APPELLATE CIVIL.

Before Mr. Justice Wassoodew.

1939
July 19

SHRIDHAR MAHADEV RASAL AND OTHERS, MINORS BY THEIR NEXT FRIEND THEIR MOTHER SUSHILABAI w/o MAHADEV LAXMAN RASAL, HEIRS OF THE DECEASED MAHADEV LAXMAN RASAL (HEIRS OF ORIGINAL DEFENDANT) APPELLANTS *v.* GODULAL JETHMAL AND ANOTHER, OWNERS OF THE SHOP GODULAL HANSRAJ (ORIGINAL PLAINTIFFS) RESPONDENTS.*

Indian Limitation Act (IX of 1908), Arts. 28, 36—Illegal distraint of property—Suit for damages—Limitation—Claims founded on different causes of action—Civil Procedure Code (Act V of 1908), O. II, r. 2—Suit not barred—Act not bona fide*—Bombay Revenue Jurisdiction Act (X of 1876), s. 6—Suit not barred.*

Respondents Nos. 1 and 2 owned a shop. Prior to May 1933, they purchased wheat from certain Bhils from whom land revenue was due to Government. On May 20, 1933, the appellants' father, as Mamlatdar, sent to the respondents' shop a Circle Inspector with a warrant to attach their moveable property and the Circle Inspector recovered from a cupboard in their shop Rs. 127-2-9.

In 1934, the respondents filed against Government and the appellants' father a suit to recover Rs. 127-2-9 with interest and in that suit defendant No. 1 paid this amount into Court.

On June 17, 1935, the respondents having filed against the appellants' father a suit to recover Rs. 2,001 as damages for illegal distraint of their property :—

Held, (1) that the suit was not barred under O. II, r. 2 of the Civil Procedure Code, 1908;

(2) that s. 6 of the Bombay Revenue Jurisdiction Act, 1876, was no bar to the suit;

(3) that the respondents' claim to compensation was barred under Art. 28 of the Limitation Act, 1908, inasmuch as the suit was instituted more than two years after the *illegal distraint.*

SECOND APPEAL from the decision of M. R. Meher, District Judge, West Khandesh, confirming the decree passed by V. V. Gadkari, First Class Subordinate Judge, Dhulia.

Suit to recover damages.

At Taloda, there was a shop known as Godulal Hansraj doing business in moneylending, wheat and cotton.

*Second Appeal No. 12 of 1938.

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Respondents Nos. 1 and 2 were its owners and the shop was managed by respondent No. 2.

Between March and April 1933, respondent No. 2 purchased wheat from Rotu Naktya and other Bhils and credited its price to their account.

The appellants' father was then Mamlatdar and First Class Magistrate of the Taloda Taluka. He received from the village officers a report stating that the Bhils had not paid land revenue to Government.

On May 20, 1933, the Mamlatdar sent a Circle Inspector with a warrant to attach the respondents' moveable property and the Circle Inspector attached Rs. 127-2-9 from a cupboard in their shop.

On June 11, 1934, the respondents brought suit No. 337 of 1934 to recover from the Secretary of State for India in Council and the appellants' father Rs. 127-2-9 plus Rs. 8-1-3 as interest, in all, Rs. 135-4-0 and in that suit the Secretary of State paid into Court Rs. 127-2-9.

On June 17, 1935, the respondents filed the present suit against the appellants' father, alleging that the latter was not entitled to recover the amount either under the Land Revenue Code or under any other law, that the act was done *mala fide*, and was illegal, and that the Mamlatdar's act had lowered the shop's credit and lowered its owners in the estimation of the public.

The appellants' father contended, *inter alia*, that the suit was not maintainable in view of O. II, rr. 1 and 2 of the Civil Procedure Code, that the suit was barred under Art. 28 of the Indian Limitation Act and that the Court had no jurisdiction to entertain the suit in view of s. 6 of the Bombay Revenue Jurisdiction Act.

The trial Judge negatived these contentions and gave the respondents a decree for Rs. 200 with proportionate costs.

