FULL BENCH.

Before Sir Shadi Lal, Chief Justice, Mr. Justice Chevis and Mr. Justice Harrison.

1921

Nov. 21.

MAHOMED GHASITA (DEFENDANT)—*Appellant*,

versus

SIRAJ-UD-DIN AND OTHERS (PLAINTIFFS)—*Respondents.*

Civil Appeal No 1396 of 1918.

Indian Limitation Act, IX of 1908, articles 52, 56, 115, 120—limitation—suit for recovery of money due on account of materials supplied and work done for constructing a floor under a contract fixing a consolidated rate for both—claim as laid in plaint, an indivisible one—meaning of "compensation" in article 115, Indian Contract Act, IX of 1872, section 73.

The defendant, who had taken a contract to construct a building at Lahore, employed the plaintiff, as a sub-contractor to do the work of flooring in the building. The plaintiff was to supply Italian marble and other stone required for the flooring and was also to do all the work necessary for constructing the floor, and was to be paid a certain sum of money for every square foot of the flooring done by him, which rate included both the price of the materials supplied and the work done by the plaintiff. The plaintiff sued for the balance of the money due to him on the basis of this contract and the plaint made no mention of the price of the materials as distinct from the price of the work. The only question before the Full Bench was what article of the Limitation Act was applicable to the suit.

Held, that the claim as laid in the plaint was an indivisible one, and could not be split up into two portions and consequently neither article 52 nor article 56 of the Limitation Act was applicable, but that the suit was governed by article 115 and not by article 120.

Radha Kishen v. *Basant Lal* (1), overruled in this respect.

Article 115 is a general provision applying to all actions *ex contractu* not specially provided for otherwise. The word "compensation" in that article as well as in article 116 has the same meaning as it has in section 73 of the Indian Contract Act, and denotes a sum of money payable to a person on account of loss or damage caused to him by the breach of a contract.

Nobocoomar Mookhopadhaya v. *Siru Mulliek* (2), and *Husain Ali Khan* v. *Hafiz Ali Khan* (3), followed.

(1) 103 P. R. 1913. (2) (1890) I. L. R. 6 Cal. 94.
(3) (1881) I. L. R. 3 All. 600 (F. B.).

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The present appeal came on for hearing in the first instance before Sir Shadi Lal, Chief Justice, and Mr. Justice Harrison, who referred the case to a Full Bench.

The order of reference, dated 7th June 1921, was as follows :—

The defendant Mian Ghasita had a contract to construct a building at Lahore, and employed the plaintiffs to supply Italian marble and other stones and to do all the work to be performed for placing the marble and the stones in their proper places in the building. The suit, which has given rise to this appeal, was for the recovery of a certain sum of money alleged to be due to the plaintiffs for the materials supplied and the work performed by them. Now, the learned District Judge upon a consideration of all the evidence has determined the various questions of facts which arose between the parties, and has fixed the amount which the plaintiffs are entitled to recover from the defendant.

The findings of facts recorded by the learned Judge cannot be assailed on second appeal ; and the only question of law, which arises in this appeal, is whether the suit is governed by article 120 of the II Schedule of the Limitation Act and is consequently within time. Now, it may be stated at once that the claim would be barred by time unless it is governed by the 6 years' rule as laid down by article 120 or article 52 (the period of three years prescribed by the latter article has been enlarged to six years by the Punjab Loans Limitation Act, 1904). As the plaintiffs supplied not only the materials but also the labour, it is clear that neither article 52 nor article 56 governs the whole of the claim and a Division Bench of the Punjab Chief Court in *Radha Kishen* v. *Basant Lal* (1), has held that, as no single article was applicable to the entirety of the claim, the suit fell within residuary article 120. The correctness of this decision has been impeached before us, and, as at present advised, we are not inclined to affirm the rule laid down in that judgment.

Now, it is a well-settled rule of law that the combination of several claims in one suit does not deprive each claim of its specific character and description—*vide* inter alia *Shrinivas* v. *Hanmant* (2), and there is, therefore, no valid reason why the claim, in so far as it relates to the price of the materials supplied by the plaintiffs, should not come within the purview of article 52, and that relating to the price of the work done should not be governed by article 56. Assuming, however, for the sake of argument that the entire claim must come within one article, we consider that the residuary article for actions arising out of contracts is article 115, and that article 120 has, therefore, no application to an action based upon a contract.

