

Before Mr. Justice Collister

1938
February, 1

COURT OF WARDS, MUZAFFARNAGAR (DEFENDANT) v.
AJODHYA PRASAD AND ANOTHER (PLAINTIFFS)*

Court of Wards Act (Local Act IV of 1912), section 55—Applies to claims arising ex delicto as well as to claims arising ex contractu—Suit for damages for wrongful conversion committed by ward lies against Court of Wards—Death of ward pending suit—Abatement of suit—Maxim, actio personalis moritur cum persona—Applicability to actions for wrongful conversion by the deceased—Claim survives against estate in charge of Court of Wards—Succession Act (XXXIX of 1925), section 306—Principle applies.

The terms of section 55 of the U. P. Court of Wards Act are quite general and make no distinction between claims relating to the property of the ward and claims of a personal nature. So where the claim arose *ex delicto* and was a suit to recover a sum of money which had been wrongfully converted by the ward to his own use instead of being paid over to the plaintiff, it was held that section 55 applied to the suit and it was rightly instituted against the Court of Wards and the ward was not a necessary party at all.

Held, also, that the death of the ward during the pendency of the suit did not cause the suit to abate by application of the maxim *actio personalis moritur cum persona*. The maxim does not apply to torts which involve the wrongful appropriation or acquisition by one man of property belonging to another, and the remedy for such wrongful act can be pursued against the estate of the deceased wrongdoer. The claim survived, therefore, against the estate of the deceased which continued in the charge of the Court of Wards; the principle of section 306 of the Succession Act applied.

Mr. A. M. Khwaja, for the appellant.

Mr. A. P. Pandey, for the respondents.

COLLISTER, J.:—This is a defendant's appeal. The defendant appellant is the Court of Wards at Muzaffarnagar, represented by the Collector, and the action out of which this appeal arises was brought by the plaintiff for recovery of a sum of Rs.26-2-0. It appears that the estate of Khan Bahadur Muzaffar Ali Khan had been taken over by the Court of Wards. Muzaffar Ali Khan

*First Appeal No. 241 of 1936, from an order of P. D. Pande, Additional Civil Judge of Muzaffarnagar, dated the 8th of August, 1936.

was an Honorary Assistant Collector and it is alleged that in that capacity he decreed a suit for arrears of rent in favour of the plaintiff against one Bakhshi, the deceased father of respondent No. 2, Pitam. Thereafter execution was taken out and it is alleged that on the 10th of February, 1931, the decretal money was paid by the judgment-debtor to Khan Bahadur Muzaffar Ali Khan, who thereupon struck off the execution case, recording full satisfaction of the claim. The money was, however, never paid to the plaintiff, but was converted by Khan Bahadur Muzaffar Ali Khan to his own use.

Hence this suit for recovery of Rs.26-2-0 plus interest, the total claim being Rs.36-10-0. The suit was instituted on the 10th of April, 1934, and on the 31st of May, 1935, it was dismissed by the Munsif of Muzaffarnagar on the ground that the plaintiff had no cause of action. Only one issue was decided by the trial court. On the 15th of August, 1935, an appeal was filed in the court of the Additional Civil Judge of Muzaffarnagar, and four months later, on the 18th of December, 1935—according to information given to me by learned counsel for the parties—Khan Bahadur Muzaffar Ali Khan died. On the 8th of August, 1936, the lower appellate court reversed the finding of the trial court and remanded the suit to that court with directions to re-admit it under its original number and determine the remaining issues. It is against that order of remand that this appeal has been preferred by defendant No. 1, i.e., the Court of Wards.

Learned counsel for the defendant appellant pleads that if the suit arises *ex contractu* it is barred by section 37 of the Court of Wards Act, and that if it arises *ex delicto* then it lay against the ward himself and not against the defendant appellant. It appears to me that according to the allegations in the plaint, the case has two aspects. It may well be said that when the judgment-debtor of the rent suit handed over this money to

