
(1958) 03 AP CK 0008

In the Andhra Pradesh High Court

Case No : A.A.A.O. No's. 79/3 and 80/3 of 1955 and Second Appeal No. 167/1 of 1956

Sajjanam Wadla China Rajayya

APPELLANT

Vs

Chappal Venkateshwar Rao

RESPONDENT

Date of Decision : 11-03-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 1, Order 1 Rule 10(2), Order 23 Rule 1(2), Order 23 Rule 2
Limitation Act, 1908 — Section 14

Citation : AIR 1959 AP 349

Hon'ble Judges : Qamar Hasan, J;Kumarayya, J

Bench : Division Bench

Advocate : C. Sriramulu, K. Madhava Reddi and V.M. Reddi, in Nos. 167/1 of 1956, for the Appellant; K. Madhava Reddi and V.M. Reddi, in Nos. 79/3 and 80/3 of 1955, for the Respondent

Judgement

Syed Qamar Hasan, J.—C. M. As. Nos. 79/3 and 80/3 of 1955 are respectively filed by the defendant against the judgment and order dated 28-10-1953 of the District Judge, Adilabad, reversing the decision of the Munsif of Chinnoor holding the suits to be beyond time and remanding the same for disposal on the merits. S. A. No. 167/1 of 1956 is preferred by the plaintiff impugning the dismissal of the suit on the ground of limitation. As the question to be determined is common, this judgment will govern all the three appeals.

2. The facts are that the plaintiff instituted, in the first instance O. S. No. 102 of 1952-53 on 18-3-1952, against the appellants in C. M. As. Nos. 79 and 80 of 1955 and the respondent in S. A. No. 167/1 of 1956 and another defendant, who is out of picture now, for recovery of Rs. 579-9-8 being the principal and interest due on four bonds severally executed by the defendants on 13-1-1950 to pay their proportionate share of an erstwhile joint debt, the promise to pay being within 19-3-1950.

3. The defendants in their common written statements denied the execution of the suit bonds and disowned the alleged liability to pay the sum claimed. They further raised the plea that the suit was bad for misjoinder of causes of action. Of the five issues adjusted the first issue was "whether the plaintiff has misjoined the causes of action", and it was set down for evidence. On 9-7-1953, the pleader for the plaintiff, instead of producing evidence contended that the sum claimed was originally borrowed by the father of the defendants which joint liability was later converted into a several one and therefore a common question of law and fact arose which entitled the plaintiff to join the defendants in the same suit in view of the provisions of O. 1, Rule 1, C. P. C.

The trial Judge repelled the arguments on the ground that the case set up for the plaintiff was neither borne out by the allegations in the plaint nor by the recitals in the suit bonds. The pleader for the plaintiff then expressed his willingness to continue the suit as against the 2nd defendant. The trial Judge ordered the name of the remaining defendants to be struck off and directed the plaintiff to file fresh plaints within three days.

This order and direction was" complied with and the fresh plaints were filed on 11-7-1953, which were separately numbered with fresh court-fees. The defendants, in reply, inter alia raised the plea of limitation. The trial Judge decreed the suit against the defendant retained in O. S. No. 102 of 1952 but since the fresh plaints were presented on, 11-7-1953 and the terminus a quo had according to the terms of the suit bonds, expired on 19-3-1953, he dismissed them as being barred by time.

The plaintiff appealed and the District Judge of Adilabad held that in so far as the appellants in, C. M. As. Nos. 79 and 80 of 1955 were concerned, the plaintiff was entitled to the benefit of Section 14 of the Limitation Act and therefore the suits against them were within time. But as against the appellant in S. A. No. 167/1 of 1956 he concurred with, the view of the trial Court. All the three appeals filed in this Court were, in the first instance, heard by Manohar Pershad J.

It was argued before him on behalf of the defendants that inasmuch as the plaintiff has withdrawn his suit against them by reason of multi-fariousness he was not entitled to the benefit of Section 14 of the Limitation Act. To support that contention, reliance was placed on a Full Bench case of the Allahabad High Court reported as Sadayatan Pande Vs. (Firm) Ram Chandra Gopal

On behalf of the plaintiff it was contended that inasmuch as the plaintiff did not withdraw the suit voluntarily and there was no specific order of the court allowing him to withdraw his suit the provisions of O. 23, Rule 1, C. P. C., were not attracted so as to deprive him of the benefit of Section 14 of the Limitation Act by reason of the provisions of Rule 2 of the same Order. In that connection, the cases of Guruvabhotlu v. Jogayya, AIR 1935 Mad 69R and Kanhayalal Sapdubhai v. Hiralal Deoram. AIR 1947 Bom _255, for the proposition that where a plaintiff having regard to the view of the court that the suit is bad for mis-joinder of

parties and causes of action, elects to give up some of the defendants, there is no withdrawal or abandonment within the meaning of Order 23, Rule 1, C. P. C., and a fresh suit against such defendant is not barred since in such cases the plaintiff is really acting under compulsion of law and not out of voluntary choice.

