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Raj Kumar JaIn and ors. Vs. Smt. Jagwati Devi and ors.

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Court : Allahabad

Decided On : Jan-23-1980

Reported in : AIR1980All225

Judge : H.N. Seth and ;V.K. Mehrotra, JJ.

Acts : Limitation Act, 1908 - Article 120; Code of Civil Procedure (CPC) , 1908 - Order 7, Rule 1

Appeal No. : First Appeal No. 119 of 1976

Appellant : Raj Kumar JaIn and ors.

Respondent : Smt. Jagwati Devi and ors.

Disposition : Appeal dismissed

Judgement :

H.N. Seth, J.

1. This first appeal by Raj Kumar Jain and Iswar Kumar Jain sons of Kailash Chandra defendant No. 1 is directed against the judgment and decree of the 1st Civil Judge, Meerut dated 11th February 1976, de- creeing the plaintiff's suit for a declara-tion that the probate dated 26th October 1961 had no effect on the plaintiffs who were the owners of the property in suit,

2. The suit giving rise to this appeal was filed by Ugra Sen son of Janki Das (plaintiff No. 1) Smt. Jag-wanti, widow of Kesho Ram another son of Janki Das (plaintiff No. 2). Smt. Rajeshwari Devi, Prem Chandra, Kumari Kamata Devi, Kumari Usha Devi, Kumari Nammo Rani Mahesh, children of Kesho Ram (plaintiff Nos. 3 to 8), on 15th October 1962. The plaintiff set up the following pedigree:--

BANSHIDHAR

|

_____

| | | |

Banarsi Das Smt. Asharfi Smt.Bisso Smt. Saggo=Ganesh

| = Janki Das =Shuganchand Lal(husband)

| (husband) (husband)

| | |

| | _____

| | | |

| | Jugmandar Das Smt. Ram Katori

| | died on 6.6.1954 died in 1955

| |

| _____

| | | |

| 1. Bhavali Ugrasen Keshoram

| 2. Asari Died long died 3.5.62

| 3. Marhana time back =Smt. Jagwati

| 4. Sewati Piff. No. 2

|

_____

| | |

Pannalal Gomti Smt. Naggo

| | |

| _____ Kailash Chandra

| | |

| Sumat Prasad Prakasg Chandra

_____

|

_____

| |

Chottey Lal Janeshwar Das

| |

| Smt. Sharbati

_____

| |

Lakhu Biru

3. According to the plaintiffs the property mentioned in the plaint belonged to Jagmandar Das who died in the year 1954, leaving behind his real sister Ram Katori as sole heir and legal representative. Ram Katori who remained unmarried throughout her life died on 30th October 1955. As at the time of her death there was no one in the family of Jagmandar Das, the property which Ram Katori inherited from Jagmandar Das passed to the plaintiffs Ugrasen and Kesho Ram sons of Janki Das, and their mother Smt. Asharfi. Eventually the share of Kesho Ram was, after his death, inherited by plaintiffs 2 to 8. The plaintiffs claimed that Ram Katori merely had life interest in the property left by her brother Jagmandar Das and she had no right to alienate the same. Defendant No. 1 Kailash Chandra Jain had no concern with the property but in collusion with some of his relations and friends he got a fictitious will purporting to have been executed by Ram Katori prepared and obtained a probate in respect thereof on 26th of October 1961 from the Court of Civil Judge Meerut. The appeal filed against the order dated 26th October 1961 was also dismissed by the High Court. However the order granting probate did not affect the rights of the plaintiffs in any manner. The plaintiffs had throughout been in possession of the property in dispute and that the cause of action for filing the suit arose on 31st October 1955, the date on which Ram Katori died,

4. Defendant No. 1, Kailash Chandra, filed a written statement and claimed that the pedigree set up by thr plaintiffs was not correct. According to him Smt. Asharfi mother of Ugrasen was the daughter of Banarsi Das and not of Bansidhar as shown in the pedigree set up by the plaintiffs. Likewise, his mother Smt. Naggo was the daughter of Bansidhar and not of Banarsi Das as shown in that pedigree. In the circumstances it was defendant Kailash Chandra who was the nearest heir of Jagmandar Das and was entitled to succeed to the property left by Jagmandar Das and his sister Ram Katori. The property in dispute belonged to Jagmandar Das and Ram Katori and Ram Katori was fully empowered to dispose it of in any manner she liked. Ram Katori executed a will on 25th October 1955 bequeathing all her properties to contesting defendants who have already obtained a probate of the said will from the court of the District Judge Meerut. Despite this the plaintiffs, after the death of Ram Katori had taken wrongful possession of the property in dispute. The defendant pleaded that as the suit had been filed more than six years after the death of Ram Katori it was barred by time. He also pleaded that the suit

was barred by res judicata and the provisions contained in Section 42 of the Specific Relief Act.

