

(1909) 01 MAD CK 0006
In the Madras High Court

T.S. Seshan Pattar

APPELLANT

Vs

T.R. Veera Raghava Pattar and Others

RESPONDENT

Date of Decision : 18-01-1909

Acts Referred:

Limitation Act, 1963 — Section 19

Citation : (1909) ILR (Mad) 284 : 4 Ind. Cas. 38

Hon'ble Judges : Arnold White, C.J; Miller, J

Bench : Division Bench

Judgement

1. The plaintiff has taken the preliminary objection that an agreement was entered into on behalf of the 3rd defendant (appellant) to settle the affairs

of the temple and to withdraw the appeal. This, is denied by the 3rd defendant.

2. Affidavits have been put in by both sides, but we cannot decide this question on affidavit evidence.

3. The case must be remitted to the lower appellate Court for a finding whether an agreement was entered into on behalf of the 3rd defendant by

parties duly authorised by him in that behalf, and for good consideration, that the appeal against the decree which had been obtained by the plaintiff

should be withdrawn.

4. Witnesses may be examined and the affidavits in reply filed in this Court may be received.

5. The finding should be submitted within 6 weeks. and 7 days will be allowed for filing objections.

6. In compliance with the above order, the Subordinate Judge submitted the following:

FINDING.

7. The issue that I am directed to try and submit my finding on in the above second appeal is:

Whether an agreement was entered into on behalf of the 3rd defendant (appellant) by parties duly authorized by him in that behalf and for good

consideration that the appeal against the decree which had been obtained by the plaintiffs should be withdrawn.

8. Plaintiffs have examined 4 witnesses including the 3rd defendant and his two cousins and their Karyastan. From their evidence it appears that the

puja in the Temple in Tirunillai gramam to which the parties belong was not being performed regularly and the Temple had been kept shut up for

about a month without puja, that there were negotiations to set the Temple matters right (vide plaintiffs' 5th witness). 3rd defendant is the

seniormost member in the family of himself and his two cousins; plaintiffs' witnesses Nos. 5 and 6 who, though living in three separate houses, are

joint in their concern and carry on banking business here in Palghat and in Coimbatore, the business here being looked after by plaintiffs' 5th

witness and plaintiffs' 6th witness, and that at Coimbatore by the 3rd defendant. Plaintiffs' 6th witness, 3rd defendant's cousin and plaintiffs' 8th

witness, their Karyastan, depose to a meeting and the execution of the memorandum by all the gramakkars in Kanny last year (September-

October 1906) and plaintiffs' 6th witness deposes that it settled the matter now in appeal whose expenses are met by his joint family and that the

memorandum was signed by him. The evidence of Mahalinga Pattar, the Karyastan, shows that he also signed it among other gramakkars, that,

before the date of the meeting there was consultation and that the meeting had been arranged for. The evidence of plaintiffs' 6th witness is to the

same effect which is that shortly before the date of the said meeting. the 3rd defendant had sent for gramakkars and had a talk with them regarding

the future management of gramam affairs in unanimity. Under the memo. two new managers appear to have been appointed including plaintiffs' 5th

witness who is 3rd defendant's nephew Rengan Pattar, and that since then it is admitted that the Puja and Utsavam in the Temple take place

regularly (vide plaintiffs' 5th and 6th witnesses) though plaintiffs' 5th witness would have it that his uncle, plaintiffs' 6th witness, and not himself

looks after the management which plaintiffs' 6th witness most reluctantly admits, stating, however, that the Temple jewels and records which were

received from former managers were delivered to Lakshmanan, a boy of 17, who is younger brother of plaintiffs" 5th witnesses, that they are in the possession of the said Lakshmanan, that the jewels are being placed in the house of plaintiffs" 5th witnesses and are brought from there during Utsavams.

