
(1990) 07 KL CK 0061
In the High Court Of Kerala
Case No : O.S. No. 393 of 1980

Jai Hind Oil Mills

APPELLANT

Vs

Kerala Electrical Allied Engineering Co. Ltd.

RESPONDENT

Date of Decision : 17-07-1990

Acts Referred:

Limitation Act, 1963 — Article 18, 26, 64, 18, 19

Citation : (1990) 07 KL CK 0061

Hon'ble Judges : S. Padmanabhan, J

Bench : Single Bench

Advocate : R.D. Sheno, for the Appellant; K.P. Balasubramanyan, Sally George and K.M. Kurian, for the Respondent

Final Decision : Allowed

Judgement

S. Padmanabhan, J.—The simple question for consideration in this appeal filed by the Defendant against a money decree is whether the claim is barred by limitation.

2. Exts. A-1 to A-3 are the three orders placed by the Respondent on 29th March 1974, 4th April 1974 and 28th August 1974 for fabrication and erection of tanks and fabrication and supply of trusses. The fourth one is for rectification of the defects of a transformer. The total claim was for Rs. 1,96,743.80. As on 8th October 1977, Respondent claimed Rs. 66,443.80 after deducting receipts. Ext. A-4 (a) is the statement of accounts sent along with Ext. A-4 letter to that effect. Thereafter, the Appellant paid Rs. 20,000.00 on 4th April 1978 and Rs. 22,000.00 on 14th August 1979. Balance claim is Rs. 24,443.80. Suit was filed on 8th October 1980.

3. No acknowledgment is pleaded in the plaint for saving limitation. Dates of cause of action mentioned in the plaint are those of Exts. A-1 to A3 in 1974, the date of demand in 1976 and the dates of payments in 1978 and 1979. The dispute is whether Article 18 or 26 of the Limitation Act will apply. Relying on the

decisions in *Bulakhidas Marwari v. Ganpatrao and Anr.* AIR 1956 Nag 112 and *Gordon Woodroffe and Co. Vs. Sheikh M.A. Majid and Co.*, trial Court found that Article 26 is applicable and Ext. A-4 (a) amounts to an account stated capable of counting a fresh period of limitation from that date. That is how the suit was decreed on the finding that it is not barred.

4. Under Article 18, time will begin to run from the date when the work is done because that is the date on which Plaintiff gets cause of action to claim the amount. That is, when no time is fixed for payment. In this case, no time is fixed. Even though some time is mentioned in Ext. A-1 order, that was not accepted and no claim is based on the time fixed in Ext. A-1. Under Article 26, time begins to run from the date on which accounts are stated in writing signed by the Defendant or his agent duly authorised on that behalf unless there is a simultaneous agreement in writing signed making the amount payable at a future date. There is no case that there was such a simultaneous agreement. The works were completed in March 1975 and normally by March 1978, the period of limitation is over unless there was an acknowledgment within that time.

5. It is the undisputed duty of the Plaintiff to satisfy the court that his plaint is within time. That must appear on the face of the plaint itself. Otherwise, u/s 3 of the Limitation Act, the court is bound to dismiss the suit though limitation is not pleaded as a defence. Dates of orders and dates of demand mentioned in the plaint are not the starting point of limitation. If there is an acknowledgment u/s 18, it must be in writing signed before the expiration of the period of limitation. The acknowledgment could be proved only by the signed writing and not by parole evidence. If exclusion of period is claimed u/s 19 on the basis of payment, it must also be before the expiry of the period of limitation and the acknowledgment of payment must appear in the handwriting of or, in a writing signed by, the person making the payment or an authorised agent. It is true that though the payment must be within time, the acknowledgment can be out of time also provided it is before suit. Proof of acknowledgment by payment could only be by the writing so signed. The acknowledgment, whether u/s 18 or 19, must be specifically pleaded in the plaint and proved by the signed writing. No such acknowledgments were pleaded and proved. The alleged payments on 4th April 1978 and 14th August 1979 not proved by any such acknowledgments are themselves out of time being after March 1978. This is a case in which the plaint as filed was prima facie barred by time.

6. Article 26 could be made applicable and the suit held within time only if Ext. A-4 (a) is treated as an account stated in writing signed by the Appellant or his duly authorised agent. It is only a statement of account sent by the Respondent to the Appellant and riot signed by him. From the subsequent payments, an inference may be possible that the Appellant accepted the correctness of Ext. A-4 (a). That may conclude him from disputing its correctness as it may amount to an admission. But that cannot amount to an account stated in writing signed in order to attract Article 26. Evidently, the claim is for price of work done and the

cause of action, in the absence of agreement to the contrary, will arise when the work is done. Article 18 alone could apply.

7. In *Gordon Woodroffe and Co. Vs. Sheikh M.A. Majid and Co.*, . Their Lordships dealt with two different instances of accounts stated. The first one is when, as in this case, accounts are submitted by one and accepted as correct by the other without any writing signed as required by Article 26. It is sufficient if the accounts are accepted as correct. Such acceptance could be inferred even from conduct without any writing. That is useful only for the purpose of preventing its correctness being disputed in future. But that will not give rise to a fresh starting point of limitation under Article 26 from the date of acceptance of the accounts. The Supreme Court made it clear that such accounts stated are no more than an admission of a debt out of court. *Bulakhidas Marwari's* case AIR 1946 Nag 112 does not appear to have laid down the law correctly and it was distinguished by a later decision of the same court in *Shambhoo Prashad v. Firm Dindyal Deokaran* AIR 1950 Nag 228 while dealing with Article 26 corresponding to old Article 64.

8. *Gordon Woodroffe and Co. Vs. Sheikh M.A. Majid and Co.*, dealt with a second type of account stated, which is the real account stated coming under Article 26. That is when the accounts contain items both of credit and debit on either side and they are adjusted and a balance struck. When several items of claims are brought into account on either side and set against one Anr. , a balance is struck and the consideration for the payment of the balance is the discharge of items on each side. That is the real accounts stated. 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 the parties mutually agree the several accounts 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 alone is payable. Such a transaction is bilateral and creates a new debt and a new cause of action. There are mutual promises, one side agreeing to accept the amount of the balance of the debt as true and pay it, the other side agreeing the entire debt as at a certain figure and then agreeing that it has been discharged to such an extent, so that there will be complete satisfaction on payment of the agreed balance.

9. These aspects were considered in *Smt. Sukhdei and Others Vs. Naipal Ram Jagannath Prasad*, which also followed *Gordon Woodroffe and Co. Vs. Sheikh M.A. Majid and Co.*, . None of these conditions are satisfied in the present case. It is true that the payment evidenced by cheque, which is encashed by the opposite side, may satisfy the requirements of Section 19 of the Limitation Act, as held in *A.R. Krishnaswami Iyer v. M.N. Ramakrishna Iyer* AIR 1945 Mad 515. It is said that the two payments on 4th April 1978 and 14th August 1979 were by cheques and when taken along with Ext. A-4 (a), they will amount to acknowledgments u/s 19. No such acknowledgments by cheques were pleaded and the cheques were not produced. As earlier stated, the acknowledgments could be proved only by the writings and they must be within the period of

limitation also. The trial Court went wrong in finding that Article 26 is applicable and the suit is within time. There is no account stated in writing signed to attract Article 26. The suit is beyond time. Article 18 alone will apply and the claim was barred in March 1978.

Appeal is allowed. The judgment and decree are set aside and the suit is dismissed as barred by limitation. No costs.