(1956) 02 AP CK 0013

In the Andhra Pradesh High Court

Case No : First Civil Appeal No. 148/1 of 1951-52

Trimbak and Another APPELLANT

Vs

Vithaldas RESPONDENT

Date of Decision : 10-02-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 7
Hyderabad Limitation Act, 1322 — Article 36, 37
Limitation Act, 1908 — Article 145, 36, 37, 48, 49

Citation : (1956) 02 AP CK 0013

Hon'ble Judges : Manohar Pershad, J;Bilgrami, J

Bench : Division Bench

Advocate : Hanmanth Rao Vaishnav, for the Appellant; Govind Das Mehta, for the Respondent

Judgement

Manohar Pershad, J.—Vithaldas filed a suit against Trimbak and Narhar for the return of 13 bales and two loose bags of cotton or Rs. 4,500/- its price and Rs. 2,500/- that is, in all Rs. 7,000/-. The allegation of the Plaintiff is that the Plaintiff used to purchase the goods through the Defendants who were the ''Adatiya'', who used to sell the goods with the consent and permission of the Plaintiff and in this connection the Plaintiff used to send money on different occasions to the Defendants that the Defendants without the consent of the Plaintiff sold tuwar, moong and sarki and in spite of the Plaintiff''s asking the Defendants for an explanation, the Defendants did not give any satisfactory reply.

The Plaintiffs therefore asked the Defendants to return the 13 bales and two bags of loose cotton, and to furnish him with the accounts, but the Defendants in reply asked the Plaintiff to go and take away the goods. Accordingly the Plaintiff sent his man but the Defendants did not return the goods or furnish the accounts. The market price of the cotton bales and loose cotton at that time was Rs. 4,500/- and Rs. 2,188-14-0 were due to the Plaintiff from the Defendants, which they refused to pay.

The Plaintiff, therefore, prayed for a decree to the extent of Rs. 7,000/-. The Defendant (sic)mitting that the Plaintiff used to buy and (sic) chase goods from and through them, stated that they had the general power of purchasing and setting goods. The Defendants admitted the receipt of 13 bales and two bags of loose cotton, and stated that he had returned the same to the Plaintiff. The Defendants inter alia denied that Rs. 2,188-14-0 were due to the Plaintiff.

A legal objection was also raised that the other members of the Defendants'' as well as the Plaintiffs'' firm have not been impleaded as parties, and as such the suit was liable to be dismissed. The Plaintiff in the reply denied the allegations of the Defendants. The trial Court on these pleadings framed seven issues. Parties led evidence. The Court of first instance on the evidence produced by the parties decreed the suit to the extent of Rs. 7,000/-. Aggrieved by this judgment and decree, is this appeal on behalf of the Defendants.

2. Shri Hanmanth Rao Vaishnav, the learned advocate for the Appellants urged first that the evidence produced on their behalf is sufficient to establish that the Defendants returned the bales and loose cotton. The second contention is that the Court below has decreed the suit to the extent of Rs. 7,000/- including Rs. 4.500/- the price of the goods, but the Plaintiff has not proved the market price that was prevalent then and as such the Plaintiff cannot get a decree to the extent of Rs. 4,500/-.

The third argument advanced is that the claim of the Plaintiff to the extent of Rs. 2,188-14-0 is time-barred and the Court below has not at all considered this point.

3. On behalf of the Plaintiff it is contended that the evidence produced on behalf of the Defendants is not at all sufficient to establish that they returned the goods, and the Court below has rightly held so, and no interference should be made in this appeal.

With regard to the question of the market price, it is very candidly conceded before us, by the learned advocate for the Plaintiff-Respondent, that there is no clear evidence in this regard, but he contends that the Plaintiff in para 4 of the plaint has shown the price to be Rs. 4,500/-, and the Defendants have not denied the same in clear terms. This he urges is sufficient to award a decree to the Plaintiff to the extent of the said amount.

