Privy Council Appeal No. 5 of 1957

Ariadne Tzamburakis and another - - - - - - *Appellants*

v.

Eftichia Rodoussakis - - - - - - - - - *Responden*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH JULY, 1958

Present at the Hearing :

LORD MORTON OF HENRYTON
LORD TUCKER
MR. L. M. D. DE SILVA

[*Delivered by* LORD TUCKER]

The appellants in this case are the administratices of one Nico Tzamburakis deceased and the respondent, who was not represented at the hearing of the appeal and who has not delivered a written case, is his sister. The deceased and the respondent were co-owners as tenants-in-common, having shares of 70 per cent. and 30 per cent. respectively, of a large sisal estate in Tanganyika.

The suit was brought in the High Court of Tanganyika by plaint dated 23rd July, 1952, by the respondent as plaintiff against the estate of the deceased represented by the present appellants claiming that the deceased had failed to account to her for monies payable by him to her in connection with this estate during the period from 1st April, 1946, to the 1st July, 1949.

The appellants pleaded inter alia that the claim was barred by the provisions of the Indian Limitation Act, 1908, which together with the Indian Code of Civil Procedure had been applied to Tanganyika in 1920 by Order in Council. This question was tried as a preliminary issue on the pleadings by Mahon, J. who on 3rd December, 1954, delivered what is described in the Record as "Judge's Ruling on Preliminary Issues" whereby he held that an amended plaint which had been filed on 27th July, 1954, did not disclose a new cause of action and that the suit was not time-barred by the Indian Limitation Act.

The case accordingly proceeded to trial on the merits and was heard by Cox, C.J. who on 17th October, 1955, gave judgment in favour of the respondent and ordered an account to be taken. The terms thereof are embodied in a decree bearing the same date and are set out at pages 42 to 44 of the Record in the present appeal.

It is important to observe that at the trial before the Chief Justice there was no dispute as to the liability of the deceased to account to the respondent. The defence was that he had rendered full and accurate accounts and that the respondent had received all monies to which she was entitled and that she and the deceased had signed a document on

14th July, 1949, confirming the settlement of all accounts up to 30th June, 1949, and acknowledging that nothing was then due by either of them to the other. As to this document the learned Judge accepted the respondent's evidence and upheld her plea of non est factum. The Judge's decision with regard to this document is not now challenged.

At page 33, paragraph 20, the learned Judge said: " Apart from a technical defence which another Judge of this Court dismissed, the defence to the plaintiff's claim is that she has received everything due to her from the estate under the lease, and that she has received full and accurate accounts. I have already touched on the allegations that the plaintiff had not received her full share. As regards the accounts, it was proved quite clearly before me that proper accounts had never been rendered ".

At page 37, paragraph 31, he said: " It will, in my opinion, probably be an extremely difficult task for accurate accounts now to be made up because the documents are apparently either non-existent, carefully hidden or misplaced, but the fact remains that the plaintiff has not had proper accounts showing her share to which she was entitled under the lease ".

It will be necessary later to refer to other passages in this judgment the relevance of which will be more readily appreciated in connection with the subsequent proceedings before the Court of Appeal for Eastern Africa. The appellants in their appeal to the last named Court challenged the ruling of Mahon, J. on the limitation issue and the decision of the Chief Justice as to the respondent's plea of non est factum. Their grounds of appeal also alleged that the judgment was against the weight of evidence. The respondent contended that there was no right of appeal from the ruling of Mahon, J. which it was contended was a preliminary decree within the meaning of Section 97 of the Indian Code of Civil Procedure (the terms of which are set out later in this judgment). Neither party disputed the basis upon which the account had been ordered to be taken if the Limitation Act did not apply. It may now be convenient before dealing with the proceedings on the appeal to refer in more detail to the transactions and arrangements between the respondent and the deceased in connection with this sisal estate of which they were tenants-in-common. From 1932 to 1st April, 1946, the respondent and the deceased worked the estate in partnership at one time on a 50 per cent. basis, but the percentage varied from time to time and by 1946 the respondent was the registered owner of 30 per cent. undivided share of the estate. The deceased was the active manager and received a salary as such. There were disputes and differences between the parties as to their proper share of the profits and in order to put matters on a more definite basis the parties entered into a lease for 3 years from 1st April, 1946, whereby the respondent, who was described as the landlord, demised to the deceased, who was described as the tenant, as to her share and interest the hereditaments described in the schedule thereto together with the sisal factory, machinery, trollies, railway lines and other chattels and effects then on the estate and forming part of the sisal estate as a running concern and paying therefor during the term a royalty of £3 per ton on all grades of sisal and tow produced from the whole estate, subject to a provision for increase or decrease depending on rises or falls in the price of sisal. The royalty was to be paid within 30 days of the sale of sisal.

