

Debi Prasad Vs. Bhagwati Prasad and anr.

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Court : Allahabad

Decided On : Oct-15-1942

Reported in : AIR1943All63

Appellant : Debi Prasad

Respondent : Bhagwati Prasad and anr.

Judgement :

Dar J.

1. This is an appeal against a judgment and decree dated 12th September 1939 of the Civil Judge of Mirzapur by which he partly varied a judgment and decree of the Munsif of Mirzapur dated 5th November 1938, in a suit for recovery of money on the basis of a sarkhat. The plaintiff Debi Prasad is the proprietor of a firm of money-lenders called Debi Prasad Bhagwan Dass at Mirzapur. The defendants Bhagwati Prasad and Buddhu Lal who are two own brothers also own a firm at Mirzapur called the firm Bhagwati Prasad Buddhu Lal. On 20th January 1930, defendant 1 Bhagwati Prasad borrowed a sum of Rs. 1200 from Bam Dass, the father of the plaintiff, and executed a promissory note in his favour bearing interest at 6 percent. per annum. Some time after the execution of this promissory note Ram Dass died, and the plaintiff Debi Prasad succeeded to the family money-lending business. On 31st December 1935, the account between the plaintiff and defendant 1 with regard to the promissory note of 1930 was settled and a sum of Rs. 1244 was found due after adjusting such payments as had been made by the

debtor to the creditor between the years 1930 and 1935. On that date, the plaintiff made a fresh advance of Rs. 56 and after adding this fresh advance to the past balance of Rs. 1244 for a consolidated sum of Rs. 1300 the following sarkhat was executed by the defendant Bhagwati Prasad in favour of the plaintiff Debi Prasad bearing interest at 8 annas per cent, per mensem :

Firm Debi Prasad Bhagwan Das. Account of Bhagwati Prasad Buddhu Lal, sons of Sita Ram, Kasera, resident of Basnai Bazar. Debit and Credit. Sambat 1992.

Rupees 1300, date Pus Sudi, six. Received rupees thirteen hundred; took on 8 annas per cent.

Signature of Bhagwati Prasad in autograph.

2. This sarkhat bears four stamps of one anna each. A substantial portion of the above writing from the word 'received' up to 'autograph' is written over the stamps, and this sarkhat is recorded on the first page of a new bahi. A default having been made in the satisfaction of the said sarkhat the plaintiff on 4th July 1938, raised an action in the Court of the Munsif of Mirzapur for recovery of a sum of Rs. 1395-12-0 for principal and interest, including Rs. 0-12-0 as cost of a notice, due on the said sarkhat against the defendants Bhagwati Prasad and Buddhu Lal. A controversy arose before the trial Court whether the sarkhat was a promissory note or an agreement or a bond, and the learned Munsif taking the view that it was a bond and after levying a duty and penalty of Rs. 110 admitted the document in evidence. The learned Munsif further found that the claim of the plaintiff was valid to the extent of Rs. 56 with interest against both the defendants and granted a decree for that amount to the plaintiff, but with regard to the sum of Rs. 1244 the learned Munsif came to the conclusion that the claim was not enforceable under Section 25(3), Contract Act, as the sarkhat did not contain any express promise to pay.

3. On an appeal by the plaintiff and on a cross-objection by defendant 2, the Civil Judge of Mirzapur affirmed the judgment and decree of the trial Court in so far as it dismissed the claim with regard to the sum of Rs. 1244, but on the cross-objection of defendant 2 he modified the decree of the trial Court to this extent that

defendant 2 was exempted from liability for the sum of Rs. 56 also on the ground that there was no legal necessity for the borrowing of that sum on the part of defendant 1. The plaintiff has now made this second appeal and the question for our consideration in the case is whether the entire amount of the sarkhat is legally recoverable from both or either of the defendants. So far as the liability of defendant 2 is concerned, the matter does not present any difficulty. It has now been found by the Civil Judge that the circumstances in which the amount of Rs. 56 was borrowed do not prove any legal necessity, and so far as the promise was made to pay the sum of Rs. 1244 by defendant 1 it was made at a time when the claim relating to that sum had become barred by time and defendant 1 as an elder brother had no power to bind defendant 2, his younger brother, with a promise to pay a barred debt or with a promise to pay Rs. 56 which was not borrowed for legal necessity. These findings are findings of fact and cannot be disturbed in second appeal.

4. But the question of the liability of defendant 1 for the entire amount due under the sarkhat raises a question of law which can and should be determined in this appeal. Dr. Sen on behalf of the plaintiff contends that the sarkhat embodies a new contract made by the defendant with the plaintiff mainly in consideration of the fresh advance by which he agreed to pay a consolidated sum of Rs. 1300 at an agreed rate and this contract being for consideration, which consideration being the fresh advance, the plaintiff was entitled to enforce the said contract and Section 25, Contract Act, has no application to contracts which are for consideration. Dr. Sen further contends that even if the receipt of Rs. 1300 recorded in the sarkhat be regarded as an acknowledgment of time-barred debt to the extent of Rupees 1244 the acknowledgment is coupled with an agreement to pay interest and whenever an acknowledgment is coupled with an agreement to pay interest, it cannot be regarded as a mere acknowledgment and it should be regarded as an agreement with a promise to pay within the meaning of Section 25(3), Contract Act (9 of 1872).

