

(2004) 10 KL CK 0008
In the High Court Of Kerala
Case No : A.S. No. 468 of 1992

Kuttappan Achari

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 28-10-2004

Acts Referred:

Evidence Act, 1872 — Section 110
Limitation Act, 1963 — Article 113, 58

Citation : (2005) 1 KLT 273

Hon'ble Judges : R. Bhaskaran, J

Bench : Single Bench

Advocate : S. Venkatasubramanya Iyer and V. Giri, for the Appellant; C. Kochunny Nair, Dale P. Kurien, S. Arun Raj and Rajasree, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

R. Bhaskaran, J.—This appeal is filed by the plaintiff in O.S.No. 570 of 1987 on the file of the Additional Subordinate Judge's Court, Kottayam. The suit was for declaration of title over plaint schedule movables and recovery of possession of the same from the 3rd defendant or for realisation of its present value from defendants 1 and 2.

2. The plaintiff is the Proprietor of Govinda Jewellery, Kayamkulam. He is also an active member of the All Kerala Gold and Silver Merchants Association. It is stated in the plaint that on 18.9.1981 he was taken into custody by the 2nd defendant from his business premises without any arrest warrant. It is also stated that the moment the plaintiff entered in the Changanacherry Police Station the 2nd defendant without even putting a question slapped the plaintiff on his checks with the palm of his hand and pointing to the 4th defendant behind the bar, threatened the plaintiff that his place also will be there unless the plaintiff would make available some gold ornaments alleged to have been stolen by the 4th defendant. The plaintiff denied having received any gold or gold

ornaments from the 4th defendant. The 2nd defendant stated in the presence of the 4th defendant that he had told him that he had given the stolen ornaments to the plaintiff and the 4th defendant denied any such statement having been made to the 2nd defendant. The plaintiff was also about to be put inside the cell where the 4th defendant was put. Being afraid of bodily harm to the plaintiff, the plaintiff agreed to do whatever the 2nd defendant wanted him to do. The 2nd defendant wanted the plaintiff to make available to him the four items of gold ornaments of varying weights and an ingot of 112 grams weight, all 18 ct. (total 157.500 grins.). Since the plaintiff agreed, he was sent to Kayamkulam with direction to take the Articles by 23.9.1981 at the latest to the 2nd defendant. It is further stated in the plaint that the plaintiff called his gold smith Nagarajan and arranged with him to have the gold ornaments and ingot made ready by 23.9.1981 and the plaintiff took the same to the Changanacherry Police Station on 23.9.1981. The 2nd defendant asked the plaintiff and Viswanathan Achary, who accompanied the plaintiff, to put their signatures on a paper. The 2nd defendant has created a recovery mahazar of the schedule articles as having been recovered from the plaintiff's shop at Kayamkulam and as pointed out by the 4th defendant. The 4th defendant was never brought to the plaintiff's shop on 23.9.1981. The plaintiff had got all accounts of his business and he had truly recorded the fabrication of ornaments and the gold ingot in his books of account. The plaintiff produced those accounts along with the plaint. The Government by G.O.(Rt) No. 1371/8 I/Home dated 16.6.1981 has debarred from forcing the gold merchants to part with gold articles unless they admit of having received stolen ornaments. The plaintiff also filed a claim petition regarding the movables before the Court of Judicial Magistrate of the I Class, where the case against the 4th defendant was being tried. That petition was rejected and the appeal filed against that order was also rejected. In CrI.R.P.No. 730 of 1983, this Court though dismissed the revision, gave liberty to the plaintiff to file a civil suit to establish title over the gold ornaments and expunged all observations of the lower Court adverse to the plaintiff. After the conviction of the 4th defendant, the articles were given to the 3rd defendant. They were handed over to the third defendant when the CrI.R.P. was pending. The revision was disposed of on 3.10.1986. Defendants 1 and 2 are liable to pay damages to the plaintiff for the unlawful restraint and injury and the 3rd defendant liable to return the gold ornaments and ingot or its value.

3. Defendants 1 and 2 filed a written statement contending that the plaint schedule gold items were stolen properties belonging to the near relatives of the 3rd defendant. On complaint from the 3rd defendant, the 4th defendant was arrested and on information given by the 4th defendant the gold ornaments were recovered. The Magistrate found the 4th defendant guilty of the offence, convicted and sentenced him to undergo rigorous imprisonment for two years. The conviction and sentence were upheld by the Appellate Court. Thereafter, the Magistrate released the gold ornaments and gold ingot to the third defendant. The allegation of detention and manhandling are ill-founded.

