

Chhogalal and ors. Vs. Kanayalal and ors.

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Court : Rajasthan

Decided On : Feb-26-1958

Reported in : AIR1958Raj303

Judge : K.N. Wanchoo, C.J. and; Jagat Narayan, J.

Acts : Limitation Act, 1908 - Schedule - Article 64; [Contract Act, 1872](#) - Sections 62

Appeal No. : First Appeal No. 24 of 1954

Appellant : Chhogalal and ors.

Respondent : Kanayalal and ors.

Advocate for Def. : Murlimanohar Vyas and; Chand Mal, Adv.

Advocate for Pet/Ap. : Sumerchand, Adv.

Disposition : Appeal allowed

Judgement :

K.N. Wanchoo, C.J.

1. This is an appeal by Chhogalal and two others against the judgment and decree of the Senior Civil Judge, Udaipur, by which he dismissed the suit brought by the plaintiffs-appellants against Nen-chand, now dead, and two others.

2. The case of the plaintiffs was briefly this. The defendants were the owners of a joint Hindu family firm Shivilal Nenchand, which had a branch in Charbhuja Road. The plaintiffs were the owners of another joint Hindu family firm known as Chhogalal Sohanlal of which Chhogalal was the Karta. There were dealings between the two firms and in that connection the defendants gave an account signed by them on Sawan Sudi 10 Section 2005. In that account the defendants showed that a sum of Rs. 9,900/- was due from them to the plaintiffs. This account bore the signature of Kanhaiyalal, defendant No. 2 and the plaintiffs the suit on the basis of this account and claimed interest at 6 per cent per annum, thus claiming in all Rs. 11,397.

3. The suit was resisted by the defendants and a number of pleas were taken on which seven issues were framed. In the present appeal however only two issues have been urged before us on behalf of the parties and we shall therefore confine ourselves to these two issues only viz.:

(1) Whether the account was a mere acknowledgment on the basis of which no suit could lie.

(2) Whether any mortgage-deed extinguishing the Khata for Rs. 9900/- was executed by defendant No. 2 and in consequence the suit was not maintainable.

4. The trial court held on the first point that account in this case was a mere acknowledgment on the basis of which no suit could lie. It therefore dismissed the suit. On the second point it held that there was no mortgage and no novation of contract extinguishing the debt acknowledged by Kanhaiyalal for Rs. 9900/-.

5. The contention on behalf of the plaintiffs in this appeal is that the court below was wrong in not considering whether the account on the basis of which the suit was filed was an account-stated. It is urged that on a true construction of Ex. P. 1, which document is the basis of the suit, the court should have come to the conclusion that it was an account stated and could form the basis of the suit. We must say that we cannot blame the court very much in this connection for it does not seem to have been urged before it that Ex. P. 1 amounted to an account stated. This point appears to have been raised for the first time in the grounds of

appeal and. is being pressed before us. We shall therefore first consider whether Ex. P. 1 is an account stated as urged on behalf of the appellants. If it is an account stated, the suit would lie on its basis.

6. We do not think it necessary to set down Ex. P. 1 in detail here. It is enough to say that there are entries both on the credit and debit sides in Ex. P. 1. There are five entries on the credit side totalling Rs. 10,283/10/6. There are nine entries on the debit side totalling Rs. 383-10-6. Then there is a balance which is in these words :

^^9900 ckdh ns.kk lEor~ 2005 lko.k lqnh 10-^^

Finally comes the signature of Kanhaiyalal, who writes about it:

^^yh- lhoyky us.kpandh tqgkj cpkoyh Hkwy pqdys.kk ns.kk^^-

7. It is not necessary for us in this case to explain what an 'account stated' is. The matter was considered by this Court in Seth Manaklalji v. Sal-giya Rajmal 195] Raj LW 341 (A) and reliance was placed on the decisions of the Privy Council in Siqueira v. Noronha, AIR 1934 PC 144 (R), and Bishunchand v. Girdharilal. AIR 1934 PC 147 (C). The account Ex. P. 1 in this case is clearly in the form of what an 'account stated' should be. It is however urged on behalf of the defendants that before Ex. P, 1 can be treated to be an account stated we have to see whether there were mutual promises, the one side agreeing to accept the amount of the balance of the debt as true and to Pay it, the other side agreeing that the entire debt was at a certain figure and then agreeing that it had been discharged to such and such an extent, so that there would be complete satisfaction on payment of the agreed balance. In short the argument is that there is no evidence in this case that there was mutual consideration to support the promises on either side and to constitute the new cause of action.

