(1951) 10 KL CK 0006

In the High Court Of Kerala

Case No : A.S. No. 458 of 1951

Sankararu Shankararu Bhattathiri — APPELLANT

Vs

Dakshayani Amma Susila Devi and Others — RESPONDENT

Date of Decision : 17-10-1951

Acts Referred:
Limitation Act, 1908 — Article 103, 108, 109, 115, 118

Citation : (1951) 10 KL CK 0006

Hon'ble Judges : Vithayathil, J;Govinda Pillai, J

Bench : Division Bench

Advocate : N. Varadaraja Iyengar, for the Appellant; K. Velayudhan Nair, for the Respondent

Judgement

Vithayathil, J.—Defendant 1 in O.S. No. 211 of 1124 on the file of the Trivandrum District Court is the Appellant in this case. The suit is for arrears of certain recurring dues. The Plaintiffs case is that their ancestors gave some properties to the Defendants family under an agreement that the Defendants family should make an annual payment of 108 paras of paddy, 54 fanams, 100 cadjan leaves and 10 bundles of fibre to the Plaintiffs tarwad. As default was made in the payment of these dues the Plaintiffs have filed this suit for recovery of 12 years dues and interest thereon for three years. The Plaintiffs sought to recover the amount from certain properties belonging to the Defendants which were scheduled to the plaint and from the Defendants personally and also from other properties belonging to their family. Defendant 1 alone contested the suit. The main contentions are that the Plaintiffs'' claim is barred, by limitation, that in any case the Plaintiffs are not entitled to claim the amount from the Defendants personally or to have a charge on the plaint properties, that in any event they are not entitled to get the money, cadjan and fibre claimed in the plaint and that the price of paddy given in the plaint is excessive.

2. The lower Court held that the Plaintiffs are entitled only to the paddy portion of the claim, that they are entitled to get 12 years dues, that they cannot claim a

charge on the plaint properties, that the Defendants are not personally liable for the plaint claim and that paddy should be valued at the nirak rate prevailing on the date of the plaint. A decree was given for 331 paras and 6 edangalies of paddy and for one half the costs of the Plaintiffs.

3. The main question raised in this appeal is that relating to limitation. The lower Court held that the Plaintiffs are entitled to 12 years dues on the basis of certain decisions in prior suits relating to the same dues. In Ext. G suit the decree was for 9 years dues and in Ext. D suit for 7 years dues. But they were both ex parte decisions. In Ext. I suit the claim was only for 3 years dues. It was held in Exts. I and II suits that the period of limitation for establishing a periodically recurring right is 12 years from the date of the denial of the right. The question whether the Plaintiffs were entitled to claim 12 years dues was not, how- over, considered in those cases. The question that was raised was whether the Plaintiffs right to the dues was lost by lapse of time. Moreover, we do not think that on a pure question of law like limitation the decisions in prior suits will operate as res judicata.

There is no doubt that the suit if viewed as one for establishing a periodically recurring right is not barred by limitation. There is no evidence in this case that the Defendants denied the right of the Plaintiffs more than 12 years before the date of the suit. But the point that was urged in this appeal is that the Plaintiffs are not entitled to claim more than 3 years'' dues. The Plaintiffs case is that the Article of Limitation Act that applies to a suit for arrears of recurring dues is Article 118, Travancore Limitation Act corresponding to Article 131, Indian Limitation Act. Defendant 1 contends that that Article applies only to a suit for establishing a periodically recurring right and not to a suit for recovery of arrears of dues on the basis of that right.

His learned advocate relies on the ruling of the Travancore High Court - ''Raman Karthavu v. Dewan of Travancore 19 Trav. L.J. 82 (A). It was held in that case that Article 108 of the old Travancore Limitation Act corresponding to Article 118 of the new Act would apply only to a suit for establishing a periodically recurring right and that it would not apply to a suit for recovery of dues based on that right. V.S. Subramonia Iyer J. observed thus in that case:

The Article in terms applies only to a suit ''to establish a periodically recurring right.'' Establishing a right is different from claiming money due on the basis of the right, a consequential relief flowing from the right when established.

