1929

AMBASHANKAR UTTAMRAM v. HEPTULLA SARAFALLI

Kemp Ag. C. J.

clause is for the purpose of defining what the client is entitled to in respect of professional services in return for the fee.

In the present case there was an agreement to pay a lump sum for the litigation. It might have turned out to be insufficient if the litigation had proceeded for a long time. In that case the pleader would not have been entitled to demand more than the fee that he had bargained for. On the other hand, as happened in this case, the client compromised his claim. Equally the pleader was entitled to retain the full amount of the fee. The pleader, when he agrees to a lump sum, knows, or tries to guess, what the amount of work involved in the suit will be and he naturally makes his engagements with reference to that and contracts for what he thinks is an appropriate fee.

In these circumstances, I am of opinion that the order of the learned Subordinate Judge should be set aside and the suit should be dismissed with costs. The opponent to pay the costs throughout.

Rule made absolute.

B. G. R.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Wild.

1929 *July* 11.

KRISHNAJI ANAJEE BHUTE (ORIGINAL PLAINTIFF), APPELLANT *v.* ANAJEE DHONDAJEE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), section 28, Articles 120, 127, 144—Joint family property—Partition—Suit for declaration of right to a share at some future date—Limitation.

A joint Hindu family consisting of a father, defendant No. 1, and his sons plaintiff and defendants Nos. 2, 3 and 4, effected a partition of the joint family property in 1910. As regards the share allotted to the father on partition on June 8, 1910, he passed a deed of gift in favour of defendant No. 4 for a portion and on January 20, 1913, another deed of gift in favour of defendant No. 2 for another portion. On June 13, 1922, the plaintiff filed a suit for a declaration that the property allotted to defendant No. 1 was agreed to be

*Second Appeal No. 985 of 1927.

enjoyed by him and his two wives for their maintenance and after their death was liable to be divided between the plaintiff and his brothers and that the alienations made by the father were void.

Held, (1) that the suit, which was for a declaration that the plaintiff was entitled to a share in the property in suit at some future date, was governed by Article 120 of the Indian Limitation Act and not by Articles 127 or 144 :

Kodoth Ambu Nayar v. *Secretary of State for India*,[1] followed;

(2) that the expression "joint family property" in Article 127 means property of a joint family and not property in which the parties are interested as tenants in common; and that the phrase "to enforce a right" in the same Article means a claim to obtain actual possession :

Amme Raham v. *Zia Ahmad*,[2] *Bhavrao* v. *Rakhmin*,[3] *Isap Ahmed* v. *Abhramji Ahmadji*,[4] *Yerukola* v. *Yerukola*,[5] and *Raoji* v. *Bala*,[6] approved:

Gavrishankar Parabhuram v. *Atmaram Rajaram*,[7] not followed;

(3) that for the operation of Article 144 there must be a prayer, express or implied, for dispossession of some one from the property or from an interest in it which the suit claimed :

Francis Legge v. *Rambaran Singh*,[8] approved;

(4) that for section 23 of the Indian Limitation Act the criterion is not whether the right is a continuing one but whether the wrong is a continuing one :

Rajah of Venkatagiri v. *Isakapalli Subbiah*,[9] approved.

SECOND Appeal against the decision of A. K. Asundi, Assistant Judge at Poona in Appeal No. 135 of 1926.

Suit for declaration.

Defendant No. 1 the father, together with his sons plaintiff and defendants Nos. 2, 3 and 4, constituted a joint Hindu family. In 1910 they effected a partition of the family property which was divided into five equal shares. The plaintiff made an application for a decree to be passed in terms of the award. After the presentation of the award the plaintiff contended that there was an agreement in writing to be passed by defendant No. 1 to the effect that the plaint property had fallen to the share of defendant No. 1 and was to be enjoyed by him during his lifetime and by the step-mother and the mother of the plaintiff during

(1) (1924) 47 Mad. 572 at p. 585 : 26 Bom. L. R. 639 at p. 651.
(2) (1890) 13 All. 282.
(3) (1898) 23 Bom. 137 at p. 140.
(4) (1917) 41 Bom. 588 at p. 613.
(5) (1922) 45 Mad. 648 at p. 668.
(6) (1890) 15 Bom. 135 at p. 143.
(7) (1893) 18 Bom. 611.
(8) (1897) 20 All. 35.
(9) (1902) 26 Mad. 410 at p. 416.

1929

KRISHNAJI ANAJEE v. ANAJEE DHONDAJEE

their lives for maintenance. On June 8, 1911, a deed of gift was passed by defendant No. 1 in favour of defendant No. 4 and on January 20, 1913, another deed of gift was passed in favour of defendant No. 2. The present suit was filed by the plaintiff on June 13, 1922, for a declaration that the property kept in possession of his father, defendant No. 1, was for the enjoyment of defendant No. 1 and his wives and was liable to be equally divided among the plaintiff and his brothers, defendants Nos. 2, 3 and 4, after the death of defendant No. 1 and his wives and that the alienations made by the father, defendant No. 1, were null and void. The lower Courts held that the suit was barred under Article 120 of the Indian Limitation Act.

