Antony Eugene Pinto and ors. Vs. Eugene Cajetan Pinto and anr.

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SooperKanoon Citation : sooperkanoon.com/368492

Court : Mumbai

Decided On : Sep-15-2008

Reported in : 2009(1)BomCR828

Judge : Dalvi Roshan, J.

Acts : Limitation Act, 1963 - Schedule - Articles 65 and 113; Specific Relief Act - Sections 5; Code of Civil Procedure (CPC) , 1908 - Sections 35 - Order 7, Rule 11 - Order 14, Rule 2 - Order 20, Rule 13(1)

Appeal No. : Administration Suit No. 1865 of 1980

Appellant : Antony Eugene Pinto and ors.

Respondent : Eugene Cajetan Pinto and anr.

Advocate for Def. : Haresh Mansukhani and ;A.B. Shreekhande, Advs.

Advocate for Pet/Ap. : Zal Andhyarujina and ;Thakkar and ;Javed Gaya, Advs.

Judgement :

Dalvi Roshan, J.

1. This Suit has been directed to be tried along with and immediately after the Testamentary Suit No. 5 of 2004 is disposed of granting or refusing letters of Administration with the last Will and Testament of Prof. Cosmas Damian T. Pinto

(the deceased), dated 12th February, 1963 annexed thereto.

2. That is because the parties in the Testamentary Suit are also the parties in this Suit and the evidence with regard to the estate of the deceased would be overlapping.

3. The original plaintiffs, defendants 1 and 2 and the husband of defendant No. 3 are the 8 children of the said deceased. The plaintiff Nos. 1, 2 and 3 have expired after the filing of the Suit. Their heirs have been brought on record as party plaintiffs.

4. The defendant Nos. 1 and 2 have sought to propound the Will of the deceased dated 12th February, 1963. Hence they are required to probate the Will. Accordingly they have filed Testamentary Petition No. 5 of 2004. The original plaintiff No. 3 has filed Caveat thereto. Evidence on behalf of the plaintiffs herein (on behalf of the Caveator therein) and on behalf of the defendants herein (the petitioners therein) has been recorded. For reasons stated in Testamentary Suit No. 5 of 2004, Letters of Administration with the carbon copy of the verbatim handwritten copy of the said Will has been granted.

5. This Suit is for administration of the estate of the deceased. The estate will be required to be administered in accordance with the directions of the deceased under his Will dated 12th February, 1963.

6. The deceased expired on 29th June, 1975. The Suit has proceeded as on intestacy. Each of the plaintiffs have claimed 1/8th share in the net estate left by the deceased.

7. The plaintiffs have sought directions for disclosure of the properties, both movable and immovable left by the deceased and for administration thereof. The correspondence annexed to the Plaint (which has been taken on record by consent of the parties as Exhibit-I (colly) in Testamentary Suit No. 5 of 2004, mentions about a Will left by the deceased, but which was until then not found, and requires the defendant No. 1 herein to administer the estate as per said Will. Nevertheless it is claimed that each of the heirs would be entitled to 1/8th share in

the estate of the deceased left by him as on the date of the death of the deceased on his intestacy.

8. The estate stated to have been left by the deceased is enumerated in the list Exhibit-C to the plaint.

9. The defendant No. 1 has filed his written statement on 31st March, 1981. He relied upon the Will dated 12th February, 1963 which has been annexed as Exhibit- 1 to his written statement. He has averred about the admitted immovable properties of the deceased and how the deceased himself dealt with and disposed them off during his lifetime. He has also averred about the movable properties left by the deceased being certain shares and a bank account standing in the joint names of the deceased, defendant No. 1 and the husband of defendant No. 3 in Grindlay's Bank, Santacruz Branch. He has shown how most of the shares and securities of the deceased inherited or acquired by the deceased came to be utilized by the deceased in the construction of the building called Damiano on one of the plots of his land.

10. The defendant No. 1 has interpreted the Will with regard to the bequest of the bungalow/house of the deceased called Marie Ville.

