

The State of Rajasthan and ors. Vs. Rao Dhir Singh and ors.

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Court : Rajasthan

Decided On : Jan-21-1972

Reported in : AIR1972Raj241; 1972()WLN23

Judge : Jagat Narayan, C.J. and; J.P. Jain, J.

Acts : Rajasthan Court of Wards Act, 1951 - Sections 50(1), 54(1) and 80; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 2, Rule 2 - Order 6, Rule 17 - Order 32, Rules 1 and 3 - Order 39, Rule 1; [Evidence Act, 1872](#) - Sections 44; Limitation Act, 1908 - Sections 3 - Schedule - Articles 62, 89 and 120

Appeal No. : First Appeal No. 7 of 1964

Appellant : The State of Rajasthan and ors.

Respondent : Rao Dhir Singh and ors.

Advocate for Def. : M.M. Tewari, Adv. (for No. 1) and; P.N. Datt, Adv. (for No. 2)

Advocate for Pet/Ap. : M.L. Shrimal, Addl. Government Adv.

Disposition : Appeal allowed in part

Judgement :

Jagat Narayan, C.J.

1. This is an appeal by the State against a decree of the Senior Civil Judge No. 2, Jaipur City, in a suit for recovery of money instituted by Rao Dhir Singh, respondent.

2. Rao Pratap Singh, the grandfather of the plaintiff, was the Jagirdar of Shahpura Thikana. Village Misriawas and 100 Bighas of land in village Locha-ka-bas were granted to one Jai Narain Misra as Muafi. Jai Narain died in 1932 and on 22-6-32 his adopted son Badri Prasad Misra, respondent No. 2, applied for Mat-mi to the then State of Jaipur. On 23-6-32 the land granted to Jai Narain Misra was attached pending Matmi. Rao Pratap Singh filed an objection that the Muafi grant had been made by his Thikana and he alone had a right to sanction Matmi. This objection was rejected and Muafi was sanctioned in favour of Badri Prasad. Rao Pratap Singh filed an appeal to the Council of the State which was dismissed on 22-2-36 and Matmi was finally sanctioned in favour of Badri Prasad. Rao Pratap Singh then raised a dispute about the boundaries of Misriawas. This was decided by the Deputy Commissioner, Jhunjhunu on 25-6-46.

3. In 1942 Rao Pratap Singh died and was succeeded by his grandson Rao Dhir Singh, who was a minor. The Thikana was taken under the superintendence of Court of wards on 16-10-42.

4. Against the order of the Deputy Commissioner fixing the boundaries and area of Misriawas the Thikana filed an appeal to the Board of Revenue, which was dismissed on 30-6-47. A revision was then filed to the Revenue Minister which was dismissed on 23-6-48. On a reviewpetition by the Thikana the Revenue Minister directed the Board of Revenue to make further enquiry. Badri Prasad then filed a writ petition in the High Court challenging that order. On 4-10-51 the Government withdrew that order and Badri Prasad's writ petition was withdrawn on 11-10-51. A writ petition was then filed on behalf of Rao Dhir Singh in the High Court which was also dismissed on 18-12-53. In this writ petition the order of the Government dated 4-10-51 withdrawing its earlier order dated 25-9-49 was challenged and the writ petition was dismissed on the ground that it was an executive order and could not be challenged by means of a writ petition.

5. On 13-12-49 the muafi lands of Badri Prasad were released from attachment by the State Government. On 14-12-49 he filed an application for refund of the income of the lands during the period of attachment after making deductions for Matmi dues and expenses. On this application an enquiry was ordered and it was reported that the Tehsil had made collections from the Muafi lands of Badri Prasad only in 1948 and 1949 and that during the remaining years collections had been made by Rao Pratap Singh and after his death by the Court of Wards on behalf of Rao Dhir Singh.

6. Before any action was taken on the application of Badri Prasad dated 14-12-49 Rao Dhir Singh attained the age of 18 years on 10-8-53 and his Thikana was released from the superintendence of the Court of Wards on 16-1-54.

7. Before the release of the estate from its superintendence the court of wards appointed Thakur Mukand Singh, Jagirdar of Thikana Chanod as the guardian of the person and property of Rao Dhir Singh under Section 48 of the Rajasthan Court of Wards Act, 1951, which runs as follows:--

'48. Appointment of guardian on release of minor.-- (1) When the Court of Wards decides to release from its superintendence, the person and estate of any minor, it may, before such release by an order in writing, appoint any person to be the guardian of the person or estate or both of such minor.

