
(1957) 03 AHC CK 0042
In the Allahabad High Court
Case No : First Appeal No. 409 of 1946

Khairul Bashar

APPELLANT

Vs

Thannu Lal and Others

RESPONDENT

Date of Decision : 19-03-1957

Acts Referred:

Limitation Act, 1908 — Article 145, 36, 49, 62, 10
Trusts Act, 1882 — Section 3, 5

Citation : AIR 1957 All 553

Hon'ble Judges : Desai, J; Beg, J

Bench : Division Bench

Advocate : N.D. Pant and Vishwa Mitra, for the Appellant; Baleshwari Prasad, Radha Krishan, Kedar Nath and O.N. Mehrotra, for the Respondent

Final Decision : Dismissed

Judgement

Beg, J.—This is a first appeal by defendant No. 1 in the suit. The trial Court has passed a decree for Rs. 20,764/14/- with proportionate costs in favour of a Committee consisting of plaintiff No. 10 Babu Prahlad Das, plaintiff No. 11 Babu Girdhar Das and defendant No. 2 Abut Latif against defendant No. 1 Kharul Bashar Proprietor of the firm Haji Abdullah Daniyal. It would appear that in Qasba Mau Nath Bhanjan, Pergana Mau, District Azamgarh, there is a firm named Sheo Ram Baleshwar Prasad. The proprietor of this firm was one Sheo Ram. Sheo Ram is defendant No. 5 in the suit. His firm used to do business in yarn. In 1942, Sheo Ram became heavily indebted. According to the plaintiff's case, in August 1942 there was a rumour that Sheo Ram had become insolvent.

On the 17th of August, 1942, he had closed his shop. This resulted in a rush of creditors who went to Sheo Ram, and insisted on payment of the debts due to them. Sheo Ram expressed his inability to pay the debts in cash. He, however, said that he had 44 bales of yarn and 900 tolas of silver which he entrusted to his creditors to enable them to convert the same into cash and distribute the proceeds among themselves. The creditors for whose benefit 44 bales of yarn

and 900 totals of silver were handed over, are arrayed as plaintiffs Nos. 1 to 11 and defendants Nos. 6 to 12, Defendants 6 to 12 are styled as defendants-fifth party in the present case.

Defendant No. 5 also executed a writing on the same date in favour of his creditors. This writing is Ext. 15. The creditors of defendant No. 5 collected together and appointed a Committee consisting of three persons, namely, plaintiff No. 10 Babu Prahlad Das, Plaintiff No. 11 Babu Girdhar Das and defendant No. 2 Abdul Latif mentioned above to arrange for the distribution of the sale proceeds of the above property. For the purpose of negotiating the sale, Babu Prahlad Das was appointed as the intermediary.

The formal agreement incorporating the above arrangement was executed by the creditors on the 1st September, 1942. This agreement is Ext. 12. The goods were entrusted to defendant No. 1 by the creditors, as defendant No. 1 was a firm in whose respectability and integrity the creditors placed reliance and trust. The arrangement was that he would sell the goods on chits to be issued by Babu Prahlad Das, that he would keep the sale proceeds in deposit with him and that he would hand over the same for distribution to the creditors after the money was collected.

2. According to the plaintiff's case, 22 bales of yarn were purchased by defendant No. 3, 1 bale by defendant No. 4, 2 bales by defendant No. 12, 2 bales by plaintiff No. 3 and 2 bales by plaintiff No. 10. The entire price of 29 bales of yarn sold to the said parties was about 9,364/14/- which was kept by defendant No. 1 by way of deposit. As to the remaining 15 bales of yarn, the evidence of the plaintiffs is that that was also sold off by defendant No. 1. The value of 44 bales of yarn entrusted to defendant No. 1, according to the allegations in the plaint, was Rs. 19,764/14/- and the price of silver weighing 900 tolas was Rs. 1000/- thus the total price of the yarn and silver entrusted to defendant No. 1, according to the plaintiffs was Rs. 20,764/14/-.