On the termination of this lease on 31st March, 1949, there followed a period of 3 months which has been referred to throughout as the inter-regnum period. As to this period the trial Judge held on the evidence that the respondent was entitled to her share of the estate. At page 36, paragraph 28, he said :—

> " The plaintiff is obviously entitled to her share in the estate over that period, and it would appear that her share in the estate over that period would have to be ascertained on the basis of the relationship existing between her and her brother prior to entering into this first lease which became effective from 1st April, 1946."

And when dealing with the form of the order he said on page 39, paragraph 34:—

> "As regard sub-paragraph (2) of paragraph 32 (referring to an earlier paragraph in his judgment wherein the plaintiff's prayer had been set out) the answer to that would appear to be ascertainable on the basis of the partnership which existed between the brother and sister prior to the 1st day of April, 1946, that is to say, on a 70 per cent. figure and a 30 per cent. figure basis, but not inclusive of any profits for the month of July, 1949, as the plaintiff had leased her share of the estate to her brother on 14th July, 1949, for Shs. 18,000/- a month with effect from the 1st day of July, 1949, and was paid the rent for the month of July."

If the respondent is entitled to an account for this period and if her claim is not barred by the Limitation Act the basis upon which the Chief Justice ordered the account to be taken has never been challenged by either party and their Lordships see no reason for rejecting the decision of the learned Judge that the proper basis was that of a partnership subsisting from 1st April, 1949, to 1st July, 1949.

As from 1st July, 1949, a second lease was entered into under which all rent has been paid and ultimately in October, 1949, the estate was sold and the proceeds divided between the co-owners. No question arises in this appeal with regard to the second lease or the sale. The dispute is confined to the period of the first lease (1st April, 1946—31st March, 1949) and the interregnum period (1st April, 1949—1st July, 1949).

As to the first lease, which was registered, their Lordships feel no doubt that the sum payable thereunder, although called a royalty and calculated on a royalty basis, was a sum which was at all times readily and easily ascertainable by calculation and amounted in law to a rent. The Court of Appeal so treated it.

The questions therefore now remaining to be dealt with are three in number.

1. Was the Court of Appeal entitled to entertain an appeal against the decision of Mahon, J. on the Limitation Act issue?

2. If so what is the proper period of limitation applicable to

   (*a*) the claim for an account of rent payable under the registered lease dated 26th March, 1946, for the period 1st April, 1946, to 31st March, 1949; and

   (*b*) the claim for an account of the respondent's share of profits on a partnership basis for the period 1st April, 1949, to 1st July, 1949.

The leading judgment in the Court of Appeal for Eastern Africa was delivered by Briggs, J.A. With this judgment the other members of the Court (Worley, P., and Sinclair, V-P.) concurred.

It is now necessary to set out the relevant provisions of the Indian Code of Civil Procedure, viz., Sections 2 (2), 2 (14), 33, 96 (1), 97 and 105 (1), and of the Indian Limitation Act, 1908, viz., Section 3, and the First Schedule Nos, 89, 106, 110, 115, 116, and 120.

Indian Code of Civil Procedure—

> "Section 2 (2). 'Decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final . . ."
>
> "Explanation. A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final".
>
> "Section 2 (14). 'Order' means the formal expression of any decision of a Civil Court which is not a decree."

"Section 33. The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow".

"Section 96 (1). Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear Appeals from the decisions of such Court."

"Section 97. Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."

"Section 105 (1). Save as otherwise expressly provided, no Appeal shall lie from any Order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the Memorandum of Appeal."

