

Ramdayal Vs. Maji Devdiji

Ramdayal Vs. Maji Devdiji

SooperKanoon Citation : sooperkanoon.com/750560

Court : Rajasthan

Decided On : Aug-31-1954

Reported in : AIR1956Raj12

Judge : Wanchoo, C.J. and; Modi, J.

Acts : [Contract Act, 1872](#) - Sections 62; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 7, Rule 7; Limitation Act, 1908 - Sections 19; [Stamp Act, 1899](#) - Schedule - Article 1; [Evidence Act, 1872](#) - Sections 114

Appeal No. : First Appeal No. 37 of 1949

Appellant : Ramdayal

Respondent : Maji Devdiji

Advocate for Def. : Hastimal, Adv.

Advocate for Pet/Ap. : Murlimanohar, Adv.

Disposition : Appeal dismissed

Judgement :

Modi, J.

1. This is a first appeal by defendant Ramdayal in a suit for recovery of money.

2. The plaintiff's case was that there were money dealings between him and the defendant, and the latter went into accounts and struck a balance of Rs. 3000/- in plaintiff's favour on Posh Sudi 9, Smt. 2005 in his Khata Bahi and signed the entry. Thereafter, on Posh Sudi 13, Smt. 2005, the defendant took a further loan of Rs. 7000/- from the plaintiff in lieu of which also he signed an entry in the plaintiff's Khata bahi.

The plaintiff further alleged that the defendant had agreed to give interest at the rate of 9 per cent, per annum. As the defendant had paid nothing towards the debt, the plaintiff instituted his suit on 13-6-1949, for the recovery of Rs 10,000/- principle and Rs. 392/- by way of interest, total Rs. 10,392/-.

3. The defendant admitted having executed the Khatas relied on by the plaintiff but resisted the suit on the ground that he had executed two Mudatti Hundies for the sum of Rs. 10,000/- in favour of the plaintiff on Baisakh Sudi 14, Smt. 2006, and thereby completely discharged the debt due from him to the plaintiff. The defendant also contended that as the old contract between the parties had been novated, the plaintiff's suit on the basis of the Khata was not maintainable. The defendant further pleaded that the plaintiff's Khata was inadmissible in evidence for want of stamp.

In his replication, the plaintiff stated that when the defendant was pressed to repay the loan, he had executed two Mudatti Hundies in plaintiff's favour; one for a sum of Rs. 5000/- payable 30 days after Baisakh Sudi 14, Smt. 2006 and another also for Rs. 5000/- but payable 46 days after Baisakh Sudi 14. The plaintiff produced the original Hundies and further stated that nothing had been paid in discharge thereof. The plaintiff also stated that the Khata did bear the necessary stamp and was, therefore, admissible in evidence.

4. The trial court decreed the plaintiff's suit for a sum of Rs. 10,392/- with costs and with pending and future interest at 6 per cent, per annum. From that decree, this first appeal has been filed by the defendant,

5. Before proceeding further, we may point out that the trial Court 'has mainly addressed itself to the question whether the execution of the two Hundies in

discharge of the plaintiff's debt amounted to novation and, therefore, the plaintiff could not sue on the basis of the original cause of action viz., the entries in the plaintiffs Khata Bahi. Both parties were obviously content with treating the question, stated above, as one of law and, therefore, did not care to produce any evidence.

6. Learned counsel for the appellant has attacked the decree of the first appellate Court firstly on the ground that the suit filed by the plaintiff was premature because, according to learned counsel, the plaintiff had executed the 'aforesaid two Hundies in lieu of his debt of Rs. 10,000/- and neither of these two Hundies had become mature for payment on the date on which the plaintiff filed his present suit. Secondly, learned counsel contended that the finding of the Court below, that the parties had not novated the original contract founded on the Khata, was completely erroneous. We shall take up the second question first,

7. The argument of learned counsel on the point of novation was that the original contract between the parties consisted of two items; one for Rs. 3000/- and another for a sum of Rs. 70,000/-, which constituted separate causes of action, and that these two contracts were really altered when subsequently the defendant agreed to give and the plaintiff agreed to accept two Hundies on 11-5-1949, for Rs. 5000/- each.