The plaintiffs further claimed an amount of Rs. 5,607/- as interest. They, therefore, prayed for a decree of a total amount of Rs. 20,764/14/- plus Rs. 5,607/- i.e., Rs. 26,371/14/- with pendente lite and future interest against defendant No. 1. In the alternative, they prayed for a decree of Rs. 9,364/14/-, the price of 29 bales of yarn sold by defendant No. 1, and recovery of silver weighing 900 totals and the remaining 15 bales of yarn of the same quality as was entrusted to defendant No. 1 by the creditors.

3. Defendant No. 1 denied the plaintiff's claim, He set up a different version of the story. According to him, only thirty-eight and a half bales of yarn and some silver ornaments weighing 286 tolas were entrusted to him on the 17th of August 1942. He, however, alleged that the entrustment was not by the plaintiffs and defendants fifth party, but by defendant No. 5 Sheo Ram. The reason for this was that defendant No. 5 was a Congressman, and he was afraid that he might be arrested in August disturbances.

Defendant No. 1 had, therefore, taken custody of the said goods on behalf of defendant No. 5. On the chits issued by defendant No. 5 dated the 17th August, 1942 he paid Rs. 3,656-4-0 to Hafiz Sayeed of Orai on 28th August, 1942. On another chit of defendant No. 5 dated the 19th August, 1942, he paid Rs. 3,810/- to Haji Mohammad Umar Mohammad Zahur on the 26th August, 1942. On a third chit issued by defendant No. 5 in November, 1942, he paid Rs. 6,206/4/- to the firm M. Sadiq & Co. defendant No. 12 through its manager Noor Mohammad.

He alleged that he had no knowledge of any agreement of the 1st September 1942 among the creditors. After making the above payments, according to him, he had handed over the remaining goods to defendant No. 5 and obtained a discharge from him. He further alleged that the suit was filed against him as a result of enmity and was not legally maintainable. He also pleaded that the suit was barred by limitation.

4. Defendant No. 3 pleaded that he had been wrongly impleaded as he had purchased some yarn from defendant No. 1 who was authorised to sell it. Defendant No. 4 contested the suit on the ground that he was not aware of any agreement or settlement as alleged by the plaintiffs. Defendant No. 5 pleaded that no amount was due from him, as he had given 44 bales of yarn and 900 tolas of silver to the plaintiffs and other creditors in full satisfaction of liabilities. Defendant No. 12 pleaded that he had no knowledge of the allegations in the plaint. Defendants Nos. 2 and 6 to 11 were absent and the suit was heard ex parte against them.

5. The trial Court found that the goods were entrusted to defendant No. 1 as alleged by the plaintiffs, that defendant No. 1 had failed to return the price of the goods or their value to the plaintiffs and that the suit of the plaintiffs was not barred by limitation. It, accordingly, passed a decree for Rs. 20,764/14/- in favour of three members of the Committee against defendant No. 1 as mentioned above,

6. Dissatisfied with the said judgment and decree, defendant No. 1 has filed this appeal.

7. The first question to be determined in this case is one of fact. It is admitted on behalf of defendant No. 1 that certain goods were entrusted to him on the 17th of August 1942. It is also admitted that the goods entrusted to him, originally belonged to defendant No. 5, namely, Sheo Ram. According to the plaintiffs' version, the goods were entrusted to defendant No. 1 by the creditors, and defendant No. 1 was holding them on their behalf; on the other hand, according to the case of defendant No. 1, the goods were entrusted to him not by the creditors but by defendant No. 5, the debtor, and that defendant No. 1 was to sell the goods and pay the amount according to the directions of defendant No. 5. In other words, he was to hold the goods on behalf of defendant No. 5 and not on behalf of the plaintiffs and defendants-fifth party.

