
(1959) 11 KAR CK 0004
In the Karnataka High Court
Case No : Regular Appeal (M) No. 42 of 1956

Mahabala Hegde	Vs	APPELLANT
Meenakshi Heggadithi and Others		RESPONDENT

Date of Decision : 05-11-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Limitation Act, 1908 — Section 120, 144

Citation : AIR 1960 Kar 193 : (1960) ILR (Kar) 226

Hon'ble Judges : B.M. Kalagate, J;A.R. Somnath Iyer, J

Bench : Division Bench

Judgement

(1) In the village of Neerve in the District of South Kanara, there was a family governed by the Aliyasanthana Law, consisting of three sisters and five brothers. Pushpavathi, Meenakshi and Narasamma were the three sisters. Mahabala, Thejappa, Anthiah, Venkappa and Krishnayya were the five brothers. Mahabala was the plaintiff in the suit out of which this appeal arises. Meenakshi was defendant 1, Thejappa was defendant 2 and the other three brothers were not parties to this suit.

(2) A dispute having arisen between the members of this family in regard to their family properties, it was referred to arbitration. The reference was to three arbitrators who made an award, in pursuance of which in O. S. 43/1937 on the file of the Subordinate Judge of South Kanara a decree was made on 9-12-1938.

(3) The arbitrators did not themselves divide the family properties between the members of that family. They gave direction as to the manner in which such division should take place. What the arbitrators did not do was to first associate the plaintiff and Thejappa with their sister Meenakshi. They likewise associated Venkatappa and Krishnayya with their sister Pushpavathi. Anthian was likewise associated with his sister Narasamma. The arbitrators made an award that the family properties in the first instance should be divided into three shares.

Those three shares had to be delivered to the possession of the three sisters out

of which had to be further carved out the properties to be given to the brothers who were associated with their sisters, to be enjoined by them during their lifetime. The properties to be so carved out for Mahabala and Thejappa, out the share of Meenakshi, had to be a property which would fetch an income of 45 muras of rice per year. Lands of equal value had to be carved out of Pushpavathi's share for being handed over to Venkappa and Krishnayya. Lands which would fetch an income of 60 muras of rice per year had to be carved out of Narasamma's share to be handed over to Anthiah.

(4) There does not appear to be any doubt that after the award became a decree, as we have mentioned, there was a separation of the family properties into three shares and each of the sisters referred to above took her share in the property so divided. But the further carving out which had to be made in pursuance of the award with respect to the property to be delivered to the possession of Mahabala and Thejappa does not appear to have been done at that time.

(5) But the case of the plaintiff was that, until the year 1943, he was receiving from the share which was divided and handed over to Meenakshi, for his maintenance some quantity of rice and that in the year 1943, there was also delivery of possession to him of a land which is described in the evidence as Melshaveguli Land.

(6) It is also not disputed that in the year 1950. Mahabala who is the plaintiff in the proceedings before us made an application for the execution of the decree which was made in pursuance of the award. At or about the same time, Meenakshi's daughter Chandravathi, who is defendant 5 in these proceedings, and her children filed a suit for the separation of their shares from out of the share which was allotted to Meenakshi Kavaru. That suit was registered as O. S. No. 285 of 1950. The execution proceeding and the original suit which were both pending in the Court of the Subordinate Judge of South Kanara were heard together and by a Judgment which was delivered on 14-9-1951, while a decree was made in favour of defendant 5 and her children, the execution application presented by the plaintiff was dismissed on the ground that it was barred by limitation. We shall have occasion to refer to the order made in those execution proceedings in a different context.

(7) But, by the Judgment which was delivered in the Original Suit instituted by defendant 5 and her children, to which the plaintiff before us and his brother Thejappa defendant 2 were also parties, they were directed to file a separate suit for the recovery of the properties to which they were entitled under the award if they were so advised. So it was that Mahabala brought the present suit in which the property to which he became entitled under the award made by the arbitration or under the decree made in pursuance thereof.

(8) This suit was resisted by defendant 5, who as we have mentioned, is a daughter of Meenakshi and her children who were defendants 16 to 18. They

contended that the suit brought by the plaintiff was unsustainable as it was barred by the provisions of S. 47 of the Code of Civil Procedure. It is also contended by them that the suit was barred by limitation.

(9) The learned Subordinate Judge upheld both those contentions and dismissed the plaintiff's suit. The plaintiff appeals from that decree.

(10) On behalf of the plaintiff, it is urged before us that the learned Subordinate Judge was not right in taking the view that the suit was barred by the provisions of S. 47 of the Code of Civil Procedure.

