

(1915) 10 MAD CK 0061
In the Madras High Court

Sarakhi Abdul Rahiman Tara Gan and Another	APPELLANT
Vs	
Muhaidin Pathummal Bivi and Another and Pathummal Bivi	RESPONDENT

Date of Decision : 27-10-1915

Acts Referred:

Citation : 32 Ind. Cas. 83

Hon'ble Judges : Sadasiva Aiyar, J; Napier, J

Bench : Division Bench

Judgement

Sadasiva Aiyar, J.—These four connected second appeals have arisen out of two connected suits brought by three Mussalman ladies--one of the suits was brought by two sisters against their two step-brothers and their mother for partition of the properties of their father (including the accretions to the said properties) and the other suit was by the mother of the plaintiffs in the first suit against her said step-sons (the same defendants Nos. 1 and 2) for her share. The father died in February 1898 and these suits were brought in July 1911.

2. The lower Appellate Court modified the order of the Court of first instance in the plaintiffs' favour on the plaintiffs' two appeals and dismissed the two appeals of the defendants Nos. 1 and 2 preferred to the lower Appellate Court against those portions of the decrees of the District Munsif which were in the plaintiffs' favour. Hence the defendants have now filed these four second appeals. The step-sisters and the step-mother of the appellants have also filed two memoranda of objections in two of the four second appeals, because the lower Courts did not give them their shares in the house standing on the site in Schedule 1 and also gave certain vague directions regarding the mode of partition of that site.

3. The Second Appeals Nos. 2276 and 2278 maybe disposed of at once. In these two second appeals, the defendants Nos. 1 and 2 contend that the plaintiff's ought to have been made liable for their shares of the debts alleged by the defendants to be family debts and also of the expenses alleged to have been incurred by the defendants out of their own pocket for the marriage expenses of

their step-sisters. Both the lower Courts have found that the marriage expenses were incurred out of the profits of the plaintiffs' shares in their father's properties and that the alleged family debts either do not exist or were not incurred for purposes binding on the plaintiffs. These are findings of fact which are binding upon us in second appeal. Further, the learned District Judge says that "the findings of the District Munsif as to the debts were not seriously attacked" before him. These second appeals, therefore, are dismissed with costs.

4. The two remaining Second Appeals Nos. 2275 and 2277 are directed against the award to the plaintiffs of their shares in two sums of Rs. 1,000 and Rs. 900, which were received by the defendants Nos. 1 and 2 from the mortgage-debtors of their father in 1904 and 1909 respectively. The attack is based on three grounds:

(1) That as the plaintiffs did not claim any shares in the amount of Rs. 1,900 in their plaints as originally framed but claimed only shares in certain Immovable properties alleged to have been purchased with the aid of the Rs. 1,900, the lower Appellate Court was wrong in allowing the plaints to be amended by claiming a share in the sums themselves and in awarding such shares (the plaintiffs having failed to prove that the Immovable properties were purchased with the aid of the Rs. 1,900).

(2) That even if the amendment were properly allowed, the lower Appellate Court ought to have granted to the defendants Nos. 1 and 2 a further opportunity to meet the plaintiffs' case after such amendment.

(3). That the plaintiffs' claims for shares in the sum of the Rs. 1,900 are barred by limitation.

5. I think there is nothing in the first two contentions. The amendments were, in my opinion, rightly allowed (Order VI, Rule 17). The defendants Nos. 1 and 2 in the 12th paragraph of their written statement contended that much more than the value of the plaintiffs' shares in these amounts and in the other properties of their father had been spent for the plaintiffs. The 11th issue also was framed on this plea of the defendants and they let in all their evidence on that issue. I agree with the remark of the lower Appellate Court that "it was quite open to them" (that is, the defendants Nos. 1 and 2) "to have shown already what they did with these moneys and I am afraid it would be nothing but a direct incitement to perjury if I allowed them to adduce fresh evidence at this stage."

6. Coming to the third ground of attack, so far as the Rs. 900 received by the defendants Nos. 1 and 2 in 1909 is concerned, the suits cannot be barred by limitation as they were brought in 1911. Mr. Devadoss, therefore, fairly admitted during the concluding portion of his argument that his plea of limitation should be confined to the sum of Rs. 1,000 received by the defendants Nos. 1 and 2 in 1904.

7. As regards this sum of Rs. 1,000 the Full Bench decision in Khadersa Hajee

Bappu v. Puthen Veettil Ayissa Ummah 6 Ind. Cas. 50; (1910) M.W.N. 447 is binding upon me. The following observations occur in that judgment: In the case of a Muhammadan dying intestate, the estate is at once vested in the heirs as tenants-in-common".... "The answer to the question referred" (namely, what is the Article applicable to a suit by one of several Muhammadan heirs for a share of the intestate's shares) "must be that Article 120" is the Article applicable "when the property is moveable property."

8. Article 120 provides a period of six years" limitation for a suit for which no period of limitation is provided elsewhere in the First Schedule (which First Schedule relates to suits) and the time from which the period begins to run is mentioned as when the right to sue accrues."

9. The next question, therefore, which has to be considered is whether the right of the plaintiffs to sue their Mussalman coheirs for their (the plaintiffs") share of the intestate's properties accrued within six years of this suit. If the phrase "the right to sue accrues" be interpreted as meaning "the right to sue first accrues", there can be no doubt that the plaintiffs" right to recover their shares in the Rs. 1,000 accrued in 1904 as soon as the defendants Nos.1 and 2 received the money from the debtors and the present suits brought in 1911 would, therefore, be barred.