8-17. Having heard learned counsel for the parties and given our earnest consideration to this matter, we are of opinion that the probabilities of the case favour the plaintiffs' version. (After discussing the documentary and oral evidence his Lordship continued:)

18. The next argument advanced on behalf of the appellant is that there is no sufficient evidence to prove the valuation of 44 bales of yarn and 900 tolas of silver alleged to be delivered by defendant No. 5. So far as silver is concerned, the judgment of the trial Court states that its valuation at Rs. 1,000/- is not said to be excessive on behalf of defendant No. 1, Its price as Rs. 1,000/- should, therefore, be taken to have been indirectly admitted.

19. As to the value of 44 bales of yarn, reliance on behalf of the respondent is sought to be placed on the statement of Babu Prahlad Rai who stated in his evidence that he knew that Rs. 20,000/- or Rs. 22,000/- had been realised by the sale of the disputed goods. He is not exact about the price. His statement on the point is obviously hearsay, because he could not be present at the time when the goods were sold by defendant No. 1 to various purchasers. In the plaint itself it is stated that apart from 29 bales of yarn worth about Rs. 9,364/14/-, the plaintiffs were unable to state exactly whether the remaining 15 bales of yarn were sold by defendant No. 1 or not. Babu Prahlad Rai is plaintiff No. 10 in the plaint. Under the circumstances, the above evidence is obviously insufficient to prove the value of 44 bales of yarn.

20. Learned counsel for the respondents was unable to point out any other oral evidence proving the value of 44 bales of yarn. He, however, referred to four documents as indicating the price of the yarn which was in the custody of defendant No. 1. These documents are: Ext. 13, Ext. 14, Ext. B-I and Ext. 15. Exhibit 13 is a slip in favour of the firm. Dilsukh Rai Jai Dayal. It proves that 2 bales of yarn were sold to them for Rs. 520/-. Ext. 14 is a slip in favour of the firm Ram Baran Ram Raghunath Prasad. This proves that two bales of yarn were sold to the said firm for Rs. 517/12/-. Exhibit B-I is a slip in favour of the firm Sardha Prasad Moti Lal. It shows that 22 bales and 12 bundles were sold to him for Rs. 7,517/6/-. Exhibit A-15 is a receipt for an amount of Rs. 3,810/- which is said to have been, paid to the firm Hafiz Mohammad Umar Mohammad Zahoor by defendant No. 1. The total of the sums referred to in the above documents come to Rs. 12,365/2/-.

21. Learned counsel for the respondent was unable to point out any other evidence on which he relied for the valuation of the bales in question. Under the circumstances, it must be held that so far as the plaintiffs are concerned, they have succeeded in proving the valuation of the yarn to the extent of Rs. 12,365/2/- only. Adding Rs. 1,000/- which is the price of 900 tolas of silver, the total amount which they can recover in this suit comes to Rs. 13,365/2/-only.

22. Lastly, the learned counsel argued that the suit of the plaintiff was barred by limitation. He contended that the suit was barred by Article 36 of the Limitation

Act. On the other hand on behalf of the plaintiffs-respondents, it was argued that Section 10 of the Limitation Act applies to the present case, and hence the bar of limitation did not apply at all. In the alternative, it was argued that Article 145 or Article 49 or Article 62 of the Limitation Act applied to the present case, and the suit was, therefore, not barred. Having heard learned counsel for the parties, we find it difficult to accept the argument on behalf of the respondents based on Section 10 of the Limitation Act or on Articles 145, 49 or 62 of the Limitation Act. Section 10 of the Limitation Act appears to us to be inapplicable to the facts of the present case.

Section 10 of the Limitation Act will be applicable only "against a person in whom property has become vested in trust for any specific purpose." A trust is an obligation annexed to the ownership of the property (vide Sections 3 and 5 of the Trusts Act), It is an essential condition of trust that property must vest in the trustee. Unless, therefore, the trustee is constituted as the owner of the property entrusted to him, a trust cannot be said to have been constituted. Reference in this connection might be made to cases reported in *Hussain Ali v. Baqir Ali*, AIR 1946 Mad 116 (A); *Shri Mahadeoji v. Baldeo Prasad*, AIR 1941 Nag 181 (B) and *Khemchand Ramdas v. Girdharidas Radhakishaindas* AIR 1947 Sind 187 (C); *Ma Thein May v. U Po Kin* AIR 1925 Rang 289 (D) and *Secretary of State for India v. Guru Proshad Dhur* ILR 20 Cal 51 (FB) (E).

