

Balaram Vs. Mangta Dass

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Court : Kolkata

Decided On : Jul-16-1907

Reported in : (1907)ILR34Cal941

Judge : R.F. Rampini, Acting C.J., ;Brett, ;Mitra, ;Woodroffe, ;Mookerjee, ;Caspersz and ;Sharfuddin, JJ.

Appellant : Balaram

Respondent : Mangta Dass

Judgement :

Rampini, Acting C.J.

1. This reference raises two very important questions of Hindu law, which, it is no doubt, very desirable that we should decide.

2. But at the close of his argument the learned pleader for the defendants, appellants, has raised the question of limitation. He contends that the suit is barred by limitation. The suit is one for foreclosure of a mortgage, by conditional sale. The bond was executed on the 20th January 1887. The due date was the 24th January 1891; and the suit was instituted on the 23rd April 1904, that is, after a period of 13 years. Now, according to the ruling of this Court in the case of Girwar Singh v. Thakur Narain Singh (1887) I.L.R. 14 Calc. 730, the period of limitation prescribed for a suit of this nature is 12 years, as provided in Article 132 of the second schedule to the Indian Limitation Act. The suit is, therefore, apparently barred by

limitation. There was a contention raised in the first Court that there had been a payment of a certain quantity of rice by the defendants on account of interest. But this alleged payment was found to be unproved; and, moreover, this payment was alleged to have taken place within one year of the date of the bond. There is, therefore, nothing to prevent the application of Article 132 of the second schedule of the Limitation Act to this suit.

3. There is, no doubt, a conflict of rulings between this Court and the Bombay High Court on this point. The Bombay High Court has ruled that Article 147 of the second schedule to the Limitation Act applies to a suit like the present, in which case no doubt this suit would not be barred by limitation. But we are bound by the Full Bench ruling of this Court, and must hold that the period of limitation is 12 years, and that the suit accordingly is barred. This question of limitation was never raised in either of the Courts below; nor has it been raised in the memorandum of the appeal to this Court. But we have felt ourselves constrained to allow it to be taken, although at a very late stage, in accordance with the provisions of Section 4 of the Limitation Act. The provisions of that section appear to us to be mandatory; and in accordance with them, we are bound to hold that the suit is barred by limitation and to dismiss it accordingly.

4. It has been suggested that the provisions of Section 4 of the Limitation Act are controlled by Section 542 of the Code of Civil Procedure. It is not necessary, however, to decide this question. It is sufficient, I think, to say that, even if we have power, under Section 542 of the Code of Civil Procedure, to refuse to allow the plea of limitation to be raised at this stage, I do not think we should do so, seeing that the point of limitation arises on the face of the plaint and there appear to be no questions of fact to be enquired into to enable us to dispose of it.

5. I would therefore hold that the suit is barred by limitation and would decree the appeal, but without costs.

Brett, J.

6. I agree.

Mitra, J.

7. I agree.

Woodroffe, J.

8. I am unable to agree with the order which the learned Chief Justice proposes to make. The suit was filed on the 23rd April 1904. No question of limitation was raised in the plaint or in the issues: nor was any such question raised in the appeal to the District Judge. Very possibly, this omission may have been due to the fact that the view taken as to the applicability of the Limitation law, to cases similar to the present one, was different from that taken by this Court to the jurisdiction of which the Sambalpore district has now been transferred. However this may be, in second appeal to this Court, no such objection was taken in the memorandum of appeal. The case was then referred to a Special Bench which could only have been done upon the assumption that no question of limitation arose in the appeal. The case was argued for the whole, of yesterday and no suggestion was made by the learned pleader for the appellant that the suit was barred and it was not until midday to-day that, for the first time, an objection was raised that the suit, which had then been pending for over three years, and had been duly instituted according to the law prevalent at the time in the Court in which it had been filed, was barred. The question now before us is this:--Whether we are obliged to allow this objection to be taken and, if not so obliged, whether we should exercise our discretion in favour of the appellant who has now, after three years' litigation and, in the circumstances stated, for the first time, raised this plea in bar. I am clearly of opinion that we are not so bound, and that Section 4 of the Limitation Act is controlled by the provisions of Section 542 of the Civil Procedure Code. The illustration to Section 4 of the Limitation Act cannot affect the precise provisions of the other statute. The matter then resolves itself into one of discretion, and I think that it would, under the present circumstances, be a fair and proper exercise of our discretion to disallow the objection which was not set out in the grounds of appeal and to which the attention of the parties was, in no wise, drawn at any stage of the litigation. Speaking for myself, I am not in a position to say that the matter is one which could not in any event be affected by any question of fact. The hearing of

the Reference should, therefore, in my opinion, proceed upon the merits and we should decide the points which have been referred to us for decision.