5. For the defence, Mr. Pandey contends that the contract by which a person borrows Rs. 56 and agrees to pay in lieu of it Rs. 1300 is to the extent of Rs. 1244 for which the claim was barred by limitation without consideration and such

transaction can only be enforced under Section 25(3), Contract Act, and Section 25(3) requires an express promise to pay, and, if in the document, there is no express promise to pay, then whatever may be the real intention of the parties and however clear the intention to pay may be by implication the transaction cannot be upheld under Section 25(3) of the Act. At the outset, it is necessary to determine the true nature of the transaction which is recorded in the sarkhat. The sarkhat bears a stamp of four annas which is a stamp requisite for a promissory note under the Stamp Act. In this document the defendant Bhagwati Prasad, the executant of the document, stated that he had received Rs. 1300 on 6th Pus Sudi 1992, (which corresponds to 31st December 1935) and he further stated that he took this amount from the Firm Debi Prasad Bagwan Dass at eight annas per cent., which means at eight annas per cent, per mensem interest. If a person takes a sum of Rs. 1300 from another person on condition that it shall carry interest at eight annas per cent, per mensem, then in legal language he takes a loan and incurs a debt, and in all debts and loans the law implies an obligation on the part of the debtor or borrower to pay back the loan and a promise to pay is implicit. The transaction therefore embodied in the sarkhat is a loan transaction and the sarkhat contains an agreement relating to a loan.

6. It is not disputed that at the time of loan a fresh advance of Rs. 56 was made and Rs. 1244 were due on old account which had become barred by time. In order to secure a fresh advance the debtor agreed to pay a time-barred debt and but for this agreement the fresh advance might not have been made. The consideration therefore for the promise to pay Rs. 1300 was in part a fresh advance and in part the time-barred debt. It is therefore obvious that the contract cannot be regarded as one wholly without consideration, though a question may arise whether the consideration was adequate and this may be a ground for relief or for avoidance of contract in a proper case. Section 25, Contract Act, only applies to contracts which are wholly without consideration and not to contracts which may be for inadequate consideration. Indeed, under Expl. (2) of Section 25 inadequacy of consideration is not relevant unless it affects the question of free consent to contract. It is true that under Section 25(3), Contract Act, an agreement to pay a time-barred debt is regarded as one without consideration, but this sub-section only applies when a wholly gratuitous promise is made to pay a time-barred debt and not to those

cases when a promise to pay a time-barred debt is made for some consideration though the consideration might be inadequate.

7. Mr. Pandey contends that if a person borrows Rs. 100 from another person on a promise to pay Rs. 200 at the end of one month, such a promise to the extent of Rs. 100 is without consideration and the creditor can recover on such a loan only Rs. 100 and its reasonable interest. On the same analogy, Mr. Pandey contends that if a person borrows Rs. 56 and promises to pay Rs. 1300 at a time when Rs. 1244 included in Rs. 1300 were not legally recoverable, to the extent of Rs. 1244 no consideration really passes between the parties. In our opinion, the principles underlying Mr. Pandey's contention have no application to the present case. It is always open to a debtor to pay a time, barred debt and if after the actual payment of a time-barred debt a fresh advance is made to the debtor including the amount received for the time-barred debt, such an advance would be a new debt legally recoverable and could be open to no objection on the ground of want of consideration. Law makes no difference if instead of an actual payment between a debtor and a creditor a notional payment takes place and by agreement a time-barred debt is treated as paid off and a fresh advance is made which includes also a previous time-barred debt: see *Muhammad Abid Husain Khan v. Bhagwan Das* ('10) 5 I. C. 418 (All.), *Bindeshri Prasad v. Sarju Singh* ('23) 10 A.I.R. 1923 All. 590 and *Ram Bahadur Singh v. Damodar Prasad Singh* ('21) 8 A.I.E. 1921 Pat. 29

7. It is also well settled that when a new contract is made for a fresh consideration superseding the previous contract which had become barred by time but including it as a part consideration in the new contract, an action could be founded upon the new contract and it can be enforced in its terms without raising any question about the acknowledgment of a time-barred debt: *Nath Sah v. Durga Sah* : AIR1936 All160 , *Abdul Rafiq v. Bhajan* : AIR1932 All199 , *Govind Singh v. Bijay Bahadur Singh* : AIR1929 All980 and *Ghulam Murtaza v. Fasiunnissa Bibi* : AIR1935 All129 . In our opinion, the sarkhat executed by Bhagwati Prasad embodied a new contract for a fresh consideration and an action could be founded upon it and the entire amount due thereunder could be recovered from its executant, defendant 1.