In the present case, defendant No. 1 cannot be said to be the owner of the property. A mere manager or agent holding property on behalf of another cannot be considered to be a trustee within the meaning of Section 10 of the Limitation Act. Unlike English law, the Indian law does not recognise a difference between legal and equitable estates. Where, therefore, the property is vested in the trustee, the owner must be the trustee. In the present case, no element of ownership of the property entrusted passed into the hands of defendant No. 1, He was only holding the property on behalf of the creditors. Where a person merely holds a property in custody on behalf of another, he cannot be said to be a trustee. The mere fact that a person is holding the property on behalf of another, will not constitute him a trustee, unless the ownership of the property is also vested in him.

23. On behalf of the respondents, reliance was placed on certain observations made in a Full Bench decision of the Madras High Court reported in *Kishtappa Chetty Vs. Lakshmi Ammal*, to the effect that mere control of the property is quite enough to vest the property u/s 10 of the Limitation Act. We find it difficult to agree with the view expressed therein. The respondents' counsel also relied on *C.T.V.E. Vairavan Chetty and Others Vs. Chettichi Achi*, . The observations contained in this case with regard to Section 10 are mere obiter, as it was held in that case that even if Section 10 did not apply, the suit would be barred by limitation, For the above reasons, we are of opinion that Section 10 has no application to the present case.

24. Article 145 of the Limitation Act has also, in our opinion, no application to the

present case. It applies only to a suit "against a depositary or pawnee to recover moveable property deposited or pawned." The present suit was not a suit for the recovery of the specific movable property that was deposited. The main relief claimed by the plaintiffs was the recovery of Rs. 26,371-14-0 which represented the price of the goods deposited and the interest on the same.

In the alternative, the plaintiffs claimed in their plaint that a decree might be passed for an amount of Rs. 9,364/14/-, the price" of 29 bales of yarn and silver weighing Rs. 900/- and for the recovery of 15 bales of yarn of that very quality which was deposited with defendant No. 1. Thus, the alternative relief for the recovery of 15 bales of yarn also did not relate to the specific goods that were deposited. All that the plaintiffs wanted was the delivery of goods of a like or similar quality. Further the entire evidence of the plaintiffs was to the effect that all the goods had been sold by defendant No. 1 and the price kept with him. Such a suit, therefore, cannot by any stretch of imagination be described to be a suit for the recovery of specific moveable property deposited or pawned. Article 145, therefore, can have no application.

25. Article 49 also relates to a case for the recovery of specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same. As already observed, the plain- tiffs are not claiming any specific property in the plaint; hence the first part of Art. 49 does not apply, Further, the plaintiffs' case is not based on Compensation for wrongfully taking or injuring or wrongfully detaining any specific moveable property; hence the second part of Article 49 has also no application to the present case.

26. Lastly, reliance was placed on behalf of the respondents on Article 62 of the Limitation Act which relates to a suit ""for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use". According to column 3 of the first Schedule, period would begin to run for such, a suit from the time when the money is received. In order, therefore, to attract the application of Article 62, the facts should be such as to entitle the plaintiff to claim receipt of the money forthwith from the defendant.

In other words, the defendant should be liable to pay the money to the plaintiff as soon as it is received; vide *U Sein Po v. U Phyu* AIR 1930 Rang 21 (H) and *The District Board of Ramnad Vs. D.K. Mahomed Ibrahim Sahib and Another*, . In the present case, the defendant No. 1 was to keep the money in deposit with him until the entire amount of goods were sold off and to hand it over to the plaintiffs only on demand. Under these circumstances, Article 62 of the Limitation Act also has no application.