(2) Such appointment shall take effect from the date of such release.

(3) In appointing a guardian under this section, the Court of Wards shall be guided by the provisions of Section 17 of the Guardians and Wards Act, 1890.

(4) Every such appointment shall be notified to the District Judge within whose jurisdiction, the estate or any portion thereof is situated.

(5) Every such guardian shall be deemed to have been appointed by such District Judge and to be subject to his jurisdiction as if so appointed and shall have and be subject to the same rights, duties and liabilities as if he has been appointed under the Guardians and Wards Act, 1890.'

8. On 6-11-54 the Government of Rajasthan passed an order, Ex. 5, directing that a sum of Rs. 5,649-4-3 which was deposited in the State Treasury but belonged to Thikana Shahpura, be paid to Badri Prasad and he may be asked to take steps to recover the balance of the money, from Thikana Shahpura by instituting a suit in a court of competent jurisdiction, if he so liked.

9. Under the above order a sum of Rs. 5,254-4-3 was paid to Badri Prasad on 30-12-54 out of the funds of Rao Dhir Singh which was in the custody of the State Government.

10. On 5-3-55 Thakur Mukand Singh instituted a suit on behalf of Rao Dhir Singh, who was minor. Ex. C-2/ D.W. 7 is the plaint of that suit. It was stated in the plaint that on 16-1-54 the estate of the minor-plaintiff was released from the superintendence of the court of wards, but the money collected on behalf of the minor by it was not handed over. Further it was stated that a sum of Rs. 5,649/- was ordered to be paid to Badri Prasad despite the objections on behalf of the minor and the same was actually paid on 30th December, 1954. Further that after the release of the Thikana from the superintendence of the court of wards the latter was not authorised to make any payment on behalf of the plaintiff without his consent. It was alleged that the plaintiff apprehended that further sums of money will be paid despite the objections of the plaintiff by the court of wards. A permanent injunction was sought restraining the defendants (1 State of Rajasthan, 2. Chairman, Board of Revenue, 3. Collector, Jaipur and Commissioner, Jaipur Division) from making any payment to any one out of the funds of the plaintiff in the custody of the court of wards. With regard to the sum of Rs. 5,649/- which had already been paid, it was stated that a separate suit shall be brought by the plaintiff.

11. Badri Prasad applied for being impleaded as a party to this suit. His application was allowed and on 28-1-55 he filed a written statement, which is Ex. C-3/D.W. 7. In this written statement it was alleged that Thikana Shahpura had made collections from his lands from 1932 to 1947 and the average income during these years was Rs. 4,000/- annually. He alleged that the money which was in deposit in the State Treasury and was paid to him was his money and not money belonging

to Shahpura Thikana.

12. The above suit was dismissed for default on 2-3-56. On 10-8-56 RaoDhir Singh attained the age of 21 years and became major.

13. Another order was passed by the Government on 26-12-56. It was directed to the Commissioner Ajmer Division asking him to pay to Badri Prasad the sum of Rs. 26,364-8-0 belonging to Thikana Shahpura which was lying in deposit with the Commissioner, Ajmer, and the Collector, Jaipur. It was also directed that Badri Prasad may be informed that for recovering the balance remaining due to him from Shahpura Thikana after payment of this sum he could file a suit in a court of competent jurisdiction. On 6-2-57 Rao Dhir Singh filed a writ petition (No. 19/1957) in the High Court for quashing the above order of the Government and for restraining the State from making payment to Badri Prasad of the sum named in the order or of any other sum belonging to him in the custody of the State Government or its officers.

14. On 8-2-57 a sum of Rupees 3,533-11-0 was paid to Badri Prasad and also National Savings Certificates of the value of Rs. 21,000/- belonging to Rao Dhir Singh were ordered to be paid to him. The writ petition was thus rendered infructuous.

15. The plaintiff thereafter served a notice under Section 80, C.P.C. and instituted the present suit on 17-8-57 against the following parties:--

1. State of Rajasthan.
2. Revenue Secretary.
3. Commissioner, Ajmer Division,
4. Collector, Jaipur District.
5. Badri Prasad.
6. Board of Revenue.

