
(1939) 03 MAD CK 0031
In the Madras High Court

Patayath Parumpayil Sankara Menon	APPELLANT
Vs	
Karumathil Puthumanae Sanku's son Kuttani and Others	RESPONDENT

Date of Decision : 21-03-1939

Acts Referred:

Limitation Act, 1963 — Section 22

Citation : AIR 1940 Mad 639

Hon'ble Judges : Wadsworth, J

Bench : Division Bench

Judgement

Wadsworth, J.—This appeal raises a question of limitation. The plaintiff who is the appellant sued to redeem a Malabar kanom mortgage

executed in the month Dhanu of the Malabar year 1034, impleading defendant 1 in his personal capacity as the mortgagee. Some time after the

filing of the suit, defendant 1 having contended that possession pertained not to him personally but to an unincorporated association of which he

was a member, an application to amend the plaint was allowed and the plaintiff was permitted to sue defendant 1 as representing the association of

which he was a member. No objection was taken to this amendment and nothing was said by the learned Judge at the time about the effect which

the amendment would have on any plea of limitation.

2. Two questions have been raised. The first relates to the position without regard to the complication caused by impleading defendant 1 in his

representative capacity. The suit was filed on 16th December 1930 and, if the suit mortgage was executed on or after 16th December 1858, the

suit would be in time since a kanom mortgage ordinarily cannot be redeemed until twelve years after its execution. The first of Dhanu 1034

corresponds to 14th December 1858. There is no evidence to show on which particular day of the month Dhanu this mortgage was executed. The question therefore is whether there is any presumption in favour of the plaintiff by virtue of which it can be said that the suit is within time. Ordinarily speaking, when an objection is taken that a suit is barred by limitation, the burden lies upon the plaintiff to prove that it is within time. All that the plaintiff has proved positively in this case is that the mortgage was executed in a month of which the last 28 days would be within the period of limitation and the first two days outside that period.

3. I am not aware of any authority for the view that there is a legal presumption that an event took place on any particular day within the month in which it is known to have taken place. It has been suggested that the odds in favour of the plaintiff's suit being within time are 14 to 1 and that, from this fact, in the ordinary course of events the Court would be entitled to presume that that happened which most probably would have happened. But I feel great Idoubt on the question whether any such presumption can take the place of positive proof of the actual starting point when a suit is challenged as barred by limitation. There is a decision of this Court in *Ittappan Kuttiravattat Nayar v. Nanu Sastri* (1903) 26 Mad.

34, which arose out of a Malabar mortgage of an unknown date though the year of its execution was found in the document itself. On the facts of that case, if the mortgage was actually executed in any part of this year except during the last 26 days, the suit would have been out of time. It was held that the suit was barred, but there is no consideration of the question whether there was any presumption against the plaintiff in that case owing to the fact that the mathematical probabilities were strongly against the plaintiff. In the absence of authority I am inclined to the view that, when the plaintiff seeks to dispossess persons who have been in possession for approximately 72 years, he should be required to prove positively that there is a subsisting mortgage which he is entitled to redeem and that this should be done not by showing a mere arithmetical probability that the mortgage subsists but by actual proof that the mortgage was executed within the period of limitation, or by proof of a valid acknowledgment which would save limitation.

4. A further question of limitation relates to the effect of the amendment of the

plaint treating defendant 1 as the representative of an association alleged to be in possession of the suit property. There is a good deal of authority for the position that when there is an amendment whereby either the plaintiff or the defendant on record is impleaded in a capacity other than that which he originally had, Section 22, Limitation Act, has no application. The case in *Saminatha v. Muthayya* (1892) 15 Mad. 417 was one in which defendant 1 was impleaded as trustee of a temple in a suit based on an allegation that the debt was one due from the temple. By an amendment of the plaint the suit was altered into one claiming the debt as due personally from defendant 1. It was held that Section 22, Limitation Act, did not apply, defendant 1 having been already on the record, the change being merely a change in the nature of a claim made against him. There is a decision of another Bench of this Court which goes a good deal further. The case reported in *Muthukrishna Pillai v. Rajam Iyengar* AIR (1917) Mad. 471 arises out of a suit which was filed by the plaintiff in his personal capacity, but an amendment of the plaint was allowed whereby he was permitted to sue as the representative of a company claiming on behalf of the company. Although the effect of this amendment was to bring the company itself which was not a party on to the record, it was held that Section 22, Limitation Act, did not bar the suit. In *P. Seshagiri Rao Vs. T.V. Seshagiri Rao*, a suit was filed against the defendant-guardian of a minor to recover a debt. After the period of limitation had expired an amendment of the plaint was allowed whereby the debt was claimed from the defendant personally. It was held that Section 22, Limitation Act, did not apply.

5. In *K. Sheik Meera Sahib and Co. Vs. Sheik Naina Lubbay Marcayar and Others*, certain defendants impleaded only as legal representatives of a deceased partner, were sued for money and an amendment was allowed impleading those defendants in their personal capacity as partners themselves. This amendment was allowed only on terms reserving to these defendants the right to raise defences which would have been available had the plaint as amended been filed in 1912. The learned Judges held that the suit was barred by limitation, but the judgment proceeds almost entirely on the terms of the amendment order and it does not quote any of the authorities regarding the effect of such an amendment on the

applicability of Section 22, Limitation Act.

6. It is not desirable, in my opinion, to quote cases from other High Courts where there has been a good deal of difference of opinion, the general

trend of decisions of this Court being fairly consistent. I must however observe that there is no case of this High Court with the possible exception

of the case in P. Seshagiri Rao Vs. T.V. Seshagiri Rao, which goes anything like as far as is necessary for the purpose of the plaintiff in the present

case; and even the case just referred to can be distinguished on the ground that the plaintiff, though he filed the suit originally in his personal

capacity was in fact at the time of suit the authorized representative of the company in which capacity he was eventually permitted to sue. The

effect of the amendment in the present case is really to implead a considerable number of individuals joined together in an unincorporated

association, with reference to which it does not appear that defendant 1 has any permanently representative status, he having been treated as its

representative at the time of amendment only by the procedure laid down for representative suits. It is not a case, to my mind, of a person already

on the record being by means of an amendment impleaded in another capacity or on other grounds. If we look at the essence of the amendment, it

is a case in which by means of an amendment a very large number of fresh parties are added, though by a special procedure one of their number

who happens already to be on the record in his personal capacity is treated as the representative of the whole association. It seems to me that this

is essentially a case of adding fresh parties after the period of limitation has expired.

7. It is suggested that the fact that the amendment was not opposed should take away the right of the association to raise a question of limitation. I

do not see how the absence of any objection to the amendment can take away any legal defence which may be open to the fresh parties brought

on the record thereby. I therefore hold that by reason of the amendment the suit as against the association represented by defendant 1 is barred by

limitation, even if it was within time as against defendant 1 personally when it was first instituted. In either view therefore, the appeal fails and is

dismissed with costs of respondents 3 and 4. Leave granted.