Learned counsel strenuously contended that this put an end to the old contract and substituted for it a new obligation, or at any rate, altered the old contract, and that this amounted to a novation of contract within the meaning of Section 62, Contract Act. Section 62, Contract Act reads as follows:

'62. If the parties to a contract agree to substitute a new contract for it, or to resand or alter it, the original contract need not be performed.'

A plain reading of this section shows that in order to have a novation, the parties to a contract must agree to the extinguishment or discharge of the old debt or obligation. There can be no novation until this has been accomplished. A novation may take place by the introduction of new parties or new terms into the contract. The test; therefore, is what was the intention of the parties, or, in other .words,

whether they intended to bring about a new or altered contract between themselves.

As we have already pointed out, this could only be brought about by agreement between the parties. The defendant upon whom the burden of establishing such an intention did not choose to lead any evidence on the point, and, therefore, there is no material on the record to lead us to come to the conclusion that there was any such intention.

It is further well established that where a creditor takes a bill, note or cheque in payment, he may either accept it in complete satisfaction of the debt, or may accept it as a conditional payment only, the effect of which is to suspend his remedies during the currency of the instrument. The presumption, in the absence of a clear indication of a contrary intention, is that payment by means of bill note or cheque is a conditional payment only. (See -- 'Mohan v. Ramji', AIR 1931 Nag 113 (A) and Jambu Chetty v. Palaniappa Chettiar', 26 Mad 526 (B)). We are inclined to think that the mere execution of the two hundies and their delivery to the plaintiff is not by itself sufficient to found a novation in this case.

The hundies were admittedly drawn by the defendant in the name of his firm Ramkishan Ramjeewan upon himself. We may point out that the original Khata according to which a sum of Rs. 3000/- was found due by the defendant in favour of the plaintiff on Posh Sudi 9 Smt. 2005 and the further loan of Rs. 7000/- was taken by the defendant on Posh Sudi 12 Smt. 2005, was not squared up, nor was a receipt in lieu of these amounts having been repaid passed by the plaintiff to the defendant. No act necessarily evidencing the discharge of the old debt and its replacement by the new one has at all been established in the present case. In this state of things, we are unable to hold that there was any novation in the present case.

The two hundies were probably executed and passed by the defendant to the plaintiff as a convenient mode of payment and nothing else. On the whole, we do not consider that they purported to alter the original contract within the meaning of Section 62, Contract Act. Learned counsel referred us to -- 'Harjas Mal v. Bhagat Ram,' AIR -1934 Lah 128 (2) (G) in support of his contention. In that case

accounts were settled between the parties and a certain sum was found due. Out of this, a particular amount was given up and something was paid in cash and a Hundi for Rs. 500/- was executed by the principal in favour of the agent. On the same day a receipt was executed stating that no other account remained between the parties except the liability upon the hundi.

It was held, under these circumstances, that there was a novation of contract and the original cause of action was put to an end. - Quite clearly, this case can have no application to the facts of the present case. As we have already pointed out above, there is no evidence whatsoever in this case in the shape of a receipt or any other thing to show that the old contract had been extinguished and, therefore, the Lahore case cannot help the appellant. We are, therefore, clearly of opinion that the defendant has failed to establish that there was any novation in the present case.

8. We now turn to the next point viz., that the plaintiff's suit was pre-mature. Learned counsel for the appellant put forward his case in the following manner. The plaintiff must, in any case, be deemed to have accepted the hundies in lieu of the previous Khatas as a sort of conditional discharge of the old debt embodied in the Khatas. Both hundies were executed on Baisakh Sudi 14, Smt. 2006. The first hundi was to mature after 30 days of Baisakh Sudi 14, Smt. 2006 corresponding to 11-5-1949, and; the second hundi after 46 days thereof. The first hundi matured on 10-6-1949, and the second hundi on 26-6-1949. The plaintiff brought his suit on 13-6-1949.