9. I may add that if, as my learned brothers are of opinion, the point of limitation may be raised, then, as the learned Chief Justice has said, in that case, it is not open to us on this reference to question (if it be applicable) the correctness of the decision of the Full Bench in the case of *Girwar Singh v. Thakur Narain Singh* (1887) I.L.R. 14 Calc. 730 upon the point of limitation.

Mookerjee, J.

10. A question of Hindu law of some importance has been referred for decision to this Special Bench, but the turn, which the discussion has somewhat unexpectedly taken renders unnecessary an examination of it. If the point of limitation which has been taken on behalf of the defendants appellants is allowed to be raised and is decided in their favour, the Court is not called upon to consider whether the plaintiff creditor is entitled to a mortgage decree against the sons of the deceased mortgagor.

11. It has been strenuously contended, however, on behalf of the respondent, that as the plea of limitation was not taken in either of the Courts below, nor included in the grounds of appeal to this Court, the objection ought not to be allowed to be pressed at this stage. This contention raises two questions which must be separately considered, namely, first, whether it is obligatory upon a Court of appeal under Section 4 of the Limitation Act to deal with the question of limitation and dismiss the suit on that ground, although limitation has not been set up as a defence in any previous stage of the proceedings, and, secondly, whether an appellant who has not raised the question of limitation in the memorandum of appeal, is entitled as a matter of right to invite the Court to decide the point, or whether he is bound to obtain leave of the Court under Section 542 of the Civil Procedure Code. The second question may be conveniently considered first.

12. The answer to the second question depends upon the effect to be attributed to Section 542 of the Code of Civil Procedure. The provisions of Section 542 in my opinion do not control and are not controlled by the provisions of Section 4 of the

Limitation Act. The two sets of provisions are independent of each other, though in the exercise of its judicial discretion under Section 512 of the Civil Procedure Code, a Court may well have regard to the mandatory character of Section 4 of the Limitation Act. If the question of limitation has not been raised in the grounds of appeal, leave of the Court must be obtained under Section 542. In support of this view, reference may be made to *Ram Kishen Upadhia v. Dipu Upadhia* (1891) I.L.R. 13 All. 580, *Ahmad Ali v. Waris Husain* (1893) I.L.R. 15 All. 123, and *Kyin Baw v. Manugson* (1904) 2 L.B.R. 237. It is therefore necessary to consider whether in the present case, the Court ought to exercise in favour of the appellants its discretion under Section 542 of the Civil Procedure Code and allow them to take the point of limitation though it has not been taken in the memorandum of appeal. The respondent does not suggest that he has been taken by surprise, nor does he contend that he would have been in a better position if the point had been included in the grounds originally. Under these circumstances, I think leave ought to be granted under Section 542 of the Civil Procedure Code.

13. This leads me to the first question, whether it is obligatory upon this Court as a Court of appeal to entertain the question of limitation and dismiss the suit on that ground, although limitation has not been set up as a defence at any previous stage of the proceedings. The answer seems to me to depend upon a well established principle.

14. If the determination of the question of limitation turns upon facts which were not investigated by reason of the omission of the defendant to take the plea of limitation in the Court of first instance, the Court of appeal cannot be invited to entertain the point and remand the case for fresh investigation; if, however, the point arises on the face of the pleadings or on the facts found, the question must be considered. The true rule is laid down by Mr. Justice Banerjee in the case of *Nadhu Mandal v. Kartick Mandal* (1903) 9 C.W.N. 56, where that learned Judge observed that Section 4 of the Limitation Act, which requires that the Court should give effect to the rules of limitation even though limitation may not be set up in defence, applies to a Court of Appeal when the point appears on the face of the record and does not stand in need of being developed by evidence. This distinction, which appears to me to be well founded on reason, principle and

