellants is one of limitation. Mr. Kalagate contends that the suit is barred by limitation, because at the time when leave was obtained by the plaintiff under Order 1, Rule 8, to sue the Hubli Panjarapole by its members in a representative capacity, more than 12 years had elapsed after the opening of reversion. When the suit was originally filed, Hubli Panjarapole was defendant No. 1 by its Chairman Sangappa Nurusavirappa Korvi. This suit was filed in the Court of the Second Class Subordinate Judge at Hubli, but when it was registered the jurisdiction of the learned Sub-ordinate Judge had been enlarged. Even so on 21-2-1947, the plaintiff moved the learned judge to transfer the suit to the Civil Judge (S. D.) on the ground that the real valuation of the property was more than Rs. 5,000 and the learned Judge made an order returning the plaint to the plaintiff for presentation to the proper Court on the same day. This order is obviously wrong; because when the suit was registered, the learned Judge had pecuniary jurisdiction to try the suit. However, that very day the plaint was presented before the Civil Judge (S.D.). An application was made before him on 2-12-1947, by exh. 37 in which the plaintiff alleged that it was necessary to sue the Panjarapole in a representative capacity under Order 1, Rule 8, Civil P. C. She, therefore, asked for leave to convert her suit into a representative one under Order 1, Rule 8. The learned Judge granted the application and ordered notices to be issued to the persons interested in the Panjarapole. After the notices were thus issued, defendants Nos. 9 to 12 offered to come on the record and they were added on 8-1-1948. Now, Mr. Kalagate's contention is that this is a very stale claim and it may be technically within time on 3-3-1944, but he argues that as it was filed on this day, the suit was defective and would have been dismissed as incompetent. The defect was cured by the application made by the plaintiff on 2-12-1947. But this application cannot help the plaintiff to overcome the difficulty of limitation, because on this date the suit was clearly barred by time.

(3) The Hubli Panjarapole is an unregistered association with numerous members. Now, there can be no doubt that such an institution can be sued and can sue only under Order 1, Rule 8. In -- AIR 1922 109 (Bom.) , the plaintiff had sued in ejectment in his own name and the claim was made by him on the authority of a resolution passed by the managing committee of the caste authorising him as the president of the managing committee to file such a suit. A plea was raised that the suit was incompetent since it had not been filed under

Order 1, Rule 8, and it was upheld by this Court and the suit was dismissed. Macleod C. J. rejected the contention of the plaintiff based upon the resolution passed by the managing committee on the ground that the said resolution would not entitle the plaintiff to sue in his own name (p. 136) :

"...There being numerous members of the community."

observed the learned Chief Justice,

"having the same interest in the suit, notice of the institution of the suit to all such persons as well as the permission of the Court was necessary for filing the suit as provided in Order 1, Rule 8 Civil P. C."

A notice had in fact been given by the plaintiff, but it was found to be defective. In the result this defective suit was dismissed. The Allahabad High Court has applied the same principle to a suit by the secretary of a club in --"N. W. P. Club v. Sadullah", 20 All 497 (B) and so too in --"Michael v. Briggs", 14 Mad 362 (C), an action to recover the price of goods supplied to the member of a non-proprietary club or on his responsibility was held to be incompetent when it was filed only in the name of the secretary of the club. It was observed that the club was a mere association of gentlemen for social purposes, managing its affairs by a committee and a secretary. And when a suit is filed against such an association, the proper procedure to follow is to obtain leave of the Court under Order 1, Rule 8. Therefore, in our opinion, there cannot be any doubt that the suit originally filed against the Panjarapole by its chairman was defective and would have been dismissed if the plaint had not been subsequently amended.

(4) It is true that ordinarily leave has to be and should be obtained under Order 1, Rule 8, at the time of, the institution of the suit. Where there are numerous persons having the same interest in one suit, the Court should be invited at the outset to give leave to bring the suit in a representative capacity. If there are numerous defendants having the same interest, leave has to be obtained to bring the suit against them in a representative capacity, and when leave is granted, notice of the institution has to be issued to all persons as may be directed by the Court. Even so, it cannot be disputed that the suit would not be dismissed only on the ground that the requisite leave has not been obtained under Order 1, Rule 8, at the commencement of the proceedings; it would be open to a party to apply for such leave and to take such further action as is required by Order 1, Rule 8, even during the pendency of the suit. In -- "Fernandez v. Rodrigues", 21 Bom 784 (D), a Full Bench of this Court has held that the permission requisite u/s 30 of the Code of 1882, which corresponds to Order 1, Rule 8, can be granted even after the suit was filed. The point which was raised before the Full Bench was whether there was jurisdiction in the Court to entertain a suit where no leave has been obtained previously u/s 30 of the old Code, and the Full Bench held that there was no question of jurisdiction involved and it would be open to the Court to grant leave even after the suit is filed. Incidentally we may refer to the statement made by Mr. Justice Tyabji in his judgment wherein the learned

Judge observed (P. 786) :

"It is really a question of adding parties (when leave is granted under the said section)."

