

Pitamber Mohapatra Vs. Lakshmidhar Mohapatra and ors.

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Court : Orissa

Decided On : Feb-24-1949

Reported in : AIR1949Ori64

Appellant : Pitamber Mohapatra

Respondent : Lakshmidhar Mohapatra and ors.

Judgement :

Ray, J.

1. This arises out of a petition by the defendant in a suit for recovery of loan due upon a handnote, executed by defendant 1, for a sum of Rs. 75 including the interest due thereon. The original creditor was one Baishnab Charan Mohapatra since dead. His son and father left behind are respectively defendants 3 and 4 (pro forma). Defendant 2 is the nephew of defendant 1 and is sought to be made liable, the debt being a family debt. The plaintiff comes to sue by virtue of an assignment of certain debts that belonged to Baishnab Charan including the present one effected by a deed of assignment executed on behalf of the legal heirs of Baishnab as well as the Karta of the then existing family, namely, defendant 4 (father of Baishnab). The defendants contest the suit on two grounds: (i) that the assignment does not bind the interest of Baishnab's widow who must have acquired an interest on the death of her husband in the property as she on her own account was not a party to the assignment; and (ii) that the debt is barred by

limitation in as much as the payment of Rs. 25 relied upon to save limitation does not appear to have been made towards interest as such within the meaning of Section 20, Limitation Act, as it then stood. The substance of this contention is that the amended Section 20 which obliterates all distinctions between payment towards interest as such or payment towards principal, will not avail to the plaintiff inasmuch as by the time the amended section came into force in March 1942, the suit pronote had been barred by limitation.

2. The learned District Judge held it as a fact relying upon the pleadings 'between the parties that the aforesaid sum of Rs. 25 had been paid and appropriated towards interest. He says that the plaint contains an averment to this effect and the same was not denied in the written statement. In this view, he came to the conclusion that, even considered in the terms of Section 20, as it stood before the amending Act XVI [16] of 1942, the suit should be in time.

3. Mr. P.C. Chatterji, for the petitioner, contends that the learned District Judge is in error in construing the pleadings of the parties in the manner he has done. It is, therefore, necessary to advert to the pleadings in order to come to the conclusion as to whether these facts shall be assumed to have been admitted for the purpose of the suit.

4. In para. 2 of the plaint, it has been very clearly averred that defendant 1 made a payment of Rs. 25 towards interest on the date mentioned below, that is, 21st October 1941. In para. 5 in setting out the cause of action for the suit, it has been stated that the cause of action for the suit arose on the date the loan was advanced and handnote was executed, that is, 25th October 1938 and on the date when the payment of Rs. 25 was made, that is, on 21st October 1941, within the jurisdiction of this Court. The procedure laid down in the Code requires that clear and specific allegations in the plaint which constitute the cause of action for the suit should be specifically denied. Specific denial undoubtedly means denial of the specific allegation of the facts as such. The written statement proceeds to deny the allegations in the plaint in the following terms:

The statements in paras. 1, 2 and 3 are not accepted by the defendant to be true and the plaintiff is put to proof thereof.5. This denial will have to be read with the

plea of limitation raised in para. 3 of the written statement which is to the effect that the plaintiff's claim is barred by limitation. I do not consider the denial to be specific. Mere raising the plea of limitation without anything more should mean that the plaint as constituted is barred by limitation. It has to be borne in mind that defendant 1 was himself the payer of the sum of Rs. 25. It was for him to assert in his written statement that the payment was not towards interest. Under the circumstances, the plaintiff cannot be put to proof whether the payment was made towards interest or not. On the contrary, for the purpose of this case, it has to be assumed independently of what the fact is, that defendant 1 made the payment of RS. 25 towards interest on 21st October 1941.

6. Mr. Chatterji is correct in his contention that there is nothing about appropriation as assumed by the learned District Judge in his judgment in the averments of the plaint; but that does not detract from the plaintiff's case. Either of the two alternatives will do to give a fresh start of limitation, that is, either appropriation by the creditor or expression of intention by the debtor. The plaintiff alleges that the debtor pays towards interest and, if that be so, he must be deemed to have appropriated towards the same account, in the absence of anything to the contrary.

7. Mr. Chatterji, however, complains that in the evidence at the hearing, it was not stated by the witnesses proving the payment that it was towards interest. That may be so, but in view of the law of limitation then prevailing on account of the amending Act of 1942 (Act XVI [16] of 1942) such a proof was not necessary. Out of this he raises the contention that if the suit was barred by limitation at the time the Amending Act came into force, it could not be revived as there was nothing in the Act which could give it a retrospective operation. He, however, contends in furtherance of this submission that the act of payment towards interest as such or the act of appropriation must have taken place either at the time the payment was made or within the prescribed period of limitation but not after. This contention is substantially true, but it does not arise in the facts of this case inasmuch as it is not stated that the appropriation was made for the first time in the plaint. On the contrary, as I have shown, the plaint avers that the payment towards interest was made on 21st October 1941. It is not urged, and that rightly, that it is not open to

the plaintiff to prove payment of interest as such by evidence apart from the endorsement accompanying the payment. The endorsement was not indicative that the payment was towards interest or principal, but it was open always to the plaintiff (creditor) to prove that the payment was towards interest though not so expressly stated in the endorsement. The proviso that requires the endorsement to be made in order to save limitation does not require that the endorsement should be the only conveyancer of the fact of payment towards interest as such, but the section in its pre-amended form requires that the payment towards interest should be as such.