The plaintiff appealed to the High Court.

G. N. Thakor, with *P. S. Joshi*, for the appellant.

M. R. Jayakar, with *S. R. Parulekar*, for respondents Nos. 1, 2 and 4.

G. R. Madbhavi, for respondents Nos. 3 and 5.

PATKAR, J. :—This is a suit brought by the plaintiff for a declaration that the property kept in possession of his father defendant No. 1 for the enjoyment of defendants Nos. 1 and 5 is liable to be equally divided among the plaintiff and his brothers defendants Nos. 2, 3 and 4, and that the sale deeds and deeds of gift passed unauthorizedly by defendant No. 1 are null and void. The case on behalf of the defendants was that there was a partition in 1910 and the property was divided into five equal shares and each sharer was absolute owner of the property that fell to his share. It appears that in 1910 there was a partition between the brothers and their father defendant No. 1. The present plaintiff made an application in 1910 for a decree to be passed in terms of an award Exhibit 83. After the presentation of the award the plaintiff contended that there was

an agreement in writing to be passed by defendant No. 1 to the effect that the plaint property had fallen to the share of defendant No. 1 and was to be enjoyed by him during his lifetime and by the step-mother and mother of the plaintiff during their lives for maintenance. Defendant No. 1 in his written statement, Exhibit 342 dated July 19, 1910, denied the assertion of the plaintiff that the plaint property was joint and asserted that the property allotted to his share by the award belonged to him absolutely. On June 8, 1911, a deed of gift, Exhibit 287, was passed by defendant No. 1 in favour of defendant No. 4 and on January 20, 1913, another deed of gift, Exhibit 288, was passed in favour of defendant No. 2. The present suit was brought on June 13, 1922.

Both the Courts held that the present suit was barred under Article 120 of the Indian Limitation Act. The learned Subordinate Judge, however, was inclined to hold that the property in suit was kept joint to be enjoyed by defendant No. 1 and his two wives for their maintenance so that it may be divided equally among all the brothers after the death of defendant No. 1 and his wives. The lower appellate Court has not investigated this important question of fact. If the question had been gone into by the lower appellate Court and found against the plaintiff, the plaintiff's suit would have been liable to be dismissed on the merits. We will assume for the purpose of this appeal that the allegation of the plaintiff is true.

It is urged on behalf of the appellant, first, that the proper Article applicable to the suit is Article 127 of the Indian Limitation Act, secondly, that if Article 127 does not apply and even if Article 120 applies, there is a continuing cause of action within the meaning of section 23 of the Indian Limitation Act, and, thirdly,

1929

KRISHNAJI ANAJEE v. ANAJEE UDONDAJEE

Patkar J.

that Article 144 would apply as it is a suit for possession of an interest in immoveable property.

The first question, therefore, is whether the present suit is governed by Article 127 of the Indian Limitation Act. Article 127 relates to a suit by a person excluded from joint family property to enforce a right to share therein. It is clear that in this case the members of the family admittedly divided the family property between themselves, and after the division they continued to be tenants-in-common and not joint tenants in the property which was to be subsequently divided. In *Amme Raham* v. *Zia Ahmad*[1] it was held that "joint family property" means the property of a joint family and not property in which the contending parties have interest as tenants-in-common. The same view was taken by the Full Bench of this Court in *Bhavrao* v. *Rakhmin*.[2] In the case of *Isap Ahmed* v. *Abhramji Ahmadji*[3] it was held by the majority of the Judges constituting the Full Bench that the expression "joint family property" must be read as property appertaining to a joint family. In *Yerukola* v. *Yerukola*[4] it was observed (p. 668) that "the effect of the partial partition of certain properties, and the reference to arbitration as regards the properties undivided, as well as the conduct of the parties subsequently, show clearly that they had become divided in status. At the date of the suit the plaintiff was not a member of a joint family." It was further held that Article 127 is inapplicable to cases where at the date of the suit the property has ceased to be joint family property and is held by sharers as tenants-in-common. The same view was taken in *Venkatappayya* v. *Venkata Ranga Row*.[5] The case of *Gavrishankar Parabhuram* v. *Atmaram Rajaram*,[6]

(1) (1890) 13 All. 282.
(2) (1898) 23 Bom. 137 at p. 140.
(3) (1917) 41 Bom. 588 at p. 613.
(4) (1922) 45 Mad. 648 at p. 668.
(5) (1919) 43 Mad. 288 at p. 299.
(6) (1893) 18 Bom. 611.

which might lend some support to the contention of the appellant, has been considered, in *Dagadu* v. *Sakubai*,[1] to have been overruled by the decision of the Privy Council in *Girja Bai* v. *Sadashiv Dhundiraj*.[2] According to the view of Macleod C. J. in *Dagadu's* case[1] even if the agreement set up by the plaintiff be held proved, the jural relation of the parties *inter se* might be that of "joint tenants *not as members of a joint family which no longer exists* but under a special agreement made after the severance." It would, therefore, follow that the property in suit is not joint family property.