(11) The view taken by the learned Subordinate Judge was based upon an impression that once a decree was made in pursuance of the award, the plaintiff's right to obtain delivery of possession of the property to which he became entitled under the decree so made could have been enforced by him only in execution proceedings and not by the institution of a separate suit. That right, according to the learned Subordinate Judge, had merged in the decree and the only course that was open to the plaintiff was to execute that decree and to obtain possession of whatever property he was entitled to under the decree.

(12) Mr. Krishna Rao, the learned advocate for the contesting defendants in this appeal has also endeavoured to support that view taken by the learned Subordinate Judges.

(13) The correctness or otherwise of the view taken by the learned Subordinate Judge depends upon a construction of the relevant provisions of the award, to which it would be necessary to refer at this stages.

(14) What the arbitrators first did was to set apart for four of the male members including the plaintiff, portions of family property fetching a net geni of 45 muras of rice. Then, they proceeded to set apart for defendant 3 a portion of the family property which would fetch 60 muras of rice. Then, they proceeded to make provision for the residence of those male members. Then, what they did was to associate each of the five brothers with one or the other of their three sisters in the manner to which we have already referred, and this is what they said in that context:

"We have included the 3rd defendant in the share of the 4th defendant, defendants 2 and 6 in the share of the 1st defendant and defendants 5 and 7 in the share of the plaintiff and so, out of the three shares made as stated below, we have directed that a portion fetching a geni of 45 mudis of rice to the 5th defendant and a portion fetching a geni of 45 mudis of rice to the 7th defendant should be set apart from out of the property set apart for the plaintiff's share, that property fetching a geni of 45 mudis of rice to the 2nd defendant and a property fetching a geni of 45 mudis of rice to the 6th defendant should be set apart from out of the property set apart for the share of 1st defendant, and that a portion fetching a geni of 60 kaide holke mudis of kuchige tholsalu rive should be set apart for the 3rd defendant from out of the property set apart for the 4th

defendant's share. As regards the said portions set apart for being enjoyed for the life-time of defendants 2, 3, 5, 6 and 7, they shall enjoy the same without making alienations of any kind of allowing the same to be made."

It has be mentioned that in the proceedings before the arbitrators, plaintiff was defendant 6, his brother Thejappa was defendant 2 and the remaining three brothers were defendants 3, 5 and 7.

(15) In another portion of the award, this is what the arbitrators said:

"Having these objects in view and after giving consideration to the income of the family properties, we have made division as stated below. For purposes of preparing separate pattis showing the boundaries and subdivisions for the properties, the parties shall present this award in the concerned Court, obtain a decree, execute the same and obtain possession of their respective shares. Or the 1st plaintiff, the first defendant and the 4th defendant may amicably get the three pattis, they shall either amicably or through such suitable steps as are appropriate, get the same separated and take possession from the concerned persons, and enjoy the same."

We should have mentioned that defendant 1 before the arbitrators was Meenakshi; the plaintiff before them was Pushpavathi and defendant 4 was Narasamma.

(16) Then, towards the end of the award, the arbitrators proceeded to state as follow:

"In the event of the above arrangement not being implemented by the first plaintiff, the first defendant, defendant 4 or by any one of them, within a period of four months from this date, it will be open to defendants 2, 3, 5, 6 and 7 or any of them to take appropriate proceedings to obtain possession of the properties to which they are entitled on the basis of this award".

(16a) What is urged on behalf of the plaintiff before us is that the arbitrators themselves not having effected any partition of the properties, having left it to the parties to either make such division through Court in execution proceedings in execution of the decree on the basis of the award or by consent, without the instrumentality of the Court, and since it was only after the division of the properties between the three sisters in the first instance that the male members were conferred the right to take appropriate steps for the recovery of possession of the properties which were awarded to them, the award decree made by the learned Subordinate Judge of South Kanara was not an executable decree, in execution of which the plaintiff could have obtained delivery of which the plaintiff could have obtained delivery of possession of the properties to which he became entitled under the award. That being so, it was argued before us that the only remedy that was available to the plaintiff was to institute a suit, if he was not able to obtain possession of his properties without being obliged to do so.

(17) Mr. Krishna Rao, on the other hand, has strenuously contended before us

that that would not be the correct construction of the award. His argument was that it is clear from the award that it was incumbent on all the parties to the award proceedings to obtain a decree in pursuance of the award in the first instance and to obtain possession of the properties to which they were respectively entitled, only in execution proceedings relating to that award decree. The award gave them, according to Mr. Krishna Rao, no right to obtain possession of those properties in any other manner.