8. In view of his contention it has to be shortly examined whether Section 20, Lim. Act, as it stood before the amendment, would govern the present suit or the later Act. There is no doubt that there is some conflict of views in the Courts in India, but tested in the light of a few fundamental principles, there does not seem to be any difficulty in coming to the right solution of the controversy. It is settled as laid down by their Lordships of the Judicial Committee in the case of *Lala Soni Ram v. Kanhaiya Lal and Ors.* 40 I.A. 74 at p. 82 that the law of limitation as a branch of adjective law applicable to a suit should be the law in force at the time of its institution. The case of *Sachindra Nath Roy and Ors. v. Maharaj Bahadur Singh and Ors.* A.I.R. 1922 P.C. 187 is relied upon as apparently in conflict with this principle; but on a close examination of the two authorities there does not appear to be any conflict. The fundamental principle that the law of limitation applicable to a suit is the law prevailing at the time of its institution is subject to this exception that its applicability will not operate so as to revive a right that has been extinguished on account of the pre-existing law of limitation. The case of *Sachindra Nath Roy v. Maharaj Bahadur Singh* A.I.R.1922 P.C.187 was one of the latter kind. That was the case of a decree which admittedly had become barred under the provisions of the Limitation Act, 1877, Schedule II, Article 179, before or by the time the Limitation Act, 1908 came into existence. The question arose whether any payment made towards that decree about 13 months after the later Act of Limitation came into force would be a valid payment towards the decree as distinguished from voluntary payment. Their Lordships of the Privy Council held that the decree had become unenforceable long before the Act of 1908 came into force and could not be revived. It was not a case of pending execution and their

Lordships had not considered whether to such a pending execution the law of limitation applicable was the one that was prevailing at the time of the filing of the execution petition or the law as prevalent at the time the decree was passed. Besides, as rightly pointed out by my learned brother in the course of argument, that in the law, as it then stood, the debt did not include a judgment-debt. Therefore, a distinction between enforceability of the decree and existence or otherwise of the debt due under it was not available. In whichever case the view has been taken that the law of limitation prevailing at the date of the suit would apply, it has been the view that the remedy might have been lost by the time the later Act came into force, but the debt was existing. This distinction between the two, namely, the remedy and the substantive right, was not available in the circumstances of the case before their Lordships of the Privy Council.

9. It is clear from the provisions of the Limitation Act that under Section 28 of the Act, right to immovable property is extinguished if the remedy to recover the same becomes barred by lapse of time, but this does not apply to other rights. Therefore, the distinction between remedy and right is applicable to a case as the present one. From various provisions of the Contract Act it is clear that a barred debt is for all purposes an existing debt which forms good consideration for a contract and which entitled a creditor to appropriate certain payments made by a debtor towards such a barred debt (vide Section 61, Contract Act). In this view the debt under the handnote was in existence at the time the Amending Act came into force and no question of revival of an extinguished right does arise and in that sense in applying the present Section 20 of the Act we do not give any retrospective operation.

10. Secondly, in the facts of this case Mr. P.C. Chatterji could not maintain the position if it could be predicated with all certainty that this suit based upon a cause of action arising from the facts then available had become barred. It has been decided by their Lordships of the Privy Council in the case of Rama Saha v. Lal Chand that the fact of payment towards interest or principal can be ascertained and adjudicated upon independently of the endorsement. In this connexion the following passage is worthwhile quoting:

Their Lordships cannot accept the contention of the learned Counsel for the respondent that appropriation by the creditor can have no effect under the section as it now stands or that the character of the payment must necessarily be determined at the time when the payment is made. Stress was laid on the change in the proviso from 'the fact of payment appears' to 'an acknowledgment of the payment appears', but neither expression affords, in their Lordships' opinion, any ground for holding that the character of the payment, as intended to go towards interest or towards principal, must appear by the writing, still less that it must be ascertainable or ascertained at the date of payment.¹¹ Their Lordships had approved of the correctness of the decision in the majority view in the Full Bench case of Allahabad High Court reported in *Udeypal Singh v. Lakshmi Chand* : AIR1935 All946 .

12. Keeping this in view, the position is that until it was thrashed out in a suit on the contest raised by the defendant it could not be said that *prima facie* the suit *pronote* had become barred by March 1942 when the amending Section 20 came into force. If the later Act governed the suit as it was instituted after it came into force the plaintiff was not under the necessity to prove that the payment was towards interest as such. In order to avail himself of the plea that the right had become barred irretrievably beyond revival, the defendant should have taken up the defence and should have established the same after which the plaintiff might have been required to meet it. The defendant not having taken the plea and the law governing the present suit being the one that prevailed at the time of its institution and that law requiring no discrimination as to whether any payment was made towards principal or towards interest as such it cannot be said that the plaintiff's evidence left a lacuna so as to render him remedy less on account of it. As for the validity of the assignment, it is clear that Baishnab's widow did join it, and the plea is not available to defendant 1.

13. In the result, I hold that the plaintiff's suit has been rightly decreed, the judgment of the learned lower appellate Court is upheld and the civil revision is dismissed with costs.

PanigrahT J

14. I agree.

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