

(2014) 01 KL CK 0063
High Court Of Kerala
Case No: A.S. No. 80 of 2002

Kurian E. Kalathil

APPELLANT

Vs

KSEB, Tvm and
Another

RESPONDENT

Date of Decision: Jan. 2, 2014

Acts Referred:

- Limitation Act, 1963 - Section 14 3
- Specific Relief Act, 1963 - Section 34

Citation: AIR 2014 Ker 35 : (2014) 1 ILR 676 : (2014) 1 KHC 149 : (2014) 1 KLJ 477

Hon'ble Judges: S.S. Satheesachandran, J

Bench: Single Bench

Advocate: M. Ramesh Chander and K.K. Vijayan, for the Appellant; P. Santhalingam and Asok M. Cheriyan, Standing Counsels, KSEB, for the Respondent

Final Decision: Dismissed

Judgement

S.S. Satheesachandran, J.

Plaintiff is the appellant. His suit for declaration that Exts. A1 and A2 orders passed by the respondents are illegal, unenforceable and void and also for a consequential injunction restraining them from effecting recovery based on such orders from the bills payable to him, was dismissed by the Ist Additional Sub Judge, Thiruvananthapuram. Aggrieved by such dismissal, he has preferred this appeal. Short facts necessary for disposal of the appeal can be summed up thus:

Plaintiff is a contractor. On an agreement entered with the defendants, first among whom a statutory authority, hereinafter referred to as the "Board", he was allotted with the work of construction of a composite dam across Karamonthodu at Padinjarathara at 2% above the estimate rate. In the schedule of rates forming part of the agreement, rates for various works to be executed were incorporated. Ext. B1 is the agreement and schedule is Section K thereof. Item No. 9 of part ii of schedule

K related to the work of providing rolled earth fill for the dam as per specification and guidelines, fixing the quantity and the rate. Rate fixed for that work was Rs. 36.30 M³ and the departmental estimate for the work was about Rs. 2,26,87,500/-. Agreement conditions stipulated that only selected earth can be used for providing rolled earth fill, and the quality of the rolled earth fill has to be certified by the laboratory. Plaintiff was allowed to use the earth collected from the foundation excavation of the dam for backfill by the Board issuing Ext. A1 order treating it as an extra item of work agreeing to pay for such extra item at the rate of Rs. 15 per M³. However, when bills were prepared for such work carried out with the earth obtained from the foundation excavation of dam, rate at Rs. 36.30 per M³ was calculated and such amount was paid to plaintiff. Later noticing that the rate for such work can be only Rs. 15 M³, Ext. A2 order was issued to recover the excess sum paid from the bills payable to him. Plaintiff challenged Exts. A1 and A2 orders filing an original petition before this Court. That original petition was disposed along with some other original petitions under Ext. A6 common judgment on the basis of undertaking given by Board. Original petitions were disposed reserving the right of parties to work out their remedies before the appropriate forum. Plaintiff thereafter filed the present suit for declaration that Exts. A1 and A2 orders issued by the Board are void and unenforceable and also for injunction to restrain the Board from effecting recovery based on such orders from the bills payable to him. Suit claims were resisted by the Board on various grounds including a challenge over its maintainability. Among other issues cast one of them was whether the suit was barred by limitation. Learned Sub Judge after holding that the suit is maintainable and not barred by limitation adjudicating the claim canvassed on materials tendered by both sides has non-suited the plaintiff. Challenge is against the decree of dismissal passed by the Court below.

2. After hearing the counsel on both sides and looking into the materials tendered by both sides, I find that the first and foremost question to be considered is whether the suit has been filed within the time prescribed by law, which has been held to be so by the learned Sub Judge. If only the suit is shown to have been instituted within time then alone the entitlement of plaintiff for the reliefs canvassed need be gone into.

3. Plaintiff has sought for a declaration that Ext. A1 order dated 29/09/1987 and Ext. A2 order dated 19/01/1993 are illegal, unenforceable and void. On such declaration consequential relief of injunction against the defendants from effecting recovery on the basis of such orders from the bills payable to him was canvassed in the suit. Merely because the plaintiff has stated that Exts. A1 and A2 orders issued by the Board are void, it cannot be held to be so. Where plaintiff has sought for a declaration that Ext. A1 and A2 orders of the Board are void he has to show that the suit which has been filed for such declaration is within the period prescribed by law. Section 34 of the Specific Relief Act which enable a party to seek declaratory relief would apply both in respect of void or voidable transactions, documents etc. which

would adversely affect the right of such person. Part III of the schedule of the Limitation Act, for short the Act, deals with suit relating to declaration whereunder Articles 56 to 58 are included. Article 56 deals with a suit to declare forgery of an instrument issued or registered. Article 57 of a suit for a declaration that an alleged adoption is invalid and that no adoption ever took place. A suit to obtain any other declaration comes under Article 58 of the Act which fixes an outer limit of three years when the right has accrued to the person to claim such relief. When does the right to sue arose for the plaintiff in the present suit to seek declaratory relief canvassed that Ext. A1 and A2 are void has to be examined to consider whether a suit has been filed within time. A right to sue under Article 58 of the Act would arise on accrual (sic: accural) of the right asserted and its infringement or at least a clear and unequivocal threat to infringe that right by defendant against whom the suit is filed has been made. On that perspective the question of limitation of the suit has to be examined to find out when did the right to sue has started running against the plaintiff.