As the judgment sought to be impeached was delivered by a Division Bench, we do not think that we would be justified in

(1) .03 P. R. 1913. (2) (1890) I. L. R. 24 Bom. 260.

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dissenting from it without referring the matter to a Full Bench. We accordingly refer for the determination of a Full Bench the question whether the suit as described above is governed by article 52, article 56, article 115, or article 120.

Muharram Ali Chishti (with him Muhammad Amin and Jagan Nath) for the defendant-appellant.—The suit is time-barred. The whole claim for materials as well as labour is inseparable and indivisible and article 115 governs the case and not article 120 as held by the Judge.

Rivis, J.—What was the contract for, cannot the materials labour and materials be separated ?]

The contract was for the whole of the work to be done, for materials as well as labour at a consolidated rate. I submit that *Radha Kishen* v. *Basant Lal* (1) does not lay down the law correctly. There are two Punjab rulings cited at page 389 of that case, one is *Abdul Ali* v. *F. Von Goldstein* (2), and the other is *Daulat Ram* v. *The Woollen Mills Co.* (3). These rulings do not support the decision of the learned Judges. The question arising in the present case did not arise in those cases. In *Abdul Ali* v. *F. Von Goldstein* (2), the claim had been brought within 3 years and the point arising in this case was not decided in that case. Again in *Daulat Ram* v. *The Woollen Mills Co.* (3), the question was not before the Court, the passage "Had the contractor . . . . . possibly article 120 would have been the article applicable" was *obiter dictum*. And at bottom of page 452 *et seq.* it was held that article 115 would apply in a case like the present. The combination of different claims into one action does not deprive each claim of its specific character. See *Shrinivas* v. *Hanmant* (4), and *Dowlat Ram* v. *Jiwan Lal* (5).

[*C. J.*—In one suit there may be two properties claimed. The suit may be barred as regards one property and within time as regards the other. (Addressing Mr. Tek Chand) Do you dispute that proposition of law ?]

Tek Chand for plaintiffs-respondents. No, I do not dispute that.

(1) 103 P. R. 1913. (3) 95 P. R. 1908 (F. B.), pp. 452, 453.
(2) 43 P. R. 1910. (4) (1890) I. L. R. 24 Bom. 260.
(5) 116 P. R. 1881 (F. B.), pp. 278, 279, 281.

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[*C. J.*—Addressing Muharram Ali Chishti—What is your position ? Do you say that part of the suit is governed by article 52 and the other part by article 56 or the whole of it by article 115 ?]

Both the parts are governed by one article, because the whole relief is indivisible.

If the suit does not fall within article 52 or 56, it should fall within article 115. My contentions are two-fold :—(1) That the contract cannot be split up as it is indivisible.

(2) Article 115 is the only article which applies to all cases of contract which are not specifically provided for in the Act. Article 115 is comprehensive. As to the word "compensation" it is not used in a limited sense, it should be used in the same sense as it is used in section 73 of the Indian Contract Act—See Mulla and Pollock's Contract Act, page 311 (latest edition), and *Vythilinga* v. *Thetchanamurthi* (1), *Nobocoomar Mookhopadhaya* v. *Siru Mullick* (2), and *Husain Ali Khan* v. *Hafiz Ali Khan* (3), which says that the word "compensation" denotes the payment which a party is entitled to claim.

Tek Chand, for respondents—I concede that in the ruling *Radha Kishen* v. *Basant Lal* (4), article 120 is erroneously applied, and article 115 comes in if article 2 or 56 does not apply, but I submit that the contention of the other side that the whole claim is indivisible is erroneous. There is no warrant for the proposition that a claim of this kind should be considered inseparable and indivisible. In regard to the supply of marble, article 52 applies, but as regards the work to be done on it article 56 would apply.

[*C. J.*—But the contract appears to be that the rate was fixed as a consolidated one for the marble as well as for the work done on it Are we not to take the contract as entered into between the parties ?]

