

(1967) 11 KAR CK 0005
In the Karnataka High Court
Case No : Second Appeal No. 297 of 1964

Rachappa Maharudrappa Kalagi

APPELLANT

Vs

Irappa and Others

RESPONDENT

Date of Decision : 13-11-1967

Acts Referred:

Limitation Act, 1963 — Section 62, 97

Citation : AIR 1968 Kar 263 : (1967) 2 MysLJ 642

Hon'ble Judges : T.K. Tukol, J

Bench : Single Bench

Judgement

(1) This is an appeal from the judgment and decree passed by the Civil Judge, Bijapur directing the appellant to pay Rs. 1,244-78 to the respondent with future interests and cost.

(2) The sole point argued in this appeal relates to limitation. In order to appreciate that point, it is necessary to refer to a few admitted facts.

(3) The present appellant was the defendant in Civil Suit No. 38 of 1961 which was instituted by the respondents on 27-7-1961 for recovery of Rs. 1,244-78 nP. as being due under a khata balance as in the year 1952. The plaintiff had been in possession of certain shop premises belonging to the defendant-appellant's father on an annual lease of Rs. 55. The defendant gave a notice on 7-7-1963 terminating the lease and thereafter instituted Civil Suit No. 145/55 in the Civil Court. Therein the plaintiffs pleaded that there had been an oral agreement of lease under which they were to continue in possession of the property as lessees for a period of 22 years in liquidation of the khata balance and that the suit for eviction was not tenable. The trial Court decreed the suit on 31-10-1955 requiring the present plaintiffs to deliver possession of the property and pay arrears of rent. The plaintiffs filed an appeal to the District Court and then to this Court in Second Appeal No. 100/1957 without any success. It was contended in that appeal that the Courts below should have passed a conditional decree for possession subject to the payment of khata balance. That contention was

negated on the ground that that was not a case in which any benefit was received by the defendant-lessee in the form of cash. The material portion of the judgment of this Court dealing with this contention reads as follows:

"This case is not one in which any benefit was received by the plaintiff in the form of cash. The agreement was that his liability under the khata balance should be regarded as discharged under the agreement. If the agreement turns out to be void or unenforceable, the benefit that the plaintiff received under the agreement by way of his exoneration from liability also falls to the ground. In other words, his liability for the amount is restored."

(4) After the disposal of the second appeal by this Court on 12-10-1960, the plaintiff was dispossessed of the property in execution on 14-6-1961. He then instituted the present suit on 27-7-1961 alleging that the cause of action for the suit arose on 14-6-1961 on which day they were dispossessed of the premises by the defendant on execution of the decree in Suit No. 145/1955. The defendant resisted this claim contending that the cause of action accrued on 7-7-1953 when the notice of eviction terminating the tenancy was served on the plaintiffs and that the suit was barred by time. He also contended that the date of failure of consideration of the alleged contract of lease was the date of the judgment of the trial Court when the plaintiff's plea was rejected.

(5) The learned trial Judge dismissed the suit holding that the suit was barred by time. In the appeal preferred by the present respondent (Regular Appeal No. 27 of 1967) in the court of the District Judge, the Civil Judge, hearing the appeal, reversed the decree of the trial Court holding that Article 97 of the Limitation Act applied to the facts of the case and that the cause of action accrued to the plaintiffs on 14-6-1961 when they were dispossessed in execution of the decree.

(6) Mr. V. Krishna Murthy, learned Counsel appearing for the appellant has challenged the view taken by the appellate Judge. He argued that Article 62 of the Limitation Act should have been applied to the facts of this case and that even if Article 97 were applied, the view taken by the Civil Judge in appeal was erroneous. In view of the fact there is a concurrent finding of both the courts below that there was an oral agreement of lease, it is difficult to agree that Article 62 of the Limitation Act would apply to the facts of this case. Article 97 provides for recovery money paid upon an existing consideration which afterwards fails the period of limitation prescribed therein is three years from the date of failure of consideration.

(7) So, the point for consideration is what is the date on which the consideration can be said to have failed in this case. Mr. Krishna Murthy has argued that the consideration can be said to have failed either on 7-7-1953 when the notice of eviction was given or at the latest on 31-10-1955 when the trial Court passed a decree for eviction in Civil Suit No. 145/1955. Mr. Desai appearing for Mr. Datar has tried to support the judgment of the Civil Judge and has cited two decisions in favour of that view.

(8) Before considering the decisions cited at the bar, I would like to point out that one significant feature of the plaintiff's claim is that he is now suing to recover the money that was due to him under the khata balance as in 1952. It is not a case of actual payment in consideration of an agreement of lease entered into by the parties. As indicated by this Court is Second Appeal No. 100 of 1957, when the agreements turned out to be void, the liability of the lessor to pay the amount came to be restored and the right of the plaintiffs to recover the amount also revived.