With regard to the question of limitation to the claim of the Plaintiff to the extent of Rs. 2,188-14-0, it is contended that having regard to Article 85, Limitation Act which relates to mutual accounts no question of limitation arises, we would first take up the question of the return of the bales and loose cotton.

4. The burden of proof was on the Defendants. They have produced nine witnesses including Defendant 1 himself. D.W. 1 Kanialal states that the Defendants gave to the Plaintiff 13 bales and two bags of loose cotton. These articles were given to Dollabhdas, the munim of the Plaintiff. In cross-

examination he says that Dollabhdas had told him that he was the Plaintiff''s muqtar, but the Defendants did not ask him any thing in this regard. The goods were preserved in the godown of Babu Durake and the witness does not know as to whom they were given from there.

D.W. 2 Sultan and D.W. 4 Dasrath are the hammals who depose that cotton bales and loose cotton bags were handed over to Dollabhdas from the godown of Babu Durake. D.W. 3 is Gangadhar who states that Dollabhdas signed in his presence, after receiving the 13 bales and two bags of loose cotton. He does not know as to what connection he had with the Plaintiff. Probably, he may be the Plaintiff''s man. In cross- examination he says that he does not have any money dealings with Dollabhdas.

D.W. 5 Kachuru is a cart-driver who deposes that he had taken 13 bales and two bags of loose cotton from the shop of the Defendant and the same were handed over to the man who had taken it from the godown. D.W. 6 is Dollabhdas himself who denies having taken the goods from the Defendants. He further states that he was not sent by the Plaintiff for that purpose but had taken a letter from the Plaintiff to the Defendant.

D.W. 7 Ghansham is an Engineer employed in the Star Ginning Factory, Gangakhed. He only deposes that the Defendant had sent certain bales for pressing. D.W. 8 is Defendant 1 himself who states that he handed over the alleged goods to Dollabhdas on the letter of the Plaintiff. D.W. 9 Ram Rao is the servant of the Defendants, who deposes that Dollabhdas is the servant of Vithaldas. In cross-examination he says that as Dollabhdas used to purchase the goods for the Plaintiff, he thought him to be his gumastha.

Apart from this evidence, the Defendants have filed the bahi khata and got the same examined by the Commissioner, Rangnath, who has been produced on behalf of the Plaintiff. He states that he examined the khatas of the parties, and that there is no entry of the return of the 13 bales and two bags of loose cotton in the khata of the Plaintiff which is kept in the regular course of the business. With regard to the Defendants'' khata, he says that there is no entry to that effect but the entries in the Defendants'' khata seem to have been tampered.

5. Now from this evidence we have to see whether this evidence is sufficient to prove that the Defendants returned the alleged goods. Of the defence witnesses D.Ws. 1, 2, 4 and 8 depose to the effect that the cotton bales and two bags of loose cotton were given to Dollabhdas who was sent by the Plaintiff.

It is said that he was the munim and also the servant of the Plaintiff and that the articles were supplied to him on the basis of a letter brought by him. This letter is dated 10-5-1946 and is printed at p. 21 of the paper book. In this letter it is written that Dollabhdas is being sent: 13 bales and two bags of loose cotton should be at once sent to Sholapur.

There is nothing in this letter to show that the Plaintiff had asked the Defendant to handover the said articles to Dollabhdas. D.W. 1 says that it was only Dollabhdas who told him that he was the muqtar of the Plaintiff. D.W. 2 only says that Dollabhdas had come for the articles on behalf of the Plaintiff. D.W. 3 says that he does not know in what way was Dollabhdas connected with the Plaintiff: he may be his man.

D.W. 4 the other hnmmal says that Dollabhdas is the gumastha of the Plaintiff. D.W. 5 Kachuru does not mention the name of Dollabhdas. D.W. 8 the Defendant only says that the bales and bags of loose cotton were given to Dollabhdas on the letter of the Plaintiff. He does not depose that Dollabhdas was the muqtar or the munim of the Plaintiff.

