
(1973) 02 GUJ CK 0005
In the Gujarat High Court

Rabari Nagjibhai Haribhai

APPELLANT

Vs

Bai Zaber and Others

RESPONDENT

Date of Decision : 10-02-1973

Acts Referred:

Limitation Act, 1963 — Section 10, 11, 12, 13, 14

Citation : (1974) CriLJ 551 : (1974) GLR 153

Hon'ble Judges : J.M. Sheth, J

Bench : Single Bench

Judgement

J.M. Sheth, J.—The facts leading rise to this revision petition, briefly stated, are as under:

Opponent No. 1 (wife) filed Criminal Miscellaneous Application No. 2 of 1969, against the petitioner (husband) u/s 488 of the Criminal Procedure

Code (which will be hereinafter referred to as ""the Code""), for obtaining maintenance. Ex parte order was passed in her favour on 15th July, 1970,

fixing the maintenance amount at the rate of Rs. 100/- per month.

2. Petitioner (husband) filed Criminal Miscellaneous Application No. 16 of 1970 on 27th July, 1970 to set aside that order. It was dismissed on

6th December, 1971. He filed Criminal Revision application against that order in the Sessions Court. That application was dismissed by the

Sessions Court.

3. Opponent No. 1 (wife) filed Criminal Miscellaneous Application No. 1 of 1972 on 5th January, 1972 for recovery of arrears of maintenance for

a period of thirty-four months, i.e. for the period between 4-2-1969 and 31-12-1971.

4. Petitioner (husband) filed Criminal Miscellaneous Application No. 25 of 1971,

for cancelling the order on the ground that he was willing to keep opponent No. 1 (wife) with him. That application was filed on 29th December, 1971.

5. Both these applications were heard together. Evidence was recorded. The learned Magistrate dismissed the petitioner's application No. 25 of

1971, He allowed application No. 1 of 1972, filed by the wife and granted full recovery of Rs. 3,400/- by an order, dated 12th June, 1972.

6. Against those two orders, two revision applications came to be filed by the husband in the Sessions Court, Mehsana. Criminal Revision

Application No. 32 of 1972 was filed against the order passed in Miscellaneous Application No. 1 of 1972, and Criminal Revision Application

No. 30 of 1972 was filed against the order passed in Criminal Miscellaneous Application No. 25 of 1971. Both these revision applications were

heard by the learned Additional Sessions Judge, Mehsana, and he dismissed them. Against the orders passed in those two revision petitions, two

revision petitions came to be filed in this Court. Criminal Revision Application No. 462 of 1972 was filed against the order passed in Criminal

Revision Application No. 30 of 1972. It was summarily dismissed (rejected) by this Court. Criminal Revision Application No. 463 of 1972

(present petition) was filed against the order passed in Criminal Revision Application No. 32 of 1972.

7. It is contended by Mr. s! B. Majmudar, appearing for the petitioner (husband), that in view of the clear provisions of Section 488 of the Code,

recovery can be ordered for the period of twelve months preceding the date of application, which is 5th January, 1972. In support of his

submission, he has relied upon the second proviso to Sub-section (3) of Section 488 of the Code. That proviso reads:

Provided further, that no warrant shall be issued for the recovery of any (amount due under this section unless application be made to the Court to

levy such amount within a period of one year from the date on which it became due.

Mr. Majmudar has submitted that in the instant case, ex parte order, fixing the amount of maintenance at the rate of Rs. 100/- per month, was

passed on 15th July, 1970. Maintenance was ordered to be paid from the date of application, i.e. 4th February, 1969. Maintenance for the month

of December, 1970, will be due on 1st January, 1971. Similarly, maintenance for the month of December, 1971, will be due on 1st January, 1972.

Application was filed on 5th January, 1972. It is, therefore, submitted that it could only be said in view of the provisions of the aforesaid proviso,

that warrant can be issued only for the maintenance amount due for the period between December, 1970 and December, 1971, For the

maintenance due for the period prior to that period, which has been claimed in the application, no such warrant can be issued. It is, therefore,

contended that the order passed by the trial Court and con-firmed by the Court of Session, ordering full recovery, cannot be sustained in law.

Merely filing. Application No. 16 of 1970 for setting aside that ex parte order on 27th July, 1970, which came to be dismissed on 6th December,

1971, could not be treated as any legal impediment for enforcing the order passed in favour of the wife. Admittedly, no stay was obtained. No

injunction was obtained. The wife could have very well filed such an application for enforcement of the order for the arrears which became due by

giving an application within a period of one year, as contemplated by the second proviso to Sub-section (3) of Section 48\$ of the Code.

Admittedly, no such application was filed and there being no legal impediment, and the amount can be said to have become due when that order

was passed, so far as maintenance amount was ordered for the period between the date of application and the date of the order and other

amounts of maintenance became due every month.