11. The written statement shows how on 2 open plots of land 2 buildings, Cosmos and Damiano, came to be constructed during the life time of the deceased and how the flats therein came to be appropriated also during the life time of the deceased. A large part of the Will of the deceased, therefore, came to be acted upon during his life time. The assets enumerated in Exhibit- C. to the plaint would be required to be dealt with in accordance with the directions in the last Will and testament of the deceased dated 12th February, 1963.

12. Much after the Testamentary Suit No. 5 of 2004 proceeded and after evidence was led, the defendants have amended the written statement to add the averment with regard to the bar of the Suit under the Limitation Act, 1963.

13. It may be mentioned that an administration suit is required to be filed within three years from the accrual of the right to sue under Article 113 of Part X of

Schedule-I to the Limitation Act, 1963. The right to sue accrued to the plaintiffs on the date of the death of the deceased i.e. on 29th June, 1975. The Suit is filed on 21st November, 1980. The Suit is, therefore, seen to be barred by the Law of Limitation unless the plaintiffs show if the bar is saved by any act or event. This issue is required to be tried as preliminary issue under the provisions of Order XIV, Rule 2 of the C.P.C.

14. If the Suit is within Limitation, since the Will has been probated, (Letters of Administration granted), a preliminary decree for administration of the estate of the deceased would be required to be passed under the provisions of Order XX, Rule 13(1) of the C.P.C. Consequently, in that event each of the properties of the deceased would have to be separately considered for its due administration for taking accounts and making inquiries as necessary.

15. In the event the suit is seen from the averments in the plaint itself to be barred by Limitation, it would have to be dismissed without directing administration of the estate of the deceased.

16. This would be dependent upon the determination of the issue of Limitation as a preliminary issue. The Issues are framed and answered as follows:

ISSUES FINDINGS1. Whether the Suit is Yesbarred by the Law ofLimitation?2. Whether the plaintiffs Yes, subjectare entitled to administer to thethe estate of the bar of Limitation.deceased as claimedby them and whetherany preliminary decreefor such administrationcan be passed?3. What Order? As per finalorder.

17. ISSUE No. 1: (RE-LIMITATION): The deceased expired on 29th June, 1975. This Suit is for administration of the estate of the deceased on intestate. The plaintiffs claim 1/8th share in the estate of the deceased. The plaintiffs have valued their share in the estate left by their deceased father at Rs. 50,000/- each, being the 1/8th share in the aggregate. No period of limitation is fixed for an Administration Suit. Consequently this Suit would fall under Part- X contained in Article 113 of the Limitation Act, 1963. The said Article runs thus:

--Description Period of Time fromof application limitation which periodbegins torun--113 Any suit Three When thefor which no years right to sueperiod of accrues.limitation isprovides else-where in thisSchedule.--

18. The right to sue accrued on the date of the death of the deceased for Administration of his estate, because it is from such date that his heirs become entitled to his estate. However, Mr. Andhyarujina on behalf of the plaintiffs drew my attention to the letters forming the admitted correspondence between the parties annexed at Exhibit- A (colly) to the plaint. The said letters have been marked Exhibit- I (colly) in the Testamentary Suit No. 5 of 2004.

19. The first letter in the proceedings is dated 28th August, 1980. It is addressed by Anthony (original plaintiff No. 1), Marie (plaintiff No. 4) and Francis (original plaintiff No. 2) to Cyril (original plaintiff No. 3), Eugene (defendant No. 1) and Irene (defendant No. 2). This letter itself is written more than three years after the death of the deceased when the right to these heirs, who made the claim in the letter, accrued. The letter itself shows that it was more than five years since their father died and no accounts have been submitted so far despite repeated efforts in that behalf.

20. Incidentally this letter also refers to a Will by the deceased and calls upon the three addressees to obtain necessary probate. The letter further takes exception to rents being collected by Irene, defendant No. 2 and certain declaration made by Eugene defendant No. 1 about the estate of the deceased.