27. Article 36 of the Limitation Act relates to a suit "for compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for". On behalf of the respondents, it is argued that this Article is not applicable as there was contract in the present case with defendant No. 1 that he would return the goods to the plaintiffs. There was, no doubt, an

agreement between the creditors and defendant No. 1 that defendant No. 1 should hold the goods on behalf of the creditors and should pay its price to them on demand. It is, however, the admitted case of parties that there was no consideration for this agreement.

It was a voluntary undertaking on behalf of defendant No. 1. It cannot therefore, be said that there was any contract between the creditors and defendant No. 1. The words "malfeasance", "misfeasance" and "non-feasance" cover a wide range of cases. Malfeasance would apply to a case where an act prohibited in law is done by a person. Non-feasance would apply to a case where a person omits to do some act prescribed by law, and misfeasance would apply to a case where a lawful act is done, in an improper manner.

In the present case, the defendant No. 1 was, bound to pay the money to the plaintiffs. He has failed to do that. His action would, therefore, be covered by Article 36 and the period of limitation would be only two years vide Court of Court of Wards Vs. L. Ajodhia Prasad and Another, . According to column 3 of the first Schedule, however, time begins to run for the said suit when malfeasance, misfeasance or non-feasance takes place. In the present case, the cause of action for the suit under Article 36 would arise only after refusal had been made by defendant No. 1 to deliver the goods or their price. According to para 20 of the plaint, the defendant No. 1, finally refused to make payment in July, 1945. The present suit was filed on the 7th of August, 1945. Therefore, the suit would be within limitation.

28. On behalf of the appellant, however, reliance was placed on the evidence of P. W. 3 Bechan Lal, who stated in cross-examination that the Committee members had demanded money from defendant No. 1, who said that he had paid it to defendant No. 5. The creditors then kept quiet. This witness further stated that he left service 7 or 8 months after that. He has also stated that he was a Munim for about a year after the agreement dated the 1st September, 1942 was executed. From this, it is argued that the cause of action had accrued some time in December, 1942 or January, 1943.

The evidence of Bechan Lal is not quite clear on the question as to the time or date of refusal. He stated that the money was demanded by the Committee members. This statement cannot possibly be correct, because even according to the defendant's own evidence, Abdul Latif who was a member of the Committee, had left the station shortly after the agreement. The statement itself is not quite definite.

29. On behalf of the applicant, reliance is also placed on the statement of Babu Prahlad Rai who stated that the sale proceeds were demanded from defendant No. 1 four or five months after the goods were sold, but he did not pay it. Babu Prahalad Rai, however, has not stated that defendant No. 1 had refused to make the payment. He merely put off Babu Prahlad Rai on the ground that Abdul Latif had gone away, and in his absence, nothing could be done. P. W. Girdhar Das

stated that defendant No. 1 did not distribute the sale proceeds among the creditors and he used to put off the creditors by saying that it would be distributed when Abdul Latif returned.

The plaintiffs' case that defendant No. 1 was putting off the payment of money on the ground that Abdul Latif had not come back appears to be supported by probabilities. This is the reason alleged by the plaintiffs for the delay caused in filing the present suit. The fact that Abdul Latif was absent is admitted on behalf of defendant No. 1 himself. There appears to be no reason why the plaintiffs should have remained silent, unless the defendant No. 1 had been putting them off on this excuse. Under these circumstances, we are of opinion that defendant No. 1 was putting off payment on the excuse that Abdul Latif had not come back, and that final refusal by defendant No. 1 did not take place until July, 1945. In this view of the matter, the plaintiffs' suit would be within limitation.

30. In view of the findings given by us above, the appeal of the defendant would succeed only to this extent that the amount of money decreed in favour of the Committee would be reduced from Rs. 20,764/14/- to an amount of Rs. 13,365-2-0. With the above modification in the decree of the trial Court, this appeal is dismissed. The parties shall be entitled to proportionate costs.

31. A cross-objection has also been filed on behalf of the respondents Nos. 10 and 11. This cross-objection relates to past, pendente lite and future interest. It was, however, not pressed before us and is dismissed with costs.