It was argued by learned counsel for the appellant that under Section 22, Negotiable Instruments Act, every promissory note or bill of exchange which is not expressed to be payable on demand, at sight or on presentment is at maturity on the third day after the day on which it is expressed to be payable, and, therefore, the defendant was entitled to another period of three days of grace after the date it was expressed to be payable. In short, the contention was that even the first hundi had not matured on the date the suit was instituted. There is no question that the second hundi had another 16 days to mature.

It was contended, however, by learned counsel for the respondent that the hundies, in this case were neither a promissory note nor a bill of exchange within the meaning of Section 22, Negotiable Instruments Act, and, therefore, no grace was permissible. We are of opinion that it was not open to the plaintiff-respondent to file a suit for the recovery of Rs. 5000/- separately in the circumstances of the case and therefore we do not consider it necessary to go into the question whether the grace claimed by the defendant was permissible or not. The suit for the entire sum of Rs. 10,000/- could not be brought until the second hundi matured: The suit was, therefore premature on the date it was filed i.e., on 13-6-1949.

9. In this connection we have been referred to Halsbury's Laws of England (Hailsham Edition), Vol. VII, page 241, para. 331.

381. Where a negotiable, instrument is given by a debtor to his creditor, the question upon what terms it is given is one of fact, depending on the intention of the parties.

A creditor is not bound to accept payment of a debt otherwise than in current coin, ... and if he takes a bill, note, or cheque in payment, he may either - accept it in absolute satisfaction of the debt, in which case he takes the risk of its being dishonoured and can sue only on the bill, etc., or may accept it as a conditional payment only, the effect of which is to suspend his remedies during the currency of the instrument.

If a bill of exchange or note be taken on account of a debt, and nothing be said at the time, the legal effect of the transaction is that the original debt remains, but the remedy for it is suspended till the maturity of the instrument in the hands of the creditor.'

As we have already observed above, the parties did not say anything at the time the hundies were executed as to whether they were intended to operate as an absolute discharge of the debt or as a conditional payment only. We have, therefore, no hesitation in arriving at the conclusion that in the absence of any such declared intention, the legal effect of the transaction was and is that the original debt remained, but the remedy for that debt stood suspended till the maturity of

the instrument in the hands of the creditor. This principle is indeed too well-established to admit of any doubt or dispute. We must, therefore, hold that in this case the suit as brought on 13-6-1949, was premature.

10. As a consequence of his argument that the suit was premature, learned counsel for the appellant has vehemently argued that the present suit should i.e. dismissed. On the other band, learned counsel for the plaintiff-respondent has strenuously urged before us that even if the suit was premature at the date it was brought, it certainly matured during the course of the trial, and, therefore, his suit should not be dismissed, and that the decree of the Court below should be maintained. Learned counsel for the respondent laid particular stress on the fact that even though the bundles had matured long ago, the defendant made no payment whatsoever to the plaintiff and the entire money even on the basis of the hundies still remained unpaid.

11. Now, the question which has been pressed before us is indeed of considerable importance and complexity, and we have heard learned counsel at length. As we understand the position, the general rule is that the rights of parties to a suit must be regulated with reference to their state at the date of the institution of the suit and a suit must be tried in all its stages on the cause of action as existed on the date of its commencement, and the relief claimed in the suit must be confined to matters existing at that date. See -- 'Doorga Prosad v. Secy, of State', AIR 1945 PC 62 (D).,

Although this is settled law as a general rule, it is equally settled that there are exceptions to this rule and it is open to a Court in exceptional cases to take into consideration events which may have taken place subsequent to the filing of the suit and grant relief on their basis where the relief as claimed originally in' the suit may have become inappropriate by reason of altered 'Circumstances and where this may appear to be necessary to shorten unnecessary litigation between the parties or tend to subserve the substantial interests of justice.