21. Upon receipt of this letter by plaintiff No. 3, he addressed the letter dated 30th August, 1980 to defendant No. 1 alleging that he was arbitrarily managing the immovable and movable assets after the death of their father in a secretive manner and that he had made a statement before Income Tax Authority. The original defendant No. 3 also mentioned about a Will left by the deceased in the said letter and called upon defendant No. 1 to forward detailed accounts of the estate and liabilities of the deceased.

22. The defendant No. 1 by his letter dated 3rd September, 1980 replied to the letter stating that in the short period of four days indicated in that letter he would not be able to give the particulars required. He also mentioned about certain business visits he had to make and assured plaintiff No. 3 that he would clarify the points and issues stated by him. He did not raise any disputes about the estate of the deceased.

23. Mr. Andhyarujina contended that the plaintiffs stated their case in the said letter and alleged about the mismanagement of the estate by the defendant No. 1 and only when the plaintiffs received the letter dated 3rd September, 1980 that the cause of action accrued to them, because defendant No. 1 disputed their right. A reading of the letter dated 3rd September, 1980 does not show that the defendant No. 1 disputed anything.

24. Mr. Andhvarujina contended that the bar of limitation, if any, was saved by the said correspondence.

25. The contention is wholly incorrect. The first letter itself was written as mentioned therein five years after the death of the father. It, for the first time, mentioned that accounts were not submitted. The letter called for the production of the Will of the father. A period of limitation can be saved only after it began to run. The period of limitation must be saved before it culminates in the statutory bar. The period of limitation would begin running only when the cause of action accrues. When the cause of action accrued is itself mentioned in the letter written five years after the death of the deceased. The cause of action, therefore, also cannot accrue upon the receipt of a reply to that letter. The plaintiffs may not have received any reply. That would not mean that the cause of action would not begin to run. The period of limitation, may, in a given case, get extended only after the period begins running.

26. Under Article 113 the period would begin to run when the right to sue accrues. The letter dated 28th August, 1980 itself shows that the right to sue accrued more than five years ago and nothing was done by defendant No. 1. No action in law could have been taken for claiming the reliefs claimed in the letter after the date of that letter. The plaintiffs have not made any averment in the plaint that the suit is

not so barred. The plaintiffs have not averred in the plaint how the bar of limitation is saved.

27. Mr. Andhyarujina argued that not Article 113, but Article 65 would apply to this case. Article 65 falls within Part-V of the Limitation Act dealing with suits relating to immovable property. It relates for suits for possession of immovable property or any interest therein based on title. Such is the claim under Section 5 of the Specific Relief Act which relates to suits for possession on title. This is not one such suit. The suit is for administration and not for possession. It is filed upon the estate of the deceased falling for administration upon his death and not on title. Consequently, even the time which begins to run under Article 65 is the time when possession of the defendant becomes adverse to the plaintiff. This is not a suit on title for prescription. The defendants did not claim adverse possession of the estate of the deceased. The Article is wholly inapplicable to this case.

28. So is a judgment relied upon by Mr. Andhyarujina in support of his contention. (Parmeshwari Devi Ruia v. Krishnakumar Nathmal Nurarka and Ors.) 2007 (6) Bom.C.R. 180. This was the case of challenge to a Deed of Conveyance in a declaratory Suit. The plaintiffs challenged Consent Terms which were filed in an earlier Suit without her knowledge. The plaintiff also alleged fraud being committed by the defendant in respect of certain construction sought to be put up on the land where the disputed building, since demolished, stood as the ancestral house of the plaintiff. The plaintiff inter alia alleged intermeddling and misappropriation of the estate of one Jankibai her grandmother and challenged an agreement for sale which was a part of the dispute in an earlier Suit, which resulted in registration of Lis Pendens Notice and an appointment of the Court Receiver. The plaintiffs also disputed the execution of the Consent Terms fraudulently executed by the parties to the previous Suit without the knowledge of the plaintiffs. The plaintiff essentially challenged the said Consent Terms as vitiated by fraud and the Conveyance Deed as null and void. That was therefore, a suit based on an Instrument . Such a suit fell under Part-V of the Limitation Act relating to immovable property. That Suit was for challenging documents executed by fraud and was held to be within the 3 years bar of limitation under Article 113 of the Limitation Act and not under Article 65 thereof.