8. Let us for this purpose look at the evidence of P. W. 4 Sohanlal to whom Ex. P. 1 was delivered by Kanhaiyalal. It is admitted that the whole of it is in the handwriting of Kanhaiya Lal and bears his signature. Sohanlal says that he had gone on that day to Kanhaiyalal to deposit Rs. 2,651/-. After he had made that

deposit Kanhaiyalal handed over Ex. P. 1 to him after making the accounts and told him to deliver it to his father. Sohanlal took this document and delivered it to his father. It is urged that this does not show that there were any mutual promises between the plaintiffs and defendants to discharge the liability of the defendants on Payment of the balance of Rs. 9900/- and that this would only have been possible if Chhoga Lal had written back that he accepted the accounts as correct. There is no doubt that Chhogalal did not write that he accepted the accounts as stated to be correct, but there is evidence that Ex. P. 1 was handed over to Chhogalal and his subsequent conduct shows that he accepted it as a correct statement of account.

He never wrote back saying that he did not accept the statement of account stated to him in Ex. P. 1 by Kanhaiyalal as correct. We are of opinion that in circumstances such as these, when the account is handed over or sent by one party to the other with the signature of the debtor on the balance and is never objected to by the creditor we can certainly presume that it was accepted by the other side and amounted to an 'account stated' within the meaning of the cases mentioned by us above. We may in this connection particularly draw attention to Siqueria's case (B). In that case the account which was treated as an 'account stated' and which was the basis of the suit was made up by Siqueria, Manager in Nairobi in Africa and sent to the plaintiff Noronha in India.

The plaintiff was not even there when the account was made up and had only asked the defendant to make up his account. There is nothing in that case to show that the plaintiff wrote back that he accepted the account as correct. All that happened was that the plaintiff by his conduct accepted that account and later on filed the suit on the basis of it for recovery of the money shown due to him in the account. We are therefore of opinion that the mere fact that Chhogalal did not write back in so many words to the defendants that he accepted Ex. P. 1 is correct would make no difference so long as the circumstances and the conduct of the parties in this case show that the account sent under the signature of Kanhaiyalal was accepted as a correct statement of the account between the parties showing the balance after setting off agreed items. We have therefore no hesitation in coming to the conclusion in the circumstances of this case that Ex. P. 1 must be

treated to be an 'account stated' and therefore a suit would lie on its basis.

9. This brings us to the next question: whether there was a novation of contract by which the debt of Rs. 9900/- was extinguished. Now the case of the defendants in this connection was that this debt was extinguished by the execution of a mortgage-deed for Rs. 9900/- by Kanhaiyalal relating to two shops of the defendants. The court below has held in this connection that there was no registered mortgage-deed and therefore there could be no mortgage. It is not the defendants' case that there was any registered mortgage deed of the two shops. In fact, therefore, there was no mortgage by which the debt of Rs. 9900/- can be said to have been extinguished. What is argued is that presumably some document was executed by Kanhaiyalal in favour of the plaintiffs. It is further urged that even if this document failed to have effect as a mortgage it would amount to a bond and its terms should have been allowed to be proved by oral evidence when the plaintiffs, in whose possession the document was, were not prepared to produce it. Now, the case put forward by the defendants was that this debt of Rs. 9900/- on the basis of Ex. P. 1 was extinguished by the creation of a mortgage of two shops.

The mortgage however has failed, even if there was some document in that connection. In the circumstances, it was not possible for the court to spell out a bond out of a mortgage deed and then to hold that this debt was extinguished because a certain bond could be spelled out of an invalid mortgage deed. According to the defendants themselves, the new contract between the parties was that the debt of Rs. 9900/- would be wiped out on the creation of a mortgage for the same sum on the two shops. Once the mortgage fails to materialise for want of a legal defect i.e. absence of registration, there could in our opinion be no new contract replacing the old contract and extinguishing the old debt.

The plaintiffs, according to the defendants' own showing, were agreeable to the extinguishment of the old debt on the basis of a mortgage of certain shops; but when that mortgage failed to come into existence owing to a legal defect there could be no question of the plaintiffs intending to make a new contract because of some bond that might have been spelled out of the invalid mortgage deed. We

may in this connection refer to Mathura Mohan Saha v. Ramkumar Saha, 35 Ind Cas 305 : (AIR 1916 Cal 136) (D) where the following observations appear at page 317 (of Ind Cas) : (at P. 147 of AIR):-

'It is further well settled that where parties enter into a contract, which, if valid, would have the effect, by implication, of rescinding a former contract, and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights in respect to the former transaction.'

It is only when the second transaction operates as the parties intended that the first transaction can be wiped out. In this case on the defendants' own showing the parties intended that the second transaction would be a mortgage of two shops. It is not in dispute that the mortgage failed because there was no registration. In the circumstances, there could be no novation of contract within the meaning of section 62 of the Contract Act. For the second transaction, in this case, having not operated as the parties intended cannot by implication affect their rights under the first transaction. We are therefore of opinion that there is no case of novation of contract.

10. We therefore allow the appeal, set aside the decree of the court below and decree the suit for Rs. 11,397/- with pendente lite and future interest at 6 per cent. p. a. In view however of the fact that the case put forward before us does not seem to have been put forward in the trial court, we order parties to bear their own costs of this litigation.

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