(18) We are of the view that the construction for which Mr. Krishna Rao contends, is not the true construction to be placed on the award made by the arbitrators. From the portion which we have already extracted, it is clear that although the first part of it lends itself to the construction that every one of the parties to the arbitration proceedings had to take steps to get a decree in terms of the award and then to execute it for the purpose of obtaining delivery of possession of the property to which he or she was entitled, the subsequent portions make it very clear that what the parties had to do was to present the award to the concerned Court in the first instance and obtain a decree.

After having done that, as we understand the award, it was open to the sisters, in the first instance, to obtain possession of their respective shares either in execution proceedings or otherwise. It is clear from the award that it was only after these three sisters had taken possession of their respective shares in any one of the two manners referred to above, that the male members became entitled to ask for the delivery of possession to them of the properties allotted to them under the award, either without the instrumentality of the Court or by the commencement of appropriate proceedings in that regard. This, according to us, is the plain meaning of the thirteenth portion marked in the award in the print book.

(19) It does not appear to us that there is any foundation for the contention urged on behalf of the contesting defendants that the only remedy possessed by the male members of the family to obtain possession of the properties allotted to them was to execute the award decree. Indeed, it is difficult to understand how any executing Court could have executed the decree made in pursuance of the award in an execution application presented by any of the male members for the further carving out of the properties to which they became entitled under the terms of the award.

It is true that the award decree, if it was a composite decree, such as might sometimes be made in proceedings for the partition of family properties, rendering further final decree proceedings in the suit unnecessary, it might have been an executed decree; but, the decree made in the present case was not one such. Even if the contention of Mr. Krishna Rao has to be upheld by our coming to the conclusion that the male members of the family were bound to obtain possession of their properties only in execution proceedings, the only method by which they could have done so would have been to make, after the award decree was made, an application for the preparation of a final decree in terms of that

award decree and then to execute it.

(20) But, it appears to us that there is nothing in the award or in the decree made in pursuance of it which would justify the conclusion that it was not open to the male members of the family to institute a suit for the recovery of possession of the properties allotted to them by the award. The concluding portion of the award to which we have already referred and which entitles the male members of the family to recover possession of the properties allotted to them by the institution of appropriate proceedings in the event of the arrangement recorded in the award not being implemented, within four months from its date, makes it very clear that that right to institute necessary proceedings which the male members had, was not confined only to the commencement of execution proceedings.

(21) In our opinion, the learned Subordinate Judge was not right to thinking that the suit brought by the plaintiff related to a matter concerning the execution, discharge or satisfaction of a decree. That being so, his finding that the suit was barred by the provisions of S. 47 of the CPC cannot be supported.

(22) Mr. Krishna Rao next urged that the plaintiff's suit must be held to have been barred by the principles of constructive res judicata. He depended in support of this argument on the fact that the plaintiff presented an execution application R.E.P. No. 407 of 1950 to the Court of the Subordinate Judge of South Kanara for the execution of the award decree which, as we have already mentioned, was dismissed as time-barred by an order made on September 14, 1951. This order, according to Mr. Krishna Rao, by necessary implication, amounts to a decision that the award decree was an executable decree. He, therefore contends that it was not open to the plaintiff after the dismissal of his execution application, to bring a suit on the footing that the award decree was an inexecutable decree and that it was therefore open to the plaintiff to bring a suit for the implementation of the award.

(23) We do not understand the order by which the execution application of the plaintiff was dismissed in that way. That execution application, as may be regard as a thorough misconception. The plaintiff appears to have considered himself to be a holder of an annuity under the terms of the award and at one stage of the execution proceedings, the executing Court recorded full satisfaction of what it described as the money portion of the decree. Then, the executing Court proceeded to consider whether, in the execution proceedings, the plaintiff was entitled to recover possession of the property which was allotted to him under the award and, in that context, this is what the executing Court said:

"15. The only question that now arises for consideration is whether in this execution proceeding the petitioners can claim for allotment of properties in their favour in lieu of their annuity. It is no doubt true that the award decree Exhibit B-2, enables them to take such appropriate proceedings as they deem necessary for having properties allotted to them in lieu of the annuities. But this decree was

passed as long ago as on 9th December 1938 and the present execution petition has been filed more than 12 years thereafter. The petitioners have not stated in their petition now their execution, petition is this execution petition is barred by limitation and dismiss it so far as it relates to the relief of allotment of properties in lieu of maintenance."