His Lordship refused to follow the Pull Bench decision of the Madras High Court - P.C. Manavikrama Zamorin Raja Avergal Vs. R.P. Achutha Menon, and the decision of the Bombay High Court - ''Sakharam Hari v. Laxmi Priya Thirthaswami 34 Bom. 349 (C) and preferred to follow the decision or the Allahabad High Court ''Lachhmi Narain v. Turabunissa 34 All. 246 (D) and that of the Patna High Court - Sri Sri Baidyanath Jiu Vs. Har Dutt Dwari and Others, In P.C. Manavikrama Zamorin Raja Avergal Vs. R.P. Achutha Menon, the Judges who referred the case to the Full Bench, namely Ayling and Tyabji JJ., were of opinion that Article 131, Limitation Act would not apply to a suit for arrears of dues under a periodically recurring right. But as there were some decisions of the Madras High Court in which a contrary view was held the case was referred to a Full Bench.

The Full Bench that decided the case consists of White C.J. and Sankaran Nair and Oldfield JJ. His Lordship White C.J. wrote the leading judgment observing thus:

If this matter had been res integra I should have been disposed to hold that Article 131 should be construed as applying to a suit brought for the purpose of obtaining an adjudication as to the existence of an alleged periodically recurring right and not to a suit in which it was sought to recover moneys alleged to be due by reason of alleged right. The question of existence of the right is no doubt distinct from the question of the right to recover moneys if it is established that the right exists.

Yet His Lordship preferred to follow the prior rulings of the Madras High Court and the decision of the Bombay High Court in ''34 Bombay 349 (C). 34 Bom. 349 (C)'' was a case in which the Plaintiff sued to recover arrears of a cash allowance which, according to Hindu Law, is Nibandhs or immovable property, although in the nature of a periodically recurring right. Sankaran Nair J. agreed with this view with the following observation. "The question is not free from doubt but I am not prepared to differ from the decisions of this Court". Oldfield J. only expressed his agreement with the opinion of the Learned Chief Justice.

4. This decision was followed by the Madras High Court in two later rulings - Senthattikalai Pandia Chinna Thambiar and Another Vs. K. Rama Iyer, and - Cherukur Krishniah Vs. Sowcar Lodd Govinda Doss Krishna Doss, But the Bombay High Court refused to follow 34 Bom 349 (C) in a later case, namely ''Janardhan Trimbak v. Dinkar Hari AIR 1931 Bom 139 (H). In that case Madgavkar J. considered the decisions in P.C. Manavikrama Zamorin Raja Avergal Vs. R.P. Achutha Menon, but preferred to follow two earlier decisions of the Bombay High Court - ''Raoji v. Bala 15 Bom. 135 (I) and ''Chamanlal v. Bappu Bhai 22 Bom. 669 (J) and held that Article 131 applied only to establish a periodically recurring right and not to a suit for arrears of dues based on such right.

5. The question war; elaborately discussed by the Allahabad High Court in - Hakim Hidayat Ullah and Others Vs. B. Gokul Chand and Another Sulaiman C.J. reviews A at length the decision of the Madras High Court in P.C. Manavikrama Zamorin Raja Avergal Vs. R.P. Achutha Menon, and that of the Bombay High Court in Janardan Trimbak Gadre Vs. Dinkar Hari Rajguru, and the earlier decisions of the Allahabad High Court - ''Mahomed Husain v. Mohammadi Bibi AIR 1915 All. 67 : 34 All. 246 (D) and came to'' the conclusion that in a suit where the Plaintiff claims a relief as to the establishment of a periodically recurring right and also for the recovery of arrears under that right Article 131

would apply only to the 1st relief and. not to the 2nd relief. In - ''Parshotam Singh v. Balwant Singh AIR 1929 Lah. 872 (2) (M) the Lahore High Court held that Article 131, Limitation Act would apply only to a suit in which the Plaintiff seeks to establish his right to maintenance but would not apply to a suit for arrears of maintenance. The same view was held Jay the Nagpur High Court in AIR 1948 397 (Nagpur) and by the Patna High Court in -'' Babu Ramji Das Vs. Rai Mahamaya Prasad Singh Bahadur and Others,

