
(1934) 08 MAD CK 0025
In the Madras High Court

Ithikat Gopala Menon

APPELLANT

Vs

Kallingalath deceased Koyathi alias Abdul Azeez, legal
representatives Cherachan Veethil Puthan Pururayil Muhanod
Kutti and Others

RESPONDENT

Date of Decision : 27-08-1934

Acts Referred:

Citation : (1935) 41 LW 442 : (1935) 68 MLJ 244

Hon'ble Judges : Madhavan Nair, J

Bench : Division Bench

Judgement

Madhavan Nair, J.—Defendants 1 to 12 are the appellants. The suit is upon a bond executed by one Koyathi predecessor of defendants 1

to 12 in favour of plaintiffs 2 and 3. The third plaintiff in the suit has been transposed as the thirteenth defendant.

2. The question for decision in the second appeal is whether the plaintiff's suit is barred by limitation.

3. The bond was executed by Koyathi in connection with a chit fund in which he held a ticket. After obtaining his amount at the auction he entered

into the suit bond Ex. A which refers to his obligation to pay the various instalments that would be due from him on various future dates. Then it

says towards the end of the document:

If at any auction the amount therefor is not paid and default is made therein the amount that should be subscribed thereto as the balance left after

deducting the dividend therein, would be paid within a month with profit thereon at 2 per cent, per month, and if default is made therein also, all the

amounts that are seen to be paid in future after excluding those that have been paid till then, would be paid with profit thereon at 2 per cent, per

month dividend, interest or due date.

4. It has been found by the lower Courts that default occurred on the 23rd May, 1922. Koyatti did not pay the amount due on that date. Default

having occurred on that date according to the terms of the document the entire amount due by him became payable on the 23rd June, 1922. The

present suit was filed on the 3rd January, 1927. It is argued by the (plaintiffs) that having regard to Article 75 of the Limitation Act the suit is

barred by limitation. Article 75 deals with suits on promissory note or bond payable by instalments, which provides that if default be made in

payment of one or more instalments the whole shall be due. According to column 3 the period of 3 years mentioned in column 2 will run from the

time ""when default is made unless where the payee or obligee waives the benefit of the provisions and then when fresh default is made in respect of

which there is no such waiver"". Obviously according to this article unless waiver by the plaintiff is pleaded by the defendant time will start from the

date when the default is made. In this case that date is 23rd June, 1922 and under Article 75 the suit is clearly barred by limitation having been

brought more than 3 years after that date.

5. Mr. Kutti Krishna Menon for the appellant argues that the provision that the entire amount will become due when default is made is a provision

in favour of the creditor and he is at liberty to waive it and the cause of action arises at the end of each period when the money becomes due and if

so, the suit is not barred by limitation. For the purposes of this argument the plea of waiver need not be referred to. This question is whether on the

words of Article 75 this argument can be accepted. No decision directly bearing on the question has been brought to my notice. The decisions

under Article 132 of the Limitation Act which deals with suits on mortgage bonds in which Limitation is calculated from the time ""when the money

sued for becomes due"" as mentioned in the 3rd column of that article have no relevancy having regard to the fact that Article 75 is not applicable to

a suit on a mortgage bond. It is therefore unnecessary to refer to the various cases brought to my notice but the decision in *Lasa Din v. Mt. Gulab*

Kunwar (1932) L.R. 59 IndAp 376; ILR 7 Luck. 442 : 63 M.L.J. 187 may be referred to with advantage though that was a case which related to

Article 132 of the Limitation Act. In the course of that judgment their Lordships

of the Privy Council referred to a decision of the English Court

Reeves v. Butcher (1891) 2 Q.B. 509. That was a suit where also there was a provision that if money was not paid at the end of a particular

quarterly instalment the entire amount would fall due. Now, that decision was brought to their Lordships' notice with respect of the argument that

the cause of action arises only at the end of each instalment and not on the date when the default occurs. Their Lordships referring to that case said:

the question for decision would have fallen in India, not under Article 132 but under Article 75 which is in very special terms.

6. This observation is directly helpful in deciding the present case. The facts of that case with reference to the question of limitation and the present

case resemble each other and the learned judges expressed the opinion that such a case in India would fall under Article 75. The exact decision of

the Privy Council which refers to Article 132 is no doubt not applicable to the present case having regard to the fact that it deals with quite a

different article. Mr. Kutti Krishna Menon in support of his argument relied upon a decision in *Lalta Prasad v. Gajadhar Shukul* I.L.R.(1932) 55

All. 283. The learned judges in that case had no doubt a money bond before them to construe. They held following the Privy Council decision in

Lasa Din v. Mt. Gulab Kunwar (1932) L.R. 59 IndAp 376 : ILR 7 Luck. 442 : 63 M.L.J. 187 that though there was a provision that in case

default occurred the whole amount will be due the provision will not apply and the amount will become due after the expiry of the period. Of

course a distinction can be pointed out between the case in *Lalta Prasad v. Gajadhar Shukul* I.L.R.(1932) 55 All. 283 and the present case. In

that case the amount became payable when each instalment fell due. But I do not want to rely on this distinction for refusing to follow the decision

in *Lalta Prasad v. Gajadhar Shukul* I.L.R.(1932) 55 All. 283. It appears to me that the learned judges have not correctly applied in that case the

decision of the Privy Council case. As I have pointed out above the observations of their Lordships in the Privy Council case is in support of the

view I have taken. If the view propounded by Mr. Kutti Krishna Menon is accepted then it will follow that all suits to which Article 75 would apply

will also fall under Article 74 and Article 75 will have no place at all. This argument is put forward by King, J. in *Jawahar Lal Vs. Mathura Prasad*

and Another . The view of Mukerjee, J. in that case supports somewhat the argument of Mr. Kutti Krishna Menon but the majority view that

prevailed did not accept that learned judge's view. For the above reasons I am of opinion that the lower Court's decision that under Article 75 the

suit is barred by limitation is correct and must be upheld.

7. The next point raised by the learned Counsel is that in this case there has been a waiver. He says that the lower Court in arriving at the

conclusion that there has been no waiver has not viewed the evidence from the proper standpoint. In my view having regard to the plaintiff's case

no question of waiver can arise in this case at all, his case being that all the amount due till the date 18th December, 1923 from which period he

dates his cause of action has been paid. If so there is no room for pleading any waiver. It is admitted that a few instalments have been paid and the

appellant wants to get over that period by saying that he elected not to collect the amount but this is not the case put forward in the plaint and so

the argument based on waiver cannot be heard. For the above reasons I agree with the findings of the lower Court. This second Appeal fails and

must be dismissed with costs.