

Krishnan Madhavan Vs. Narayanan Jayadevan and anr.

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Court : Kerala

Decided On : Feb-18-1974

Reported in : AIR1975Ker18

Judge : K. Bhaskaran, J.

Acts : [Limitation Act, 1963](#) - Schedule - Article 37

Appeal No. : S.A. No. 1171 of 1971

Appellant : Krishnan Madhavan

Respondent : Narayanan Jayadevan and anr.

Advocate for Def. : K. Sudhakaran and; K.K. Babu, Advs.

Advocate for Pet/Ap. : P. Sukumaran Nayar, Adv.

Disposition : Appeal dismissed

Judgement :

K. Bhaskaran, J.

1. The facts are not in dispute. Only the question of law pertaining to limitation requires to be decided in this second appeal.

2. The appellant was a foreman conducting chitties. The first defendant was a subscriber to a chitty, and the second defendant was a surety in a chitty bond executed by the first defendant. The first defendant became defaulter in regard to payment of subscription after the 22nd instalment when there were 28 more instalments for the termination of the chitty. The payment for the 23rd instalment had fallen due on 16-8-1964. On 11-3-1965 the plaintiff (appellant) sent a registered notice to the defendant claiming payment for the twenty-eight instalments payable after the 22nd instalment. The suit was filed on 22-3-1968. The question is whether the plaintiff's suit is barred by limitation. Both the courts below have dismissed the suit taking the view that the suit was barred by limitation.

3. Shri P. Sukumaran Nayar, the learned counsel for the appellant-plaintiff, contends that the courts below went wrong in finding that the suit claim was barred by limitation. The Article of the Limitation Act which would apply to the case has to be considered before proceeding further. The learned Subordinate Judge has referred to Article 75 of the Limitation Act, 1908, corresponding to Article 37 of the Limitation Act of 1963, and said that in view of the decision in Velayudhan v. Appavu Mudaliar, 1963 Ker LT 277 = (AIR 1964 Ker 234) the bond in question (Ext. P-1) could not be said to be a bond simpliciter coming under Article 75 of the Limitation Act of 1908 corresponding to Article 37 of the Limitation Act of 1963. However, later on, in the judgment it is seen that the learned Subordinate Judge has also stated-

'..... The plea of waiver should be specifically alleged in the plaint, or, at any rate, the same should spell out from the pleadings. It was argued for the appellant that the respondents are claiming an unjust benefit. That may be so. But that is not a ground to hold that the suit is not barred by limitation. Had the plaintiff pleaded that he had waived his right to get the future subscriptions in a lump or if he did not send the registered notice, he would have been entitled to get the amounts payable for the instalments that fell due within three years of the filing of the suit. But having exercised the option to claim the entire future subscriptions in a lump, the appellant will not be entitled to fall back on Exhibit P-1 and claim the amounts in instalments.'

Though the learned Munsiff began his discussion by indicating that Article 37 would not apply to the case, ultimately appears to have concluded that the proper Article applicable to the present case is none other than Article 37. Article 37 reads as follows:

Description of suitPeriod of limitationTime from which period begins to run

XXXXXX37. On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due. Three Years. When the default is made, unless where the payee or obligee waives the benefit of the provision and then when fresh default is made in respect of which there is no such waiver.'XXXXXX

At this juncture it may be advantageous to consider the pleadings. In paragraph 4 it is stated that the default was committed on and from the 16th August, 1964 when the 23rd instalment fell due and in paragraph 6 it is stated that cause of action arose in August, 1964 when the default occurred and from 11-3-1965 on which date the notice was issued. The cause of action, therefore, could arise only on either of these two days. If it is considered that the cause of action arose on 16-8-1964, the claim is barred by limitation, in case it is Article 37 that applies, as clearly the suit filed on 22-3-1968 was much beyond three years from the date of default. It is also clear that if the limitation runs from the date of notice, namely 11-3-1965, the suit is just beyond three years from that date, and as such is barred under Article 113, if not under Article 37. So on these facts we have to find out whether Article 37 of the Limitation Act would apply to the case. From the wording of the Article it appears that where in a bond in the nature of Ext. P-1 which provides for payment in instalments by the executant, land, in default of one or more instalments, also for his liability to pay the instalments in default with all the future instalments in lump at once, the period of limitation is three years when the default is made, unless where the payee or obligee waives the benefit of the provision and then, when fresh default is made in respect of which there is no such waiver. Here, the cause of action arose in terms of Article 37 when on 16-8-1964 the 23rd instalment was kept in arrears. So the limitation starts from that date unless the plaintiff had waived the benefit of the provision which enabled him to