10. In Mohabharat Shaha v. Abdul Hamid Khan 1 C.L.J. 73, Mookerjee, J., says at page 76, "if we are called upon in any concrete case to decide the question" (namely, whether the provisions of the Limitation Act do or do not apply to suits for partition, administration, construction of Wills, public charities, and apportionments of rent), "we might possibly hold that such suits are not beyond the scope of the Limitation Act, but that in each case, the right to sue accrues every moment during the whole of the time, that the right to the property continues to exist; for instance, the liability to be partitioned is one of the incidents of joint property and a co-owner has the right to sue for partition at every moment of the whole period during which he continues to be co-owner. Indeed, it has been held in more than one case to be found in the books that Article 120 and Section 23 may have to be simultaneously applied to determine whether or not a suit is barred by limitation." These observations are, no doubt, obiter for the question, which had to be decided in that case, was whether a declaratory suit brought more than six years after the denial of the legal character sought to be declared by the suit was barred or not; and it was held that where the suit is based on a wrong or injury which is in the nature of a completed act, that is, where the wrong is not a continuing one in the eye of the law, limitation begins to run from the date of the wrong and the question whether the right to sue is a continuing one is irrelevant. However, it is clear from that case that the learned Judges did make a distinction between suits for partition, administration and the like suits which do not necessarily arise out of any wrongful act on the part of the defendant and other suits which are necessarily based upon such a wrong. In the former class of suits, the right to

sue accrues day by day so long as the right to the suit property exists. In the recent case of *Marian Beeviammal v. Kadir Meera Sahib Taragan* 29 Ind. Cas. 275, decided by Sankaran Nair and Oldfield, JJ., the following remarks occur: "The defendants having taken up possession of the property as tenants-in-common, they must be deemed to have been in possession of such property on behalf of themselves and of the plaintiff and it lies on them to show that so far as the plaintiff is concerned, the character of their possession was changed six years before the date of their suit." That was a similar case to the case before us and the learned Judges held that the plaintiffs' claim was not barred, though the moveables (namely, cash and sovereigns of the value of more than Rs. 25,000) in which she (the plaintiff) claimed a share had come into the defendants' (co-heirs') hands more than 20 years before suit.

11. This question of limitation is not, however, at all free from difficulty. The Allahabad High Court in the case reported as *Abdul Gaffar v. Nur Jahan Begum* 29 Ind. Cas. 347; 13 A.L.J. 686 has taken the view that Article 62 applied to a similar case. [See also *Amina, Bibi v. Najm-un-nissa Bibi* 27 Ind. Cas. 712; 13 A.L.J. 255 But I think I am bound by the decision of *Khadersa Hajee Bappu v. Puthen Veettil Ayissa Ummah* 6 Ind. Cas. 50; 20 M.L.J. 288; (1910) M.W.N. 447 and *Marian Beeviammal v. Kadir Meera Sahib Taragan* 29 Ind. Cas. 275. I would, therefore, hold that the claims of the plaintiffs for their shares in the Rs. 1,000 are not barred by limitation. The result is that these two Second Appeals Nos. 2275 and 2277 should also be dismissed with costs.

12. Coming to the memoranda of objections, we must accept the finding by the lower Courts that the houses on the sites in Schedule I were built with the self-acquired funds of defendants Nos. 1 and 2 and that the plaintiffs acquiesced in the erection of the buildings found on that site.

13. The objections are, however, maintainable in so far as they attack the vague reference in the District Munsif's decree to the Partition Act. The decree in each suit says that "as regards house-sites in Schedule I, steps be taken under the Partition Act, IV of 1893, in execution." What precise steps were intended to be taken, or directed to be taken, is not clear. In the Munsif's judgment, the following vague words occur: "Under these circumstances and especially as the defendants Nos. 1 and 2 own more than a half share in the items" (that is, the house-sites in Schedule I), "and it is inconvenient to divide the sites after removing the buildings, I decide to take action under the Partition Act, as requested by the learned Vakil for the defendants Nos. 1 and 2." The Partition Act contains only 10 sections. The provisions of the Act empower a Court to direct a sale of properties sought to be divided if a division of the property itself by metes and bounds cannot reasonably or conveniently be made. It seems to me that in this case, a sale of the sites alone without the houses would lend only to further litigation between the purchaser at such a sale and the defendants Nos. 1 and 2 and that it is not the most convenient way of effecting partition. But the CPC in Order XXVI, Rule 14, Clause 1, empowers the Court to authorise the

Commissioner, who is appointed before a final decree for partition is passed, to award sums to be paid to one or more of the sharers for the purpose of equalising the value of the shares. Order XX, Rule 18, Clause 2, further empowers the Court in its preliminary decree to give such further directions as may be required to effect the most equitable partition. I would, therefore, modify the decrees of the lower Courts in Suit No. 259 of 1911, by omitting the clause "that as regards the house sites in Schedule 1, steps be taken under the Partition Act, IV of 1893, in execution, and by substituting for the clause and the plaintiffs do recover 14/48th share of the value of the house sites above said" the following, namely, that the Commissioner to be appointed before the final decree is passed be authorised to award 14/48th share of the value of the house sites in Schedule I to the plaintiffs for the purpose of equalising the value of the shares, allowing the defendants Nos. 1 and 2 to take the sites themselves exclusively." A similar modification with the necessary variation as to the fractional share will be made in the decree in the other suit. There will be no order as to costs in the memoranda of objections.

Napier, J.

14. I agree. I think that we must give a broad construction to the words "'right to sue accrues" in an "omnibus" Article like 120. The specific Articles contain various different starting points of limitation and doubtless if the Legislature had succeeded in providing for every class of suit, words more suited to each suit would have been used and not this general language. In this case we are entitled to treat this right as a continuing right to sue from day to day. Any other construction would work the greatest injustice.