29. This Suit is for administration of both movable and immovable properties of the deceased father of the parties. The estate of the deceased is enumerated in Exhibit- C. It shows eight properties. Three of these properties at item numbers 1, 2 and 8 are movable properties; the remaining five properties at item numbers 3 to 7 are immovable properties. The Suit is, therefore, not relating to immovable property being a suit for possession based on title. Neither the Article nor the judgment relied upon by Mr. Andhyarujina would apply to this Suit.

30. This Suit is clearly barred by the Law of Limitation on the face of the plaint itself. Hence, the preliminary issue is answered in the affirmative.

31. In fact the plaint deserved to be rejected under the provisions of Order VII, Rule 11(d) of the C.P.C as it appears to be barred by the Law of Limitation from the statement in the plaint relating to the death of the deceased itself. It may be mentioned that failure of the office of the Court to raise the objection and of the Court to consider rejection of the plaint at the threshold itself, a salutary procedural provision, has resulted in needless consumption of considerable judicial time in this Suit as well in the Testamentary Suit which has come to nothing resulting in a complete failure of case management.

32. ISSUE No. 2: (RE-PRELIMINARY DECREE FOR ADMINISTRATION OF THE ESTATE): The estate of the deceased father of the parties would otherwise be required to be administered as per his last Will and Testament dated 12th February, 1963 for which Letters of Administration with the carbon copy of the verbatim handwritten copy of the Will of the deceased annexed thereto have been granted to defendants 1 and 2 herein in Testamentary Suit No. 5 of 2004.

33. The deceased executed the Will twelve years before his death. The deceased dealt with a large part of his movable and immovable properties during his life time. Most of his estate deemed during his life time.

34. The evidence in the Testamentary Suit No. 5 of 2004 has shown ademption of plot of land on which one building Cosmos was constructed by a Gift Deed with regard thereto. The evidence has further shown the ademption of the plot on which the building Damiano was constructed by the deceased himself from certain

shares which stood in the name of the deceased and/or in the name of the deceased jointly with defendant No. 1 herein and by payments made by defendant No. 2 and how the deceased dealt with the said property during his life time and how the deceased dealt with the flats in the said building. The said property of the deceased, being the open plot of land bequeathed under his Will underwent a complete metamorphosis and ademption (Chaman Lal Kapoor v. Kundan Lal Kapoor) : AIR1979 Delhi240 . Upon such ademption the deceased continued, albeit in another capacity as flat owner in respect of two flats on the first floor of the said building which remained a part of his estate not disposed of by a further Will or Codicil.

35. The plot of land on which the building Marie Ville stood including the goods and furniture in Marie Ville have all been bequeathed to defendant No. 1 and the husband of defendant No. 3. That bequest has to be effectuated as per the Will.

36. The rents collected from the buildings Damiano and Marie Ville would go as a corollary to the ademption and effectuation of those bequests respectively.

37. There is absolutely no evidence of any book written by the deceased and hence, no royally can be even remotely shown to have been earned by him to form a part of his estate.

38. Certain monies in the bank account of the deceased being Savings Bank Account No. 780 in Grindlay's Bank, Santacruz Branch, Mumbai, which he held as a joint owner with defendant No. 1 and the husband of defendant No. 3 had inter alia the rents collected for the two flats on the first floor of Damiano building which was the only estate of the deceased at the time of his death.

39. Evidence with regard to the shares, if any, which the deceased continued to hold in various Companies until his death would otherwise be required to be led before the Commissioner for taking accounts.

40. The property at Goa which the deceased owned and possessed is also shown to have been dealt with and disposed of by sale by the deceased during his life time as per the oral evidence led in the Testamentary Suit No. 5 of 2004 readwith

the documentary evidence Exhibit- O thereto.