On appeal, the District Judge confirmed the trial Court's decree. In holding that the claim was in time, he stated as follows :—

"It is next contended that the suit having not been filed within one year of the cause of action is barred. If Article 28 of the Limitation Act is applicable the suit is barred but not if Article 36 is applicable. The lower Court held that Article 36 was applicable. It further held that even if it was doubtful whether Article 28 or 36 was applicable, that Article which kept alive rather than that which barred the right to sue must be preferred, in view of the ruling in *Kasturchand* v. *Hari*, 36 Bom. L.R. 1068. In my opinion the Article applicable to the facts of the case is Article 36 of the Limitation Act, it being a suit for compensation for misfeasance. Article 36 prescribes a period of limitation of two years for compensation for any wrong, malfeasance, non-feasance or misfeasance independent of contract and not specially provided for. It was observed by Farran J. in *Essoo* v. *Savitri* (I.L.R. 11 Bom. 133) 'The words "malfeasance, misfeasance or non-feasance independent of contract" used in Article 36 are of the widest import, and embrace all possible acts or omissions commonly known as torts by English lawyers, that is to say, wrongs independent of contract . . . For torts, a two years' period of limitation is thus provided as the general rule, subject to special exceptions contained in other Articles of the schedule.' Similarly it was held in *Kirpa Ram* v. *Kunwar Bahadur* (I.L.R. 54 Allahabad 467) that 'Article 36 is a more general Article. It is applicable to suits for compensation for any malfeasance, misfeasance or non-feasance independent of contract. It refers to action which may be on account of the commission of some act which is in itself unlawful, or being the improper performance of some lawful act, or the omission of some act which a person by law is bound to do.' In my opinion the present case clearly falls under Article 36 and not under Article 29. Article 29 refers to suits for compensation of wrongful seizure of moveable property under legal process. The cases reported under that Article relate to wrongful seizure in pursuance of decrees or orders of Civil Courts. I think that the words 'by legal process' do not apply to executive acts and refer to attachments made by processes of Courts."

Defendant's heirs appealed.

B. G. Rao, Assistant Government Pleader, for the appellants.

Y. V. Dixit, for the respondents.

WASSOODEW J. This is a second appeal from a decision of the District Judge of West Khandesh. The plaintiffs instituted this action on June 3, 1935, to recover compensation or damage for illegal distraint of their property by the Mamlatdar of Taloda through the Circle Inspector on

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May 20, 1933. It was alleged that a sum of Rs. 127-2-9 which was due as arrear of land revenue from certain Bhils who were holders of some lands, was recovered under a warrant issued by the Mamlatdar " out of the amount lying in the plaintiffs' cupboard ". The plaintiffs alleged that the Mamlatdar's act was *ultra vires* and without jurisdiction, and that their reputation had suffered in consequence.

Among the defences raised to this action the first was that the suit was not maintainable inasmuch as on June 12, 1934, the plaintiffs had instituted another action to recover the sum removed from them under the alleged illegal distraint with interest in which this claim could have been added, and that the failure to do so was fatal to this action under O. II, r. 2, of the Civil Procedure Code. It was also contended as a second ground of defence that inasmuch as the Mamlatdar was acting in pursuance of law his action was protected under s. 6 of the Bombay Revenue Jurisdiction Act (X of 1876). Lastly, it was urged that the claim made more than one year after the cause of action accrued to the plaintiffs was barred under Art. 28 of the Indian Limitation Act. All these contentions were disallowed in the Courts below which have held that Rs. 200 is the proper amount of damage sustained by the plaintiffs as against the claim of Rs. 2,001 made by them. Consequently that amount with proportionate costs was decreed in the Courts below. Against that decree the Mamlatdar's heirs have filed this appeal.

The same contentions as in the Courts below have been raised in this appeal on the appellants' behalf. It seems to me that the first two contentions cannot be sustained. But the appeal ought to succeed on the question of limitation.