The next question is, whether this is a suit to enforce a right to share therein. This is a suit for a declaration that the plaintiff is entitled to a share at some future date in the property in suit. In *Raoji* v. *Bala*[3] it was held that Article 127 provides for a suit "to enforce a right" (not "to establish a right") and by this phrase is intended a claim to obtain actual possession. We think, therefore, that Article 127 cannot apply to the facts of the present case.

It is urged on behalf of the appellants that there is a continuing cause of action within the meaning of section 23 of the Indian Limitation Act and reliance is placed on the case in *Chukkun Lal Roy* v. *Lolit Mohan Roy*,[4] where it was held that a suit for a declaratory relief except in cases specially provided by the Indian Limitation Act cannot be held to be barred so long as the right to the property in respect of which the declaration is sought is a subsisting right. That case is dissented from by the Madras High Court in *Rajah of Venkatagiri* v. *Isakapalli Subbiah*[5] and by the Patna High Court in *Maulavi Muhammad Fahimul Huq* v.

(1) (1923) 25 Bom. L. R. 806.
(2) (1916) L. R. 43 I. A. 151.
(3) (1890) 15 Bom. 135 at p. 143.
(4) (1893) 20 Cal. 906.
(5) (1902) 26 Mad. 410 at p. 416.

1929

KRISHNAJI ANAJEE v. ANAJEE DHONDAJEE

Patkar J.

Jagat Ballav Ghosh.[1] In *Rajah of Venkatagiri's case*[2] it was held that the cause of action for a declaratory relief is the alleged wrongful denial by the defendant in each case of the plaintiff's title and possession, and the criterion is not whether the right is a continuing one but whether the wrong is a continuing one within the meaning of section 23 of the Indian Limitation Act. In *Maulavi Muhammad Fahimul Huq's case*[1] it was observed that the declaration obtained in a suit for possession is merely ancillary and is generally unnecessary; but where the cause of action is based upon a shadow cast upon the title of a person, who is not entitled to any consequential relief at the moment, limitation must run from the date on which that challenge to his title commences. A declaratory suit under section 42 of the Specific Relief Act can be brought when the plaintiff's title is denied by some person, and the denial itself gives a cause of action for a declaratory relief. To such a suit section 23 of the Indian Limitation Act cannot apply as it refers to a continuing wrong and not to a continuing right.

The last question is whether Article 144 of the Indian Limitation Act applies. This is not a suit for possession, but a suit for declaration and to such a suit Article 144 of the Indian Limitation Act cannot apply. In *Francis Legge* v. *Rambaran Singh*[3] it was held as follows (p. 36):—

> "It seems to us that there is the widest possible difference between a suit for a declaration such as is asked for in this suit and a suit for actual possession of immoveable property. In a suit to which Article 144 would apply, there must be a prayer, express or implied, for the dispossession of some one from the property or from the interest in it which the suit claims. . . . There is no one to be dispossessed from it or from any interest in it."

According to the decision of the Privy Council in *Kodoth Ambu Nayar* v. *Secretary of State for India*[4]

(1) (1922) 2 Pat. 391 at p. 402.
(2) (1902) 26 Mad. 410.
(3) (1897) 20 All. 35.
(4) (1924) 47 Mad. 572 at p. 585, 26 Bom. L. R. 639 at p. 651.

the proper Article applicable to such a case is Article 120 of the Indian Limitation Act.

We think, therefore, that the view taken by both the lower Courts is correct and this appeal must be dismissed with costs. The costs will be paid to respondents Nos. 1, 2 and 4. The cross objections are dismissed. No order as to costs.

Decree confirmed.

B. G. R.

APPELLATE CIVIL.

Before Sir Norman Kemp, Kt., Acting Chief Justice, and Mr. Justice Murphy.

GHELABHAI JIVABHAI (ORIGINAL PLAINTIFF), APPLICANT *v.* CHHAGAN NARASI AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 3), OPPONENTS.*

1929 *July* 16.

Civil Procedure Code (Act V of 1908), Order II, rule 2—Khata in the name of father—Two separate khatas in sons' name—Suit for balance due at the foot of khata in father's name—Suit dismissed—Subsequent suit for account of all three khatas—Suit not barred.

One Chhagan and his sons were members of a joint Hindu family. Chhagan opened a khata in his name in the plaintiff's books for goods supplied from June 28, 1923, to May 30, 1924. Two other khatas were opened by the sons of Chhagan in their names for goods supplied by the plaintiff during later periods. The plaintiff filed a suit on the first khata against Chhagan alone, claiming a certain sum of money as due at the foot of that khata. That suit was dismissed on the ground that there was a running account between the parties which contained items in all the three khatas mentioned. The plaintiff then filed a suit on the account of all the three khatas against Chhagan and his sons. It was contended that this suit was barred under Order II, rule 2, of the Civil Procedure Code, 1908, the plaintiff having failed to sue in respect of the whole of his claim in the former suit.

Held, that the suit was not barred under Order II, rule 2, as the cause of action in the former suit was not a cause of action on the whole running account of the three khatas, but on a separate cause of action on a specific khata.

APPLICATION for setting aside the order passed by the Joint First Class Subordinate Judge, Surat, in Small Cause Suit No. 2297 of 1927.

*Civil Revision Application No. 159 of 1928.