

(1938) 07 BOM CK 0003
In the Bombay High Court
Case No : O.C.J. Suit No. 410 of 1938

Karbalai Gulam

APPELLANT

Vs

Haji Ebrahim Busheri and Co.

RESPONDENT

Date of Decision : 18-07-1938

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 48
General Clauses Act, 1897 — Section 6
Limitation Act, 1871 — Section 2

Citation : AIR 1939 Bom 342 : (1939) 41 BOMLR 518

Hon'ble Judges : Engineer, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Engineer, J.—This is a summons for judgment, and the first point that arises is whether as submitted by the defendants the suit as a summary suit is barred by the law of limitation.

2. The article applicable in summary suits is Article 5, which as it originally stood, provided a period of one year. That article was amended by an amendment which came into force on January 15, 1938. By this amendment the period of limitation is increased to three years. It is common ground that before January 15, 1938, more than one year had expired from the accrual of the cause of action, so that if the original article applies, the plaintiffs are not at liberty to file this suit as a summary suit. The plaintiffs however contend that the amendment is retrospective and that the Indian Limitation Act in force when the suit was filed was the Act as amended, and therefore the period of limitation applicable is three years.

3. The Indian Limitation Act of 1859 provided by Section 18 that all suits that might then be pending or that should be instituted within the period of two years from the date of the passing of that Act should be tried and determined as if that Act had not been passed, but all suits to which the provisions of that Act were

applicable and which might be instituted after the expiration of the said period should be governed by that Act and no other law of limitation, any statute, Act or Regulation then in force notwithstanding.

4. In the Limitation Act of 1871 which received the assent of the Governor General on March 24, 1871, and which came into force on July 1, 1871, it was expressly provided that nothing contained in Sections 2 and 3 or in parts II and III applied to suits instituted before April 1, 1873. Sections 2 and 3 and Parts II and III of the Limitation Act of 1871 make up the whole of that Act except the last Part, viz., Part IV which refers to the acquisition of ownership by possession.

5. Thus in both the Acts of 1859 and 1871 express provision was made for cases where suits were filed after the coming into operation of the respective Acts up to a certain period.

6. When we come to the Limitation Act of 1877 we find that it provided in Section 2 that all references to the Limitation Act of 1871 should be read as if made to the Act of 1877, and that nothing contained in the Acts of 1871 and 1877 should be deemed to affect any title acquired or to revive any right to sue barred under the Act of 1871 or under any enactment thereby repealed.

7. In (1888) L.R. 15 I.A. 167 (Privy Council) their Lordships of the Privy Council observed that if the later Acts of Limitation altered the law they would not revive the right of suit. The Limitation Act under which the suit was barred was the Act of 1859.

8. In (1892) L.R. 20 I.A. 30 (Privy Council) the Privy Council held that on April 1, 1873, the plaintiffs' suit was barred by the law of limitation under the Act of 1871, and that the Act of 1877 could not revive the plaintiff's right so barred.

9. The provision aforesaid no longer appears in the Limitation Act, but there is a general provision now appearing in the General Clauses Act of 1897, Section 6 of which provides that the repeal of an enactment shall not revive anything not in force or existing at the time when the repeal takes effect ; or affect the previous operation of any enactment so repealed.

10. In *Vinayak Govind and Narayan v. Bobaji* ILR (1879) 4 Bom. 230 the Appeal Court held that a claim barred by limitation when Act IX of 1871 came into force was not revived by the passing of that Act. In the Limitation Act of 1859 the period of limitation for recovering a deposit was three years from the date of the deposit. The deposit was made on December 12, 1864, and the accounts in question were adjusted in July, 1865. In 1871 a new Act of Limitation came into force which provided a period of three years from, the date of the demand as the period of limitation for recovering a deposit. The plaintiffs made a demand in April, 1877, and filed a suit on June 25, 1877. It was held that the suit was barred by the law of limitation.

11. This decision was followed in *Mahomed Mehdi v. Sakinabai* ILR (1912) 37 Bom. 393 : 14 Bom. L.R. 908. That was a suit for restitution of conjugal rights.

The husband demanded restitution by his letter of July 11, 1906, and the wife refused the demand on July 19, 1906. In the Limitation Act of 1871 there was an article, viz., Article 35, which provided a period of two years from the date of demand and refusal as the period of limitation for suits for restitution of conjugal rights. In 1908 the present Limitation Act came into force by which Article 35 was repealed. On June 16, 1911, the husband made a fresh demand, and the demand not being complied with by the wife, he filed a suit on June 20, 1911. It was held that the plaintiff's right to sue had become barred under Act XV of 1877, and that it could not be revived by Act IX of 1908 which repealed Article 35 of the earlier Act. Mr. Justice Heaton, who decided the suit in the first instance, considered himself bound by the authority of *Vinayak Govind and Narayan v. Babaji*, although he himself was of a different opinion. The matter was taken to the Appeal Court and the Court of Appeal consisting of Sir Basil Scott C.J. and Mr. Justice Chandavarkar affirmed the law laid down in *Vinayak Govind and Naraym v. Babaji*.

12. On behalf of the plaintiffs *Gopaldas v. Tribhowan* ILR (1920) 45 Bom. 365 : 22 Bom. L.R. 1420 was cited in support of their submission. In that case it was held that Section 48 of the Code of Civil Procedure, 1908, has a retrospective effect but this decision proceeded on the ground that Section 154 of the Code clearly contemplated a retrospective effect of the Code and an interference with rights acquired under the old Code, and that therefore there was a different intention within the meaning of Section 6 of the General Clauses Act.

13. I, therefore, hold that it was not competent for the plaintiffs to file the suit as a summary suit.

14. The question then arises as to what order I should make in the matter. In my opinion it is not necessary to dismiss the suit. The filing of the suit is not barred, only the right to file a summary suit is barred. If the Prothonotary had refused to accept it as a summary suit the plaintiffs could have got it put on the file as a short cause or a long cause. The order I, therefore, make is that the suit be transferred to the list of long causes.

15. As regards the merits of the defence it is not necessary for me to say more than that the defence is of such a character that the Court would be justified in directing an early hearing of the suit. I direct the defendants to file their written statement within four weeks. Parties to make their respective affidavits of documents within ten days thereafter, usual inspection forthwith thereafter, and the suit to be on some board for hearing on November 14, 1938.

16. As regards the costs of the chamber summons, the plaintiffs have chosen a wrong method of procedure and I direct the plaintiffs to pay the costs of the chamber summons. Counsel certified