In the plaint all the necessary facts were recited. With regard to the suit filed on behalf of the plaintiff during his minority by his guardian on 5-3-55 it was stated that it was dismissed for default on account of the negligence of the guardian and had consequently no effect against him. The following reliefs were claimed:--

1. Recovery of Rs. 5,649/- plus Rs. 3,533-11-0 with interest against defendants 1 and 5.
2. Declaration that the orders dated 6-11-54 and 26-12-56 were null and void.
3. Permanent injunction restraining Badri Prasad, defendant No. 5 from utilising the National Savings Certificates which had been delivered to him. On 13-2-58 the State Government got the amount of the National Savings Certificates for Rs. 21,000/- belonging to Rao Dhir Singh, which had been handed over to Badri Prasad, paid to him by the post office. Badri Prasad made a recital about the encashment in his written statement dated 13-3-58. The plaintiff then filed an amendment application on 29-2-60.

This amendment was allowed and the amended plaint was filed on 3-3-60. In the amended plaint the following reliefs were claimed:--

1. Recovery of Rs. 5,649/- plus Rs. 3,533-11-0 plus Rs. 21,000/- together with interest from defendants Nos. 1 and 5.
2. Declaration that the orders dated 6-11-54 and 26-12-58 were without jurisdiction and were void.

The suit was contested by the State of Rajasthan and by Badri Prasad on various grounds. The trial Court decreed it for the recovery of Rs. 30,182.69 (all the 3 items claimed by the plaintiff) with Rs. 1,347/- as interest at 3% till the date of the suit on these amounts against defendants 1 to 4. The suit was dismissed against Badri Prasad. Against the above decree an appeal has been filed by defendants 1 to 4. The plaintiff has not filed any cross-objection against Badri Prasad.

16. The first contention on behalf of the appellants is that money was paid to Badri Prasad in exercise of the powers conferred by Section 50 (1) of the Rajasthan

Court of Wards Act, 1951 and the exercise of discretion cannot be questioned in civil Court by virtue of Section 54 (1) of that Act. These provisions run as follows:--

'50 (1). When the Court of Wards retains superintendence of any estate under the provisions of Section 46, Section 47 or Section 49, it may exercise all or any of the powers conferred by this Act in respect of such estate and may do all such things requisite for the proper care and management of the estate as the landholder thereof if not disqualified might do for its care and management, and may pay such allowances to relatives and dependants of a deceased ward as may seem to it reasonable; all acts done by the Court of Wards in exercise of the powers conferred by this Sub-section, shall be binding on the person who succeeds to such estate.'

'54 (1). The exercise of any discretion conferred on the Government or the Court of Wards by this Act, shall not be questioned in any Civil Court.'

17. It will be seen that powers under Section 50 (1) can only be exercised during the period during which the court of wards retains superintendence of any estate and Section 54 (1) is applicable only to acts performed in the exercise of the powers under Section 50 (1). After the estate of the plaintiff was released from the superintendence of the court of wards on 16-1-54 no payment could be made on behalf of the plaintiff either by the State or by any of its officers. The payments made by the State to Badri Prasad out of the funds of the plaintiff in its custody were wholly unauthorised and the plaintiff is entitled to recover them by suit. The jurisdiction of the Civil Court is not barred.

18. The next contention is that so far as the payment of Rs. 5,254-4-3 on 30-12-54 under the order dated 6-11-54 is concerned the claim of the plaintiff is barred under Order 2, Rule 2, C.P.C. because the cause of action for its recovery was the same as the cause of action for the suit instituted on behalf of the plaintiff by his guardian for permanent injunction restraining the State of Rajasthan from making payments out of the funds of the plaintiff in its hands, to any one without his consent. The contention on behalf of the plaintiff is that the cause of action for a suit for permanent injunction is different from the cause of action for a suit for recovery of a specific sum of money.

19. In *Md. Khalil Khan v. Mahbub Ali Mian*, AIR 1949 PC 78 it was held that the cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment. Further that the cause of action does not depend upon the character of the relief prayed for by the plaintiff; it refers to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour. Their Lordships went on to hold that where the facts which would entitle the plaintiffs, in their new suit to recover property Y, to establish their title are substantially the same as those alleged in their former suit to recover property X, the causes of action in the two suits are identical and the plaintiffs are barred by reason of Order 2, Rule 2 from maintaining the new suit.