We have been referred to a large number of cases where the Court has exercised such a power depending of course upon the special circumstances of each particular case. (See 'Rai Charan v. Biswanath', AIR 1915 Gal 103 (E); -- 'Nun

Mian v. Ambica Singh', AIR 1917 Cal 716 (F); --- 'Rama Chaadra v. Maharaja of Jeypore', AIR 1917 Mad 198 (G); -- 'Thimmayya v. Siddappa', AIR 1935 Mad 63 (H) -- 'Butchiraju v. Seetharamayya', AIR 1926 Mad 377 (I); -- 'Sornammal v. Thangavelu Mudaliar', AIR 1940 Mad 412 (J); -- 'Krishnaji Vinayak v. Motilal Magandas', AIR 1929 Bom 337 (K); -- 'Meghaji v. Anant Pandurang', AIR 1948 Bom 396 (L); -- 'Joti Bhushan v. B. N. Sarkar', AIR 1945 All 311 (M); -- 'Mt. Ghulam Fatima v. Rahman', AIR 1919 Lah 262 (N); -- 'Labhu Ram v. Charnu Fauju', AIR 1929, Lah 409 (O); -- Dera Sadh v. Basti Ram', AIR 1940 Lah 194 (P); -- 'Kimatrai v. Mangharam', AIR 1943 Sind 182 (Q); -- 'Biswanath Saran v. Muj'taba Husain', AIR 1941 Oudh 422 (R) and -- 'Mandli Prasad v. Ramcharanlal', AIR 1948 Nag 1 (S).

12. Some of these cases pertain to suits for recovery or division of property, where owing to death of certain parties during the course of, the suit, the relief claimed has naturally become inappropriate, or to suits brought by next reversioners at a time when their right had not accrued or was doubtful but which right became clear of all cloud or dispute as a result of the death of the intervening limited heirs during the trial of the suit.

Similarly where a suit was assailed on the ground of want of a certain condition precedent which did not exist at the time the suit was brought but that condition was fulfilled during the course of the trial of the suit, it was held to fall within the exceptional rule. See 'Mt. Ghulam Fatima v. Rahman (N)'. Another type of cases in point is where the plaintiff had no right of suit at the date of institution but he acquired the right through inheritance opening in his, favour after the filing but before disposal of the suit. (Thimmayya v. Siddappa (H)):

13. We need not multiply examples. We may, however, add that such a power has been held to subsist even at the stage of appeal. Thus in 'Dera Sadh v. Basti Ram (P)', it was held that although a suit when instituted was premature but had ceased to be so in appeal, the question could be considered whether the suit should be decreed. That was a suit brought by a trustee for possession of certain land and for ejectment of the defendant donee on the ground that the last Mahant, father of the defendant, had no right to make a gift of the property in question.

In a previous suit where this gift had been challenged, it was held that the donee would remain, in possession of the land gifted during the life-time of the father or until he was removed from the Mahantship.

The trial Court dismissed the suit on the ground that it was premature by reason of the compromise arrived at in the previous suit according to which the donee's possession was not to be disturbed during the life time of his father.

The latter died during the course of the appeal and so it was urged that the only ground on which the suit was dismissed by the trial Court having ceased to exist the suit should be decreed. It was held that the relief claimed in appeal was a matter in the discretion of the Court and further that the discretion should, be exercised in favour of the plaintiff on the ground that the suit was no longer premature by reason of the death of the Mahant and whatever might have been the rights of his son during the life-time of the father, the defendant son had no right to property thereafter.

14. The question still remains whether the-principle referred to above has been applied to suits for money; for undoubtedly those would be cases much nearer to the case before us. Such an instance is furnished by the case reported as -- 'Subbaraya Chetty v. Nachiar Animal', AIR 1948 Mad 143 (1) (T). The learned trial Judge in that case dismissed the suit on the ground that it was premature owing to the terms of a certain bond.