8. Mr. Bhatt, appearing for opponent No. 1 (wife) has contended that filing of an application by the wife for enforcement of the order would have

been futile as the petitioner (husband) had filed an application for setting aside that ex parte order. In case he had succeeded, and the ex parte

order had been set aside, no amount would have become due. it is further contended by him that the wife bona fide did not file an application for

enforcement of the order earlier in view of the husband having filed an application for setting aside the ex parte order and thereafter filed revision

petition against that order on dismissal and that revision petition also came to be dismissed by the Sessions Court. It was, therefore, contended that

the two Courts below were justified in excluding that period and if that period can be excluded, there would be no such bar.

9. In my opinion, in view of the clear wording of the second proviso to Sub-section (3) of Section 488 of the Code, and there being no injunction

order or stay order against the enforcement order, the submission made by Mr. Majmudar appears to be well-founded.

10. Sub-section (1) of Section 488 of the Code contemplates passing of such maintenance order, if the conditions referred to therein are satisfied.

Sub-section (2) of it indicates that such allowance ordered shall be payable from the date of the order, or if so ordered, from the date of the

application for maintenance. It is thus evident that such maintenance allowance amount becomes payable from the date of the order, or if it is

ordered, from the date of the application for maintenance, it becomes payable from that date. If it is not so paid, it can be said that it has become

due.

11. Sub-section (3) of Section 488 of the Code deals with enforcement of order. A perusal of that sub-section indicates that if any person so

ordered fails without sufficient cause to comply with the order, the Magistrate has been empowered for every breach of the order to issue a

warrant for levying the amount due in the manner hereinafter provided for levying fines, and is further empowered to sentence such person for the

whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to

one month or until payment, if sooner made. First proviso to that sub-section gives another opportunity to the husband to make a genuine bona fide

offer to maintain his wife on condition of her living with him. That proviso reads:

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may

consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is

just ground for so doing.

Thereafter, the second proviso which is required to be interpreted in this case, follows. It has already been referred to, by me earlier.

12. Sub-section (5) of Section 488 of the Code deals with the position when such order passed can be cancelled by the Magistrate. Sub-section

(6) of Section 488 of the Code reads:

All evidence under this Chapter shall be taken in the presence of the husband or

father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons cases:

Provided that if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court, the, Magistrate may proceed

to hear and determine the case ex parte. Any orders so made may be set aside for good cause shown on application made within three months

from the date thereof.

In the instant case, in view of the power vested in him under this proviso, the Magistrate decided the case ex parte, That order was liable to be set

aside if good cause was shown on application made within three months from the date thereof.

13. Section 489 of the Code deals with the position, when alteration in allowance can be made on proof of a change in the circumstances of any

person receiving u/s 488 a monthly allowance, or ordered under the same Section to pay a monthly allowance to his wife or child. Sub-section (2)

of it deals with the position when such order can be cancelled or varied in view of the decision of a competent Civil Court.

14. In the instant case, there was no legal impediment for the enforcement of the order. There was nothing to prevent the wife from making an

application for the enforcement of the order passed in her favour. Merely filing of an application by the petitioner (husband) for setting aside that ex

parte order could not prevent her from filing such application for enforcement of the order. That being the position, in my opinion. the period

claimed to be excluded, cannot be excluded.

15. In Jagannath Patra Vs. Purnamashi Saraf and Another, , a single Judge of the Orissa High Court has observed:

The second proviso to Sub-section (3) of Section 488, Cr. P. C. enacts that no warrant shall be issued for the recovery of any amount due under

this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due. Thus

the period of limitation is one year. Any arrear falling beyond one year is barred by limitation.

16. In A.S. Krishnappa Chettiar and Others Vs. Nachiappa Chettiar and Others, , the Supreme Court has in terms considered the question,

whether the principle underlying Section. 15(1) of the Limitation Act, 1908, can be extended by analogy or not. It is significant to note that the

learned Additional Sessions Judge has come to the conclusion that the aforesaid period can be excluded by extending the principle laid down in the

provisions of Section 15(1) of the Limitation Act by analogy and that has been done by invoking the aid from the decision of the Madhya Pradesh

High Court to which I will make reference at an appropriate stage. At page 231, in para 10, the Supreme Court has observed:

The first submission made by Mr. Viswanatha Sastri is that the principle underlying Section 15(1) of the Limitation Act is applicable to a case of

this kind and that, therefore, the execution applications are within time.... According to Mr. Sastri the composition of a decretal debt does not

amount to an adjustment or satisfaction of a decree until the acts required to be done thereunder have been performed. Here the composition

scheme required payment of 40 per cent, of the decretal debts by the trustees to the creditors. According to him, until that condition was fulfilled

the original decree cannot be said to have been satisfied. Since the decrees herein involved could not be regarded as having been satisfied they are

still alive. Then, according to Mr. Sastri, where a composition scheme prescribes the period during which a condition has to be performed till the

expiry of the period or performance of the condition the operation of the decrees must be deemed to have been stayed. For, during this period it

would be incompetent to the decree-holders to execute their decrees. Such period could therefore be deducted by applying the principles

underlying Section 15(1) of the Limitation Act from computing the period of limitation for filing a fresh execution application.