(24) It is clear that what the executing Court did was to dismiss the execution application on the ground that it was barred by limitation. It did not go into the other questions such as might have arisen in the execution petition, including the question whether the plaintiff could have allotted to him by the award in execution proceedings. That question was merely nosed by then executing Court but was left undecided.

If this is how we have to interpret the order made by the executing Court, there can be no foundation for the contention that the order made by the executing Court, by necessary implication, involves a decision that the award decree was, in so far as it related to the plaintiff an executable decree but that the plaintiff was disentitled from executing it since his execution application was time-barred.

(25) We must, therefore, hold that the suit brought by the plaintiff was not incompetent and was not unsustainable.

(26) Even if it had been possible for us to come to the contrary conclusion, and to hold that it was not open to the plaintiff to bring a suit for possession of the properties allotted to him by the award, there would have been no difficulty whatsoever in nevertheless coming to the conclusion that the dismissal of the plaintiff's suit by the learned Subordinate Judge was entirely unjustified. The award decree made in this case is, on its face, nothing more than a preliminary decree such as what is usually made in a partition suit.

In pursuance of that preliminary decree, the partition between the three sisters at any rate should have been made in the first instance, and thereafter the male members should have been delivered possession of the properties respectively belonging to them. All that could have been done only in the final decree proceedings in which a final decree should have been passed by the Subordinate Judge. It would have been, therefore, open to the plaintiff to make an application for the preparation of such final decree and Mr. Krishna Rao with his usual frankness has conceded before us that if the plaintiff had made that application when he brought this suit on January 12, 1952, it would not have been possible for his clients to contend that that application was time-barred.

In those circumstances, what we would have done if we had agreed with the contention of Mr. Krishna Rao that it was not open to the plaintiff to bring a suit for the recovery of his property, would have been to direct the Subordinate Judge to treat the plaint presented by the plaintiff in this case as an application for the preparation of a final decree and to dispose of it in accordance with law. We would have, in any event, not confirmed the decree of the Subordinate Judge dismissing the plaintiff's suit.

(27) The only other matter that requires to be considered is the correctness of the finding of the learned Subordinate Judge that the plaintiff's suit was time-barred. He was of the view that the suit was barred by Article 120 of the Limitation Act.

(28) Mr. Krishna Rao has urged before us that the article of limitation to be applied to the present case is Article 113 of the Act.

(29) It appears to us that neither of those articles is the article applicable to the case before us. This was a case in which the plaintiff brought a suit for possession of the property to which, according to him, he was entitled under the award. That being so, the article of limitation applicable to his suit was Article 144 and, in the absence of any plea or any trustworthy evidence that there had been any ouster of the plaintiff from his property, the suit should have to be held to be within time. Article 120 can thus have no application to the present case.

(30) But, it was urged by Mr. Krishna Rao that the claim made by the plaintiff must be treated as a claim for the specific performance of a contract embodied in the award which was to the effect that defendant 1 Meenakshi should deliver from out of the share which was given to her by the arbitrators the property allotted to the plaintiff. That being so, it was contended that Article 113 of the Limitation Act was the Article applicable to the plaintiff's suit and since the suit was brought nearly fourteen years after the award decree was made, it was clearly time-barred.

(31) It is impossible, in our opinion, to regard the plaintiff's suit as a suit for the specific performance of a contract. What was done by the arbitrators in the arbitration proceedings was to create an interest in the plaintiff to a portion of the family property to which he became entitled under the terms of the award. The property allotted to him was, therefore, property to which he became entitled under the award, although, according to the terms of the award, he was entitled to that property only to be enjoyed by him during his lifetime.

We are unable to accede to the argument which was presented to us by Mr. Krishna Rao that, under the award, no title to any portion of the family property was created in favour of the plaintiff but all that the plaintiff became entitled to under the award was a right to recover possession of some portion of the family property set part for him. We see no justification whatsoever in placing such a narrow and restricted construction on the award in the present case.

The award declared in no uncertain terms that the plaintiff was entitled to a portion of the family property. It created an interest in the plaintiff in that portion of the family property with the result that the plaintiff became entitled to recover possession of that property in the event of that property not being delivered to him as directed by the award. The plaintiff's suit was therefore, clearly one for recovery of possession of the property to which he was entitled under the award and such a suit, it is indisputable, is clearly governed by Article 144 of the Limitation Act.