5. Another written statement was filed by defendant No. 2 Smt. Sharbati Devi who claimed to be Jagmandar Das's grandfather's brother's daughter. She alleged that neither the plaintiffs nor defendants Nos. 1, 3 and 4 had anything to do with the properties left by Jagmandar Das and Ram Katori. After filing the written statement she did not contest the suit any further and did not adduce any evidence in support of her claim.

6. Defendant No. 1 Kailash Chandra died during the pendency of the suit After his death the appellants who are his heirs and legal representatives filed yet another written statement wherein they adopted the defence which had already been set up by their father Kailash Chandra.

7. The trial court held that in view of the findings recorded by the probate court it was no more open to the plaintiffs to contend that the will dated 25th October 1955, executed by Ram Katori had in fact not been executed by her or that the same had been obtained by Kailash Chandra by practising fraud. However, the order granting probate of the will did not preclude the plaintiffs from maintaining the suit for a declaration that they were the owners of the property in dispute and that their rights were not affected by anything contained in the will. It also accepted the pedigree set up by the plaintiffs and held that they were the nearest heirs of Jagmandar Das. Ram Katori had merely a life interest in the property in dispute, and that she was not competent to bequeath the same to Kailash Chandra. After Ram Katori's death the property reverted to the plaintiffs who were the nearest reversioners of Jagmandar Das. The court observed that as the plaintiffs were in substance challenging the effect of the probate dated 25th October 1961 the suit for declaration filed by them on 15th October 1963 was well within time. In any case, as the suit had been filed within six years of initiation of the probate proceedings by Kailash Chandra, it was not barred by time. As the plaintiffs were admittedly in possession of the disputed properties the suit was not barred by Section 42 of the Specific Relief Act. In the result it decreed the suit and declared that the probate dated 26th Oct. 1961 had no effect on plaintiff's rights who after

the death of Ram Katori had become the owners of the property in suit.

8. Being aggrieved by the decree passed by the trial court, the contesting defendants, who are sons of Kailash Chandra, have come up in appeal before this Court. Learned counsel appearing for them conceded that in case the finding recorded by the trial court that Smt. Asharfi mother of Ugrasen (plaintiff No. 1) and mother-in-law of Smt. Jagwanti plaintiff No. 2 was the real sister of Smt. Bisso, mother of Jagmandar Das and Ram Katori is upheld, then, subject to the objection with regard to the suit being barred by time, the plaintiffs would be entitled to the decree claimed by them. He, however, challenged this finding and claimed that it was Smt. Naggo mother of defendant Kailash Chandra and not Smt. Asharfi, who was the sister of Bisso. According to him Smt. Asharfi was the daughter of Banarsi Das and the plaintiffs had interchanged the positions of Smt. Asharfi and Smt. Naggo in the pedigree set up by them in the plaint.

9. In the probate proceedings initiated by Kailash Chandra. Sumat Pra-sad, son of Smt. Gomti (shown in the pedigree) filed a written statement (Ex. 511 admitting the pedigree set up by the plaintiffs in this case. He stated that Smt. Naggo mother of Kailash Chandra was the daughter of Banarsi Das. Sumat Prasad is dead and the statement made by him in the written statement with regard to relationship of Smt. Naggo mother of Kailash Chandra and Banarsi Das is admissible in evidence under Section 32 of the Indian Evidence Act. While making the said statement Sumat Prasad, who was an Independent member of the family, had no axe of his own to grind. His evidence therefore goes a long way to support the plaintiff's case. Ex. 49 is a copy of the statement of Kailash Chandra (deceased defendant) which shows that in the probate proceedings initiated by him he had stated that Janki Das was the Bahnoi of Banarsi Das, i.e. sister of Banarsi Das was married to Janki Das. It is not disputed that Smt. Asharfi was married to Janki Das. This statement therefore implied an admission of Kailash Chandra that Smt. Asharfi was the sister and not the daughter of Banarsi Das. This circumstance also goes a long way to support the pedigree set up by the plaintiffs.