20. In the former suit it was specifically stated that a separate suit would be brought to recover the sum of Rupees 5,649/-. The plaintiff cannot avoid the bar by making such a declaration in his plaint. The former suit was for an injunction restraining the State from making further payment to third parties out of the funds of the plaintiff in its possession. An injunction is a specific order of the Court forbidding the commission of a wrong threatened or the continuance of a wrongful course of action already begun. The cause of action for the suit for injunction was that the estate of the plaintiff had been released from the superintendence of the court of wards on 16-1-54, that thereafter the court of wards had no authority to make any payment out of the funds of the plaintiff in its custody to any one else without his consent, that one such payment had already been made amounting to Rs. 5,649/-, on 30-12-54 and that there was an apprehension that further payments will be made. The cause of action for the recovery of Rs. 5,649/- in the present suit is covered by the cause of action in the previous suit for injunction. Evidence to support a claim for the recovery of Rs. 5,649/- would have had to be given if the former suit had come up for trial, in order to get relief of permanent injunction prayed for in that suit. In this view of the matter the claim for the recovery of Rs. 5,649/- (the actual amount paid was Rs. 5,254-4-3) is barred by Order 2, Rule 2, C.P.C.

21. Next it was argued on behalf of the plaintiff that it was pleaded in the present suit that the guardian acted negligently in prosecuting the previous suit and that the very fact that the suit was dismissed for default is sufficient to prove

negligence on his part. This argument cannot be accepted because Badri Prasad filed a written statement in which he controverted the assertion that the guardian acted negligently. He alleged in the written statement that because he got himself impleaded as a party to the previous suit and filed a written statement disclosing the true facts the guardian thought it prudent not to prosecute that suit. It was for the plaintiff to have proved by evidence that the guardian acted negligently and did not deliberately refrain from prosecuting the suit because he thought that it would not be successful.

22. Lastly it was contended on the basis of some authorities that even if a suit brought on behalf of a minor by his next friend is dismissed he can bring another suit on attaining majority in respect of the same cause of action.

23. In *Vyankat v. Onkar*, AIR 1921 Bom 434 during the minority of the plaintiff his mother brought a suit on his behalf to recover possession over some of the properties of his father. All the properties were not included in that suit. On attaining majority the plaintiff brought a suit to recover possession over those properties which were left out in the previous suit. It was held that the argument that the suit was barred under Order 2, Rule 2. 'Would not apply to a case like this where the previous proceedings were taken in the name of the minor by his next friend. The minor could not possibly be prejudiced by a mistake made by those representing him during his minority as his rights to sue in his own person only come into effect when he attains majority. He will, therefore, be entitled to disregard any proceedings which had been taken during his minority if his interests had not been properly safeguarded. I cannot see how he could possibly be injured and prevented from now suing for the suit property owing to the fact that his adoptive mother did not sue for it in 1910 during his minority.'

24. The above decision should be considered to have been overruled by the Full Bench decision of the same Court in *Krishnadas v. Vithoba*, AIR 1939 Bom 66 (FB) in which it was held that mere grossnegligence, apart from fraud or collusion, on the part of the next friend or guardian ad litem of a minor litigant does not afford the basis of a suit to set aside a decree against him.

25. Section 44, Evidence Act runs as follows:--

'Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under Section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.'

26. Section 40, Evidence Act lays down that the existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such court ought to take cognizance of such suit or to hold such trial.

27. Order 32, Rule 1 provides that every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. Order 32, Rule 3 lays down that where the defendant is a minor the court shall appoint a proper person to be guardian for the suit for such minor. If a suit is not brought on behalf of a minor by a next friend the decree obtained in it is a nullity. So is the decree obtained in a suit against a minor in which he was not represented by a guardian ad litem. In cases falling under Section 44, Evidence Act namely where the decree is by a court which has no jurisdiction or which was obtained by fraud or collusion it is a nullity.