(5) Therefore, it was perfectly open to the learned Judge to have grafted leave under Order 1, Rule 8, on 2-12-1947. But that does not dispose of the point of limitation raised before us by Mr. Kalagate. The question which we have to consider is, if when leave was granted, the suit was already barred by limitation, can it be said that the leave which is granted operates retrospectively and that the suit in its present representative form, must be taken to have been instituted on 3-3-1944? Now, the legal position appears to be that on this day, the Hubli Panjarapole had not been properly sued and technically the suit against the Panjarapole would have been dismissed on that ground alone. It may perhaps be that by obtaining leave under Order 1, Rule 8, "new" parties "as such" are not added, but a defect in the suit is removed by bringing before the Court either directly or constructively all the constituent members of the Panjarapole. But if the suit was materially defective when it was filed and if for removing such defect additional parties had to be brought before the Court -- may be not in their own individual lights but as constituting the Panjarapole collectively -- it seems to us difficult to hold that the suit in this altered representative form could be said to relate back to the date on which the original suit was filed. It is clear that if parties are added under Order 1, Rule 10, Section 22 Limitation Act will come into operation and the proceedings against these added parties shall be deemed in the words of Tyabji J. to have been begun only on the service of the summons. In the present case it is possible to say that in the eye of law parties are added after leave is granted, under Order 1, Rule 8, and so the suit must really be taken to have been properly filed on 2-12-1947. But even if it is held that technically it is not a case of addition of "new" parties as such, technically again it is equally clear that it is a case where the suit has been properly filed for the first time when leave was obtained; and if that be so, the point of limitation raised before us by Mr. Kalagate must obviously be answered in his favour. It cannot be said that in the suit as it was originally filed the defendant institution had been merely misdescribed. In fact the said institution had not then been properly brought before the Court at all; and so it is only when action is taken under Order 1, Rule 8, that the suit is properly brought against the defendant. It is thus not a case of making a formal amendment in the plaint at all. The suit which would have been dismissed as having been improperly filed is allowed to be converted into a proper and competent suit and so this material alteration in the nature of the suit cannot operate retrospectively. That in our opinion is the true legal position.

(6) We may with advantage refer to the observations made by the Privy Council in -- "*Meyappa Chetty v. Subramanian Chetty*", AIR 1916 PC 202 (E), while they were dealing with Section 22, Straits Settlements Ordinance of 1896. This section is substantially the same as Section 22, Limitation Act. Dealing with the

said Section 22 their Lordships observed that (P. 205) :

"...(It) contemplates cases in which a suit is defective by reason of the person or one of the persons whom the right of suit is vested not being before the Court."

On this view, the said Section 22 has no application to cases in which the suit which was originally properly constituted as to parties has become defective because there has been a change or devolution of interest. Such cases do not fall within the mischief of Section 22. Applying this test if the suit which was first filed against the Panjarapole by its chairman alone was defective in the sense that the Panjarapole had not been properly sued at all, and if the defect was subsequently removed and the suit became a proper representative suit after leave was granted under Order 1, Rule 8, the provisions of Section 22 , Limitation Act must come into operation and the question of limitation must be dealt with on the basis that the proper suit against the Panjarapole was filed on 2-12-1947. In -- Seerangathuni Vs. Bava Vaithilinga Mudaliar, , Wallis J. and Ramesan J. were dealing with a claim made by one of the two executors against the widow of the testator. The widow pleaded that the plaintiff alone was not entitled to sue without joining his co-executor. The said co-executor was then added as a defendant. But on the date when he was added the widow's claim of adverse possession had become, complete though it was not complete at the time when the suit was originally filed. The question which the Court had to consider was whether the later addition of the co-executor to the suit as a defendant justified the claim of adverse possession made by the widow. Their Lordships held in favour of the widow. They took the view that the original suit was defective, and when the defect was removed, the claim made against the testator's widow had been barred by adverse possession. It seems to us that similar considerations would apply to the case with which we are dealing. Therefore, in our opinion, the suit must be deemed to have been properly filed as a representative suit on 2-12-1947, and if that be so, the claim made by the plaintiff is obviously barred by limitation.

(7) On this view, we do not think it is necessary to consider the question as to the legal necessity and inquiry on which the Judge has found in favour of the plaintiff and against the defendants.

(8) The result is the appeal succeeds and the plaintiff's suit is dismissed with costs throughout.

(9) Appeal allowed.