9. It must be-observed that all these witness, plaintiffs" witnesses Nos. 5 to 8, give their evidence most unwillingly. They attempt to belittle the

significance of the meeting and of the memorandum, and 3rd defendant who had with him the original memorandum which had been given to him

by is Karyastan (plaintiffs" 8th witness) and who had taken it to Madras and have given a copy of it to E.K. Govinda Iyer, plaintiffs" son-in-law,

who is 3rd defendant"s nephew--sister"s son--getting a copy of the receipt passed by gramakkars to the former managers; (Exhibit-B referred to

in plaintiffs" affidavit) pretended not to know whether it was the original itself that he had or its copy. Plaintiffs" 8th witness, the Karyastan, says

that he got back the memorandum from the 3rd defendant after his return from Madras and had kept it in his house, that his boy took it to a

gramam meeting and left it there, which does not look credible. It is significant to observe that this Karyastan says that 2 or 3 days after the memo.

was executed the 3rd defendant who was absent in Coimbatore came, and when told of it he did not consent, and that none of its provisions were

carried into effect. This does not appear to be true when regard is had to the evidence of plaintiffs" 5th and 6th witnesses, both of whom admit, as

already observed, that Puja and Utsavams are being regularly performed since, the evidence of plaintiffs" 6th witness who admits that the former

managers delivered over the Temple records and jewels and the evidence of plaintiffs" 5th witness who admits that under the direction of the 3rd

defendant he wrote to Mr M.R. Sankara Iyer who is their Vakil engaged to prosecute the second appeal now in question in the High Court, to

Bay that the suit was adjusted here and asked him not to conduct the appeal and to let the witness know the number of the second appeal so that a

vakalath and compromise petition might be sent to him. Thus it appears to me that with the view of settling the differences among the gramakkars

and for the regular performance of the Puja and Utsavams which were admittedly not being performed, the agreement now in question was come

to as arranged by the 3rd defendant by his cousins and Karyastans and that it was for good consideration.

10. I must, however, observe that the original agreement which appears to be suppressed as shown above does not seem to have been stamped.

Accordingly the copy produced--granting it to be a correct copy--cannot be received in evidence. That the memorandum is a memorandum of

agreement, I do not feel any doubt about. It was treated by both the parties before the High Court as an agreement and appears to be an

agreement. It provides among other things that, as the matter of 2nd Appeal in O.S. No. 141 of 1903 filed by Veeraraghavan Pattar on the file of

the Palghat Munsif's Court against the Devaswom, has been adjusted between the parties, it was settled that petitions, &c., are to be presented

for the appeal being dismissed, that deducting what was properly realised by Veeraraghavan Pattar, for what was sold in the name of Anantakrishna

Pattar, son of Lakshmana Pattar, for a nominal price in execution of the above decree, the balance, if any found due, as also the balance, left out of

costs incurred up to appeal by Seshan Pattar & Co. (3rd defendant and his cousins) after deducting Rs. 200 relinquished by them voluntarily shall

be paid to them within a year with interest at 8 annas per cent. per mensem. Thus it will be observed that each party gave up something of his rights

and accepted something less (vide para. 3 of A. referred to in plaintiffs' affidavit) evidently with the object of getting the Puja and Utsavams an the

grama Temple in which all were interested conducted properly. It is significant to observe that the 4th and 5th paras. of A. the agreement referred

to in the plaintiffs affidavit show that as ashtabandhas had got loose that the new managers were authorized to get them strengthened immediately,

to get samprokshna or purification ceremony performed to get repairs made to the cars, and also to get new Vahanams (vehicles) made, and it

was settled for this purpose that loans as found necessary were to be taken from T.R. Seshan Pattar Company, that the Company was to give the

loans that the loans were to be returned to the Company with interest at 10 annas per cent. per mensem, and that for that purpose the new

managers were to collect with great care the grama panom dues that were outstanding and that the ceremonies that were being performed formerly

were to be performed regularly and at the proper time without any obstruction. This agreement being reduced to writing--whether it is also not a

power-of-attorney and does not require to be stamped under Article 48(d)--it is unnecessary to consider for the purpose of this finding and it

being undisputedly unstamped which is to be regretted neither the copy A nor any secondary evidence of the agreement seems to be admissible

vide Ramasami Nadan v. Ulaganatha Goundan 22 M. 49 Thaji Beebi v. A.V. Tirumalaiappa Pillai 17 M.L.J. 308. So the evidence adduced

cannot be accepted and acted on. Accordingly I find the issue in the negative and against the plaintiff.