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Khan Bahadur Muzaffar Ali Khan for payment to the plaintiff an implied contract of agency came into being, and from that point of view the suit would be barred under section 37 of the Act, which provides among other things that a ward shall not be competent to enter into any contract which may involve him in pecuniary liability. But the matter has also another aspect. It may be said that the handing over of this money to the Honorary Assistant Collector was tantamount to making a deposit in court—Khan Bahadur Muzaffar Ali Khan being the Presiding Officer of that court—and from this point of view the conversion of this money to his own use by Khan Bahadur Muzaffar Ali Khan would clearly be a tort. The Munsif has said in his judgment that the suit has not been framed as an action in tort and this observation finds some support from the allegations in paragraphs 3 and 5 of the plaint; but in paragraph 7 of the plaint it is said that “Muzaffar Ali Khan practised this fraud and deception and also misappropriated the amount and thus he has also committed an offence, and defendant No. 1 is, in every way, liable for payment of the amount to the plaintiff.” According to these allegations, the claim for damages arose *ex delicto* rather than *ex contractu*. Learned counsel for the plaintiff respondent contends that it was an action in tort, and learned counsel for the defendant appellant himself in ground No. 4 of his memorandum of appeal stated as follows: “Because the action, if any, lay in tort and as such Muzaffar Ali Khan was liable only personally.”

Moreover, even in argument the plea of contract was only hinted at by learned counsel for the defendant appellant and it was virtually accepted that the suit out of which the appeal arises was an action in tort. Arguments were addressed accordingly.

The first plea which is taken before me by learned counsel for the defendant appellant is that the suit lay against the ward himself and not against the Court of Wards.

Now section 55 of the Court of Wards Act reads as follows: "No ward shall sue or be sued nor shall any proceedings be taken in the civil court otherwise than by and in the name of the Collector in charge of his property or such other person as the Court of Wards may appoint in this behalf."

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Learned counsel for the defendant relies upon the case of *Sri Thakurji v. Hira Lal* (1). In that case a suit was brought by an idol and by two persons whose property was under the management of the Court of Wards and it was alleged that the defendant had taken wrongful possession of a plot of land. A plea was taken that the two plaintiffs, other than the idol, were not competent to sue for the reason that their property was under the management of the Court of Wards. It was found that they were in fact disqualified proprietors and that their property was under the Court of Wards, but it was also found that the property of the idol was not under the Court of Wards. The District Judge thereupon dismissed the suit by reason of the provisions of section 55 of the Court of Wards Act. The learned Judges of this Court, however, disagreed with that view. In connection with section 55 of the Court of Wards Act they observed:

"That section has, however, no application to cases where a disqualified proprietor has no personal interest in the property by virtue of which a right to sue is claimed. His disability extends to the property he owns and not to that which he holds as a trustee. A person who happens to be the manager of an endowed property is not the owner of that property, and holds no beneficial interest therein. He cannot be regarded as a disqualified proprietor in regard to the property which he so holds as manager, and the idol, in whom the endowed property is supposed to be vested, cannot be treated as a ward within the meaning of section 55 of the Act."

That case is distinguishable from the one with which I am now dealing, for it is clear that the plaintiffs there had a dual capacity, one personal and the other representative.

(1) (1922) I. L. R. 44 All. 634.

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In *Deputy Commissioner, Kheri v. Daya Chand Chaubey* (1) a certain person and his wife sued for a declaration that the defendants, who were their creditors, had exaggerated the debts due from the plaintiffs, and there was a claim for recovery of Rs.20,000 as damages. Soon after the institution of the suit the plaintiffs were declared to be disqualified proprietors and thereafter the Court of Wards assumed superintendence of the estate. Subsequently, the Deputy Commissioner applied that his name be brought on the record in place of the plaintiffs, and substitution was accordingly made. Later on, the Deputy Commissioner applied for withdrawal of the suit and this application together with an application on behalf of the plaintiffs challenging the right of the Court of Wards to assume management of the estate came up for hearing before SRIVASTAVA, J. In considering section 55 of the Court of Wards Act the learned Judge observed:

"Lastly, it was urged that the claim for damages made in the plaint is a personal claim, and the Court of Wards has nothing to do with it. It was argued that in such circumstances the Court of Wards can represent the plaintiffs only in respect of the claim for declaration as regards the debts, but not as regards the personal claim for damages. So it was contended that the applicants must be retained as co-plaintiffs with the Court of Wards. . . . The terms of this section are perfectly general and make no distinction between claims relating to the property and claims of a personal nature."

With these observations I am in complete agreement. It is, moreover, obvious that if this suit were decreed, the decree could only be satisfied out of the estate, which is under the management of the Court of Wards, and the latter is therefore a necessary party. On the other hand, having regard to section 55 of the Act, I am of opinion that the ward is not a necessary party at all.

The next plea taken is that Khan Bahadur Muzaffar Ali Khan having died on the 18th of December, 1935, the suit abates. This plea (which again presupposes

(1) A.I.R. 1935 Oudh, 234.