If I combine my reliefs in one action then I simply superadd wages to the materials supplied. Could I not give up my claim for wages and sue simply for the price of materials ? Suppose I sue for moveables as well as immoveables. My suit as regards the former

(1) (1880) I. L. R. 3 Mad. 76.
(2) (1890) I. L. R. 6 Cal. 94.
(3) (1881) I. L. R. 3 All. 600 (F. B.).
(4) 103 P. R. 1913.

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may be time-barred, while as regards the latter it may be within time. There is no authority one way or the other. Take the case of a necklace of gold, the illustration cited by Your Lordship (the Chief Justice) on the last occasion. If the goldsmith supplies the gold as well as the work on it, his suit may be within time as regards the gold but barred as regards wages.

Muharram Ali Chishti, replied.

Second appeal from the decree of T. P. Ellis, Esquire, District Judge, Lahore, dated the 31st January 1918, affirming that of Lala *Achhru Ram, Subordinate Judge, 1st Class, Lahore, dated 7th February 1916, decreeing the claim in part.*

The judgment of the Full Bench was delivered by—

SIR SHADI LAL, C. J.—The action, which has led to this reference, was brought by the plaintiff for the recovery of a certain sum of money on the basis of a contract. It appears that the defendant, who had taken a contract to construct a building at Lahore, employed the plaintiff as a sub-contractor to do the work of flooring in the building. The plaintiff was to supply Italian marble and other stones required for the flooring, and also to do all the work necessary for constructing the floor, and was to be paid a certain sum of money for every square foot of the flooring done by him. The rate, though varying with the stone used in flooring, did not specify separately the price of the stone and other materials supplied by the plaintiff, and that of the labour required for doing the work. In other words, the parties fixed for each kind of flooring a consolidated rate including the price of the materials to be supplied and the work to be done by the plaintiff.

The action brought by the plaintiff was for the recovery of the balance of the money due to him on the strength of the contract described above; and the question for consideration is what article of the Limitation Act governs the claim. Our attention has been invited, in the first instance, to article 52, which prescribes a period of 3 years (enlarged to 6 years by the Punjab Loans Limitation Act of 1904) for the recovery of the price of goods sold and delivered

to the defendant; and also to article 56, which lays down a period of 3 years for a suit to recover the price of work done by the plaintiff for the defendant. Now, as stated above, the plaintiff supplied not only the materials, but also the labour, and it is clear that neither of the aforesaid articles governs the suit in its entirety. It is, however, urged that the action comprises two claims, one for the price of the materials supplied by the plaintiff, and the other relating to the price of the work done by him, and that these two claims should be dealt with separately, and that they are governed by article 52 and article 56, respectively. The rule of law is no doubt firmly established that a combination of several claims in one action does not deprive each claim of its specific character and description. The Code of Civil Procedure allows a plaintiff, in certain circumstances, to combine in one action two or more distinct and independent claims, and it is quite possible that one of the claims may be barred by limitation, and the other may be within time; though both of them arise out of one and the same cause of action. In a case of that description there is no reason why the Court should not apply to each claim the rule of limitation specially applicable thereto. It is nowhere laid down that only one article should govern the whole of the suit, though it may consist of several independent claims, and that the suit should not be split up into ts component parts for the purpose of the law of limitation.

The question, however, is whether the action as brought by the plaintiff can be treated as a combination of two distinct claims. Now, the plaint makes no mention of the price of the materials as distinct from the price of the work, and contains no reference whatsoever to two claims. There is only one indivisible claim, and that is for the balance of the money due to the plaintiff on the basis of a contract, by which he was to be paid for everything supplied and done by him in connection with the flooring of the building at a comprehensive rate. The claim as laid in the plaint is an indivisible one; it cannot be split up into two portions. We must, therefore, hold that it falls neither under article 52, nor under article 56.

