

(1934) 10 MAD CK 0064
In the Madras High Court

Peram Chennamma

APPELLANT

Vs

Peram Mangamma and Others

RESPONDENT

Date of Decision : 22-10-1934

Acts Referred:

Limitation Act, 1963 — Article 93

Citation : AIR 1935 Mad 709 : 158 Ind. Cas. 121 : (1935) 42 LW 535

Judgement

1. This is an appeal from the learned Additional Subordinate Judge of Guntur and raises the question of limitation. The claim is for possession of property which is claimed by the plaintiff as the widow of the deceased proprietor of the property against various persons whose substantial defence is that they are entitled under the terms of a will. The will has not been probated, but there have been two proceedings involving in some way or another, the will. Of these proceedings we need not deal with the mutation proceedings because counsel for the respondents admits that in view of *Achut Raysappa v. Gopal Subbaya* 1915 Bom. 136 he cannot rely upon the mutation point. There remains the other proceeding which was for issue of a succession certificate. There defendants 1 and 2 applied and the plaintiff and defendant 7 were impleaded as counter claimants, and in the result defendants 1 and 2 were granted succession certificate. The order granting the succession certificate was dated 5th November 1920 and the succession certificate was issued on 29th November 1920 and the date of the application was 24th April 1920. And it is said that those proceedings were an attempt to enforce this will against the plaintiff and as the plaintiff did not within three years from the date of that attempt take proceedings to declare the instrument a forgery, she is now precluded from so proceeding by Article 93, Lim. Act, and that in this case although she is not proceeding for the declaration of the will as a forgery she ought to have so proceeded because she cannot claim as though there were not a will since she knows of the existence of the will and has not set aside the will. On the other hand, it is said that the scope and purpose of the Limitation Act is to impose a time limit upon the person seeking a remedy: it belongs to the adjective or procedural law and not to the substantive

law and that if a plaintiff can get what that party seeks without making a claim of a particular nature but a claim of another nature, the only article that you should look at in determining whether the suit is barred is the article relating to the claim actually made and not to some other claim which the plaintiff might also have made.

2. That leads to this further point. Here it is said in effect that this plaintiff had only to allege and prove the following broad facts in order to obtain the relief she sought - the fact that the deceased died leaving a certain property, the fact that she is his widow - and on those simple allegations she is entitled to her rights as a widow to that property. It is then for the defendants to allege facts which establish that granted all those facts still they are entitled to the property. That they do by alleging this will. That will like any other allegation in the defence has got to be proved and if they fail to prove it, they lose the case. For the respondents it is said in effect that the mere allegation of the will in such a suit is sufficient to enable the defendants to succeed without the will being proved or any attempt being made to prove the will because the plaintiff knew of the will, knew that an attempt had been made against her in the succession certificate proceedings to enforce the will against her and she having let three years go by without setting aside or attempting to set aside the will as a forgery the mere allegation of the will defeats her. The question is which of these two points of view is correct. A considerable number of cases have been cited to us which it is necessary shortly to refer to. The case that is nearest to this case is Venkamma v. Narasimham 1918 Mad. 1198. There the headnote is as follows.

There is no obligation on a party, who challenges as a forgery a document purporting to confer rights, to set it aside by a suit. He is entitled to treat it as waste paper and it cannot be regarded as binding on anyone even before it is set aside. The joinder of an unnecessary prayer in a claim which is barred with other substantial reliefs not barred cannot entail the dismissal of the suit. The former may be struck out and the claim adjudicated with regard to the substantial relief.

3. In that case the plaintiff was the reversioner of a Hindu widow. The suit was for a declaration that an alienation made by the widow was void beyond, her life-time. The widow during her lifetime had sued the plaintiff for a partition and had produced a will under which she claimed as the heiress of her husband. The plaintiff challenged that it was a forgery but partition was ordered without any adjudication on the genuineness of the will. The plaintiff in this suit claimed a declaration that the will was a forged document. That portion was barred under Article 93 admittedly. The trial Court dismissed the whole suit as barred. It was held by this High Court on appeal that the plaintiff need not have added the prayer to declare the will a forgery, that the relief claimed in respect of the will was unnecessary and did not affect the plaintiff's right to the other substantial reliefs into which the Court was bound to enquire. Now there as here, it will be observed that if the will was good, it stood in the way of the reversionary rights. The suit was for a declaration that an alienation that would have been perfectly

good if the will had been a valid will was bad. A claim was made in that suit to have the will declared void as being a forgery. The only difference that we can see between that case and this is that in this case that unnecessary prayer which was there struck out has not been made and of course therefore it is not necessary to strike it out. In this case the plaintiff claims quite apart from the will and it is for the defence to prove the will. If they prove it, then on the merits the plaintiff fails. If they fail to prove it, then the plaintiff, so far as that defence is concerned, succeeds. There is no obligation whatsoever upon the plaintiff to join to her present claim another claim for a relief which she does not ask for and does not need.