10. As against the aforesaid documentary evidence produced on behalf of the plaintiff the only documentary evidence relied upon by the defendants in support of

their case was a recital made by Ram Katori in the will executed by her in favour of Kailash Chandra. According to that recital Kailash Chandra was her brother and was entitled to succeed her. The recitals made in the will indicate that Kailash Chandra had been living with Ram Katori and Ram Katori wanted that after her death the property in dispute should go to him. In all probability it was with a view to ensure that the disputed property in any event went to Kailash Chandra that the recital that Kailash Chandra was brother of Ram Katori was got made in the will. In these circumstances much weight cannot be attached to it.

11. Oral evidence examined by the plaintiffs in support of their case regarding the pedigree set up by them, consisted of the statements made by P. W. 2 Prem Chandra and P. W. 3 Om Prakash. P. W. 2 Prem Chandra is the son of Kesho Ram husband of plaintiff No. 2 who was in a position to know the relationship between the parties fully supported the pedigree ?et up in the plaint. As pointed out by the trial Court. he stood the test of the cross-examination well and the defendant could not elicit anything from him in the cross-examination which might indicate that he was not speaking the truth. So far as P. W. 3 Om Prakash is concerned, he was living as a tenant in a portion of the house which belonged to Kailash Chandra. According to him Kailash Chandra resided in another portion of the same house, in which Ram Katori and Jagmandar Das lived. According to him he knew Ram Katori and Jagmandar Das. Ram Katori had told him that sons of Kailash Chandra were the grand children of her maternal brother and that Ugrasen and Kesho Ram were her cousin brothers, being the sons of her mother's sister. Having gone through the cross-examination of this witness carefully we do not find anything therein to show that his testimony is not reliable.

12. The witness produced on behalf of the defendants however failed to prove the pedigree as set up by defendant Ishwar Kumar Jain. Ishwar Kumar admitted that he did not mention any pedigree in the written statement and failed to explain as to how it found place therein His evidence shows that he did not know as to how various members shown in the pedigree set up in the written statement filed by him were connected with each other. His evidence therefore is not of much value.

13. Bhagwati Prasad another witness for the defendants also does not appear to be acquainted with various persons mentioned in the pedigree set up in the written statement. He merely stated that Kailash Chandra was related to Jagmandar Das as his brother but then he admitted that he came to know of this fact from Kailash Chandra himself. Keeping in view the statement made by Kailash Chandra in the probate proceedings discussed above, it is not possible to attach any value to the evidence of this witness.

14. In the result we agree with the trial Court that the plaintiffs have succeeded in proving the pedigree set up by them and in showing that they were the nearest reversioners of Jagmandar Das.

15. Learned counsel for the appellant submitted that the limitation for filing the present suit was governed by Article 120 of the Limitation Act, 1908 whereunder the period of limitation for filing such a suit was 6 years from the date on which the right to file the suit for declaration accrued. He invited our attention to the averment made in para 16 of the plaint wherein the plaintiffs have stated that the cause of action for filing the suit accrued when Ram Katori died on 30th Oct., 1955. As the present suit had been filed on 14th Oct., 1962, more than 6 years after 30th Oct., 1955, it was on the face of it barred by time and the trial Court was bound to dismiss it on this preliminary ground. It is true that in the Limitation Act of 1908 there is no specific article dealing with the prescription of the period of limitation for filing a suit for declaration Accordingly such suits were governed by Article 120 which prescribes 6 years as the period of limitation for filing a suit for which no limitation was provided for elsewhere in the schedule. This article further laid down that such period was to commence to run from the date on which right to file the suit accrued. Main question, therefore, that arises for consideration is as to when the right to file the present suit accrued and whether the date of accrual of cause of action for filing the suit fell within 6 years of 14th Oct., 1962, the date on which the present suit was filed by the plaintiffs.