28. Where however a minor is properly represented in a suit, but the next friend or the guardian ad litem acts with gross negligence, there is a divergence of judicial opinion as to whether the decree is binding on the minor. The view of the Allahabad, Calcutta, Madras, Lahore and Patna High Courts is that the minor can file a suit in the Civil Court to avoid such a decree. The view of the Bombay High Court on the other hand is that the minor cannot avoid the decree. The reasoning is that a plaintiff after he had got a person appointed as the guardian ad litem of the minor defendant could not be held responsible for the failure of the guardian ad litem to perform his duty and the anxiety of the Courts to protect an infant who cannot protect himself at the expense of finality in suits against infants was to be deprecated. It was pointed by the learned Judges in AIR 1939 Bom 66 (FB) that in Venkata Seshayya v. Kotiswara Rao, 64 Ind App 17 = (AIR 1937 PC 1) their Lordships of the Judicial Committee had held that Section 44, Evidence Act, could not be extended to cases of gross negligence. They were of the view that Section

44 defined with precision the grounds of such avoidance as fraud or collusion, and that negligence or gross negligence could not amount to fraud unless fraud or collusion was the proper inference from the facts. The other High Courts have however taken the view that the guardian of a minor is a trustee for the minor and he is under an obligation to look after the best interest of the minor and if the minor can show that the guardian had not done his duty and the minor's interest was thereby jeopardised the minor has a substantive right to avoid the decree. These Courts have held that Section 44, Evidence Act was permissive and not prohibitive.

29. In *Rameshwar Prasad v. Ram Chandra*, AIR 1951 All 372 a Full Bench of the Allahabad High Court held that a decree passed in a suit in which the guardian or the next friend of the minor was grossly negligent is voidable and not void. That means that the decree is valid for all intents and purposes so long as it has not been duly avoided by the party having the right to avoid it and within the period of limitation prescribed for the purpose.

30. In *Gurdevi v. Raman Mal*, (1910) 8 Ind Gas 547 (Punj) an obiter observation was made by a learned single Judge of the Punjab High Court to the effect that

'as at present advised, I see no difficulty in her suing again through another next friend, or suing on attaining majority.'

This observation is not correct in our opinion. A decree in which the minor is properly represented is binding on him. A minor suing through one next friend cannot bring another suit through another next friend when the first suit is dismissed. Nor can he bring a suit on the same cause of action after attaining majority.

31. Some other similar decisions were also cited, but they need not be noticed as in our opinion they do not lay down the law correctly.

32. We are accordingly of the opinion that the claim made in the plaint with regard to the sum of Rs. 5,649/- is barred under Order 2, Rule 2, C.P.C.

33. On behalf of the defendants it was contended that the suit was barred by limitation. The learned Additional Government Advocate argued that the suit was substantially one for setting aside the orders dated 6-11-54 and 26-12-56. The limitation provided under Article 14 to set aside any act or order of an officer of Government in his official capacity is one year from the date of the act or order.

So far as the order dated 6-11-54 is concerned the suit was brought beyond one year of the date of that order. We are of the opinion that Article 14 has no application to the present suit. The suit is substantially for the recovery of two sums of money paid to Badri Prasad on 30-12-54 and 8-2-57 and the price of the National Savings Certificates delivered to Badri Prasad on 8-2-57 and cashed by him on 13-2-58. So long as the estate of the plaintiff was under the superintendence of the court of wards the relationship between them was a fiduciary one similar to that between a guardian and his ward. There is a divergence of judicial opinion as to the article of the Limitation Act applicable in a suit by an ex-minor for accounts against an ex-guardian. In *Kisan-das v. Godavaribai*, AIR 1937 Bom 334 it was held that Section 27, Guardians and Wards Act requires a guardian to deal with the minor's property as carefully as if it were his own. In Section 20 a fiduciary relationship is created between the minor and his guardian and under Section. 39 he has to perform the duties of his trust. But these provisions do not amount to vesting the property in the guardian as a trustee for a specific purpose. The scheme of the Act shows that a guardian is regarded as an agent acting on behalf of the minor with a liability analogous to that of a trustee. That however does not make him an express trustee.

In the Trusts Act also the only reference to a guardian is in Illustration (h) to Section 88 which comes under the chapter 'Of certain obligations in the nature of trusts'. This would mean that the relation between a guardian and minor is fiduciary, and his obligations are based on a constructive as opposed to an express trust. Where therefore a minor files a suit against the guardian for accounts more than 3 years after attaining majority the suit is barred by limitation as Section 10, Limitation Act is not helpful, a guardian not being an express trustee. In that case the suit was brought more than 7 years after attaining majority. The learned Judges did not say which article of the Limitation Act was

applicable.

34. In *Golam Panjatan v. Najafannessa Bibi*, AIR 1952 Cal 230 money was taken by the defendant as de facto guardian of minors. He executed a receipt in which he said that the amount was in amanat with him. It was held that Article 145 did not apply, but that the proper article to apply was Article 62. There is no discussion as to why Article 62 was applicable. That article runs as follows:--

"62. For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. Three years. When the money is received."