convenience, is recognised in the cases *Mapan v. Manny*, *Sasi Baw* (1901) 2 U.B.R. 446, *Mangun Jha v. Dolhin Golab Koer* (1898) I.L.R. 25 Calc. 692, 695, *Harak Chand v. Deo Nath Sahay* (1897) I.L.R. 25 Calc. 409, 410, and *Dso Narain Chowdhury v. Webb* (1900) I.L.R. 28 Calc. 86. The cases of *Atma Ram v. Sardar Koer* (1884) 4 All. W.N. 327, *Ahmad Ali v. Waris Husain* (1893) I.L.R. 15 All. 123, *Dattu v. Kasai* (1884) I.L.R. 8 Bom. 585, *Shivapa v. Dod Nagaya* (1886) I.L.R. 11 Bom. 114 do not lay down any inconsistent principle; they only show that a Court of Appeal will not entertain a question of limitation for the first time, when to do so would render necessary a fresh enquiry into the facts. This view is identical with that taken by Mr. Justice Wilson in the case of *Raghu Nath Singh Manku v. Paresram Mahata* (1882) I.L.R. 9 Calc. 635, where that learned Judge observed as follows:--'The effect of Section 4 of the Limitation Act, as I understand it, is simply this: whenever a case is properly before a Court, whether it is a Court of Appeal or a Court of first instance, it is bound to take notice of the question of limitation, but in order to enable the appellate Court to do that, the case must be before it.' This is also borne out by the observations of the Judicial Committee in *Venkata Narasimha Naidu v. Bhashya Karlu Naidu* (1902) I.L.R. 25 Mad. 367, 370, 378, where their Lordships indicate the test to be, does the question of limitation, arise upon the pleadings or upon the evidence. Apart, however, from the question of the right of the appellant to raise the point, it is incontestable, that it is the duty of the Court to deal with the matter, provided it arises on the pleadings or on the facts found (if the case is in a Court of second appeal), or on the materials on the record (if the case is in a Court of first appeal): *Ambala Vaveri Manakel Raman v. Nadu Vakata Krishna* (1883) I.L.R. 6 Mad. 325, *Har Narain Singh v. Bhagwant Kuar* (1891) I.L.R. 13 All. 300, 304 where the Judicial Committee said--'The statute is there and the Judges are bound to take judicial notice of it.' I must hold, therefore, that Section 4 of the Limitation Act applies to an appellate Court subject to the restriction I have explained. I have arrived at this conclusion independently of illustration (a), because it has been said that illustrations cannot control the meaning of a section [*Koylash Chunder Ghose v. Sonatun Chung Barooie* (1831) I.L.R. 7 Calc. 132, *Nanak Ram v. Mehin Lal* (1877) I.L.R. 1 All], though the Legislature has sometimes deemed it necessary expressly to repeal them [Act II of 1882, Schedule]. Now, what is the effect of the application of these principles to

the case before us? It is not denied that the whole case is properly before this Court. It cannot also be denied that the question of limitation arises on the face of the pleadings. It is, therefore, not merely open to this Court, but it is also its duty to consider the plea of limitation, and give effect to it, if it is well founded.

15. There is another contention of the respondent which was vigorously pressed and to which reference is necessary. It was argued by the learned vakil for the respondent that we are precluded by the decision of their Lordships of the Judicial Committee in the case of *Ramgopal v. Shamskhaton* (1892) I.L.R. 20 Calc. 98 from entertaining the question of limitation. It was seriously suggested that according to the construction placed by the Judicial Committee upon Section 584 of the Civil Procedure Code, the term 'specified' in the section means 'specified in the memorandum or grounds of appeal,' and, therefore, as a necessary consequence, it is not competent to a Court which hears an appeal from an appellate decree, to deal with any question which has not been specified in the memorandum of appeal. The contention in substance is that Section 542 is inapplicable to appeals from appellate decrees. I am entirely unable to hold that there is any foundation for this argument. The question which was raised before the Judicial Committee in *Ramgopal v. Shamskhaton* (1898) I.L.R. 20 Calc. 93 was as to the meaning of the phrase 'specified law or usage' in Section 584. The contention before the Privy Council was that 'specified law' meant 'statute law', and that by 'usage having the force of law' was meant the 'common customary law of the country or community.' This contention was negatived, and it was ruled that 'specified' meant 'specified in the memorandum or grounds of appeal.' There was no suggestion before the Judicial Committee that if a ground was not specified in the memorandum of appeal, it could not be urged at the hearing, even if the Court of appeal allowed it to be taken under Section 542. No such question was raised, and consequently, could be taken to have been decided either directly or by implication. I entirely agree with the learned Judges of the Allahabad High Court that Section 542 of the Civil Procedure Code, applies to appeals from appellate decrees: *Ahmad Ali v. Waris Husain* (1893) I.L.R. 15 All. 123, 127. My view, then, of the combined effect of Section 4 of the Limitation Act and of Sections 542 and 584 of the Civil Procedure Code is this: the appellant is not entitled, without the leave of the Court, to urge or be heard in support of the ground of limitation, if it