16. Learned counsel for the appellant contended that Section 42 of the Specific Relief Act, 1877 provided that any person entitled to any legal character or to any right as to any property could institute a suit against any person denying or

interested in denying his title to such character or right and that the Court could in its discretion make therein a declaration that he was so entitled. Accordingly, the right to file a suit for declaration arose in this case when the appellant became interested in denying the title of the plaintiffs in the property in dispute or at any rate when they denied the plain-tiffs' title. Once the period of limitation started running it could not be interrupted and any suit filed more than 6 years after the first denial of title would be barred by time. He then contended that the defendant Kailash Chandra denied the title of the plaintiffs for the first time when he obtained a will from Ram Katori on 25th Oct., 1955 and as such the period of limitation commenced with effect from that date. In any case the defendant had disputed the title of the plaintiff's right from the date of the death of Ram Katori which took place on 30th Oct., 1955. The material on record indicates that the plaintiffs were fully aware of such denial and as such the commencement of the period of limitation for filing the suit for declaration could not have been deferred beyond 30th Oct., 1955 and the present suit which was filed on 15-10-1962 was barred by time.

17. The question as to when the period of limitation for filing a suit for declaration of title commences to run under Article 120 of the Limitation Act, 1908 was discussed by Subba Rao, J, of the Supreme Court in the case of Rukhma Bai v. Laxmi Narain : [1960]2SCR253 . After quoting Article 120 of the Limitation Act the learned Judge, at page 349, observed thus:--

'This Article was subject to judicial scrutiny both by the Judicial Committee as well as by the High Court of various States. The leading decision on the subject is that of the Judicial Committee in Mst. Bolo v. Mst. Koklan . Therein Sir Vinod Mitter observed:

'There can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendants against whom the suit is instituted.' The said principle was re-stated and followed by the Judicial Committee in Annamalai Chettiar v. Muthu Kuruppan Chettiar and in Gobinda Narayan Singh v. Sham Lal Singh . The further question is if there are successive invasions or denial of a right when it can be held that a person's right had been clearly and unequivocally threatened so as to

compel him to institute a suit to establish that right. In Pothukutchi Appa (AIR 1938 Mad 193 at p. 198) a Division Bench of the Madras High Court had to consider the said question in that case when Venkata Subba Rao, J. after considering the relevant decision expressed the view thus.

'There is nothing in law which says that the moment a person's right is denied he is bound at his peril to bring a suit for declaration. The Government beyond passing the order did nothing to disturb the plaintiff's possession. It would be most unreasonable to hold that a bare repudiation of a person's title without even an overt act, would make it incumbent on him to bring a declaratory suit.' He then went on to add at p. 199:--

'It is a more difficult question, what is the extent of the injury or infringement that gives rise to what may be construed a compulsory cause of action.'

The legal position may be briefly stated thus: the right to sue under Article 120 of the Limitation Act accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right however, ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardises the said right.'

18. It may be that the defendants had, to the knowledge of the plaintiffs, asserted on the death of Ram Katori that they were entitled to the property in dispute on the basis of the will executed by Ram Katori and that according to them the plaintiffs were not its owners, this denial by itself did not amount to an unequivocal threat by them to infringe with the rights of the plaintiffs who admittedly were in possession of the property after Ram Katori's death. As observed by the Supreme Court in Rukhma Bai's case (supra) the threat which results in accrual of a right to file a suit must be an unequivocal threat to infringe the right asserted by the plaintiff in the suit. The real threat to infringe the rights of the plaintiffs, in the circumstances of the case, arose when the defendants successfully obtained probate of the wilt on 26th Oct., 1961 and there was a likelihood that in pursuance of that probate they

would take steps to interfere with the rights of the plaintiffs. In the circumstances the suit for declaration filed by the plaintiffs within 6 years of 26th Oct. 1961 was well within the period of limitation.

19. Learned counsel for the appellant then contended that as the plaintiffs themselves had mentioned in the plaint that the cause of action for filing the suit had accrued on 30th Oct., 1955 they should not be permitted to go behind that statement and to claim limi-ation from the date on which the defendant had obtained the probate from the Court of District Judge, Meerut. We are unable to accept this submission. As held by the Lahore High Court in the case of Fateh Ali Shah v. Mohammad Baksh AIR 1928 Lah 516 that in computing the period of limitation the plaint has to be, with a view to find out the date on which the cause of action accrued read as a whole and that the plaintiffs cannot be tied down to the date of cause of action mentioned in the plaint. In the instant case, we find that the plaint read as a whole and specially paras 12 and 13 thereof, indicates that according to the plaintiffs threat of infringement of their rights arose when on 28-10-1961 the defendants successfully obtained the probate of the will dated 26th Oct., 1955, executed by Ram Katori, from the Court of the District Judge, Meerut. The suit filed within 6 years of that date was, therefore, clearly within limitation.

20. In the result, we find no merit in the present appeal which fails and is dismissed with costs.

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