(32) The view that we have taken in this case was also the view expressed by a Full bench of the High Court of Bombay in *Kurbanhussein Mahamadalli Vs. Husseinbhai Mithabhai*, . That was a suit brought for possession of an Immovable property based upon title under an award, which had not been enforced by a suit and which had not been followed by a decree under the summary procedure. The contention that was urged by the defendants in that suit was that the suit was barred by Article 120 of the Limitation Act.

Their Lordships repelled that contention and pointed out that since the award created an interest in the property for the recovery of which the plaintiff had brought that suit, the article of limitation applicable to that suit was Art. 144 and not Article 120. While referring, in the course of their judgment to a decision of the High Court of Madras and another of the High Court of Calcutta, this is what their Lordships said:

"Both the Madras and Calcutta High Courts have taken the view that an award creating an interest in immovable property gives rise to a title in that property and a suit can be filed for possession of that property on the strength of that award and the period of limitation is Art. 144 and not Art. 120, In *Sornavalli Ammal v. Muthattyya Sastrigal*. ILR 23 Mad 593, by the award the plaintiffs were held to be entitled to certain immovable property and the suit was not barred as the article applicable was Art. 144. In the judgment it was stated: (P. 596)

"No doubt, an award springs out of an agreement to submit to arbitration, but the award itself is a decision of the arbitrator binding upon the parties as a decision."

In *Bhajahari Saha Banikya v. Behary Lal Basak* ILR 33 Cal. 881, the suit was for recovery of possession of land on declaration of the plaintiff's right thereto on the basis of an award. There, too, it was contended that the suit was for specific performance of a contract. That contention was rejected and the Court held that the suit held that the suit fell under Art. 144., taking the view that a valid award was operative even though neither party had sought to enforce it by suit or under the summary procedure."

With great respect, we agree with the view expressed by their Lordships of the High Court of Bombay.

(33) The same principle was also enunciated by their Lordships of the High Court of Madras in *Ramanna Shetty and Others Vs. Tejappa Shetty and Others*, . Their Lordships pointed out in that case that where a partition deed between the members of a family governed by the Aliyasanthana Law in unambiguous terms declared the substantive rights of the plaintiff's branch and the defendants' branch, each to a moiety in the suit properties and the provision was made only for postponement of division by metes and bounds till after the death of one of the parties to the agreement, the suit to work out the rights declared under the partition deed could in no sense be described as a suit for specific performance of a contract and that the period of limitation applicable to a suit of that description

was that prescribed by Art. 144 of the Limitation Act.

(34) Now, if the plaintiff's suit is governed by Article 144 of the Limitation Act, his suit has to be held to be within time, unless we can come to the conclusion that there was an ouster of the plaintiff from his property. Now, it is clear, and that is also what the learned Subordinate Judge himself has found, that after the award decree was made, the plaintiff was being paid his maintenance from out of the family properties by defendant 1. His finding was that till March 1951, plaintiff and defendant 2 were paid maintenance in that way.

It was admitted by even defendant 6 that, in the year 1943, one property belonging to the family was handed over to the possession of the plaintiff. Defendant 6, however, contended that it was so delivered since the plaintiff became a tenant of the family in respect of that property. The learned Subordinate Judge disbelieved the story that the plaintiff was a tenant of the family. If that story was disbelieved, it follows that the plaintiff was handed over that property as part of the property to which he became entitled under the terms of the award.

Defendant 1 Meenakshi admitted that she was paying maintenance to the plaintiff and defendant 6 giving evidence as D.W. 1 also admitted that the plaintiff was assisting defendant 1 in the management of the family property. In those circumstances, it is, we think, impossible to come to any conclusion other than that there was no ouster of any kind of the plaintiff from the property to which he became entitled under the award.

(35) The finding that we must, therefore, record is that the plaintiff's suit was not barred by limitation, and that it was well within time.

(36) Since the findings on the basis of which the learned Subordinate Judge dismissed the plaintiff's suit have all been reversed by us, we must also reverse the decree made by the learned Subordinate Judge dismissing the plaintiff's suit. The suit is now remitted to the Court below for being disposed of in accordance with law, in regard to matters other than those which have already been disposed of by us. Both parties party for an opportunity to produce further evidence in the case on those matters and they are permitted to do so. Since this suit was instituted as long as in 1952, the Court below is directed to dispose of the suit with the greatest possible expedition.

(37) The costs of this appeal will be costs in the cause and will abide the eventual result.

(38) The institution fee paid on the memorandum of appeal will be refunded to the appellant.

(39) Suit remanded.