11. The second appeal again coming on for further hearing, the Court made the following.

ORDER

12. Upon the finding of the Subordinate Judge that the compromise agreement was reduced to writing, and that the document was not stamped,

we must accept his finding that the respondent failed to prove the agreement upon which he relied. We are not prepared to say that the admissions

in the appellant's affidavit relieved the respondent from the obligation of proving the agreement which he set up.

13. The objection taken on behalf of the respondent that the appellant ought to have made the persons whom he made parties to his appeal to the

lower appellate Court parties to this appeal must, we think, be upheld. We accordingly direct that this appeal stand over in order that these

persons may be brought on the record as respondents.

14. Any question of limitation is reserved.

15. The case was accordingly reported for hearing after the addition of those persons as respondents.

JUDGMENT

16. The contentions raised on behalf of the appellant were first that the agreement come to in April 1899 and recorded in Exhibits A and B was

invalid as contravening the rules of Gramajenam, and secondly, that the plaintiff's claim was barred by limitation. As regards the first point, under

paragraph 19 of the proceedings of the Gramajenam of 1893 (Exhibit--I) the power of the Committee to incur debts was restricted to the

purposes mentioned in that paragraph. This restriction on the powers of the Committee does not affect the powers of the whole body of members

of the Gramajenam. As regards paragraph 21 of the proceedings" of 1893, the

resolution recorded in Exhibit--B does not purport to cancel or modify any prescribed rule and is not inconsistent with any prescribed rule. The question is: Are the resolutions contained in paragraph 6 of the proceedings of the meeting of April 1899 (Exhibit B), and the ""receipt"" of the same date (Exhibit A), binding on all the members? Paragraph 12 of Exhibit--I provides that a resolution of the members of the Gramajenam at a general meeting shall be binding on all the Gramajenam. Exhibit--B is a record of a resolution passed at a general meeting and, signed by 25 of the Gramajenam who were present at the general meeting. The Subordinate Judge found (paragraph 17) that the meeting was held after notice to all the villagers. True, it was not shown that the meeting was convened by the Secretary on a requisition of members as provided by resolution 12 of the proceedings of 1893, but the meeting was duly held after notice to members, and we are of opinion that the resolution passed at that meeting was binding on all the members, and that it did not contravene any of the rules of Gramajenam.

17. As regards the question of limitation it was contended on behalf of the appellant that what took place in April 1899 did not give the plaintiff an independent cause of action, and that, if it did, inasmuch as the 2nd plaintiff was necessary party and was not made a party till September 1903, the claim in any view, was barred by limitation.

18. The general authority to bind all the members by a resolution passed at a general meeting, in our opinion, includes an authority to make an acknowledgment on their behalf and to enter into a fresh contract on their behalf. Assuming that an ""account stated"" cannot, as in England, be sued on as a fresh contract see *Shankar v. Mukta* 22 B.k 513 an account stated, which is signed by the defendant or his duly authorized agent gives a substantive cause of action see *Amathu v. Muthayya* 16 M.k 339. The resolution, in our opinion, is something more than an agreement to give time. It is an agreement under which the defendants accept the accuracy of the accounts and agree to pay the debt in certain instalments with interest, the defendants not being liable to pay interest on the original debt. We are of opinion that the resolution constitutes a fresh contract Holding on all the members, and that if the 1st plaintiff was entitled to sue alone, the suit was in time. In the view we take that that the resolution

constituted a fresh contract the point taken on behalf of the appellant that if the resolution was to be regarded as an acknowledgment for the

purposes of Section 19 of the Limitation Act, the suit was still out of time, does not arise. As regards the point whether the plaintiff was entitled to