6. The learned advocate for the Respondent relied on two relied of the Travancore High Court - ''Ramakrishna Aiyan v. Sivan Pillai 11 Trav. L.J. 418 (P) and - ''Krishna Iyen v. Kanthi Ammal 13 Trav. L.J. 354 (Q). In both these cases the suit was for melvaram. In the 1st case it was held that melvaram is a recurring right charged upon immovable property. It was therefore not necessary to decide in that case whether the claim would come under Article 108, old Limitation Act corresponding to Article 118 of the new Act. (Travancore). It is true that their Lordships followed in that case the decisions in P.C. Manavikrama Zamorin Raja Avergal Vs. R.P. Achutha Menon, But it was not necessary to decide the question in that case. The actual decision in the case was to the'' following effect:

Whether Article 108 or 109 applies to suits to recover such moneys we are clear in holding that the claim'' of the Plaintiffs is not barred by limitation.

18 Trav. L.J. 354 (Q)'' only followed 11 Trav. L.J. 413 (P). It is true that these two decisions were not considered in - ''Raman Karthava v. Dewan of Travancore 19 Trav. L.J. 82(A). But in view of the fact that the question did not arise for decision in those cases we do not think that the omission to refer to them will in any way detract from the authority of the ruling in 19 Trav. L.J. 82(A). We are therefore of opinion that Article 118, Travancore Limitation Act does not apply to the present suit in so far as it relates to the claim for arrears of dues.

7. It was next argued for the Respondent that the plaint claim is one charged on immovable property and that therefore the Plaintiffs are entitled to claim 12 years'' dues under Article 119, Travancore Limitation Act. It is true that in the decree prepared in this case it is stated that the amount decreed is charged on the plaint schedule properties and other properties belonging to the Defendant''s family. But this is clearly a mistake made in preparing the decree. The question whether the Plaintiffs are entitled to a charge on the plaint properties was raised in the case and it was held that they were not entitled to such a charge. The finding in para. 9 of the judgment is to the following effect:

I therefore hold that no charge can be given to the Plaintiffs for the plaint claim over the plaint properties and that the Plaintiffs can be given only a decree against the family properties and assets generally of the Defendants.

In the decretal portion it is thus provided:

The charge asked for against the plaint properties is not allowed, but those properties will beliable for the decree amount just like all other properties belonging to the Defendants'' family.

It is thus clear that in the judgment the charge claimed in the plaint was not allowed. But in preparing the decree the following words were used:

(Malayalam Passage omitted - Ed.)

(The Plaintiff is allowed to realise the amount as a charge on all the properties belonging to the Defendants'' family including the plaint properties but not as a charge on the plaint properties alone). This is clearly an incorrect rendering of the provision in the judgment. What was really meant by the judgment is that the Plaintiffs were not entitled to a charge on the plaint properties but that they could realise the plaint amount from the family properties of the Defendants including the plaint properties also. This provision does not amount to creating a charge on any specific property.

The learned advocate for the Respondent argued that such a provision amounts to creating a charge and in support of his position he referred to a ruling of the Madras High Court - Mr. Mittinti Narasimhamurti and Another Vs. Pandiri Satyanandam (judgment-debtor) and Others, We do not think that that decision goes to the extent of laying down that a decree allowing the Plaintiff to realise the decree amount from the properties of the Defendant amounts to creating a charge on those properties. In that case the decree provided that all the properties of the Defendant both movable and immovable would be charged for the decree amount. It was contended that such a charge was not enforceable in execution as the property charged was not specified. But the Court held that the property charged for the decree debt could be ascertained at any moment and that therefore a valid charge was created by the decree. In this case it is expressly stated in the judgment that the amount decreed would not be a charge on the plaint properties. The direction that the '' decree amount could be realised from the properties of the Defendants'' family cannot amount to creating a charge on thaw properties.