4. In the written statement filed by the third defendant, it was contended that in the night of 24.7.1977 gold ornaments weighing 60 sovereigns and other gold articles were stolen by breaking open the almirah. The gold articles belonged to his mother, father, two married sisters and one unmarried sister and the daughter of mother's brother. The matter was reported to the police on 25.7.1977 by the third defendant. Item No. 1 is a gold ring with mark T.J.T." belonging to his father. Item No. 2 is a gold ring with blue stone belonging to his sister who got it from his father. Item No. 3 gold wrist chain belonged to his sister's daughter. Item No. 4, two bangles, belonged to his sister. The ingot, item No. 5, is of the gold ornaments which were stolen. In the mahazar prepared by the investigating officer for recovery, the plaintiff was an attestor and he never made any complaint about it. It was only on a subsequent thought that the suit was filed. The plaintiff has no title over the ornaments or the ingot. Since the owners of the ornaments and gold ingot are not impleaded, the suit is not maintainable. He has prayed for dismissal of the suit.

5. The Trial Court framed the following issues:

1. Is the suit maintainable?
- 2 Is the plaintiff entitled to declaration and recovery as prayed for in the plaint?
3. Is the plaintiff entitled to the title and legal possession of the gold ornaments?
4. Whether the plaintiff has purchased gold ornaments from the 4th defendant as alleged by the 3rd defendant?
5. Whether the plaintiff is estopped from making a claim of the gold ornaments?
6. Is the plaintiff entitled to claim damages from the defendants?
7. Whether the plaintiff is entitled to recovery the value of the gold ornaments from the defendants?
8. Is the plaintiff entitled to claim interest at the rate of 19.5%?
9. Reliefs and costs.

6. On the side of the plaintiff, Exts. A1 to A24 were marked and PWs. 1 to 3 were examined. On the side of the defendants, Exts. B1 to B3 were marked and DWs. 1 and 2 were examined. After trial, the Trial Court dismissed the suit. Before the Trial Court, the plaintiff produced the receipts, vouchers and account book relating to the gold ornaments. The plaintiff who was examined as PW1 admitted that these records were prepared for producing them in the Police Station. He also admitted that he could not state the source of gold ornaments entrusted to PW2. He further admitted that he had not stated anything before the Magistrate about the threat or coercion by the 2nd defendant. The Trial Court found that there are alterations and interpolations in the documents produced by the plaintiff and they are written in a different ink and in different handwriting. It was also found that on a thorough scrutiny of these documents, there were

plenty of erasures, interpolations and rewritings. They were made in different circumstances by different persons using different inks. The original writings found on Ext. A1 were rubbed off. Ext.A2 contained additional entry in a different ink. Exts. A3 to A14 do not reveal the source from which those gold ornaments were purchased. Since entries were made subsequent to the original entries in the documents produced by the plaintiff, the Trial Court found that the documents relied on by the plaintiff were not sufficient to show that the plaintiff had any right over these gold ornaments and ingot. Since the plaintiff has prayed for a decree for declaration the burden is on him to establish the ownership of the ornaments. The suit was therefore dismissed by the Trial Court.

7. In this appeal, it is contended that the Trial Court should have accepted the documentary evidence produced by the plaintiff as well as the oral evidence of PWs.1 to 3 and found that the ownership of the ornaments and gold ingot belong to the plaintiff especially when the third defendant did not produce anything to claim ownership for himself or on his relations. It is also contended that the comments made by the Trial Court about the receipts and other documents produced were uncalled for.

8. When this appeal came up for hearing, the learned senior counsel Shri. S.V.S. Iyer argued that the gold ornaments and gold ingot were admittedly taken from the custody of the plaintiff. Therefore, prima facie, the plaintiff was the owner of those movables. If the 3rd defendant has got any claim, it was for him to establish the same. He also argued that the alleged theft was in 1977 and the ornaments were taken into custody in 1981 and it was too much to think that the 4th defendant even if he had stolen the ornaments would have kept those ornaments in his custody for such a long time or if it were sold to the plaintiff the plaintiff would have retained the ornaments in the same position for a long time. It is also argued that so far as the gold ingot is concerned, there is nothing to show that it belonged to the third defendant or his near relations.