On appeal it was held by a Division Bench of the Madras High Court that having regard to the fact that the money became payable immediately after the suit was filed, it would be undesirable that the plaintiff should be compelled to institute another suit for the money, and the learned Judges reversed the decree of the District Judge and in view of what they called special circumstances of the case decreed the suit.

This case was followed in -- 'Mt. Gulam Fatima v. Rahman', (N), -- 'Kanshi Ram v. Jaimal Singh', AIR 1923 Lah 590 (U) and -- 'Butchiraju v- Seetharamayya (I)'. It is urged by learned counsel for the appellant that -- 'Subbaraya Chetty v. Nachiar Ammal (T)' was not followed in -- 'Rangayya Naidu v. Basana Simon', AIR 1926

Mad, 594 (V). The latter case was decided by a learned single Judge who held that the only course where the suit of the plaintiff was brought before the cause of action was to dismiss the suit with liberty to bring a fresh suit upon a proper cause of action.

With all deference, we are of opinion that the learned Judge went too far in saying what he did and in holding that under no circumstances could a Court take into consideration events arising subsequently to the suit and grant relief on that footing because in suitable cases the exercise of the exceptional power has been indeed well recognised and it will be too late in the day to hold otherwise.

Similarly in a Sindh case D, the owner of certain machinery hypothecated it to P and afterwards sold it to M who had agreed to pay the money to P. The latter sued for a declaration and injunction to protect his possession against N and ha the alternative claimed his money which had not become due at the date of the suit but became due by the first hearing of the suit. The Court decreed the suit for money. (Kimatrai v. Mangharam (Q)).

(15) The entire question, therefore, boils down to this: whether the present' case can be held properly to fall within the exception to 'the general principle discussed above. In this connection it was urged with great force before us by learned counsel for the appellant that the principle relied upon on behalf of the respondent was one of equity and that it was a well-established principle of equitable relief that he who comes into equity must come with clean hands. Learned counsel relied on Pomeroy's Equity Jurisprudence, Vol. II, Edn. 5, page 91 where it has been observed by the learned writer that

'the maxim 'he who comes into equity must come with clean hands' is much more efficient and restrictive in its operation. ...it says that whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him) any remedy.'

16. The argument of learned counsel was that the plaintiff in this case had completely suppressed the fact of the execution of the hundies in his plaint and that he had based his suit on the original Khatas and that in doing so he had acted dishonestly and thereby forfeited all right to the equitable relief which he was now seeking to claim.

There is no gainsaying the fact that the plaintiff in this case founded his suit entirely on the Khata and did not make any reference to the hundies which had been executed by the defendant in plaintiff's favour which he might have been better advised to do. We are not sure however whether in acting in the manner which he did, the plaintiff acted dishonestly.

It has been urged by learned counsel on his behalf that the legal advisers of the plaintiff thought--may be, that they thought wrongly--that the hundies executed by the defendant in this case were a mere collateral security which did not in any way affect his right to sue on the original Khatas and that it was on that account that no reference was made to the hundies in the plaint.

He further urged that so soon as the defendant raised his contention on the basis of the hundies in his written statement, the plaintiff produced them in original forthwith without any hesitation and, accepted the fact of their execution in his replication and further pleaded that nothing had been paid towards the hundies up to the date of filing of his replication, which was 5-8-1949.

Having given the matter pur careful consideration, we think that it would be too much to hold that the plaintiff in not referring to the hundies in his plaint was necessarily or even probably acting dishonestly. It would be nearer the mark to say that the plaintiff acted negligently and without due circumspection or under mistaken legal advice. There are other circumstances to which we must now draw special attention.

In the first place, we must point out that when the plaintiff filed his present suit on the basis of the original Khatas executed by the defendant, the latter in his defence did not raise the plea of the suit being' premature at all. Among certain other pleas, with which we are not concerned at this stage, the main contention

raised by the defendant was that the defendant had made an absolute discharge of the debt due by him by execution of the hundies in plaintiffs favour.