4. The next case was *Narayanan Chetty v. Kannammal Achi* (1905) 28 Mad. 338 which follows *Sundaram v. Sithammal* (1893) 16 Mad 311, where it was decided that Article 93 does not apply where the suit is substantially for possession of property though the plaintiff avers that the instrument relied upon by the defendant is a forgery. In *Ratnamassari v. Akilandammal* (1903) 26 Mad 291, the dissenting judgment was delivered by Bhashyam Ayyangar, J., and that dissenting judgment has since been inferentially approved by the Privy Council. The dissenting judgment begins at p. 297 and the passage relied upon is at p. 313. There he observes:

Can it be contended that a suit brought for redemption or recovery of immovable property or or the recovery of a debt within the period of limitation prescribed for such suits would be governed by Articles 92 and 93 and barred thereunder if the defendant resists the suit by relying upon a forged instrument of conveyance or receipt and proves that the plaintiff had knowledge of its issue or registration more than three years before the date of the suit?

5. We raise the same question and we answer the question the learned Judge there puts in the negative. We do not think that it can be so contended. In 1924 the Privy Council considered that matter in *Kalyandappa v. Chanbasappa* 1924 P.C. 134, and 428. There their Lordships, having cited other authorities in the Privy Council and in particular the decision of the Board in *Thakur Tirbhuwan Bahadur Singh v. Rajah Ramashar Baksh Singh* (1906) 28 All. 727, observed:

In consequence of. this decision the High Court of Madras in *Velaga Mangamma v. Bandlamudi veerayya* (1907) 30 Mad 308 went back upon its previous decision in *Ratnamassari v. Akilandammal* (1903) 26 Mad 291, and held in obedience to the decision of this Board that Article 118 only applied to declaratory suits in respect of adoption and not to suits for possession, and that in suits for possession Article 141 was the proper one to apply.

6. Their Lordships then proceed to indicate that that is the correct point of view. the result of that is this, *Ratnamassari v. Akilandammal* (1903) 26 Mad 291, in which Bhashyam Ayyangar, J., was the dissenting Judge, has been gone back upon in *Velaga Mangamma v. Bandlamudi veerayya* (1907) 30 Mad 308, the Privy Council approve *Velaga Mangamma v. Bandlamudi veerayya* (1907) 30 Mad

308 and disapprove the majority judgment in *Ratnamassari v. Akilandammal* (1903) 26 Mad 291 and we think therefore by implication approve the decision of Bhashyam Ayyangar, J. and the observations of their Lordships of the Judicial Committee at pp. 421 to 423 would answer the question proposed by Bhashyam Ayyangar, J., in the sense that we now answer it.

7. In *Bijoy Gopal Mukerji v. Krishna Mahishi Debi* (1907) 34 Cal 329, the suit was by a reversioner to recover possession from the lessee after the widow's death. She had granted a lease and the action was more than three years after. It was held that there was nothing for the reversioner to set aside or cancel as a condition precedent to his right of action and therefore he was not barred by Article 91 but had the time given to him by Article 141 and that therefore the suit was within time. It is true that in that case the article was Article 91 and that in this case the article is 93 but we see no difference in principle between the two cases as regards the point we are now considering which is this : Whether a plaintiff seeking to recover possession of property and knowing the existence of an instrument that would be fatal on the merits to the claim is bound to seek as part of his remedy to set aside that instrument on peril of finding that a mere allegation in the defence of the existence of that instrument is fatal. Article 91 relates to the cancellation or setting aside of an instrument not otherwise provided for and the time dates from the knowledge. Article 93 is a more limited article relating to forgery and the critical date is the date of the attempt to enforce it against him. In *Bijoy Gopal Mukerji v. Krishna Mahishi Debi* (1907) 34 Cal 329 the three years had expired from the date of knowledge. In the present case assuming that the succession certificate proceedings amounted to an attempt to enforce-a question which we do not decide and which does not in the view we take arise in this case-the three years has expired from the date of the attempt. In neither case is the plaintiff relying upon the document. In both cases, the plaintiff's case was complete without any reference to the document. In both cases the document was raised by the defence. In both cases the document has to be proved by the defendants. And in that case and in this the proper period is the period that relates to the cause of action that is actually brought. In that case it was Article 141. In this case it is Article 144.