9. Mr. Arun Raj, the learned counsel appearing for the third defendant on the other hand contended that the 4th defendant was convicted for stealing these ornaments by the Magistrate and the conviction was confirmed by the Appellate Court. The application of the plaintiff for return of the ornaments was dismissed by the Trial Court, by the Appellate Court as well as by the revisional Court. Though this Court in revision had given liberty to the plaintiff to file a civil suit to establish title, the plaintiff has not succeeded in establishing the title to those ornaments and gold ingot. He also argued that the suit for declaration was at any rate barred by limitation as it was filed more than three years after they were taken into custody by the police.

10. The points for consideration in this appeal are (1) whether the plaintiff has established his title to the gold ornaments and the gold ingot, and (2) whether the suit is barred by limitation.

Point No. 1

11. u/s 110 of the Evidence Act, when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. According to the learned counsel for the appellant, since admittedly the gold ornaments and gold ingots were taken from the custody of the plaintiff, he must be presumed to be the owner of those articles unless the third defendant establishes title to them. In the commentaries by Sirkar on Evidence Act, 15th Edition, at page 1566, it is stated as follows:

"The presumption u/s 110 would apply when two of the conditions are satisfied (1) that the possession of the plaintiff is not prima facie wrongful (2) that the title of the defendant is not proved once the initial title of another person is established Section 110 no longer applies and the possessor must prove that title has some how or other been terminated. As stated by Story, J., "Presumption of this character are adopted from the general infirmity of human nature, the difficulty of preserving the muniments of title and the public of supporting long and uninterrupted possession" (Rickard v. Williams, 7 Wheat, (US) 109; Jones s 74). The presumption of title from lawful possession is a rebuttable presumption and like all other rebuttable presumptions must yield to proof".

The statutory provision is based on the principle that possession is prima facie proof of ownership. But when the case put forward is that possession was obtained on the basis of supply of stolen articles and the plaintiff denies the same and put forward and sets up that he has got title and document to show title, the case must turn on his succeeding in establishing title on the basis of such document. When once he had got a definite case that his possession is based on valid documents and he fails to establish the same, he cannot get a declaration-of title for which the suit is filed. A declaratory decree is a discretionary relief and when the relief is sought based on documents which are concocted, no declaration of title can be granted. The position will be the same even if no formal declaration is necessary but only a finding on title so as to give a decree for recovery of possession on the strength of title. The case of the plaintiff is that as instructed by the 2nd defendant, he directed his goldsmith to make certain ornaments and gold ingot out of the gold supplied by the plaintiff. It is not the case of the plaintiff that the police took certain ornaments kept by the plaintiff in his custody for sale and created a mahazar for the ornaments as stolen from the custody of the third defendant by the 4th defendant. Therefore, the plaintiff will not be entitled to get a decree for declaration of title merely for the reason that these ornaments were supplied by him or were taken from his custody.

12. The plaintiff has mainly relied on Exts.A3 to A14 and A17 to establish title to the gold ornaments and ingot. In Ext. A17, page Nos. 31, and 42 relate to the ornaments and ingot in question. The genuineness of that entry is doubtful as all the items are clubbed in two entries unlike in the previous entries which are separate for each item and all the entries contain the particulars of the weight

and other details and for this entry alone there are no such details. More over, the entire book ends on 24.12.1981 just after a few entries. .

13. Ext. A1 is said to be the counterfoil book of the voucher evidencing the details of the gold entrusted to Nagappanachari for manufacture of ornaments. Page 22 of the counterfoil book is seen dated 22.8.1991. Being the counterfoil, the original writings will not be seen in Ext A1. The counterfoil contained only what is written on the original as impressed by the carbon paper. But curiously on the page containing entrustment of 123 grams of gold to Nagappanachari on 22.8.1981 entries are made in original writings with date as 23.9.1981 for the ornaments which are now in dispute in this case. This has to be read along with the entry in Ext.A7 which also is found to be written subsequently. PW1 also admitted that he did not give any declaration in respect of the gold entrusted to Nagappanachari. The relevant entry in Ext. A16 also shows much doubt about its genuineness as it is written in between the various entries from 23.9.1981 to 28.9.1981. Since the documents produced to show title to the gold ornaments are suspicious in character, it is not a case where the Court can declare the title and ownership of the movables of the ornaments with the plaintiff and the reasoning of the Trial Court cannot be said to be wrong.