The defendant even went to the length of "suggesting that he had paid the entire money by so doing. He filed his written statement on 5-8-1949, by which date both hundies had certainly matured. On the substantial question he raised no defence whatsoever whether he had paid the money on the hundies.

Learned counsel for the appellant contested that he was not called upon to do so as the suit had not been brought on hundies. We consider that the fundamental rules of pleading clearly require that the defendant must answer the question of substance and not merely wander about it. The question of substance in this case was whether the debt had been discharged or not. This contention is, therefore, without any merit whatsoever.

The result was that the learned trial Judge raised only one issue viz., whether, the execution of the hundies amounted to a novation and no other issue was raised; nor does the point seem to have been, taken before the trial judge during the course of arguments because the judgment of the trial Court under appeal makes no reference to it.

We would also point out that this particular ground was not taken up even in the memorandum of appeal dated 13-12-1949, filed on behalf of the defendant in this Court. We must further point out that if the defendant had taken up the plea of the suit being premature in the trial Court, it would have certainly been possible for the plaintiff to reconsider the whole position and either apply for the amendment of the plaint or in any case apply for permission to withdraw his suit with liberty to bring a fresh one.

The position at this date, therefore, would be indeed one of heavy odds against the plaintiff, if we were to throw out his suit on the ground of its being premature. His only remedy would be to bring a fresh suit upon a cause of action which arises some time in 1949. So far as we can see, such a suit will indeed run a great risk of being dismissed on the ground of limitation. The plaintiff may try and seek the benefit of Section 14, Limitation Act but no one can predict with safety that

such a plea would be acceptable.

The result of all this would be that if we were to non-suit the plaintiff on the new ground urged before us, for the first time, we would be placing him in a highly difficult if not an almost impossible position. We cannot also ignore the fact that the defendant in this case merely raised some technical pleas to the plaintiff's suit and did not plead that he had paid the monies due by him to the plaintiff.

17. Consequently, we have come to the conclusion that the present case is one in which having regard to its special circumstances, we should exercise our discretion in favour of the plaintiff and take into consideration events which took place subsequent to the filing of the suit and treat his case on that footing although the suit was premature at the date it was, filed.

We pause here to point out that we would not have been prepared to adopt this course but for the very special circumstances of this case and in no case should we have been willing to do so if we were persuaded to the conclusion that the plaintiff's conduct savoured of dishonesty. We accordingly hold that the plaintiff's suit should not be , dismissed on the ground of its being -premature in the peculiar and extraordinary circumstances of this case and in the interests of substantial justice.

18. This appeal will now be fixed for hearing on the remaining points in due course.

Wanchoo, C.J.

19. This is a first appeal by defendant Ramdayal. It came up before a Bench of this Court for hearing in August, 1953, and two points were decided by judgment dated 7-8-1953, and it was ordered that the appeal be fixed for hearing on the remaining points in due course. It is therefore not necessary for us to recapitulate the cases of the parties. The judgment, dated 7-8-1953, may be considered part of this judgment which we are delivering today.

20. Briefly put the case of the plaintiff respondent was for recovery of a sum of Rs. 10,000/- from the defendant appellant. The suit was based on a balance of Rs.

3000/- which was said to be due to the plaintiff after settlement of accounts, and a sum of Rs. 7000/- which was further advanced in cash. The main defence was that there had been a novation of contract, and therefore the plaintiff could not sue on the basis of the khata, Ex. P. 1.

This was the only issue which was framed in the trial Court. When the case was heard by this Court on the previous occasion, a further point was raised, namely that the suit- was premature. The question of novation was decided against the defendant, and though it was held that the suit was premature at the time it was filed, this Court took notice of events which took place 'after the filing of the suit, and allowed the suit to proceed.

21. Learned counsel for the appellant now surges two further points against' the decree of the trial Court. In the first place, it is contended that the suit is based on a mere acknowledgment, and in view of the decisioas of this Court in -- 'Kanraj v. Vijaisingh', AIR 1951 Raj 74 (W) and -- 'Hastitnal v. Shanker Dan', AIR 1952 Raj 7 (FB) (X), it must fail, as a mere acknowledgment cannot be the basis of the suit.