41. Only directions with regard to the ascertainment of the shares of the heirs and legal representatives of the deceased with regard to the rent of the two flats on the first floor of Damiano collected and credited to the Bank Account No. 790 in Grindlay's Bank, Santacruz Branch, Mumbai and the shares, if any, remaining with the deceased till the time of his death are required to be passed under the preliminary decree. Similarly, directions with regard to the evidence to be led before the Commissioner for Taking Accounts in respect of shares of Companies in which the deceased would be shown to have shares are required to be passed, which could have been passed in this Suit, subject to the bar of limitation. Issue No. 2 is answered accordingly.

42. ISSUE No. 3 : (RE-ORDERS IN THE SUIT) : Each of the plaintiffs claim 1/8th share in the estate of the deceased. The estate of the deceased is shown to be two plots of land with buildings constructed thereon leased to third parties and part occupied by defendant No. 1, the immovable property in Goa, the movables in one of the buildings, rents collected from both the buildings, the bank account and the shares held by the deceased as also a royalty alleged to be received by the deceased. The plaintiffs have valued their share at Rs. 50,000/- each. The valuation, in 1980 when the suit was filed, is seen to be far below its then market value. The plaintiffs have undertaken to pay additional Court Fee after the plaintiff's share is ascertained. To ascertain the plaintiffs' share they have sought to prosecute this suit as also challenged the carbon copy of the handwritten copy of the Will of the deceased produced by defendant No. 1 as Exhibit-1 to his Written Statement. The Will was required to be proved and probated. (Since the executors of the Will have died, Letters of Administration with that copy of the Will annexed was required to be applied for and granted). Despite the initial claim of the deceased having left a Will, the plaintiffs have refuted the Will produced by defendant No. 1 as called upon.

43. The reliefs in this Suit could be granted only upon considering whether the Will of the deceased produced by the defendant No. 1 could be probated or not. Hence, the probate petition which resulted in the Testamentary Suit being filed

upon the Caveat of the original plaintiff No. 3 had to be tried first.

44. Evidence in the probate petition as well as in this Suit would necessarily be overlapping, because it is related to the same estate claimed by the same parties. This suit was, therefore, directed to be heard together and immediately after the Testamentary Suit No. 5 of 2004. Extensive evidence therein has been led. Various issues of fact and law are considered. Letters of Administration with the Will annexed thereto has been granted. The entire effort has come to naught, since the Administration Suit itself is seen to be barred by limitation.

45. It may be mentioned that the very claim as well as the strenuous effort made to agitate and prosecute it by the plaintiffs herein has been vicious and perverse from the inception of the litigation.

46. The plaintiffs applied for and got appointed Court Receiver with regard to the entire estate of the deceased including the bank account in which the rents were credited and the future rents which were obtained from the third parties who were leased/licensed the flats in the building Marie Ville as well as Damiano. The Court Receiver was appointed in respect of the amounts which stood to the credit of the account of the deceased being Account No. 790 in Grindlays' Bank, Santacruz branch as also the amount which stood in the personal account of the defendant No. 1 in the branch of the said bank jointly with the deceased in which no part of the estate of the deceased was credited. Though the plaintiffs together claimed 5/8th of the estate of the deceased, the remaining 3/8th being admittedly the legitimate claim of the defendants, no part of the bank account or the rents was spared for the defendants.

47. The Court Receiver was appointed in respect of not only the flats leased to third parties to take symbolic possession and to collect rents therefrom, but also in respect of some of the rooms in the flat occupied by defendant No. 1 on the first floor of Marie Ville, the bungalow/house in which the deceased lived with defendant No. 1 until his death. 2 rooms have remained sealed since 1981.

48. The Court Receiver has remained in possession from 1981 and 2008, an amazing 27 years in a Suit so distinctly barred by the Law of Limitation as can be

evidenced from the statements in the plaint relating to the date of the death of the deceased and the date of the filing of the plaint itself.