claim the entire amount in a lump, and then, when fresh default is made in respect of which there is no waiver. Here it is pointed out that the suit claim was for recovery of the instalments due for the entire 28 instalments that fell due after the 22nd instalment. There is no pleading of waiver in the plaint so as to attract that clause relating to waiver in Article 37. To claim the benefit of waiver which is a mixed question of law and fact, the plaintiff ought to have alleged and proved it. Waiver being an abandonment of a right, it must be intentional, the intention being either express, implied or inferable from the conduct. The plaintiff's intention to waive his right must be manifest by his pleadings, and abstinence from suing alone cannot be considered to be an act of waiver. It could not be so, particularly in this case where, after the long lapse of time from the date of default; and even after the issuance of notice, the plaintiff has chosen to claim the entire 28 instalments without pleading waiver in respect of any instalments in default to save limitation. I find support for the view that waiver should be pleaded and proved in the decisions of the Madras High Court in *Thirumala-chariar v. Varadappa*, (AIR 1962 Mad 210); and that of the Madhya Pradesh High Court in *Devidas v. Parma Gokalia*, (AIR 1959 Madh Pra 413).

4. Sri Sukumaran Nayar, the learned counsel for the appellant submits that the reasoning of this Court in the decision reported in *Kunjamma George v. Kesava Pillai*. (1963 Ker LT 68) to the effect that the bond or promissory note mentioned in Article 75 of the Limitation Act, 1908, stands on a different footing as the amount payable thereunder is immediately due, but for the instalment clause, and the debtor is only given the right to pay it in instalments; it proceeds on an erroneous consideration in regard to the nature and extent of the liability under the chitty bond and therefore it requires reconsideration. I notice the strength of this argument. As in other bonds the liability under the chitty bond also arises as soon as the document is executed for the simple reason that, when a chitty is prized and the amount towards the future instalments also is received by the subscriber, he becomes indebted to the foreman for the entire amount and the only facility given to him is to pay the amount in instalments. That liability does not appear to be any way different from the liability under any other bond of that nature. The distinction to my mind appears to be this : as far as a chitty bond is concerned, by virtue of Section 32 (1) of the Travancore Chitties Act, without issuing a notice

demanding the future instalments also along with the instalments in default the foreman is not entitled to proceed against the subscriber who had executed the bond, for the future instalments, his right otherwise being confined to the recovery of instalments in default only. This distinction may have a bearing to the interpretation that has to be given to Article 37 of the Limitation Act while considering the point of time at which the limitation starts under the said Article. In the case of chitty bonds, it could be argued, by the operation of Section 32 (1) of the Travancore Chitty Act that the liability to pay the future instalments also in a lump along with the instalments in default arises only after the notice contemplated thereunder, and, in that way, the application of Article 37 of the Limitation Act to suits for recovery of amounts due under such (chitty) bonds would depend upon the fulfilment of this condition also. However, in this case the position is rather clear, because all the circumstances are against the plaintiff.

He had issued notice as early as on 11-3-1965; the default had commenced from as early as 16-8-1964: the claim in the plaint was for the entire amount which was payable after the 22nd instalment; and there was no indication, not to speak of a specific pleading or proof, that the plaintiff had waived the benefit of claiming the future instalments also in a lump. Having considered all these aspects together, I hold that Article 37 applies to the facts of this case, and in that view, when the cause of action had arisen on 16-8-19-64 when the default had commenced and in the absence of proof regarding any waiver, the suit should have been filed within three years from that date. Needless to say that even if the date of issue of notice is taken to be the starting point of the time, then also, by virtue of Article 113 of the present Limitation Act, the suit is barred by limitation. The learned counsel for the appellant has also argued that the issue of notice under Section 32 (1) of the Travancore Chitties Act is only for the purpose of enabling the foreman to claim the future instalments in a lump, and merely for the reason that such a notice has been issued and that was not followed up by a suit, it should not be construed that the starting point of limitation is the date on which the instalments in default along with the future instalments become payable on demand by the issue of such notice, but as and when each of the instalments fell due. In support of this contention, he seeks support from an observation of Raghavan J., as he was then, in (1963 Ker LT 68), wherein at p. 69 there is the following observation :

'..... Under the sub-section, even if the foreman decides to take advantage of the provision in the bond, even then he has to give notice in writing. In such a situation, unless the notice in writing is also given, his right does not become enforceable and, therefore, limitation cannot run against him regarding all the future instalments. The foreman will be entitled to get all the instalments which accrued due within three years prior to the date of suit.....'

In this case, the waiver in terms of Article 37 of the [Limitation Act, 1963](#), having not been proved, it is not necessary to consider the correctness of the observation contained in the said judgment.

The result is that the appeal fails and is dismissed with costs.

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