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The learned advocate for the plaintiff contends that as neither of the above articles governs the claim, it should come within article 120. The judgment in *Radha Kishen* v. *Basant Lal* (1), which is relied upon in support of this contention, no doubt, related to a suit for the recovery of a sum of money alleged to be due for the work performed and materials supplied by the plaintiff to the defendant under a contract, and the learned Judges held that neither article 52 nor article 56 was applicable to the entire claim. They then made the following observation:—

"There is no other article specifically applicable, and hence the only article which can be applied is article 120."

Now with all deference to the learned Judges we are unable to hold that there is no other article governing a claim of that character. It seems that their attention was not drawn to article 115, which governs every suit for compensation for the breach of a contract not in writing registered and not specially provided for in the Limitation Act. It is beyond doubt that this article is a general provision applying to all actions *ex contractu* not specially provided for otherwise; and the present claim certainly arises out of a contract entered into between the parties. The word "compensation" in article 115 as well as in article 116 has the same meaning as it has in section 73 of the Indian Contract Act and denotes a sum of money payable to a person on account of the loss or damage caused to him by the breach of a contract. It has been held, and we consider rightly, that a suit to recover a specified sum of money on a contract is a suit for compensation within articles 115 and 116—*vide Nobocoomar Mookhopadhaya* v. *Siru Mullick* (2) and *Husain Ali Khan* v. *Hafiz Ali Khan* (3).

We are accordingly of opinion that the present claim must be regarded as one for compensation for the breach of a contract, and that there is no special provision in the Act which governs the claim. It must, therefore, come under the general provision contained in article 115, which governs every action arising out of a contract not otherwise specially provided for.

(1) 103 P. R. 1911. (2) (1880) I. L. R. 6 Cal. 94.
(3) (1881) I. L. R. 3 All. 600 (F. B.).

Our reply to the question referred to us is that the suit is governed by the three years' rule as prescribed by article 115. The case must now go back to the Division Bench for final determination.

Case sent back to Division Bench.

APPELLATE CIVIL.

Before Mr. Justice Wilberforce and Mr. Justice Martineau.

MUSSAMMAT NASIB-UN-NISA (PLAINTIFF)—*Appellant,*

versus

MUSSAMMAT AHMADI-UN-NISA AND OTHERS (DEFENDANTS)—*Respondents.*

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July 23.

Civil Appeal No. 2428 of 1915.

Custom—Succession—Sayads of Kharkhauda, Rohtak District—family custom allowing special concessions to females—daughter of predeceased brother or son of predeceased sister—whether females possess the right of representation—mesne profit.

B. A., a Sayad of Kharkhauda in the Rohtak district, died in 1872. The whole of his property ultimately passed into the hands of his last widow *Mussammat* B. B., and her donees. After her death three suits for possession were instituted, *viz.*, (1) by *Mussammat* N. N, the daughter of S A, a predeceased brother of B. A, (2) by A. A., the son of a sister who survived B. A., but died before his widow, *Mussammat* B. B., and (3) by *Mussammat* A. N., a collateral in the fourth degree.

Held, that the Sayads of Kharkhauda have for a very long period followed custom

Kadar Ali v. *Sikandar Ali* (1), Civil Appeal No. 2295 of 1916 (unpublished), *Mir Mumtaz Ali* v *Jawad Ali* (2), *Bunyad Ali* v. *Faiz Muhammad* (3), *Aman Ali* v. *Mussammat Amina Begam* (4), *Mussammat Umat-ul-Ala* v. *Mussammat Said-ul-Nissa* (5), *Mussammat Vasi-un-Nissa* v. *Mansur Ali* (6), and *Faiz-ud-Din* v. *Aman Ali* (7), followed.

Held, however, that in matters of succession they have been somewhat influenced by their personal law and have widely recognised the right of succession of females.

Mir Mumtaz Ali v. *Jawad Ali* (2), *Faiz-ud-Din* v. *Aman Ali* (7), *Mussammat Nasib un-Nissa* v. *Mansur Ali* (6), and Civil Appeal No. 2295 of 1916 (unpublished), followed.

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(1) 60 P. R. 1878.
(2) 82 P. R. 1887.
(3) 173 P. R. 1889.
(4) 46 P. R. 1890.
(5) 143 P. R. 1893.
(6) 120 P. W. R. 1909.
(7) 143 P. W. R. 1910.