In the second place, it is submitted that the acknowledgment in this case not having been stamped as required by Article 1, Schedule I, Stamp Act is not admissible in evidence. Learned counsel takes the case out of the decision of this Court in -- 'Ratanlal v. Daudas', AIR 1954 Raj 173 (Y), on the ground that the admissibility of the document was disputed in the trial Court, but the -trial court did not frame any issue about it and did not decide it.

22. The reply of learned counsel for the plaintiff is two-fold. In the first place, it is urged that the entry in this case is not an acknowledgment, but is merely acceptance of the correctness of the accounts stated and settled between the parties, and therefore there is no question of any stamp being affixed to such an entry. In the alter-native, it is urged that even if it is a mere acknowledgment, the recent case of the Supreme Court in -- 'Hiralal v. Badkula', AIR 1953 SC 225 (Z) has in effect overruled the Full Bench decision of this Court in 'Hastimal v. Shanker Dan (X)'.

23. Before we consider the question whether the document in this case is a mere acknowledgment or amounts to acceptance of the account stated and settled we might briefly consider the point whether 'Hiralal's case (Z)' has overruled the Full Bench decision of this Court in 'Hastimal, v. Shanker 'Dan (X)'. It may be mentioned that in 'Hiralal's case (Z)' the suit was based on balance of an account stated and adjusted, and it was held by the Supreme Court that the Judicial Commissioner's view that an unqualified acknowledgment like the one in that suit and the statement of the account under which the entry had been made were sufficient to furnish a cause of action to the plaintiffs. Reference was then made to the observations of their Lordships of the Privy Council in -- 'Maniram v. Seth Rupchand', 33 Ind App 165 (PC) (Z1) where it was observed that an unconditional acknowledgment implies a promise to pay.

Thereafter, two Lahore cases, namely --. Tateh Mahommed v. Ganga Singh', AIR 1929 Lah 264 (Z2) and -- 'Khan Chand Dulararn v. Dayaram Amritlal, AIR 1929 Lah 263 (Z3), were approved. The Supreme Court then observed that the defendant in the case accepted the statement of account contained in the plaintiff's account book, and made it his own by signing it, and it thus amounted to an 'account stated between them in the language of Article 64, Limitation Act. In the end, reference was made to -- 'Ghulam Murtaza y. Mt Fasiunnissa Bibi', AIR 1935 All 129 (Z4) in the following words:

'In this case it was held that even if an acknowledgment implies a promise to pay it cannot be made the basis of suit and treated as giving rise to a fresh cause of action,' We have examined the decision and we are satisfied that it does not lay down good law.'

Stress is being laid on these observations for the view that the Supreme Court has held that a mere acknowledgment can be the basis of a suit, and thus has impliedly overruled the Full Bench decision of this Court in 'Hastimal v. Shanker Dan (X)'. It is enough to say that, in the first place, the question before the Supreme Court was not whether a mere acknowledgment, i.e., a bare admission of the balance due, can be the basis of a suit because the suit in 'Hiralal's case (Z)' was based on accounts stated.

In the second place, the disapproval of the decision in 'Ghulam Murtaza's case (Z4)' was of that part of it where it was held in that case that even if an acknowledgment implied a promise to pay, it cannot be made the basis of a suit and treated as giving rise to a fresh cause of action. Looking at 'Ghulam Murtaza's case (Z4)', we find that Sulaiman C. J., with whom Harries J. agreed, approved of the decision in the earlier Allahabad case in -- 'Bal Krishna v. Deb Singh', AIR 1934 All 76 (Z5); but he went on further to say that a receipt containing an acknowledgment of a previous debt may not be a mere acknowledgment, i.e., a bare admission of the existing liability, but it may contain words indicating an implied promise to pay the earlier debt.'