35. A perusal of the wordings of third column goes to show that this article only applies where it is the duty of the person receiving the money to pay it immediately to the person for whose use it is received. Now it is not the duty of the guardian to pay the money immediately on receipt to the minor. It is his duty to pay it when the minor attains majority.

36. In *Mani Devi v. Anpurna Dai*, AIR 1943 Pat 218 it was held that a guardian is not an agent of the ward within the meaning of Article 89. The relationship between the guardian and his ward is in the nature of a fiduciary relationship. A suit by an ex-minor for accounts against the ex-guardian is accordingly governed by Article 120 and not by Article 89.

37. The same view was expressed in *Mirahai v. Kaushalyabai*, AIR 1949 Nag 235 although the observation on the point is obiter.

38. In *Amiamalai v. Muthukaruppan*, AIR 1931 PC 9 it was held that Article 62 does not apply to an equitable claim against a trustee liable to account, for an account and ascertainment of what may be due.

39. We are of the opinion that Article 120 is applicable to the present suit. Cause of action for recovering the funds of the plaintiff in the hands of the court of wards arose on 16-1-54 when the estate was released from its superintendence. The plaintiff was entitled to bring a suit for the recovery of the suit amounts within 6 years of 16-1-54 or within 3 years of the date of his attaining majority namely 10-8-56. The claim with regard to the sums of Rs. 5,649-4-3 (out of which Rs. 5,254-4-3

were actually paid) and Rs. 3,533-11-0 was within limitation as they were made in the original plaint which was filed on 17-8-57.

40. The claim with regard to Rs. 21,000/- the value of National Savings Certificates delivered to Badri Prasad on 8-2-57 and cashed by him on 13-2-58 was not made in the original plaint filed on 17-8-57. No relief with regard to the National Savings Certificates was claimed against the State. This claim against the State was put forward for the first time in the amendment application dated 29-2-60. This claim cannot relate back to the date of the original plaint namely 17-8-57 as it was not made in that plaint. If any authority is needed for the proposition it is provided by the decision in *Manindra Chandra v. Ranglal*, AIR 1918 Cal 443. In that case the plaint filed in a suit for possession of certain plots of land was subsequently amended by the inclusion of certain other plots in the plaintiffs claim. It was held that the case was not one of amendment of plaint, but of an addition of entirely new lands and that therefore as regards such new lands the suit must be taken to have been filed on the date when the claim in respect thereof was made by the application for amendment. But as we have held above that Article 120 of the Limitation Act is applicable to the present suit the claim with regard to Rs. 21,000/- is also within limitation. As we have already said above the cause of action for recovering the funds of the plaintiff in the hands of the Court of Wards arose on 16-1-54 when the estate was released from its superintendence. The plaintiff served a notice under Section 80, C. P. C., before bringing the suit. He is entitled to exclude a period of two months under Section 15(2) of the Limitation Act. The claim with regard to Rs. 21,000/- could therefore have been filed upto 16-3-60. It was put forward for the first time in the amendment application dated 29-2-60 which was allowed on 1-4-60, The amended plaint relates back to the date on which the amendment application was filed. We accordingly hold that the claim with regard to the sums of Rs. 5,254-4-3, Rs. 3,533-11-0 and Rs. 21,000/- is within limitation, but the claim with regard to Rs. 5,254-4-3 is barred under Order 2, Rule 2, C. P. C.

41. We accordingly allow the appeal in part, modify the decree of the trial Court and decree the suit of the plaintiff for the recovery of Rs. 24,533-11-0 only with proportionate costs and interest as indicated hereinafter. On the sum of Rs. 3,533-

11-0 the plaintiff will get interest at 4 1/2% per annum simple from 17-8-57 till the date of realisation. On Rs. 21,000/- the plaintiff will get interest at 4 1/2% per annum simple from 29-2-60 to the date of realisation. The suit for recovery of Rs. 5,254-4-3 (Rs. 5,649-4-3 wrongly claimed) is dismissed as being barred under Order 2, Rule 2, C. P. C.

42. The plaintiff and defendant No. 1 shall receive and pay costs of this appeal in proportion to their success and failure. Having regard to the circumstances of the case, we leave Radri Prasad to bear his own costs of the appeal.

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