D.W. 9 Ram Rao in his examination-in-chief states that Dollabhdas was the servant of Vithaldas, the Plaintiff, and in cross-examination he says that since he used to purchase goods on behalf of the Plaintiff, he thought he was the gumastha of the Plaintiff.

From, these depositions it is very difficult to hold that Dollabhdas was the gumastha of the Plaintiff. Dollabhdas who has been produced on behalf of the Defendants and who is D.W. 6 totally denies that he was the gumastha of the Plaintiff. The Defendant himself has not stated this fact in his own testimony. What he has stated is that on the letter of the Plaintiff the goods were handed over to him. As discussed above, the letter does not show that the Plaintiff had asked the goods to be handed over to him.

6. The Plaintiff himself has come into the witness-box and has totally denied having received the goods. There is no entry in the Plaintiff''s accounts regarding the return of the alleged goods. We are, therefore, of the opinion that the evidence produced on behalf of the Defendants is not at all sufficient to establish that he gave the 13 bales and two bags of loose cotton to Dollabhdas.

Even assuming that these goods were handed over to Dollabhdas, the Defendants cannot get any benefit out of the same unless they prove that Dollabhdas was authorised to receive the goods on behalf of the Plaintiff. This, in our opinion, has not been established. In this regard we agree with the opinion of the trial Court.

7. The next claim of the Plaintiff relates to Rs. 2,188-14-0. The money dealings between the Plaintiff'' and the Defendants commenced in 1354F, and continued till 1355F, and a balance of Rs. 2,188-14-0 is shown to be recoverable from the Defendants. The present suit which is for the recovery of this amount is dated 5th Amardad, 1358F.

In case when there was no mutual dealings and reciprocal demand between the parties, the suit for the recovery of the amount has to be brought within three years from the date of the payment but where there are mutual dealings and reciprocal demands between the parties, the period for action prescribed is three years from the close of the year in which the last item admitted or approved is entered.

From the report of the Commissioner who examined the khatas of the parties it is clear that there were reciprocal demands between the parties. In view of this limitation would start from the close of the year in which the last item is entered.

In the present case the last entry is Jaisht Shud 11 Samvat 2002 (5th Amardad 55F.) and the year ends on 24th Azur 1356F., that is, Asvin Bud Amavas Samvat 2002, and if this is taken to be the starting point of limitation, no question of limitation would arise as the present suit is dated 5th Amardad 1358F.

The Court below has passed a decree for a sum of Rs. 7,000/- in favour of the Plaintiff including Rs. 4,500/- the price of the goods but as argued by the learned advocate for the Appellants, the Plaintiff has not proved the market price of the goods 08 prevalent then. We, therefore, agree with the contention of the learned1 advocate for the Appellants that in the absence of proof, the Plaintiff cannot get any decree to the extent of Rs. 4,500/- being the market price of the cotton bales and two bags of loose cotton.

8. Shri Govind Das Mehta, the learned advocate, for the Plaintiff-Respondent, contended that his suit is for the return of the 13 bales and two bags of loose cotton or in the alternative its price, and if it is held that he is not entitled to the price, having failed to prove the market price, he, may be given a decree for the return of the goods, that is, the 13 bales and two bags of loose cotton.

He drew our attention to Order 7, Rule 7, Code of Civil Procedure, and urged that the Court has power to grant appropriate relief even though he may not have specifically claimed the same. He further states that he has put in a petition requesting the Court to allow him to amend the plaint and pass a decree accordingly.

9. On behalf of the Appellants it is strenuously urged that the Plaintiff has clearly prayed for the price of the goods and he cannot, therefore, now claim the return of the goods. It is further urged that if the Plaintiff is allowed to amend the plaint, and add a prayer for the return of the goods, it would become time-barred.

In this connection he drew our attention to Articles 36 and 37, Hyderabad Limitation Act (corresponding to Articles 48 and 49, Indian Lim. Act), Kripa Ram Vs. Kunwar Bahadur, , ''Ma Mary v. Ma Hla Win (AIR 1925 Rang 146 v. 12) (B), - ''Gopalasami Ayer v. Subramania Sastri'' 35 Mad 636 (C), AIR 1928 47 (Oudh) , and Kalyan Mal and Another Vs. Kishan Chand, .