Point No. 2

14. In the light of my finding on point No. 1, it may not be necessary to enter a finding on point No. 2. However, since elaborate arguments have been addressed with regard to the question whether the suit is barred by limitation or not, I will refer to the contentions of the parties and some of the decisions relied on by them. According to the learned counsel for the appellant, the relevant article applicable to the case is Article 58 of the Limitation Act. Articles 56 to 58 of the Limitation Act relate to suits for declarations. Article 56 states that the period of limitation to declare the forgery of an instrument issued or registered is three years when the registration becomes known to the plaintiff. Article 57 states that the period to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place is three years when the alleged adoption becomes known to the plaintiff. Article 58 is a residuary Article in the group of suits for declaration and it says that the period of limitation to obtain any other declaration is three years when the right to sue accrues. The learned counsel for the respondent mainly stressed on the clause in the article which says that "when the right to sue first accrues". According to the learned counsel, the right to sue first accrued when the gold ornaments were taken into custody by the police on 23.9.1981 or at least when the claim petition of the plaintiff was dismissed on 29.3.1982 by the Magistrate's Court. The present suit was filed only on 16.11.1987. According to the learned counsel for the appellant, the right to sue first accrued only on 3.10.1986 when the Criminal Revision Petition filed by the plaintiff was dismissed by this Court and the , suit is filed within time.

15. The plea of limitation was not raised in the Trial Court and the Trial Court had no occasion to consider this question. But being a plea of limitation and a

question of law it can be raised even in appeal if the facts are not in dispute. According to the counsel for the respondent, it is stated in the plaint itself that the cause of action first arose only on 23.9.1981 when the police seized gold articles from the plaintiff's custody. The learned counsel also relied on Section 34 of the Specific Relief Act and contended that any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right. Therefore, the moment the gold articles were seized, the plaintiff obtains a right to file the suit, contends the learned counsel.

16. The learned counsel for the appellant on the other hand contended that it is not Article 58 that is applicable but Article 113 which is a residuary Article in respect of filing of suits and as per that Article the period of limitation is three years "when the right to sue accrues". Ordinarily, in a suit for recovery of possession of property on the strength of title, there is no necessity to pray for declaration of title. In *Padmavathi v. Kesava Reddi* 1987 (2) KIT 386, this Court relied on a Full Bench decision of the Patna High Court in *Ramkhelawan Sahu Vs. Bir Surendra Sahi and Others*, . The passage relied on by this Court from the Full Bench decision of the Patna High Court is worth reproducing.

"It would seem that there is much misunderstanding in India as to the legal meaning of the word "declaration" as applied to a remedy to be granted by a Court. The habit has grown up to describing a suit for possession of property as being a suit "for a declaration of title together with a decree for possession of the property in suit", and the word "declaration" has been used to mean what would more correctly be described as the finding of fact necessary before the decree for possession can be granted. In every suit for possession the plaintiff cannot succeed unless he proves the facts necessary to establish his title, but the real remedy which he seeks is a decree for delivery of possession. The distinction between the remedy sought and the finding of fact necessary to justify the granting of that remedy may be simply tested by considering whether the plaintiff obtaining an order for possession but having been refused a formal "declaration" in the decree could come to the Appellate Court with a complaint that he had not received the whole of the remedy for which he had asked. If the Appellate Court is in a position to tell the plaintiff that the remedy of possession is all that the plaintiff is entitled to ask and that the so-called "discretion" claimed in the plaint is merely a finding of the Court to set forth in the judgment as distinct from the decree, the jurisdiction for granting the remedy, then the so-called "declaration" claimed in the plaint is not a declaration at all.