I shall briefly deal with the contention based upon the provisions of O. II, r. 2, of the Civil Procedure Code as well as the defence under s. 6 of the Bombay Revenue Jurisdiction Act. It is not denied that the action of the Mamlatdar was illegal and *ultra vires* and that by reason

of that act the sum of Rs. 127-2-9 was illegally seized and forcibly removed from the plaintiffs' possession on May 20, 1933. That was a transaction which gave rise to two different claims for the loss sustained, first, the claim to recover back the amount with the consequential loss of interest due thereon, and secondly, the claim for loss of reputation and business. In my opinion, these claims are founded on different causes of action although they arise from the same transaction and therefore they need not have been included in the same action [see *Payana Reena Saminathan* v. *Pana Lana Palaniappa*].[1] The test would be whether they could be supported by different kinds of evidence. Inasmuch as the answer must be clearly in the affirmative, the plea founded on the provisions of O. II, r. 2, cannot be sustained.

With regard to s. 6 of the Bombay Revenue Jurisdiction Act, it cannot be said that the Mamlatdar's act was *bona fide* in pursuance of the provisions of any law for the time being in force. The order passed by him for attachment was directed expressly against the property of the plaintiffs who were neither occupants of the land for which the arrear of revenue was due, nor in any sense defaulters in respect to the payment of land revenue. The *panchnama* made by the Revenue Officers at the time of the attachment of the property confirms the belief that they were executing distress against the property of the plaintiffs on the supposition that either they had agreed to pay the dues of the defaulters or that notwithstanding the sale of the latter's property to the plaintiffs that property was still attachable in the hands of the purchasers. Both these suppositions were not warranted by the facts, and the action of the Mamlatdar was *ab initio* illegal and *ultra vires*. No *bona fides* could be claimed in respect of such an act and I think the defence founded upon the provisions of s. 6 of the Bombay Revenue Jurisdiction Act cannot be allowed to prevail.

[1] (1913) L. R. 41 I. A. 142.

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Then there remains the plea of limitation. The contention of the appellants is that the Article applicable to this case is Art. 28 of the Indian Limitation Act. That Article provides the period of limitation " for a suit for compensation for an illegal, irregular or excessive distress." The period provided is one year from the date of distress. I have very little doubt in holding that the claim for the illegal distress in the present case would fall within that Article. It is a specific Article dealing precisely with a claim to compensation for illegal distress or distraint, for distress has the same meaning as distraint [see *Jagatjiban Nando Roy* v. *Sarat Chandra Ghosh*].[1] The illegal distress contemplated by the provisions of that Article might be, in my opinion, the result of various causes. The seizure of the property might be illegal either because the party from whose possession it was seized was not liable or because the property on account of its character was itself exempt from seizure. Again the person effecting seizure or the Officer under whose authority the distraint is effected might have no power or jurisdiction to effect the seizure or the distraint itself may not be in conformity with the provisions of the statute under which the act is purported to be done. As instances one may refer to the powers of distraint conferred by special acts on individuals or Local Boards and Corporations. The distrainer under those powers has to conform to the provisions of the statute otherwise the distraint will be illegal. It is difficult to accede to the argument that seizure due to want of jurisdiction is not contemplated by the provisions of Art. 28. It seems to me that such a seizure would be tantamount to an illegal distraint if the power is illegally exercised or the person exercising the power has acted under an erroneous belief that he had the power. The competing Article which was applied in the lower Courts was Art. 36. It is a very wide and general Article governing cases of compensation for any act of misfeasance or malfeasance

[1] (1902-3) 7 Cal. W. N. 728.

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or non-feasance independently of contract and not specifically provided for. In accordance with general principles where the statute by an express Article deals with a specific case of this nature, that Article must prevail over the general provisions [see *Municipal Board of Mussoorie* v. *H. B. Goodall.*[1]] I therefore, hold that inasmuch as the suit was instituted more than two years after the illegal distraint, the claim to compensation is barred. Consequently I allow this appeal and dismiss the suit with costs throughout.

Appeal allowed.

Y. V. D.

[1] (1904) 26 All. 482.