
(1956) 10 AHC CK 0051
In the Allahabad High Court
Case No : Civ. Rev. No. 454 of 1954

Mst. Thagni alias Thaguli

APPELLANT

Vs

Ude Ram and Others

RESPONDENT

Date of Decision : 26-10-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Contract Act, 1872 — Section 2, 65
Limitation Act, 1963 — Article 97

Citation : (1957) 27 AWR 251

Hon'ble Judges : Roy, J

Bench : Single Bench

Advocate : N.D. Pant, for the Appellant; G.C. Ghildayal, for the Respondent

Final Decision : Allowed

Judgement

Roy, J.—This is an application by the Defendant u/s 115 of the CPC to revise an order dated 8-12-1953 passed by the Civil Judge of Tehri by which he allowed the Plaintiff's appeal and decreed his suit for a sum of Rs. 400/ - against Smt. Thagni alias Thaguli, Defendant No. 1.

2. It appears that on 7-1-1944 a Khaikari deed was executed by Smt. Thagni in favour of Indramani in respect of land assessed to certain amount as revenue, and a sum of Rs. 400/ - paid as consideration of the deed. Indramani was the deceased father of the Plaintiff. One Narain Dutt was the co-sharer in the land on which the khaikari was created. He brought a suit for cancellation of the deed aforesaid in the court of the Civil Judge of Lansdowne. The suit was decreed ex-parte on 2-2-1948. Indramani's application to set aside the ex-parte decree was disallowed. Indramani then preferred an appeal against that order. By an order dated 4-5-1951 the learned Additional District Judge held that the appeal had abated as Indramani died during the pendency of the appeal and his legal representatives did not come forward within time to be substituted on the record. Narain Dutt put the decree into execution and obtained possession of the

khaikari land on 1-1-1952. Thereafter the present suit was filed on 19-1-1952 for the money paid upon an existing consideration which afterwards failed. The Defendant pleaded that the suit was time-barred. The trial court gave effect to that plea holding that under Article 97 of the Limitation Act time began to run from the date of the deed, namely, 7-1-1944 which was the date of the failure to pay consideration. The trial court, therefore, dismissed the suit. An appeal was preferred against that decision. The lower appellate court held that although Article 97 of the Limitation Act was applicable to the case time began to run from 1-1-1952 when possession was obtained by Narain Dutt. Upon that finding the appeal was allowed and a decree in the sum of Rs. 400/- was passed against Smt. Thagni.

3. Before we proceed to consider the question of limitation, which is the only point raised in revision, it would be necessary to quote a passage from the Manual of I and Tenures of Kumaon Division by V.A. Stowell, (1928 edition), regarding Khaikari rights. The passage is as follows:

A source of difficulty with regard to these registered leases is often found in cases where one or more owners of unpartitioned land purport to create khaikari right in their share of land. This they cannot do, unless their share is admittedly held in the shape of specific separate land and the other co sharers agree to the transaction. This is not infrequently the case; it is found in partition that one or more of the parties have admittedly given khaikari rights in part of the common land and are, by agreement allotted such portions of the land in lieu of part of their share of khudkasht. But if the other joint hissedar objects, such giving of khaikari rights is ultra vires.

4. In construing this passage in the light of the circumstances of the present case the lower appellate court observed:

The above paragraph means that khaikari right in unpartitioned land can be made when the share is admittedly held in the share of separate land and the other co-sharers agree to the transaction. In the present case it is an established fact that the Defendant No. 1 was in separate and exclusive possession of the land when she executed the khaikari deed. There is, however, nothing to show if the other co-sharers, namely, Defendant No. 2 agreed to the transaction. I, however, remains that after some years he challenged it. Evidently, it would have remained a perfectly valid transaction if it had not been avoided by him. It necessarily leads to the conclusion that the transaction was not void but voidable. It was thrown out when the person entitled to get it annulled, chose it to do so.

After making that observation the lower appellate court came to the conclusion that the transaction in question was voidable and not void within the meaning of Section 65 of the Indian Contract Act and that in this particular case the failure of the consideration within the meaning of Article 97 shall be the date when possession passed out of the hands of the Plaintiff on 1-1-1952, and not before

that.

5. Whether the contract was void or voidable will not, however, be of any material importance for our purpose. Once it was conceded that the suit was a suit of the nature covered by Article 97 of Sch. I of the Limitation Act, the term void in Section 65 of the Contract Act in relation to the interpretation put upon that term in Section 2(g) and (j) of that Act will also cover the contract which ceases to be enforceable by law and thereby becoming void when it ceases to be so enforceable.