10. Shri Mehta on behalf of the Respondent relying on the cases of ''Gangahari Chakrabarti v. Nabin Chandra (AIR 1916 Cal 869 v. 3) (F),: ''Ma Shwe, On v. Ma Saw (AIR 1928 Rang 309 15) (G), Ahilyamba Chatram and Devasthanam Vs. R. Subramania Ayyar, , '' Kishtappa Chetty Vs. Lakshmi Ammal, and Ajneswar Karmakar Vs. Kailash Chandra Ghose, urged that Article 145, Indian Lim. Act would become applicable to such cases and Articles 48 and 49 would not come into play.

11. We have given careful consideration to the arguments.

12. Order 7, Rule 7, Code of Civil Procedure, is, in our opinion, very clear and runs thus:

Every plaint shall state specifically the relief which the Plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the Defendant in his written statement.

13. It would follow from this that the Court can grant relief though not specifically prayed for in the plaint, if the facts pleaded and found proved show that the Plaintiff is entitled to it. We are supported in this view by the case of AIR 1930 92 (Nagpur) . Similar view has been taken by the Madras High Court in the case of ''Adhilakshmi Animal v. T Nallasivan Pillai (AIR1944 Mad 530 v. 31) (L) and it has been laid down:

Where the Plaintiff has placed before the Court all the facts on which he bases his claim without deducing his legal position properly from those facts and thus bases his suit on a wrong cause of action, it is for the Court to apply the correct legal principles and give the Plaintiff that which is due to him.

14. Their Lordships of the Supreme Court in the case of Srinivas Ram Kumar Vs. Mahabir Prasad and Others, observed:

In a suit for specific performance of a contract, in part performance of which the Plaintiff alleges to have paid the Defendant some money, the Defendant denies the contract and pleads that money was taken by him as a loan, the Court can pass a decree for recovery of the loan in favour of the Plaintiff on his failure prove the contract even though the Plaintiff had failed to plead and claim the relief in the alternative case.

15. It would, therefore, follow from this that under Order 7, Rule 7, Code of Civil Procedure, the Court can grant relief to the Plaintiff even though that relief may not have been specifically claimed by him, and such relief can be given to the Plaintiff even though he may not have applied for amendment.

16. The next question that falls for consideration is whether this relief is within time for which we have to see which Article of the Limitation Act is applicable. The learned advocate for the Appellants argued that Articles 48 and 49, Lim. Act would be applicable to the case. Article 48 runs thus:

For specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same.

Apparently, this article is not applicable. It only applies to cases where the property has been acquired by theft or dishonest misappropriation. The learned advocate also very candidly conceded that this article is not applicable. He laid great stress on Article 49 which is as follows:

For other specific movable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same.

This article would be come applicable only when the taking and detention is wrongful. Plaintiff''s case is that he purchased] the cotton bales and loose cotton and kept the same with the Defendants. In other words, what the Plaintiff says is that, they were kept in deposit with the Defendants. There is no allegation or any wrongful taking or detention of the property.

When goods are kept in deposit and are not returned to the original owner and the owner claims the return of the same Article 145 would become applicable. Article 49 which is a general article would apply provided there is no other article applicable to the case. When there is a special article applicable there is no question of the application of Article 49.

17. A direct authority on the point is the case of AIR 1938 110 (Privy Council) where Government promissory notes were left by a debtor with his creditor as security for the sum borrowed by him and on a suit for the recovery of the notes, or for credit of amount realized by sale of notes, the defence taken was that it was time-barred and Article 49 applied. It has been held by their Lordships of the Privy Council that Article 145 applies and not Article 49.

18. The Calcutta High Court also in (AIR 1916 Cal 869 v. 3) (F) and Ajneswar Karmakar Vs. Kailash Chandra Ghose, has taken a similar view. These were cases where gold was entrusted to a goldsmith for making ornaments. The gold was neither returned nor did the goldsmith prepare the ornaments. On an action by the owner for the return of the gold or the price, the Defendant objected that the suit was time-barred. It was held that the suit was within time and that Article 145 was applicable.