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that the action lay in tort) is based on the maxim *actio personalis moritur cum persona*. I find myself unable to accept this plea. The maxim of Roman law referred to above is by no means of universal application at the present day, having been whittled down by statute and otherwise. Section 306 of the Indian Succession Act reads as follows: "All demands whatsoever and all rights to prosecute or defend any action or special proceeding, existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory." It is argued that the Court of Wards is not an executor or administrator of the deceased ward as contemplated by the Indian Succession Act. This may be so; but it is conceded that on the death of Khan Bahadur Muzaffar Ali Khan, the Court of Wards, acting under section 48 of the Act, retained the superintendence of the property and continued to manage it, and I think that the same principle will apply. In *Rustomji Dorabji v. Nurse* (1) SADASIVA AYYAR, J., at page 369 observed: "The maxim (*actio personalis moritur cum persona*) has always been considered as an unfair and even barbarous maxim, especially when applied to a case where the injured party is denied redress because the wrong-doer died. I may add that it seems to me to be based upon no principle of justice, equity or good conscience . . ."

In Salmond's Law of Torts, seventh edition, at page 92 the learned author observes:

"This rule, however, which seems destitute of any rational basis, has been to a very large extent eaten away by exceptions, some of which were admitted by the common law itself, while others have been introduced by statutes ancient and modern. Their aggregate effect is, speaking generally, to abolish the rule so far as it relates to injuries to property, but to leave it in full operation with respect to injuries of other kinds."

(1) (1920) I.L.R. 44 Mad. 357.

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At page 93, in dealing with exceptions to the maxim *actio personalis moritur cum persona*, he observes:

“The maxim *actio personalis moritur cum persona* does not apply to torts which involve the wrongful appropriation or acquisition by one man of property belonging to another. Executors may sue and be sued for the value of that property. This is a second exception established by the common law, the maxim in question not being applied so as to allow a wrongdoer to retain another’s property, or the proceeds of it, simply because the owner from whom he wrongfully took it has since died. Nor, conversely, is it tolerable that the executors of a wrongdoer should refuse to pay the value of property wrongfully appropriated by the deceased, simply because the wrongdoer is now dead.”

The author then quotes the following observation from the case of *Phillips v. Homfray* (1):

“The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act appear to us to be those in which property, or the proceeds or value of property, belonging to another have been appropriated by the deceased person and added to his own estate or moneys.”

At page 94 the learned author says:

“All that is necessary to make the executors liable is that the deceased shall have wrongfully appropriated the property and got the benefit of it. Whether he kept it, or consumed it, or sold it makes no difference. For all unjust benefit so derived by him his executors must account.”

I am clearly of opinion that the present suit does not abate by reason of the death of Khan Bahadur Muzaffar Ali Khan and that, if the alleged act of conversion is proved, the defendant No. 1, i.e., the Court of Wards, will be liable to satisfy it out of the estate.

The last plea taken is that the suit is barred by limitation. This plea does not find place in the memorandum of appeal and it does not appear to have been pleaded by the contesting defendant as respondent before the lower appellate court. It was, however, taken in the written

statement and there was an issue upon it. This is one of the issues which have not yet been decided and, if the order of remand were sustained, it would be decided along with the other undetermined issues by the trial court. It is argued by learned counsel for the plaintiff respondent that in the circumstances it would be more proper to leave the adjudication of this plea to the trial court. On the other hand, he has made no attempt whatsoever to meet the plea, and on the face of it it appears to be unanswerable. The cause of action, as alleged in the plaint, occurred on the 10th of February, 1931, and the suit was not instituted until the 10th of April, 1934. The period of limitation allowed by article 36 of the Limitation Act is two years. Under article 62 it is three years. In the plaint it is claimed that the suit is within three years by reason of section 54 of the Court of Wards Act. But article 62 will only apply if there was an implied contract; and in that case the suit will be barred by section 37 of the Act. If (as seems to be accepted) the suit arises out of tort, or if it arises both from tort and contract and there is no waiver of the tort, it is beyond the two years allowed by article 36. In the circumstances, it seems to me that it would be a complete waste of time to allow the suit to go back to the trial court for adjudication upon this and the other issues. I find that the suit is barred by limitation and it must, therefore, be dismissed.

In the result I allow this appeal and set aside the order of the lower appellate court and I dismiss the suit of the plaintiff; but in the circumstances I make no order as to costs.

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