Our learned brother doubted the correctness of the authorities cited on behalf of the plaintiff in view of the decision of the Privy Council in the case of AIR 1939 110 (Privy Council) wherein Lord Porter while delivering the judgment of the Board observed:

"The appellant (plaintiff) indeed contended that he had not proceeded under Order 23, Rule 1, in applying to substitute the new trustees for the old, but that his application was made under Order I, Rule 10 alone. Their Lordships cannot accept this view. The last named Rule no doubt authorizes the Court to order the name of a party improperly joined to be struck out and that the names of any person who ought to have been joined be added. But such an order is expressly directed to be made on such terms as may appear to the court to be just.

If no terms are inserted in the order, then in their Lordships' view the effect of withdrawing the suit against some of the defendants is to be ascertained from Order 23, Rule 1. That order is not very happily worded but its meaning is reasonably clear. Under its provisions, the court may give liberty to the applicant to institute a fresh suit after a withdrawal but if it does not do so, the plaintiff is precluded from instituting a fresh suit in respect of the same subject-matter."

Having regard to the implication of these observations and being of opinion that the matter was not free from difficulty and was of general importance our brother referred it to the Division Bench.

4. The pattern of arguments which necessitated the reference remained unchanged before us. We may straightway point out that the above decision of the Privy Council strictly speaking has no bearing, and if any, a very remote bearing on the present controversy. In that case, the plaintiff was a building contractor who was employed by four trustees of a pagoda. In the plaint for recovery of Rs. 26,000/- and odd each of the four trustees was named as a defendant.

Shortly after the suit had been begun the trustees were removed from their position as trustees of the pagoda and eight others were appointed in their place. The plaintiff thereupon made an interlocutory application asking originally to add the eight new trustees as defendants and ultimately to substitute the new trustees in place of the old. The application was granted and thereupon the names of the four original trustees were struck out and those of the new trustees inserted in their place.

When however the case came on for trial and before the hearing on the merits, the trial Judge suggested that the liability of the original trustees was "a personal one and that no liability attached to the new trustees. Thereupon the plaintiff

applied to replace the names of three out of the four original, trustees (the other having died) as defendants. This application, the trial Judge refused to grant.

The suit then proceeded to trial, the claim against the new trustees was dismissed and the remaining defendant on the record was found liable as guarantor. In the appeal preferred by the guarantor, it was contended that the trial Judge erred in law in holding him liable on the ground that his liability should have been held to be discharged by the act of the plaintiff in foregoing his claim against the original trustees. The High Court acceded to the plea and allowed the appeal.

The question canvassed before the Board was whether the High Court had erred in holding that the guarantor was discharged from his liability. In this context occur the observations of their Lordships extracted above. On the basis of those observations, the result they arrived at was that the guarantor was not discharged or released from the debt and that the only consequence of striking out the names of the original four trustees was to preclude the plaintiff from suing afresh the principal debtor.

5. It would thus be seen that their Lordships were dealing with a case which was properly constituted as originally framed and in which" no question of multifariousness was involved. Had it been allowed to proceed as such it might have resulted in a decree against the four trustees or any of them. The plaintiffs by having their names struck out from the plaint, brought the whole procedural position within the ambit of Sub-rule (3) of Order 23, R. 1, C. P. C., precluding himself from instituting any fresh suit, because he was deemed to have abandoned the claim in so far as the originally im-pleaded trustees were concerned. In this view of the matter, the provisions of Rule 10 (2) of Order 1, C. P. C., could not naturally be attracted.

6. In the instant case the defect of multi-fariousness was existing from the beginning and there was objection on the part of the defendant to that effect. The contention of the plaintiff was that as the suit bonds had stemmed from the common debts due from the father of the defendants all the defendants could be joined in the same suit, and no question of mis- joinder of the causes of action would arise. The trial Judge did not feel inclined to accede to this contention and allowed¹ the plaintiff to go on with the suit as framed. He, therefore, passed an order on 9-7-1953, saving

"The learned pleader has now realised the mistake and that he wants to keep the defendant 2 as-party in the case. So struck off all the remaining, names. The plaintiff is given time of three days to produce fresh plaints."

There is no controversy that if the trial Judge had dismissed the suit as framed, for multifariousness and the plaintiff had brought fresh separate suits against each of the defendants, he would not have been handicapped by the provisions of Rule 2, of Order 23, Order P. C., in claiming the benefit of Section 14. of the Limitation Act.