8. The learned advocate for the Respondent then referred the decision of the Madras High Court in AIR 1933 Mad. 47 (G)'' for tile position that the plaint claim is one charged on immovable properties. In that case the claim was for a payment which had to be made out of the profits of immovable properties and it was held that it was in the nature of a charge on such properties. But it was net necessary to decide in that case whether the claim was one charged on immovable property or not as it was held that the claim was one to which Article 131, Limitation Act applied. It was therefore not necessary to decide in that case whether the suit would be governed by Article 132 (corresponding to Article 119, Travancore Limitation Act). Moreover it cannot be said that the payment claimed by the Plaintiffs in this case is one that has to be made out of the profits of immovable property. We are therefore of opinion that the plaint-claim is not one charged on immovable property and that it will not come under Article 119.

Travancore Limitation Act.

9. The further question for consideration is what Article of the Limitation Act will apply to this case. It was argued for the Respondent that if Article 118 or Article 119 will not apply to this suit it will corns under the residuary Article 109, corresponding to Article 120, Indian Limitation Act. In 19 Trav. L.J. 82 (A) it was held that the residuary Article would apply to the claim in that suit as it was conceded in that case that no specific Article in the Limitation Act would cover the claim in that suit. That suit was for amount due to the Plaintiff from Sirkar as Karathil Chilavu. It was not decided in that case what the basis of the claim was. But in this case the claim is based on an agreement between the Plaintiff''s tarwad and Defendant''s family. The allegation in para. 3 of the plaint is to the following effect, (original in Malay am omitted-Ed.)

It was mutually agreed between the predecessors, of the Plaintiffs and the Defendants that every year the Defendants family should give to the Plaintiffs'' family 108 Aggrasala paras of paddy 54 Fanams, 100 Madals of coconut leaves and 10 bundles of kettunar, and as per that the Defendants'' family was paying the Plaintiffs'' family the paddy and money etc.

In Babu Ramji Das Vs. Rai Mahamaya Prasad Singh Bahadur and Others, referred to above, the claim was for certain monthly and yearly dues by way of money and articles which the Defendants'' father had promised to pay in consideration of the Plaintiff marrying his daughter. It was held that Article 115, Limitation Act would apply to that suit.

10. We are of opinion that the claim in this case is one for compensation for breach of a contract and that it will come under Article 103, Travancore Limitation Act corresponding to Article 115, Indian Limitation Act. That Article applies to suits for compensation for the breach of any contract express or implied not in writing registered and not specially provided for in the Limitation Act, and the period of Limitation is three years from the time when the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (Where the breach is continuing) when it ceases. In this case failure on the part of the Defendants to make the annual payment amounts to a breach of contract and the Plaintiffs will have a cause of action on such breach. We are therefore of opinion that the Plaintiffs are bound to sue in this case within 3 years from the date of the breach of the contract to make the annual payment. The Plaintiffs can therefore claim only three years'' dues in this suit.

11. Another point raised by the Appellant is that although in the judgment it is provided that paddy should be valued at the nirak rate that prevailed on the date of the suit in preparing the decree the rate given in the plaint was adopted. This is clearly a mistake. The decree will be amended in this respect and paddy will be valued according to the nirak rate that prevailed on the date of the suit.

12. Defendant 1 had deposited in Court three years dues and the Plaintiffs had

drawn the same. Although it is provided in the decree that the amount so deposited should be given credit to it is not stated what that amount is. This also will be made clear in the decree. In the result we hold that the Plaintiffs are entitled only to three years dues and that the suit is barred in respect of the amounts that accrued due more than three years before the date of the suit. We also direct that the decree should be so amended as to make it clear that the Plaintiffs are not entitled to a charge on the plaint properties. Paddy, will be valued according to the nirak rate that prevailed on the date of suit. The amount deposited by Defendant 1 will be given credit to and a decree will be given only for the balance amount, if any. Both parties will suffer their respective costs in the lower Court. The Appellant will get his costs in this Court from the Respondents. The decree of the lower Court is modified and the appeal allowed in the manner stated above.