He then expressed the view that whether the receipt was a mere acknowledgment or more than an acknowledgment and contained words indicating an implied promise to pay, it could not be made the basis of a suit. We are of opinion that it is this part of the decision in 'Ghulam Murtaza's case (Z4)' which has been held by the Supreme Court to be wrong in 'Haralal's case (Z)'. Our attention was drawn to the approval by the Supreme Court of the two Lahore cases AIR 1929 Lah 264 (Z2) and AIR 1929 Lah 263 (Z3). Of these 'Kahan Chand Dularam's case (Z3)' was one to which Article 64 applied, and was based on account stated and settled.

It is not clear whether 'Fateh Mahommed's case (Z2)' was similar or not as the judgment is very short. But there also it appears that the plaintiff sued on the basis of a balance. It is not clear whether that balance was in an account stated and settled as in this case, or was a mere acknowledgment, i.e., a bare admission of the liability. We may also add that 'Maniram's case (Z1)' was clearly based on the original cause of action and the acknowledgment in that case was being used for the purpose of extending the period of limitation.

The suit in 'Maniram's case (Z1)' was not based on a mere acknowledgment. There is an observation of their Lordships of the Privy Council based on English Law in that case that an unconditional acknowledgment has always been held to imply promise to pay. But the High Courts in India have generally held that that is not the law in India, and following these decisions, this Court has held in 'Hastimal

v. Shanker Dan (X)', that that was not the law.

We do not think that the decision, of the Supreme Court in 'Hiralal's case (Z)', can be said clearly to overrule the view that a mere acknowledgment, as distinguished from an acknowledgment in which there are words from which an implied promise to pay may be inferred, cannot be the basis of a suit.

24. But the contention of learned counsel for the respondent before us is that this is not a case of mere acknowledgment, but of accounts stated in writing signed by the defendant. A suit of this kind is contemplated in Article 64, Limitation Act, and this case is exactly of the same kind as 'Hiralal's case (Z)'.

We have to look at Ex. P. 1 for that purpose. We find in it an opening balance of Rs. 8,488/4/- on the debit side. Then we find three items totalling to Rs. 5,751/7/6 on the credit side. Then there are two items of interest on the debit side amounting to Rs. 273/3/9 in all. Thereafter a balance is struck showing Rs. 3000/- due from the defendant to the plaintiff. Then there is the signature of the defendant in these words:

'Daskhat Ramdayal Gangni Rupia Teen-Hazar Baki.'

We are of opinion that where a signature like this appears on an account of this kind, the presumption is that the person signing was accepting the correctness of the account and making it his own. Of course, in one sense the signature and these words may amount to an acknowledgment also; but it is a question of fact whether about such an acknowledgment appended at the foot of such an account, it can be said that the intention was to supply evidence of such debt.

We are of opinion that where the acknowledgment is of this kind appearing at the foot of such an account, the presumption should be that the intention was to accept the correctness of the account 'and to make it the account of the person signing it, and not that the intention was to supply evidence of the debt, unless the contrary is' proved by clear evidence. We, therefore, hold that what the defendant did by signing this account and saying that Rs. 3000/- were due was merely to accept the correctness of the account and to make it as his own.

There being no evidence to the contrary it cannot be said that the Intention was to supply evidence of the debt. In this view of the matter, there is no question of any stamp being required on an acknowledgment of this kind, and the suit as based on this account for Rs. 3000/- must succeed. So far as the amount of Rs. 7000/- is concerned, that was paid in cash, and is evidenced by a stamped receipt, and the plaintiff is entitled to it.

25. Learned counsel for the appellant has urged that as it has been held that the suit was premature when it was filed, the Court may order parties to bear their own costs. We are of opinion that so far as the trial Court is concerned this point was not taken by the defendant there is no reason to deprive the plaintiff respondent of the costs of that Court. So far as this Court is concerned, we do think that parties should bear their own costs in this Court.

26. We, therefore, dismiss the appeal, but order that parties will bear their own costs in this Court. Costs of the trial Court will be borne as ordered by that Court.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com