4. Admittedly before filing the suit plaintiff had filed an original petition challenging Ext. A1 and A2 orders, which, after consideration with some other original petitions, had been disposed by Ext. A6 reserving right of both parties in such proceedings to work out their rights before the appropriate forum. Ext. A6 judgment was rendered on 25/09/90. Right to sue in respect of Ext. A1 and A2 orders issued by the Court on whatever grounds was available to plaintiff at least by the time he filed OP No. 3587/1986 which was disposed under Ext. A6 judgment. Plaintiff in his suit has not set forth any case that the period of time during which he prosecuted the above original petition to challenge Exts. A1 and A2 orders has to be excluded u/s 14 of the Limitation Act. Rights of parties to work out their remedies have been reserved under Ext. A6 judgment disposing the OP can be given consideration to hold that plaintiff had been prosecuting such petition in good faith, even if it has not been so pleaded for exclusion of time to file the suit. But in order to claim exclusion u/s 14 of the Act other conditions must also be satisfied, and there must be pleadings and proof on those aspects. However, even the entitlement of plaintiff to seek for any benefit u/s 14 of the Limitation Act would not save his present suit from the bar of limitation where it is shown that the suit has been filed after the expiry of three years from the date of Ext. A6 judgment. Original Petition impeaching Ext. A1 and A2 orders passed by the Court with some other petitions were disposed by Ext. A6 judgment dated 25/09/90. Suit filed by plaintiff for the declaratory relief impeaching Ext. A1 and A2 orders was instituted on 26/03/94 which was clearly beyond the period of three years the outer limit fixed for entertaining a suit for declaration under Article 58 of the Limitation Act. When such be the case, the suit was clearly not entertainable as barred by limitation.

5. No issue whether the suit is barred by limitation was cast among the issues framed for adjudication and suit has been disposed on merits by the Court below after holding that it is not barred by limitation has been canvassed by learned

counsel for plaintiff to press for consideration of the appeal on merits re-appreciating the pleadings and evidence of the case and examining the propriety and correctness of the decree of dismissal of the suits. I do not find any merit in the submissions. Section 3 of the Act ordains that no suit or proceeding beyond the period prescribed shall be entertained by the Court. It is the duty of the Court to dismiss the suit instituted after the prescribed period of limitation irrespective of the fact limitation has not been set up as a defence. Section 3 of the Act mandates that "every suit instituted, appeal preferred, and application made, after the prescribed period shall be dismissed". The mandate imposed a duty on the Court to dismiss the suit filed beyond time. Unless exclusion of time under any other provision of the Act is available and shown to exist, there is no provision in the Limitation Act for condoning the delay in filing the suit. Any suit which was filed after the period of limitation has to be dismissed irrespective of the fact whether the plea of limitation is a defence or not. Where the suit is time barred the Court has no jurisdiction to entertain such a suit and dispose it on its merits. Even if such a suit is decreed then the judgment passed by the Court is required to be set aside. Plaintiff has impeached Ext. A1 and A2 orders of the Board are void cannot be the criteria for fixing the period of limitation as no litigant can determine whether such orders are void or otherwise. An order passed by a competent body or firm is valid and binding unless set aside or declared to be void by an authority legally empowered to do so. Such exercise must be undertaken within the time prescribed under the Act and if the period is overstepped and the order assumes finality any challenge against time barred order has to be nipped at the threshold and it cannot be entertained is the fundamental principle applicable governing limitation. Once the prosecution of the case is barred and by lapse of time rights accrue in favour of the opposite party such rights cannot be lightly taken away or interfered. Suit filed by the plaintiff for declaration of Ext. A1 and A2 orders issued by the Board is shown to be clearly barred by time, which ought to have been dismissed at the threshold. Suit has been disposed of on merits entering a wrong finding by the Court below that it was filed within time would not enable the plaintiff in any manner to show his entitlement for the relief of declaration canvassed. His remedy to challenge Ext. A1 and A2 orders has been lost by the bar of limitation. No adjudication of his claim would arise for consideration entertaining the suit. In view of the finding that the suit instituted by plaintiff is barred by limitation, no further dilation over pleadings made and evidence tendered in the case, to examine the propriety and correctness of the decree of dismissal rendered by the Court below, is called for. Appeal is dismissed directing both sides to suffer their respective costs.