Indian Limitation Act, 1908—

"Section 3. Subject to the provisions contained in Sections 4 to 25 (inclusive) every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefore by the first Schedule shall be dismissed, although limitation has not been set out as a Defence."

FIRST SCHEDULE

Description of Suit	*Period of Limitation*	*Time from which period begins to run*
89. By a principal against his agent for movable property received by the latter and not accounted for.	3 years	When the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates.
106. For an account and a share of the profits of a dissolved partnership.	3 years	The date of the dissolution.
110. For arrears of rent.	3 years	When the arrears become due.
115. For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.	3 years	When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.
116. For compensation for the breach of a contract in writing registered.	6 years	When the period of limitation would begin to run against a suit brought on a similar contract not registered.
120. Suit for which no period of limitation is provided elsewhere in this Schedule.	6 years	When the right to sue accrues."

The Court of Appeal held that there having been no appeal entered within time from the decision of Mahon, J., which in their view was a preliminary decree within the meaning of Sections 2 (2) and 97 of the Code of Civil Procedure, the grounds of appeal seeking to attack his decision were incompetent.

Their Lordships do not agree. They prefer the decision of the Full Court Bench in Bombay in the case of *Chanmalswami* v. *Gangadharappa* (1915) 39 Indian Law Reports (Bombay Series) 339 which overruled the case of *Sidhanath Dhonddev* v. *Ganesh Govind* in which it had been held that

decisions as to misjoinder, limitation and jurisdiction were preliminary decrees from which the unsuccessful parties must at once appeal by reason of Section 97 of the Code.

There is, however, another reason why their Lordships are of opinion that the Court of Appeal should have dealt with the issue of limitation, viz., that Section 3 of the Indian Limitation Act, 1908, set out above, in terms requires the dismissal of every suit instituted after the prescribed period of limitation even though this defence is not pleaded.

In the case of *Muhammad Kamil and others* v. *Musammat Imtiaz Fatima and others* 14 *C.W.N.* 59 on appeal to this Board, where a plea under Section 4 of the Limitation Act 1877 (which corresponds with Section 3 of the Act 1809) had been abandoned by Counsel at one stake in the Courts below. Lord Macnaghten at page 63 observed during the course of argument ' the abandonment would not relieve the Court from taking notice of it," and the Board in its judgment said: " As to this question of limitation their Lordships are of opinion that it was properly dealt with in the Courts below."

In the present case their Lordships are of opinion that no procedural defect could relieve the Court of Appeal of its duty to give effect to the statute on an appeal from a judgment given in favour of a plaintiff in respect of a time-barred cause of action.

It is necessary therefore to consider whether on the basis upon which judgment was entered for the respondent at the trial her claim was in whole or in part time-barred.

It was contended by the appellants that the amended plaint disclosed a new cause of action and that for the purposes of the Limitation Act time should be calculated from this date, i.e., 27th July, 1954. Their Lordships having compared the original plaint with the amendment are satisfied that the latter discloses no new cause of action, but in any event, the amendment having been made by consent and approved by the Court without the imposition of any condition with regard to limitation it follows that time must be calculated from the date of the original plaint, i.e, 23rd July, 1952.

As regards the claim for rent the relevant period of limitation depends upon whether the claim for payment under this lease, which was a contract in writing registered, falls within article 116 of the first schedule under which the period is six years, or article 110 under which it is three years.

This question was settled by a Board of the Judicial Committee consisting of Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins in 1917 in the case of *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur* I.L.R. 44 Calcutta 759. In a judgment delivered by Lord Sumner it was held that a claim for rent under a registered lease came within article 116. In view of the unqualified words " arrears of rent " in article 110 and the use of the word " compensation " in article 116 it is perhaps desirable to set out at some length the passage in the judgment dealing with this matter.