has not been set forth in his memorandum of appeal. The appellate Court may grant the leave; whether it should do so depends on the circumstances of the case. But the appellate Court may of its own motion consider the question of limitation, though the plea has not been taken in the memorandum of appeal, and rest its decision on that ground, provided that the opposite party is given adequate opportunity to be heard on the point. In either case, however, the bar of limitation must be patent on the face of the proceedings.

16. As regards the plea of limitation in this particular case, there can be no possible controversy that it must prevail. The mortgage by way of conditional sale which the plaintiff seeks to enforce was executed on the 20th January 1887; the mortgage money was repayable on the 24th January 1891; the present action was commenced on the 23rd April 1904. To avoid all questions of limitation, the plaintiff alleged in his plaint that the mortgagor died about ten years before suit, after making a payment on account of interest. This statement has been found to be doubly false; the mortgagor died in November 1887, and, the alleged payment, which was attempted to be proved by the evidence to have been made on the 30th December 1887, was a myth. The suit is, therefore, manifestly barred under Article 132 of the second schedule of the Limitation Act. That Article 132 governs the case, and not Article 147, is conclusively shown by the cases of *Girwar Singh v. Thakur Narain Singh* (1887) I.L.R. 14 Calc. 730 and *Nilcomal Pramanick v. Kamini Koomar Basu* (1891) I.L.R. 20 Calc. 269. The learned vakil to the respondent argued, however, that the decision of the Full Bench in the former of these cases is erroneous, and he relied upon the cases of *Shib Lal v. Ganga Prasad* (1884) I.L.R. 6 All. 551, *Datto Dudheshvar v. Vithu* (1895) I.L.R. 20 Bom. 408 and *Narayana Ayyar v. Venkataramana Ayyar* (1902) I.L.R. 25 Mad. 220 in support of the view that Article 147 is applicable to cases of this description. I agree with the learned Chief Justice that the respondent is not entitled to challenge the decision of the Full Bench in *Girwar Singh v. Thakur Narain Singh* (1887) I.L.R. 14 Calc. 730 which is binding on this Court till it is set aside by the Judicial Committee or overruled by a Special Bench of this Court constituted for that purpose; it is not open to this Bench which was constituted for the consideration of a different question, to examine the validity of the decision of the Full Bench. The conclusion is, therefore, irresistible that there is no answer to the objection of limitation.

17. It was suggested by the learned vakil for the respondent and I am disposed to agree with him so far, that the position in which his client finds himself is one of considerable hardship. He points out that in the Courts of the Central Provinces, within the jurisdiction of which the suit was instituted, the view seems to have prevailed that upon a true construction of Articles 132 and 147 of the Limitation Act, Article 147 must be taken to apply to foreclosure suits on the basis of mortgages by way of conditional sale: *Ghasi Ram v. Duli Chand* (1887) 2 C.P.L.R. 57, *Jagmohan v. Chaita* (1894) 8 C.P.L.R. 65, *Murat Singh v. Ramlal* (1894) 8 C.P.L.R. 83, *Mahomed Amir v. Jan Patel* (1898) 12 C.P.L.R. 26. If the case had been heard finally by the Judicial Commissioner of the Central Provinces, no question of limitation would probably have been raised; but as by reason of the, transfer of Sambalpur to the jurisdiction of this Court, the appeal comes to be heard by this Court where a different interpretation has been put upon the provisions of the Limitation Act, a fatal objection to the suit becomes possible. This may be hard on the plaintiff; but the learned vakil does not argue that for this case the Court is bound to adopt the interpretation which prevails in the Courts of the Central Provinces. I must hold, therefore, that there is no answer to the objection that the suit is barred by limitation. I may add that upon the facts as disclosed in the judgments of the Courts below, the claim is unquestionably very stale, and, if there is any case in which a Court ought to exercise its discretion under Section 542 of the Civil Procedure Code, this is pre-eminently of that description. On these grounds, I hold that the plea of limitation ought to be entertained and allowed, the appeal decreed, and the suit dismissed, but without costs.

Caspersz, J.

18. I agree.

Sharfuddin, J.

19. I agree.