If, on the other hand, the Appellate Court should find that the plaintiff is really making a claim to a declaration properly so called and that the decree for possession is merely consequential relief, it may u/s 12 of the Act adjust the matter of the court-fee in accordance with Section 7, para (iv). It is this very difference which is at the basis of the practice under which the Court will not ordinarily grant a mere declaration and the plaintiff must claim consequential

relief also. Section 7, para (iv)(c) has application to declaration property so called, such for instance as declaration of public status, or a declaration that the plaintiff holds a public office, or a declaration as to the meaning of a will or a trust deed or other public document. It has no reference to the kind of declaration in the sense of a finding of fact as to the plaintiffs title necessary for granting a decree for possession to claim a declaration. Indeed declarations in the true sense are rarely required. The plaintiff should only allege the facts necessary to establish his title and that the defendant is wrongfully in possession. If he goes on to claim, in the manner so beloved of pleaders, a declaration of title in addition to an order for possession, the Court may and should treat the case as a claim for possession pure and simple, and ignore entirely the claim for a "declaration of "title". Suits for possession of land, houses and gardens are to bear a court-fee as provided by para (V), that is to say, if the land forms an estate paying revenue to Government, at a multiple of the revenue so payable. There are also provisions for valuing the suit where the land does not pay revenue to Government, and also for valuing the suit if the subject-matter is a house or garden. Therefore, the valuation of the suit for court-fee purposes is to be determined by the question of whether the suit is really one for a declaration in the true sense of the word, or whether it is a suit for possession; and, if there be a claim in the plaint for a declaration, the plaint should be examined to see whether it is a declaration properly so called, or whether it is an unnecessary claim and the suit is really a suit for possession".

Later, in *State of Maharashtra Vs. Pravin Jethalal Kamdar (Dead) by Lrs.*, , the Supreme Court held that in a case where there was no necessity to file a suit for declaration of title, it was Article 65 and not Article 58 that would apply as the relief sought for was recovery of possession of immovable property. In that case, the person who was in possession of less than the ceiling area limit u/s 27(1) of the Urban Land (Ceiling and Regulation) Act (by the State of Maharashtra) had sought permission of the competent authority to sell his land to a stranger. Subsequently, Section 27(1) was held to be invalid in so far as it related to lands within the ceiling limit. But prior to that the property was purchased by the State by exercising the option available under the Act. When the provision was held invalid, the original owner filed a suit for possession. Though the Trial Court dismissed the suit, the High Court granted a decree. It was held that the suit was basically for possession based on title and the order dated 26.5.1976 by which the competent authority exercised the option to purchase the property being void and without jurisdiction, there was no necessity to seek a declaration of title and the suit was found to be filed within time as Article 65 of the Limitation Act applied. The Supreme Court confirmed this reasoning of the High Court. Similarly, in *Rameshwer Dubey and Others Vs. Masomat Asha Kaur and Others*, , it was found that the suit filed in 1970 for declaration and injunction on the ground that the sale deed executed in 1966 on account of fraud committed on the owner of the property and for possession of the property, the period of limitation starts from the date of dispossession and not from the date of

execution of the original document.

17. A Constitution Bench of the Supreme Court had occasion to consider the applicability of both Article 58 and Article 113 of the Limitation Act in S.S. Rathore Vs. State of Madhya Pradesh, . In that case, the plaintiff was dismissed from service by the Collector on 13.1.1966. The suit was filed on 30.9.1969. The Supreme Court held that it was Article 58 that will apply as Article 113 is a residuary Article. It was held that the cause of action should be taken to arise not from the date of the original adverse order but on the date when the order of the higher authority where a statutory remedy is provided entertaining the appeal or representation is made and where no such order is made, though the remedy has been availed of, within a six months period from the date, of preferring the appeal. In the present case also, the gold ornaments were taken custody of by the police and unless and until the prosecution ended the plaintiff need not have filed a suit for recovery of possession of the material object. In fact, he availed of the remedy provided under the Code of Criminal Procedure for getting custody, but failed. Therefore, even if Article 58 applied, it could not be said that the right to sue first accrued the moment when it was taken custody by the police. Since there was no necessity for a declaration at all, but it was only sufficient for the plaintiff to establish title, it cannot be said that it is Article 58 that is applicable. In that view of the matter also, it cannot be said that the suit is barred by limitation.

18. Though it was not necessary for the plaintiff to pray for a declaration of title, it was necessary for the plaintiff to establish tide in order to get a decree for recovery of possession of the gold ornaments and the ingot. Since the documents produced to show title are of suspicious character and the finding of the Trial Court is that they cannot be relied on it is not a case where the suit can be decreed merely for the reason that the gold was taken custody of from the plaintiff. Though various other decisions have been referred to by the learned counsel on both sides with regard to the question of limitation, I am not referring to all those decisions, in view of my finding on point No. 1.

The appeal is therefore without any merit and it is dismissed with costs.