49. The evidence itself shows the plaintiffs' own suggestion in the cross-examination of defendant No. 1 that his business had closed due to certain strike of the workers during the life time of the deceased, which made the deceased very unhappy with defendant No. 1. The further evidence of defendant No. 1 upon such suggestion shows that his business was closed due to the strike declared illegal by the Court, since 1990. The cross-examination of defendant No. 1 has sought to show that he lives under frugal circumstances. This is despite the fact that he is a son of a father, who left large and valuable movable and immovable properties. His evidence further shows that even the rents which were being collected by him from the tenants/lessees/licensees of the flat on the ground floor of Marie Ville and two flats on the ground floor of Damiano leased by him was stopped due to the appointment of the Court Receiver, The interim order passed in this time- barred Suit has deprived defendant No. 1 of his legitimate livelihood from his inheritance, though he has lived without want and with dignity.

50. This is a gross ease of a false claim, intensified by laws delays resulting in complete ruin of a party ultimately seen to be on the right side of the law and the legal process being resorted to and availed of by the parties seen to be on the wrong side of the laws.

51. It is astounding how so stark a fact could not be noticed in the last about three decades that the defendants, more specially defendant No. 1, came to be so adversely effected by a barred suit and an interim order therein. This is, therefore, a case for heavy costs required to be imposed upon the plaintiffs who grossly delayed in filing their action and then vehemently agitated it, the entire exercise which has proved futile.

52. Costs are required to be granted under Section 35 of the C.P.C. Section 35 runs thus:

35 Costs : (i) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to

all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(ii) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

53. The Court Receiver has given account of the rents collected from the Lessees/licensees of the buildings Damiano and Marie Ville. These are invested in five banks from time to time. The total amount lying to the credit of this Suit invested by the Court Receiver in Fixed Deposit and as credited by the Court Receiver in his General Account is Rs. 19,94,477/- . It is now seen that the plaintiffs would not be entitled to the payment of any amount from the aforesaid total amount lying with the Court Receiver since the estate of the deceased cannot be administered under an order of the Court in the action brought by the plaintiffs, after the period of limitation expired. The Court Receiver is required to be discharged without rendering any accounts (other than the above) and on payment of his costs, charges and expenses. All the properties for which the Court Receiver came to be appointed are required to be handed back to defendant No. 1 from whom the Court Receiver took possession.

54. As a consequence of the above the entire amount lying to the credit of this Suit with the Court Receiver shall also have to be handed over to defendant No. 1 as the estate of the deceased which admittedly was in the hands of defendant No. 1 which the plaintiffs sought to seize. Hence, the following order:

ORDER

(i) The Suit is dismissed with costs fixed at Rs. 25,000/-.

(ii) The Court Receiver stands discharged.

(iii) The Court Receiver shall forthwith hand over possession of all the immovable properties being the flats in Damiano as well as in Marie Ville to defendant No. 1.

(iv) The Court Receiver shall pay over Rs. 19,94,477/- without rendering further accounts and after deduction of his costs, charges and expenses to the defendant No. 1.

(v) The plaintiffs apply for stay of this judgment.

(vi) The plaintiffs admittedly have a claim to and interest in 5/8th of the estate of the deceased, the other 3/8th being admittedly belonging to the defendants. The stay, if any, to be granted is, therefore, in respect of the plaintiffs' 5/8th share in the immovable properties as well as in the aforesaid amount lying with the Court Receiver.

(vii) The Court Receiver shall, therefore, retain 5/8th of the amount of Rs. 19,94,477/- with him after deduction of his costs, charges and expenses. He shall hand over 3/8th of the amount to the defendant No. 1.

(viii) Consequently the appointment of the Court Receiver is continued for a period of four weeks from today for 5/8th of the estate of the deceased.

(ix) The Court Receiver shall continue to collect rents as before for a period of four weeks from today.

(x) The Court Receiver shall keep invested 5/8th of the rents received by him as before.

(xi) The valuation of the Suit properties as on 1st November, 1980, the date of the filing of the Suit shall be determined by the Commissioner for taking accounts.

(xii) The plaintiffs shall pay the deficit, if any, in the Court Fees upon such valuation.