After referring to Section 15(1) of the Limitation Act, which reads:

In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has

been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on

which it was withdrawn, shall be excluded.

it is observed:

It is clear from its terms that it is restricted in its application to a case -where the execution of a decree has been stayed by an injunction or an

order. By no stretch of imagination can it be said that the acceptance by the insolvency Court of the composition operated as a stay of execution of

the decrees for the period of four years referred to in the deed or as an injunction.

Furthermore, in para 13 of the judgment, at page 232, after referring to several decisions, it has been observed:

In both these cases the Court applied what according to it were the general principles underlying Section 15 of the Limitation Act, though the facts

of these cases do not strictly fall within the purview of that section. The question is whether there is any well-recognised principle whereunder the

period of limitation can be regarded as being suspended because a party is prevented under certain circumstances from taking action in pursuance

of his rights. The Limitation Act is a consolidating and amending statute relating to the limitation of suits, appeals and certain types of applications to

Courts and must, therefore, be regarded as an exhaustive Code. It is a piece of adjective or procedural law and not of substantive law. Rules of

procedure, whatever they may be, are to be applied only to matters to which they are made applicable by the legislature expressly or by necessary

implication. They cannot be extended by analogy or reference to proceedings to which they do not expressly apply or could be said to apply by

necessary implication. It would, therefore, not be correct to apply any of the provisions of the Limitation Act to matters which do not strictly fall

within the purview of those provisions.... For the same reasons the provisions of Sections 3 to 28 of the Limitation Act cannot be applied to

situations which fall outside their purview.

These provisions do not adumbrate any general principles of substantive law nor do they confer any substantive rights on litigants and, therefore,

cannot be permitted to have greater application than what is explicit or implicit in them. Suspension of limitation in circumstances of the kind

obtaining in these appeals is neither explicit nor implicit in Section 15 upon which reliance is placed on behalf of the appellants.

Same is the position in the instant case. Such exclusion of the period is neither explicit nor implicit under the provisions of Section 15(1) of the

Limitation Act. There is nothing also in Section 15 of the New Limitation Act, 1963 which would indicate any position to the contrary.

17. In *Sirajul Haq Khan and Others Vs. The Sunni Central Board of Waqf, U.P. and Others*, , similar view has been taken by observing:

For excluding the time u/s 15, it must be shown that the institution of the suit in question had been stayed by an injunction or order; in other words,

the section requires an order or an injunction which stays the institution of the suit. And so in cases falling u/s 15, the party instituting the suit would

by such institution be in contempt of Court. If an express order of injunction is produced by a party that clearly meets the requirements of Section

15. Even assuming that Section 15 would apply even to cases where the institution of a suit is stayed by necessary implication of the order passed

or injunction issued in the previous litigation, there would be no justification for extending the application of Section 15 on the ground that the

institution of the subsequent suit would be inconsistent with the spirit or substance of the order passed in the previous litigation. It is true that rules

of limitation are to some extent arbitrary and may frequently lead to hardship : but there can be no doubt that, in construing provisions of limitation,

equitable considerations are immaterial and irrelevant, and in applying them effect must be given to the strict grammatical meaning of the words

used by them.

18. A Division Bench of the Bombay High Court, in *Somshikhar Swami Shidlingswami Vs. Shivappa Mallappa Hosmani*, , had also an occasion to

deal with a similar question. In that case, the facts were as under:

Plaintiff obtained a decree for possession on February 15th, 1913. There was an appeal first to the District Court and then to the High Court,

which ultimately confirmed the decree on December 10th, 1915. He filed his application for execution of this decree on June 28th 1920. During

the interval, however, the defendant filed Suit No. 42 of 1916 for a declaration that the plaintiff's decree had been obtained by fraud. That

litigation lasted till July 31st, 1920 and ended in the present plaintiff's favour.

It was held that plaintiff may have been under an honest but mistaken impression that during all this time it would be futile for him to prosecute the

application for execution of the decree which was challenged by the suit of 1916. That in a case of this kind it may be desirable that the plaintiff

ought to be in a position to deduct the time taken up in defending a litigation of the nature such as in the present case. But that, as it was impossible

to bring the case within the provisions of the Indian Limitation Act the application was time-barred.