After referring to the history of the limitation legislation culminating in the Acts of 1871 and 1877 the judgment proceeded :—

> " Both these Acts draw, as the Act of 1859 had drawn, a broad distinction between unregistered and registered instruments much to the advantage of the latter. The question eventually arose whether a suit for rent on a registered contract in writing came under the longer or the shorter period. On one hand it has been contended that the provision as to rent is plain and unambiguous and ought to be applied, and that in any case ' compensation for the breach of a contract ' points rather to a claim for unliquidated damages than to a claim for payment of a sum certain. On the other hand it has been pointed out that ' compensation ' is used in the Indian Contract Act in a very wide sense, and that the omission from article 116 of the words, which occur in article 115, ' and not herein specially provided for ' is

critical. Article 116 is such a special provision, and is not limited, and therefore, especially in view of the distinction long established by these Acts in favour of registered instruments, it must prevail. There is a series of Indian decisions on the point, several of them in suits for rent, though most of them are in suits on bonds. They begin in 1880, and are to be found in all the Indian High Courts. In spite of some doubts once only was it held in 1903 [*Ram Narain* v. *Kanta Singh*] that in such a suit article 110 and not article 116 applied. Then in 1908, and in this state of the decisions, Act IX of 1908 replaced the Limitation Act of 1877 without altering the language or arrangement of the articles, and in 1913 in *Lal Chand* v. *Narayan* the High Court of Bombay held that, especially in view of this re-enactment, the current of decisions must be followed and Ram Narain's case must be disapproved. In the present case the High Court treated the matter as settled law in the same sense. . . .

" However arguable the construction of Act XV of 1877 may have been when the matter was one of first impression, it certainly cannot be said that the construction for which the appellant argues, was ever clearly right. On the contrary their Lordships accept the interpretation so often and so long put upon the Statute by the Courts in India, and think that the decisions cannot now be disturbed."

This decision was given in 1917, three years before the Indian Limitation Act was applied to Tanganyika. It was binding on the Indian Courts and settled once and for all a matter with regard to which there had been some conflict of opinion. Their Lordships do not consider it would be proper at this date to refuse to follow a decision of this Board given in such circumstances, which must have been recognised as valid and binding when the Indian Limitation Act, 1908, was made applicable to Tanganyika.

They accordingly hold that article 116 is applicable to the claim under the lease and that the relevant period of limitation is 6 years. Counsel for the appellants drew their Lordships' attention to the fact that the decree of 17th October, 1955, ordered an account to be taken of all sisal produced during the period covered by the first lease, namely from 1st April, 1946, to 31st March, 1949, and of the rent by way of royalty due to the respondent on such total production whereas the period of six years calculated from 23rd July, 1952, would go back to 23rd July, 1946, and any money payable between 1st April, 1946, and 23rd July, 1946, would be time-barred. Their Lordships are of opinion that the taking of an account covering the whole period of the lease was properly ordered, but they would point out that after the account has been taken the appellants should not be ordered to pay any sums received by the deceased in respect of sales of sisal made more than 30 days prior to 23rd July, 1946, or any sums received by him on sales of machinery or other movables before that date.

With regard to the claim in respect of the interregnum period (1st April, 1949, to 1st July, 1949) their Lordships have already signified their acceptance of the basis upon which the account was ordered by the Chief Justice. That basis has never been challenged by the respondent and the appellants are entitled to say that it is the only basis upon which this part of the claim can be dealt with. It follows therefore that as to this period the claim is time-barred under Section 106 of the Indian Limitation Act 1908, and the appellants are entitled to the necessary consequential amendment of the decree drawn up pursuant to the judgment of the Chief Justice.

Their Lordships will accordingly humbly advise Her Majesty that the appeal be allowed to the extent that the order of the Court of Appeal for Eastern Africa dated 18th July, 1956, be set aside and the decree of the High Court of Tanganyika dated 17th October, 1955, be varied by striking out paragraph (2) thereof. The appellants, although successful only with regard to a small part of the period covered by the claim, have had to

appeal to the Court of Appeal for Eastern Africa and thence to this Board in order to secure the appropriate variation of the order made against them and are consequently entitled to some measure of relief in respect of costs, which in all the circumstances their Lordships consider will be met by ordering that the respondent do pay one quarter of the appellants' costs in the Court of Appeal for Eastern Africa and of this Appeal.

(39455) Wt. 8021—25 100 8/58 D.L.

In the Privy Council

ARIADNE TZAMBURAKIS AND ANOTHER

v.

EFTICHIA RODOUSSAKIS

DELIVERED BY LORD TUCKER

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1958