(9) We have, therefore, to see whether this right to recover the amount due under the khata balance became revived on 31-10-1955 as contended by the learned Advocate for the appellant or on the date of dispossession on 14-6-1961 as contended by the learned Advocate for the respondents.

(10) Mr. Krishna Murthy, has drawn my attention to two decisions of the Privy Council which have bearing on the point at issue. In *Juscurn Boid v. Pirthichand Lal* AIR 1918 PC 151, there had been a sale of Patni Taluq under the Regulation of 1879 for arrears of rent. The darpatnidar had the sale set aside. Thereafter, the purchaser sued the zamindar to recover the money paid by him under the sale with interest. Their Lordships considered that Article 62 of the Limitation Act would be applicable to a case of that type as a claim one for money had and received by the defendant for the plaintiff's use. Dealing with the application of Article 97, this is what they stated;-

"But by the decision in the first suit No. 248/1904 the sale was reversed in its entirety and for all purposes irrespective of the decree in the 3 later suits, so that if the reversal of the sale is the cause of action, the only question is whether time began to run as the plaintiff alleges from the 3rd of August 1906 the date of appellate decree, or as the defendant-respondent contends from the 24th of August 1905 the date of the original decree in suit No. 248/1904. Both the Courts have held that the failure of consideration was at the date of the first court's decree. Their Lordships feel no doubt that as between these 2 decrees, this is the correct view, for whatever may be the theory under other systems of law, under the Indian Law and Procedure, a original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal."

The other decision relied upon by the learned Advocate is found in *Abdullah Ashgar Ali v. Ganesh Das*, AIR (20) 1933 PC 63 That was a case in which the Liquidates applied to the Court to recover certain sums of money and the question that was considered was whether the recovery of the sums had been barred at the date of the application. Their Lordships held that "in the absence of special circumstances, the time at which the agreement is discovered to be void within the meaning of Section 65 is the date of the agreement." These sums had been paid either as deposit or as earnest towards fulfilment of a contract. The only circumstance which compels me to hold that the date of the alleged contract itself cannot be the starting point of limitation in the present case is that the

present plaintiffs had set up an oral agreement in the former suit brought by the lessor for the recovery of possession and his cause of action to recover the money due to him under the khata balance would accrue the moment that oral agreement was held to be void by the trial Court on 31-10-1955.

(11) On the other hand, Mr. Desai appearing for the respondent has relied upon two decision to support the view that limitation would start to run against his client from the date of dispossession. He has drawn my attention to the decision of the Rangoon High Court in *U Talok v. Maung The Nyo* AIR 1937 Rang.148. In that case, the appellants had lent Rs. 500/- to the respondent in consideration of an oral transaction of usufructuary mortgage. They had been put in possession of the property and were entitled to enjoy the usufruct towards the principal and interest. They retained the possession of the land for seven years until they were deprived of possession in the execution of a decree obtained by some other party. It was held under these circumstances that the suit fell under Article 97 as possession of the land was clear consideration and that consideration existed until the lender was deprived of possession and that consequently time did not run until the date of dispossession. Reliance has also been placed on another decision of the Nagpur High Court in *Saraswathi Bai v. Madhukar*. AIR 1950 Nag. 229. It was the case of vendee trying to recover the money paid and damages on the ground that he had been subsequently dispossessed. The property had been transferred by the vendor when the same was under the management of the Collector and the sale was set aside. It was held that the contract was void since its inception u/s 65 of the Contract Act and that the vendor was liable to refund the amount. It was also held that under Art. 97 of the Limitation Act, time commenced to run from the date of failure of consideration which was the date of dispossession. As already observed, it should be seen that both these cases were cases where a vendee had parted with money and was entitled to enjoy the lands and had in fact been enjoying the same in consideration of the amount paid by him. He got the cause of action to recover the money only on his dispossession. So far as the present case is concerned, it is a suit for recovery of khata balance and the moment the oral agreement of lease was held by the trial Court to be void by its decree dated 31-10-1955, the present plaintiffs got the cause of action for recovery of the khata dues. This view find support from the decision of the Privy Council in AIR 1927 99 (Privy Council) .

(12) For these reasons, I am of opinion that the view taken by the learned Civil Judge is erroneous and the appeal has therefore, to be allowed. I accordingly allow the appeal, set aside the decree passed by the appellate Court and dismiss the suit. Parties to bear their costs throughout.

(13) Appeal allowed.