sue without making his brother, the 2nd plaintiff, a party, the 1st plaintiff admitted in his evidence that he and his brother were undivided, that the

brother used to help him in his business, and that the amount advanced was from their trade funds. The Subordinate Judge found that the plaintiff

was the manager of the joint family (though he is not so described in the plaint), that the 2nd plaintiff acquiesced in the suit being brought in the

name of the 1st plaintiff alone, and that as the fresh contract was with the plaintiff himself, and did not show that the money was due to the family,

the plaintiff was entitled to sue alone, and the suit was not time-barred. The Subordinate Judge relied on the decisions in *Ramanuja Chariar v.*

Srinivasa. Chariar 9 M.L.J. 103 and *Adaikkalam Chetti v. Marimuthu* 22 M.k 326.

19. In view of the state of authorities, this question is one of some difficulty. Subject to the question of acquiescence by the 2nd plaintiff in the

present case, the case of *Alagappa Chetti v. Vellan Chetti* 18 M.k 33 would seem to be a clear authority for holding that the 2nd plaintiff was

necessary party to the suit and that the suit was time-barred. This case was followed in *Angamuthu Pillai v. Kolandavelu Pillai* 23 M.k 190 where

there was no evidence that the undivided brother acquiesced in the institution of the suit. The same view was taken in the recent case of *Shamrathi*

Singh v. Kishan Prasad 4 A.L.J. 194 where the authorities were reviewed, and the view there taken is supported by the passages from Mr.

Mayne's book on Hindu Law which are cited in the judgment in the *Shamrathi Singh v. Kishan Prasad* 4 A.L.J. 194 The cases of *Ramanujah*

Chariar v. Sirinivasa Chariar 9 M.L.J. 103 and *Adaikkalam Chetti v. Marimuthu* 22 M.k 326 are authorities the other way. We do not think the

present case could be distinguished from the cases in which it has been held that the undivided member was a necessary party to the suit on the

ground suggested on behalf of the respondent, viz., that though the moneys may have been advanced in the first instance out of family funds and on

behalf of the family, the fresh contract was made with the 1st plaintiff in his own name and for his own benefit. The fresh contract was made for the

purpose of discharging the original liability, and if the family were entitled to the benefit of the discharge of the original liability, they are entitled to

the benefit of the payment in discharge of the fresh contract. The balance of authority appears to be in favour of the view that the 2nd plaintiff was

a necessary party and that the suit is time-barred. We are not prepared to hold that the defect of the non-joinder of the 2nd plaintiff is cured by the

fact that he acquiesced in the bringing of the suit in the name of the 1st plaintiff alone.

20. The point was taken on behalf of the respondent that, in any view, the suit was not time-barred as regards the 3rd instalment.

21. Under Article 75 of the 2nd Schedule to the Limitation Act time begins to run, in the case of an instrument like the one in question in the

present case, from the 1st default, unless where the payee waives the benefit of the provision, and then when fresh default is made in respect of

which there is no waiver.

22. It appears to be well settled that mere abstinence from suing does not amount to waiver see *Sethu v. Narayana* 7 M.k 577; *Gopala v.*

Paramma 7 M.k 583 and *Jadab Chandra Bakshi v. Bhairab Chandra Chukerbutty* 31 C.p 297. An acceptance of an overdue instalment may be

evidence of a waiver see *Nagappa v. Ismail* 12 M.k 192; *Kashiram v. Pandu* 27 B.k 1; *Jadab Chandra Bakshi v. Bairab Chandra Chukerbutty* 31

C.k 297 but it is not suggested in the present case that any instalment was paid. All that the plaintiff could rely on was the evidence that in his (the

plaintiff's) books he credited the defendants in connection with this debt with certain moneys which the plaintiff had received. It is not shown that

the credits were in respect of the 1st instalment or that the fact of these sums being credited was communicated to the defendants. This being so,

we must hold there was no evidence of waiver and that the suit was barred by limitation.

23. On this ground the appeal must be allowed and the suit dismissed with costs throughout.