6. The principal question which is necessary to be determined in the present case is what was the date of the failure of the consideration which would be the starting point of limitation under Article 97. The period of limitation prescribed under that Article is three years. The earlier suit by Narain Dutt was decreed by the trial court on 2-2-1948 and the document in question was cancelled or annulled by that decision. The transaction was reversed in its entirety and for all purposes irrespective of abatement of the appeal on 4-5-1951. The date of the trial court's decree, namely, 2-2-1948, would, in my opinion, be the starting point of limitation; the failure of consideration was on that date. Neither the date of the appellate decree, namely 4-5-1951 nor the date of obtaining possession by Narain Dutt, namely, 1-1-1952, would be the starting point. A similar point arose before Their Lordships of the Privy Council in *Jascurm Boid v. Pirthichand Lal Chaudhary* AIR 1918 P.C. 151, where, under analogous circumstances, it was held that under the Indian Law and Procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal. In that case, to escape from this position and its consequence, a new starting point was suggested in the course of the argument and it was contended that the period of limitation began to run when possession was lost. Their Lordships observed that there may be circumstances in which a failure to get or retain possession may justly be regarded as the time from which the limitation period should run, but then that was not the case there and that the quality of the possession acquired by the purchaser excluded the idea that the starting point is to be sought in a disturbance of possession or, in any event, other than the challenge to the document and the negation of the purchaser's title to the entirety of what he acquired and involved in the decree. Taking into consideration all the facts and circumstances of the case I am clearly of opinion that Article 97 of Sch. I of the Limitation Act applied to the suit and the limitation began to run from the date of the failure of the consideration which was the date of the trial court's decree, namely, 2-2-1948 and the suit having been filed more than three years after that date, namely, on 19-1-1952 was clearly time-barred.

7. A question arises whether a wrong view on the point of limitation can be set right in revision. The scope of revision u/s 115 of the CPC has been considered by the Supreme Court in *Keshardeo Chamria Vs. Radha Kissen Chamria and Others*, and it was held that the court could decide a question wrongly and by

deciding a question wrongly the court did not act illegally or with material irregularity in the exercise of its jurisdiction which the court below undoubtedly possessed over the subject-matter of dispute. It is true that the court does not commit any illegality or irregularity in the exercise of its jurisdiction on account of its deciding any question of fact or law wrongly, but it has been held by the Privy Council in AIR 1949 239 (Privy Council) that if the erroneous decision results in the subordinate court exercising a jurisdiction not vested in it by law or failing to exercise a jurisdiction in it by law or failing to exercise a jurisdiction so vested a case for revision arises under Sub-section (a) or Sub-section (b), and Sub-section (c) can be ignored. This principle of law has been endorsed in the Supreme Court case referred to above. The Privy Council, however, in continuation of what has been stated above in the Supreme Court case further observed "the case of Babu Ram and Another Vs. Munna Lal and Others, and Hari Bhikaji v. Naro Vishvanath ILR 9 Bom. 432 may be mentioned as cases in which a subordinate court by its own erroneous decision (erroneous that is in the view of the High Court), in the one case on a point of limitation and in the other on a question of res judicata, invested itself with a jurisdiction which in law it did not possess, and the High Court held, wrongly their Lordships think, that it had no power to interfere in revision to prevent such a result."

8. This was by way of illustrating the effect of what Their Lordships held by saying that if the erroneous decision resulted in the court's exercising a jurisdiction or not exercising a jurisdiction, a case for revision would arise under Sub-section (a) or Sub-section (b) of Section 115 CPC though not under Sub-section (c) of that section.

9. The non-repetition of this illustrative observation in the judgment of the Supreme Court does not mean that this observation has not been approved by it. I am of opinion that decisions on question of limitation would, as these observations of the Privy Council indicate, very well come under the principle of law laid down by the Privy Council and approved by the Supreme Court, and some types of erroneous decisions by a court of competent jurisdiction can lead to further assumption or non-assumption of jurisdiction and thus can give rise to cases for revision under Sub-section (a), or Sub-section (b) of Section 115 Code of Civil Procedure.

10. A similar view was taken by Raghubar Dayal, J. in Munshi and Others Vs. Chiranji Singh and Another, In my opinion, therefore, the decision of the lower appellate court comes within the mischief of Section 115 CPC and is revisable.

11. In the result I allow the application in revision, set aside the judgment and decree of the court below and dismiss the Plaintiffs' suit with costs to the Defendant applicant in all the courts.