19. The Rangoon High Court in the case of (AIR 1928 Rang 309 V 15) (G), held that when goods are deposited, the Article applicable is Article 145. It was further held that the mere fact that the depositor demands the thing and the depositee refuses to return the same, does not make Article 49 applicable to the case. This was also a case where jewellery was entrusted for the purpose of raising a loan.

20. The Madras High Court in the case of (AIR 1923 Mad 578 V 10) (I) has held that Article 145 applies to a case of the return of the goods (jewels) or its price kept in deposit with the Defendant to raise a loan. The cases cited by the learned advocate for the Appellants do not apply to the facts of the present case.

21. Kripa Ram Vs. Kunwar Bahadur, was a case where property was attached and it was held by their Lordships that Article 36 applied. This case does not help the contention of the learned advocate for the Appellants as in this case Suleman and Young JJ., have held that Articles 48 and 49 are not applicable.

22. AIR 1928 47 (Oudh) was a case decided by the Oudh Chief Court. In this case A had given a necklace to B on condition that the latter would pay its price if it was approved or return if it was not approved. B did not return the necklace and retained the same in spite of a notice to return the same.

In the circumstances of the case their Lordships came to the conclusion that the possession of the Defendant after express stipulation was unlawful and having taken that view applied Article 49. This ruling, therefore, does not help the contention of the Appellants as there is no case of unlawful detention here.

23. In the case of (AIR 1925 Rang 146 v. 12) (B), Robinson C.J., and Brown J. held that refusal to comply with the demand for the return of the property and possession thereafter becomes unlawful and having come to that conclusion on the peculiar circumstances of that case, their Lordships held that Article 49 Lim. Act was applicable. The circumstances of that case were different from the circumstances of the present case.

24. The case of (AIR 919 All 102 V 6) (E) also does not help the contention of the learned advocate for the Appellants for in that case it has been observed that the period of limitation for a suit against a depositary to recover property is provided by Article 145 of Schedule I to the Limitation Act, but when upon demand the property is not forthcoming, the suit may be treated as one in Tort and Article 49 of the Schedule of the Act would'' furnish the period within which the suit must be brought.

25. It may be noted that in all the cases cited by the learned advocate for the Appellants there was a question of unlawful taking and detention. The demand and wrongful refusal were proved. In the present case it is not so. What the Plaintiff has alleged is that he kept the goods with the Defendants for selling, and the Defendants allege that they returned the goods. So there is no question of any wrongful taking or wrongful detention.

We have no doubt, therefore, that Article 145, Limitation Act is applicable to the case. Article 49 is a general article whereas Article 145 is a special article. If a particular case is covered by both these articles, the special article will prevail. We are supported in this view by the case of ''Narmadabai v. Bhavani Shanker 26 Bom 430 (O). According to Article 145 the period prescribed is 30 years, as such no, question of limitation arises.

The trial Court has given a decree to the Plaintiff to the extent of Rs. 7,000/-, that is, the price of the goods supplied and Rs. 2,188-14-0 being the amount of the cash dealings. So far as the decree to the extent of the cash transaction is concerned, the judgment of the Court below is upheld but as regards the other claim, that is, the price of the goods supplied, we are of the opinion that the Plaintiff should be given a decree for the return of 13 bales and two bags of loose cotton and in default thereof to pay the market price of the goods.

26. The decree of the Court below is modified as per directions above and the

Plaintiff''s suit to the extent of the return of the 13 bales and two bags of loose cotton is decreed against the Defendants. The Plaintiff is further given a decree to the extent of Rs. 2,188-14-0. In case the Defendants-Appellants fail to return the cotton bales and loose cotton, the Plaintiff would be entitled to the market price of the goods at the time of the transaction which would be determined by the executing Court. Plaintiff will be entitled to costs throughout.

