BOMBAY HIGH COURT

Lingangouda Marigouda

Vs.

Lingangouda Fakirgouda

Civil Revn. Appln. No. 578 of 1951

(Chagla, C.J.)

08.07.1952

ORDER

Chagla, C.J.

This revision application raises a question of limitation. The plaintiff and defendant No.2 on the one hand and defendant No.1 on the other paid to the Sangli State assessment in the sum of Rs. 582-6-4. The plaintiff and defendant No.2 paid a moiety as they were liable to pay and defendant No.1 paid the other moiety. On June 4, 1938, the Sangli State ordered that this amount of assessment which was paid should be refunded, and instead of refunding half to plaintiff and defendant No.2 and the other half to defendant No.1, the State refunded the whole amount to defendant No.1. On April 6, 1943, the plaintiff filed the suit claiming on his behalf and on behalf of defendant No.2 the half share, viz, Rs. 291-3-2. The trial court dismissed the plaintiff's suit holding it was barred by limitation. The learned District Judge who has reversed the decision held that the suit is in time and decreed it, and the question that arises is whether the suit is governed by Article 62 or Article 120. If it is governed by art.62, then it is out of time. If it is governed by Article 120, then it is within time.

2. A preliminary objection is taken by Mr. Hungund that no revision appliction lies because the decision of the District Judge was a decision with jurisdiction, and however erroneous it might be in law, it cannot be corrected by this Court. There is considerable force in Mr. Hungund's contention. Mr. Datar has relied on a recent Privy Council decision in - *'Joy Chand Lal Babu v. Kamalaksha Chaudhury[1]',* and Mr. Datar says that that decision lays down that in every case of limitation and 'res judicata, if the decision of the lower Court is erroneous in law, the High Court can correct it in revision under Section 115. The claim made by Mr. Datar for the jurisdiction of the High Court under Section 115 seems to be rather wide and extensive, but undoubtedly there, are observations in the judgment of their Lordships which seem to support that contention. On the other hand, there is a judgment of the Privy Council in the same volume at p.67 - *'Venkatagiri*

Ayyangar v. Hindu Religious Endowments Board, Madras[2]*',* which lays down the principles which should govern the application of Section 115, and if those principles are applied to the present case, it is difficult to see how a decision on a question

[1]76 Ind App 131 (PC)

[2]76 Ind App 67 (PC)

of limitation would attract the application of Section 115. The matter is not free from difficulty. I prefer not to express any opinion on this application, because in my opinion even assuming I had jurisdiction under Section 115 to interfere with the decision of the learned District Judge, this is not a case where I should interfere because in. my opinion the decision of the learned Judge seems to be correct in law.

3. Now, the question is whether the moiety of the sum of Rs. 582-6-4 was received by defendant No.1 for plaintiff's use. It is only if it was received for the plaintiff's use that the money would be payable by defendant No.1 to the plaintiff. Now, the language used in art.62 is the language taken from English cases. But there is one important fact that should be borne in mind that in England it was necessary for the Courts to find an implied contract in order that suits may be maintainable. A suit in personam would not lie unless there was an express or implied contract and therefore the Courts were at pains in many cases to infer or imply a contract so that the plaintiff should not fail by reason of a defect in procedure. Therefore, in the Elglish books there are many cases where an implied contract has been arrived at in order to sustain the action. In India there never was any reason to stretch a point in favour of the plaintiff, in order to sustain his action. As Courts here were both Courts of law and equity, the question of formal procedure which was of such importance at one stage in England never troubled our Courts and our Judges and therefore it is always safe to follow English decisions in construing Article 62. If anything, in India art.62 should be more strictly construed, because a liberal construction would result in more plaintiffs losing in a large number of cases on the ground of limitation, because if art.62 is strictly construed, then the suit would fall under Article 120 which gives to the plaintiff a longer period of limitation.

4. Now, limitation like any other question of law must to a large extent depend upon the particular facts found in a particular case; and before I look at the authorities it is necessary to consider what are the actual facts found in this case. In this case it is important to note that the sum of Rs. 582-6-4 was paid by the Sangli State to defendant No.1 alone because in the opinion of the Sangli State defendant No.1 alone was entitled to this amount. Further, the sum was received by defendant No.1 because he contended that he alone was entitled to this amount. Therefore, neither in the case of the payer nor the payee was there any suggestion that the amount of Rs. 582-6-4 was being paid to defendant No.1 not for himself, but at least in respect of a part of it for someone else. Therefore, the transaction with which we are concerned was a transaction where the payer paid a certain amount to the payee as the sum due by the payer to the payee, and in my opinion when you have a transaction like this it is impossible to contend that on a strict construction art.62 would apply and that I should hold that the amount was received by defendant No.1 for the use of the plaintiff.

5. The case strongly relied upon by Mr. Datar is a case reported in - *'Mahomed Waheb v. Mahomed Ameer*[3]*',* and as I shall presently point out, the facts in that case were entirely different from the facts before me. There we had a case of co-mortgagees and one of the mortgagees received the money from the mortgagor and the other mortgagee instituted a suit for recovering his share and the Court held that Article 62 applied. In that case there was no dispute that the amount received by one of the co-mortgagees was being received not only for himself but also on behalf of the co-mortgagee and the payment was also

[3]32 Cal 527

being made by the mortgagor to discharge the mortgage in which two persons were interested. The observations made in that case on which Mr. Datar relies are after all observations to be read in the light of these facts. But what is more, the authority of this case has been rather shaken by a subsequent decision reported in - *'Anantram Bhattacharjee v. Hem Chandra Kar*[4]*',*

In that case there was a dispute between the owners of contiguous properties. Some of the lands were attached under Section 146 of the Criminal Procedure Code and the income was deposited in the Collectorate. The owner of one of the properties withdrew a portion of the income alleging that it represented his share of the profits. The owners of the other property sued him for the recovery of that money on the ground that the lands belonged to them, and the Court held that Article 120 applied and not Article 62. In that case the learned Judges, Mr. Justice Walmsley and Mr. Justice Ghose, considered the case of - '*Mahomed Waheb v. Mahomed Ameer*' and they pointed out that that case presented no difficulty because there one co-mortgagee received the entire sum of money due to himself and the other co-mortgagee from the mortgagor, and they also pointed out at p.479 that the real difficulty seems to be that, in construing the words of Article 62 of the Indian Limitation Act, the Courts in some of the cases have apparently considered that that article refers to all cases where an action for money had and received would lie at common law in England, and then the learned Judges point out that the common law form of action for money had and received grew out of the circumstance that at common law in England an action 'in personam' is maintainable only on contract or on tort. The learned Judges held that the plaintiffs in that case were equitably entitled to the money as the profits of the lands, which one of the owners of the lands withdrew honestly believing that he was entitled to it, and therefore according to the learned Judges the claim was an equitable claim against the defendants. In my opinion here too, although defendant No.1 did not receive the money for the use of the plaintiff and defendant No.2 and although the State of Sangli did not pay the money to defendant No.1 for the use of the plaintiff and defendant No.2, as soon as the plaintiff establishes that he has a share in equity he has a claim to it, and if it is an equitable claim and not a contractual claim, then the article that would apply is Article 120 and not Article 62. On the whole, in my opinion, the learned Judge below was right in the view that he took that Article 120 applied and that the suit was within time.

6. The result is that the application fails. Rule discharged with costs.

Rule discharged.

[4]50 Cal 475