8. On the other hand it is said that *Janki Kunwar v. Ajit Singh* (1888) 15 Cal 58 is against the appellants' contention. That is a decision of the Privy Council and if it controls this case it is, of course, binding upon us. But there the facts were fundamentally different. The suit was to obtain the cancellation of a deed of sale on the ground of fraud with consequential recovery of the land sold as evidenced by that deed. It was held that the essence of the claim was the setting aside of the deed and the recovery of the land was consequential upon that claim succeeding and therefore it was held that the basis of the action being for the cancellation, a claim that could not be struck out leaving anything effectively subsisting, it was a claim which was controlled by Article 91, If that article applied, admittedly limitation was a bar. The article applying, the defence of limitation accordingly succeeded. We think that on those facts that case is clearly

distinguishable from this case. The remedy was different and that remedy could not as in *Venkamma v. Narasimham* 1918 Mad. 1198 be struck out leaving a subsisting real claim that the plaintiff was litigating. If in *Janki Kunwar v. Ajit Singh* (1888) 15 Cal 58 according to the view of the Judicial Committee, that claim were struck out, there would be nothing left in the case. Here not only is the claim, that it is said is barred, not essential to the cause of action but it is not even made. *Raja Rajeswara Dorai v. Arunachellam Chettiar* 1916 Mad. 350 is also said to be against the appellant. It is a decision of this High Court. It was an action for the recovery of possession of property which the plaintiff claimed and which had been leased by the plaintiff's father under two registered lease deeds to the deceased father of the defendants. The claim was that the leases were obtained by undue influence exercised by the father of the defendants on the plaintiff's father. The father of defendants had died in 1899. It was held that the suit was barred by limitation under Article 91, Lim. Act. There again it was fundamental to the plaintiff's claim, before he could obtain possession, to set aside the document there, on the ground of undue influence. In other words the document there was voidable. The remedy sought was its-avoidance and it was therefore necessary to allege it in the plaint in order to have it set aside. It should be observed that *Sundaram v. Sithammal* (1893) 16 Mad 311 was dissented from in *Raja Rajeswara Dorai v. Arunachellam Chettiar* 1916 Mad. 350, but in the later case of *Narayanan Chetty v. Kannammal Achi* (1905) 28 Mad. 338, in which *Sundaram v. Sithammal* (1893) 16 Mad 311, was referred to, it does not seem to have been dissented from. It is not necessary for us to express any opinion-upon whether *Sundaram v. Sithammal* (1893) 16 Mad 311 is correct or not.

9. The next case that is relied upon by the respondents is *Hurri Bhusan Mukerji v. Upendra Lal Mukerji* (1897) 24 Cal 1. There-the plaintiffs sued to set aside an adoption on the ground of lack of authority. In fact the Privy Council in that case" held that neither Article 92 nor Article 93 was applicable to bar the suit because-there had been no issue of the instrument within the meaning of the former article and no attempt to enforce the instrument against the plaintiff. It does not appear to us therefore that this case carries us very much further in the direction of the respondents. The next case relied upon by the respondents is *Narasagounda v. Chawagounda* 1918 Bom. 188, which, so far as it decides anything, is against them. Indeed it was only cited for the dictum that the analogy of adoption cases to other cases is doubtful. The actual decision there was that Article 91 does not apply to a suit for possession where the plaintiff alleges that the sale deed is void but does not claim expressly to have it - set aside. So far as it goes and it is a decision of a Full Bench of the Bombay High Court - it seems to favour the contention of the appellant rather than the contention of the respondents, *Mt. Muradan v. Raghuhandan Prasad* 1927 All 826 does not touch the point that we have now got to determine.

10. In our opinion therefore the article to apply in any proceeding is that article that relates to the form of remedy that the plaintiff seeks. Here the form of

remedy is the recovery of possession. That claim will fail on the merits if the will is proved. The mere allegation that there is a will does not prove it. In order to establish the defence of the will it will be necessary for the allegation to be proved. If in course of the attempt to prove it, it is apparent to the Court that the will is not a genuine document, the Court will be perfectly at liberty to find as a fact that there is no will. If the Court so finds, that defence will fail and the plaintiff will succeed. If on the other hand, the Court is satisfied by the evidence adduced that there is a will, then the defence on the merits succeeds and the plaintiff fails. It will therefore be necessary for this case to go back for trial. In the result, the decree of the lower Court is set aside and the case sent back for trial. The costs of this appeal will be the plaintiff's in any event and the costs in the lower Court will abide and follow the result.