

(1968) 10 BOM CK 0001
In the Bombay High Court
Case No : Second Appeal No. 984 of 1961

Shankar Moreshwar Kulkarni Chinchwadkar	APPELLANT
Vs	
State of Maharashtra	RESPONDENT

Date of Decision : 17-10-1968

Acts Referred:

Limitation Act, 1908 — Article 120, 145, 60, 62, 96

Citation : AIR 1970 Bom 8 : (1969) 71 BOMLR 367 : (1969) ILR (Bom) 955

Hon'ble Judges : Nain, J;K.K. Desai, J

Bench : Division Bench

Advocate : V.B. Rege, for the Appellant; M.A. Rane, Asstt. Govt. Pleader, for the Respondent

Judgement

Nain, J.—This is a second appeal from the judgment and decree dated 14th March 1961 of the learned Assistant Judge, Kolhapur, allowing the defendants' appeal and dismissing the suit of the plaintiff on the ground of limitation.

2. The plaintiff had filed the suit from which this appeal arises in the court of the learned Civil Judge, Senior Division, Kolhapur, for recovery of a sum of Rs. 1,319-8-6, interest and costs on the following facts: Messrs. Dhavate and Rote had filled in a tender for supplies with the Director of Civil Supplies, Kolhapur State. The tender was accepted by two letters dated 9th November 1944 and 8th January 1945. Under the terms of the contract, 10% of the amount payable to Messrs. Dhavate and Rote was to be deducted and paid to them on completion of the contract. The contract was completed in the year 1946. Kolhapur State thereafter merged in the then State of Bombay and was later succeeded by the State of Maharashtra. By a letter dated 27th May 1949 the Civil Supplies Department, Kolhapur wrote to Messrs. Dhavate and Rote informing them that a sum of Rs. 2,079-9-1 was due to them and asking them to send a receipt signed jointly by Dhavate and Rote and to receive the amount. This amount was, however, not drawn by Messrs. Dhavate and Rote.

3. Rote filed a suit against Dhavate on the Original Bide of the Bombay High

Court and obtained a decree for Rs. 1,039-12-6. In execution of the decree, the amount in the hands of the Director of Civil Supplies Kolhapur was attached. As Collector of Kolhapur disputed the liability, a receiver was appointed to file a suit for recovery of the amount. Accordingly in 1958, Suit No. 443 of 1958 was filed by the plaintiff as receiver against the State of Maharashtra. The defendants inter alia contended that the suit was time barred. The learned trial Judge held that the article 145 of the Indian Limitation Act, 1908, which prescribed a period of thirty years applied and the suit was not time barred. The trial Court accordingly decreed the plaintiff's suit for a sum of Rs. 1.039-78 and costs and interest.

4. Against the said decision, the defendants filed an appeal in the District Court at Kolhapur. The learned Assistant Judge who heard the appeal held that Art. 145 of the Limitation Act was not applicable, but in the opinion of the learned Assistant Judge, Article 62 was applicable which prescribed a period of three years. He held that the suit of the plaintiff was time barred. He allowed the appeal, set aside the judgment and decree of the trial Court and dismissed the suit. Against the said decision, the present appeal has been filed.

5. The only point argued in this appeal before us is as to which of the Articles 62, 120 and 145 of the Indian Limitation Act, 1908 was applicable to the suit. The contention of the plaintiff is that Article 145 or in the alternative Article 120 is applicable while the defendants contend that Article 62 is applicable.

6. Article 62 of the Indian Limitation Act 1908, prescribes a period of three years for a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. The time from which the period begins to run is when the money is received. Article 145 prescribes a period of thirty years for a suit against a depositary or pawnee to recover movable property deposited or pawned. The time from which the period begins to run is the date of the deposit or pawn. Article 120 is the residuary article and prescribes a period of six years for suits for which no period of limitation is provided elsewhere in the first schedule to the Indian Limitation Act, 1908. The time from which the period begins to run is when the right to sue accrues.

7. In our opinion, Article 145 has no application to the facts of this case. The suit is for recovery of an amount deposited under a contract which became payable when the contract was completed. It is not a suit against a depositary or pawnee to recover movable property deposited or pawned. The amount was deposited with the State of Kolhapur as and by way of security for the performance of a contract to supply materials or in any case under the terms of the contract and became due on completion of the contract.