That rule prescribes that in any fresh suit instituted on permission granted under the last preceding rule (Order 23, It. 1) the plaintiff shall be bound by the law of Limitation as if the first suit had not been instituted. The learned advocate for the defendant contended that the order of the trial Judge dated 9-7-1953 was one which was passed under Sub-rule (2) of Rule 1 of Order 23, C. P. C.

On that construction of the order he urged" that the ratio of the decision in Sadayatan Pande Vs. (Firm) Ram Chandra Gopal ; Madhosingh and Another Vs. Jaitpalsingh and Others, and Yalpi Virupakshappa Vs. Chowdireddi Veerabhadra Gowd and Others, should apply to the facts of the case. We shall take note of the Allahabad case since the other two cases are based on the Allahabad case. In that case, the plaintiff in the first instance filed a suit against two sets of defendants for recovery of money due to him by the defendants on babi khata accounts.

A preliminary objection was taken to the plaint on the ground of multifariousness. The trial court expressed the opinion that the defect in the frame of the suit was there and actually ordered that the plaintiff should elect as to which of the two cases he would like to proceed against. After this order was passed the plaintiff filed an application under Order 23, Rule 1, C. P. C., for withdrawal of the suit against one set of the defendants with permission to institute a fresh suit against them afterwards and those to proceed with the suit against the remaining defendants.

The Court ordered the suit to be withdrawn and granted the permission asked for. On the very day the permission was granted, the plaintiff instituted the fresh suit which admittedly was time-barred. Reliance was placed on Section 14 of the Limitation Act, to bring the suit within time. As it was a clear case of withdrawal of the suit being the voluntary act of the plaintiff. Sulaiman C. J., as he then was, while delivering the opinion of the Full Bench observed:

"The words "unable to entertain if in Section 14 do-not merely mean that the Court has expressed its mind that the suit is defective but must mean that the Court has passed an order terminating the suit or proceeding on the ground that there is a defect of jurisdiction or cause of a like nature on which the suit must fail.

So long as the Court has not terminated the proceeding but has merely given an option to the plaintiff to chose one of the two alternatives and the plaintiff voluntarily chooses one, it cannot be said that the case falls within Section 14 of the Limitation Act. Here it is" not an act of the Court which terminates the suit, but the voluntary act of the party which does so,"

A perusal of the order of 9-7-1953 shows that there was no application by the plaintiff either orally or in writing to permit him to withdraw the suit with liberty to bring fresh suits, as has been the case in "the three authorities cited by the advocate for the defendants. When the Court insisted that the suit was bad for multifariousness, the pleader for the plaintiff merely expressed his willingness to

continue the suit as against the 2nd defendant,

Thereupon the Court did not order the suit to "be withdrawn but merely made an order to strike off the names of defendants 1, 3 and 4. That part of the order would to our mind fall under Order 1, Rule 10 (2), C.P. Code. The fact that the Court further directed the plaintiff to file fresh plaints within three days would not attract the provisions of Order 23, Rule 1 (2) because of the act of the Court.

The authorities insist upon the voluntary act of the plaintiff and not that of the Court. If the act is that of the Court, the party suing cannot be mulcted for what he has not done. In these circumstances and for the reasons given above, we are of opinion that the provisions of Rule 2 of Order 23 did not come into operation and the plaintiff was not debarred from claiming the benefit of Section 14 of the Limitation Act. Looked at from that point of View, it is not necessary for us to consider whether the cases of AIR 1935 Mad 696 and AIR 1947 Bom 255, were wrongly decided.

7. Now it is to be seen how far the provisions of Section 14 of the Limitation Act would benefit the plaintiff. The promise in the suit bonds is that the sum borrowed would be paid before the Ugadi of 1950. In other words, the payment at the most ought to have been made on 18-3-1950. O. S. 102 of 1952-53 was instituted on 18-3-1953 which was the last date for filing the same.

The names of the defendants 1, 3 and 4 were struck off on 9-7-1953, and the present plaints were filed on 11-7-1953. If the period between 18-3-1953 and 9-7-1953 is excluded u/s 14 of the Limitation Act, two days have to be accounted for. The act that the Court had given three days' time for presenting fresh plaints would be of no avail to the plaintiff because the Court had no jurisdiction to fix any time for filing suits or presenting fresh plaints. As these three days cannot be excluded from computation, the suits would obviously be time-barred.

8. In the result C. M. S. As. Nos. 79 and 80 of 1955 are allowed and the judgments and decrees of the trial Court are restored. Second Appeal 167/1 of 1956 is dismissed. The plaintiff in each appeal will pay costs to the successful defendants.