8. What we have said above is sufficient to dispose of the case. But as the matter has been debated before us we might also consider for a while the question whether an agreement relating to a time-barred debt requires an express promise to pay to satisfy the requirements of Section 25(3), Contract Act. It is now generally agreed that a mere acknowledgment of debt without more is not sufficient to satisfy the conditions of Section 25(3), Contract Act, and an express promise to pay is necessary. Some controversy still lingers between the Lahore High Court on one side and the other High Courts in India on the other on the question whether the words 'balance due' or 'amount due' endorsed by a debtor in the creditor's account books import an implied promise or express promise to pay, but the better opinion is that they carry only an implied promise and not an express promise: See *Fateh Mohammad v. Surja* ('39) 26 A. I. R. 1939 Lah. 486 *Balkrishna v. Jayshankar* ('38) 25 A. I. E. 1938 Bom. 460 and *Gobind Das v. Sarju Das* ('08) 30 All. 268 With reference to cases relating to acknowledgments, pure and simple, it has also been generally held that Section 25(3), Contract Act, requires an express promise to pay and not merely an implied promise. But no case was cited before us at the bar in which it has been definitely held that an agreement to pay a time-barred debt as distinguished from a mere acknowledgment of a time-barred debt required an express promise to pay to satisfy the conditions of Section 25 (3), Contract Act. On the other hand, in *Prahlad Prasad v. Bhagwan Das* : AIR1927 All677 this Court has definitely held that in case of an agreement to pay a time barred debt an express promise was not necessary and an implied promise would satisfy the requirements of Section 25(3), Contract Act. And in *Shanti Parkash v. Harnam Das* ('38) 25 A.I.R. 1938 Lah. 234 a Full Bench of the Lahore High Court on the principle of stare decisis has taken a similar view.

9. There is a clear distinction between an acknowledgment of a debt simpliciter and an acknowledgment coupled with a statement that the debt acknowledged shall in future carry a certain rate of interest. In the former case there is no promise to pay the debt and the promise to pay the debt can only be implied; in the latter case the statement that the debt shall bear interest means and can only mean that the interest shall be paid and therefore exhibits a promise to pay the interest in express terms, and if there is a promise to pay interest there exists clearly an agreement to pay principal. Taking this view, it is now generally held

that when an acknowledgment of debt also contains a statement that the acknowledged debt will bear future interest at a certain rate it ceases to be a mere acknowledgment and become an agreement within the meaning of the Stamp Act: see *Mahadeo Kori v. Sheoraj Earn Teli* ('19) 6 A. I. E. 1919 All. 196, *Laxumi-bai v. Ganesh Raghunath* ('01) 25 Bom. 373, *Mulchand Lala v. Kashibnllav Biswas* ('08) 35 Cal. 111 and *Prahlad Prasad v. Bhagwan Das* : AIR1927 All677

10. For the purposes of Section 25(8), Contract Act, a distinction might well be drawn between an acknowledgment of a debt simpliciter and an acknowledgment of a debt coupled with an agreement to pay future interest and in an acknowledgment of debt which is incorporated in a sarkhat, hundi, promissory note, bond or other agreement evidencing a loan. An acknowledgment of a debt is a unilateral act of the debtor; it is not an agreement or a contract; it merely states that a debt is due and it contains no express promise to pay the debt acknowledged and, indeed, under Article 1, Schedule 1, Stamp Act, such a promise is excluded from the scope of an acknowledgment. Now Section 25(3), Contract Act, enacts:

An agreement made without consideration is void unless it is a promise made in writing and signed by the person to be charged therewith,...to pay wholly, or in part a debt of which the creditor might have enforced payment but for the law of limitation of suits.

11. Since Section 25 (3) requires a promise to pay in writing it may well be that an acknowledgment of a debt simpliciter which contains no express promise to pay is not within the meaning of the statute. But if there is an express promise to pay interest on the debt acknowledged, the express promise with regard to interest might reasonably include a promise for payment of principal also. And if the acknowledgment of debt forms part of a promissory note or bond or sarkhat or hundi or of other agreement evidencing a loan, then all rights and obligations which legally flow from the agreement and from the relationship created by it should also be deemed to be incorporated in the agreement and be read into it. And, if the document contains an agreement relating to a loan and about its existence and its validity, and is not merely an acknowledgment of a pre-existing

debt, the liability to pay the debt should be read into it though it is not expressed therein in so many words.

12. The sarkhat executed by the defendant Bhagwati Prasad purported to be a promissory note; it contained an agreement about payment of future interest; it was treated as a bond by the trial Court and excess duty and penalty was levied on it. It cannot therefore be regarded either in form or in substance as a mere acknowledgment of a time-barred debt and if necessary it could satisfy the conditions laid down in Section 25(3), Contract Act. It follows that Bhagwati Prasad, defendant 1, had no valid defence to the action and the claim should have been decreed against him. We accordingly allow this appeal, set aside the decrees of both the Courts below in so far as they dismissed the claim of the plaintiff against defendant 1, Bhagwati Prasad, and in lieu thereof we grant to the plaintiff a decree for the sum claimed against defendant 1 with pendente lite and future interest at 3 per cent, per annum till payment. The plaintiff will have his costs in all Courts against defendant 1, but he will pay the costs of defendant 2 in all Courts, and defendant 1 will bear his own costs in all Courts.