8. In our opinion, Article 62 will also have no application. Article 62 will have no application if the money when received by the defendant is not either in fact or in point of law received for plaintiff's use and the circumstance that by reason of subsequent events the money has become money received to plaintiff's use will

not render Article 62 applicable. The plaintiff must have a right of action at the date of the receipt of money. If when the defendant receives the money, plaintiff is not entitled to it, Article 62 will have no application. This point is directly covered by a judgment of the Supreme Court in the case of A. Venkata Subba Rao Vs. State of Andhra Pradesh, . The observations in the judgment of Ayyangar J. at p. 620 (of SCR) = (at p. 1794 of AIR) read as under :--

"Where the defendant occupies a fiduciary relationship towards the plaintiff, it is clear that Article 62 is inapplicable. Next even if the claim could have been comprehended under the omnibus caption of the English "action for money had and received", still if there are other more specific Articles in the Limitation Act, e.g. Article 96 (mistake), Article 97 (consideration which fails) Article 62 would be inapplicable. Lastly, if the right to refund does not arise immediately on receipt by the defendant but arises by reason of facts transpiring subsequently, Article 62 cannot apply, for it proceeds on the basis that the plaintiff has a cause of action for instituting the suit at the very moment of the receipt."

In the present case, according to the terms of the contract, the amount was to become due on completion of the contract. It was to become due by reason of subsequent events. The right to refund did not arise immediately on receipt by the defendant. Accordingly, Article 62 will have no application to the facts of the present case. We have also stated hereinabove that Article 145 would not be applicable. The only article that would appear to us to be applicable is Article 120, which is the residuary article.

9. Where money is deposited by way of security for the due performance of a contract or otherwise under the terms of a contract and is refundable after the completion of the contract in our opinion, Article 62 is not applicable to the suit for refund as the money was not received by the defendant for the plaintiff's use. Such suit would be governed by the residuary Article 120 of the Indian Limitation Act, 1908.

10. This point arose for decision in the case of Harij Gram Panchayat Vs. Thakkar Lakhiram Ramji and Others, , and Mr. Justice Bhagwati held that the cause of action envisaged by Article 62 was not the same as that for money had and received under English law and that Article 60 or Article 97 was not applicable and in the absence of any specific article, Article 120 would apply. In that case, money was received by way of security for due performance of a contract and a suit was filed for recovery of the same on completion of the contract.

11. Our attention was invited to the judgment of a Division Bench of this Court in the case of Dhanraj Mills Ltd. v. Laxmi Cotton Traders, Bombay, 60 BomLR 1295 = AIR 1960 Bom 404. In that case it was merely held that Article 145 was not applicable to the facts which were similar to the facts of this case, but it was not decided as to which of the articles in the first schedule of the Indian Limitation Act was applicable. In an earlier Bombay case, namely. Lingangouda Marigouda Vs. Lingangouda Fakirgouda and Others, -- Chagla C. J. had taken the view that

Article 120 was applicable in a similar matter. The reason given in the judgment was that Article 62 should not apply to a case where the terms of the article were not literally complied with. It was observed that such a construction would result in plaintiffs losing a large number of cases on the ground of limitation whereas if Article 120 was held to be applicable, the plaintiffs would be safe. The reasoning of this decision was not approved of by the Supreme Court in *A. Venkata Subba Rao Vs. State of Andhra Pradesh*, referred to hereinabove. We are however concluded by the judgment of the Supreme Court on the point that Article 62 was not applicable. The only article with which we are left is Article 120. In our opinion, Article 120 is applicable being the residuary article.

12. In this case the contractors were informed by the letter Exh. 27 written on behalf of the defendants on 27th May 1949 that the sum of Rs. 2,079-9-1 was due to them and that the amount could be withdrawn against joint receipt of Dhavate and Rote. In our opinion, this will be the date when the right to sue accrued. The contract had already been completed in 1946. This suit was filed in 1958 and but for the acknowledgments of the defendants, it would have been time-barred even under Article 120. But in letters Ex. 28 dated 17th December 1951, Exh. 29 dated 11th June 1955 and Exh. 30 dated 3rd February 1956, the claim in the suit has been acknowledged and Dhavate and Rote have been informed that the amount could be received against joint receipt of Dhavate and Rote. In the last two letters, the amount has been described as "Anamat" amount held on behalf of Dhavate and Rote. By virtue of these acknowledgments, the limitation is saved and, in our opinion, the suit of the plaintiff is within time.

13. Accordingly, we allow this appeal, set aside the judgment and decree of the District Court, Kolhapur, and restore the judgment and decree of the trial Court. The defendants will pay the costs throughout.

14. Appeal allowed.