Similar is the position in the instant case

19. In *Ambujammal Vs. Singarammal and Others*, , a single Judge of the Madras High Court held that a suit for variation of the maintenance

decree was no legal impediment in the way of execution. Hence, the period of the suit could not be excluded.

20. In *Nandigama Venkata Krishna Rao Vs. Mullpudi Ganeswara Rao*, , it is observed:

While computing limitation for an application for execution, the decree-holder is not entitled to exclude the time spent in prosecuting an appeal or

second appeal against a claim suit under Order 21, Rule 63 (Civil P. C.) when there was no order or injunction restraining him from filing execution

application.

The reason is that for excluding time under this section it must be shown that the institution of the suit in question had been stayed by an injunction

or order.

In view of these decisions, it is evident that the principle underlying Section 15(1) of the Limitation Act, cannot be ex-tended by analogy to a case

like the present case, as has been done by the two Courts below and as has been canvassed by Mr. Bhatt before me.

21. I will now refer to the decision of the Madhya Pradesh High Court on which considerable emphasis has been laid by Mr. Bhat in support of his

submission and which had been also relied upon by the two Courts below.

22. In *Deviden Chenaji Vs. Mankibai Devideen*, a single Judge of the Madhya Pradesh High Court has observed:

Though Section 15(1) of the Limitation Act does not apply to proceedings u/s 488, Criminal P. C., but its analogy should be made applicable, as

those proceedings are quasi judicial proceedings. Similarly, when an application for recovery of arrears of maintenance cannot be granted forthwith

and another application between the same parties is pending, in the decision of which depends the success or failure of the latter application, the

period required for decision of that application should be excluded for computing the period of one year mentioned in the proviso. Section 488 has

been enacted for the maintenance of wives and children. The wife cannot be

expected to carry on the litigation without any money which she legitimately claims from the husband.

These observations are made in para 7 of the judgment. At page 1090, in para 8, it is observed:

The words ""from the date on which it became due"" should be interpreted to mean from the date on which she could successfully make an application, i.e., from the date when the Court holds she is entitled to recover. If the Court had not passed an order that she was entitled to get the amount, the application would be infructuous. On 25-2-59 the Court finally decided that she was entitled to recover rejecting all the pleas raised by the husband. When the husband raises a plea to maintain his wife on condition of her living with him, the previous order passed u/s 488 is substituted by the subsequent order. The period of one year is therefore to be calculated from the date when the subsequent order is passed under the proviso.

It is significant to note that in that case, the facts were as under:

An order for maintenance was passed some time in 1953 (31-7-1953). On the basis of the order, payments were made for some months by the husband and thereafter defaults were made. So, an application was made by the wife on 26-7-1956 for recovery of arrears due then. That application was resisted by the husband on various grounds including his offer to maintain his wife on condition of her living with him and also his inability to pay the maintenance amount. The matter dragged on for a long time and ultimately that application was decided against the husband on 25-2-1950. In the said order, recovery for the seven months which was due on the date of the application was passed. A fresh application was moved on 11-6-1959, but the same was dismissed for default on 21-7-1959. The wife, however, made further application on 22-8-1959 for recovery of the arrears of maintenance till then and also granting maintenance allowance pendente lite.

23. It is thus evident that the question that arose for consideration in that case was about the recovery of maintenance allowance amount which became due during the proceeding that dragged on for a long time without any fault on the part of the wife. We are not concerned with any such case. It is observed at page 1090:

On 25-2-1959 the Court finally decided that she was entitled to recover rejecting all the pleas raised by the husband. When the husband raises a

plea to maintain his wife on condition of her living with him, the previous order passed u/s 488 is substituted by the subsequent order. The period

of one year is therefore to be calculated from the date when the subsequent order is passed under the proviso.

In the instant case, no such application was made for enforcement of the order within the period of one year. The application made within the

period of one year is only for claiming maintenance from December, 1970 to December 1971, as said earlier. Warrant for recovery of the amount

due for those months can only, therefore, be issued. Issue of warrant for the amount which had become due prior to "that period, is, therefore, not

warranted by the provisions of the aforesaid second proviso to Sub-section (3) of Section 488 of the Code. The revision petition, therefore, partly

succeeds.

24. The revision petition is partly allowed and the order passed by the trial Court in Criminal Miscellaneous "Application No. 1 of 1972, dated

12th June, 1972, directing that warrant for levying the amount towards arrears of maintenance for the period from 4-2-1969 to 31-12-1971,

amounting to Rupees 3,400/- be issued as provided for levying fines as per provisions enacted in Section 386(1)(a) of the Criminal Procedure

Code, is modified. Such warrant will be issued only for levying the amount towards arrears of maintenance for the period from December, "1970

to December, 1971, Rule is modified.