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Court : Kolkata

Decided On : Mar-04-1912

Reported in : 14Ind.Cas.133

Judge : D. Chatterjee and ;N. Chatterjea, JJ.

Appellant : Binda Dasya Chutiani

Respondent : Chota

Judgement :

1. This suit was brought on the 4th of October 1907 on an alleged bond of the 7th of October 1904. The document, however, is not a bond but an agreement of partnership for the capture of elephants and incidentally mentions a debt of Rs. 600 previously taken from the plaintiff and provides that 6-annas of the profits of the business in the share of the executant would go towards the liquidation of the debt of Rs. 600. The defendant, who is the heir of the executant of the bond, pleads limitation and want of cause of action and the lower Courts have upheld the plea. It is contended in second appeal before us that the Courts below are wrong, firstly, in the construction of the agreement and, secondly, in holding that the document does not repel the bar of limitation.

2. The document, undoubtedly, contains an acknowledgment of the debt and if it could be shown that it was made while the debt was yet alive, the provisions of Section 19 of the Limitation Act would repel the statute. The plaintiff has, however,

failed to prove that and the suit must fail unless the document is such as to attract the provisions of Section 25, Clause 3, of the Contract Act. That section provides that an agreement made without consideration is void unless it is a promise made in writing to pay wholly or in part a barred debt. The effect of the section is that the old debt is not revived but it is considered to be a good consideration for the promise to pay and this new promise is the measure of the creditor's right. This promise may be absolute or conditional. If it is absolute, if there is no 'but' or 'if', it will support a suit without anything else; if it is conditional, the condition must be performed before a suit upon it can be decreed. This is the English law on the point; See Leake on Contracts, 6th Edition, 723-724; Philips v. Philips 3 Hare 299 at p. 300 : 13 L.J. Ch. 445; Chasemore v. Turner L.R. 10 Q.B. 500 : 45 L.J.Q.B. 66 : 33 L.T. 323 : 24 W.R. 70. This rule has been followed in India before the passing of the Contract Act; see Tillakchand Hindumal v. Jitmal Sudaram 10 B.H.C.R. 206 at p. 215 (Westropp, C.J., and West, J.); and also after the passing of the Contract Act; see Watson v. Yates 11 B. 580, [Sargent, C.J., and Farran, J.] And we cannot say this is inconsistent with the rules of justice, equity and good conscience according to which we have to administer the law. As the debt is hypothecally barred and the creditor cannot insist upon its having been paid, the debtor, who is inclined to be honest, must be allowed to impose his own terms, if any. He may agree to pay by instalments or by some special arrangement or on the happening of a contingency. The whole of the promise, whether free or clogged with a condition, gives the cause of action. If he says,-- I will pay when I can', the creditor must prove his ability to pay. See Tanner v. Smart 6 B. & C. 603 : 30 R.R. 461 : 9 D. & R. 549 : 5 L.J. (O.S.) K.B. 218; Watson v. Yates 11 B. 580. If he says,-- I will pay by a set off or some special arrangement', the creditor can realise his dues in no other way. See Routledge v. Ramsay 8 A. & E. 221 : 3 N. & P. 319 : 1 W.W. & H. 232. 7 L.J.Q.B. 156 : 2 Jar. 789; Cripps v. Davis 12 M. & W. 159 : 13 L.J. Ex. 217; Goate v. Goate 1 H. & N. 29; Francis v. Hawkesley 1 El. & El. 1052 : 28 L.J.Q.B. 370 : 5 Jur. (N.S.) 1391 : 7 W.R. 509. In the present case, the debtor promised to pay by a share of the profits of the elephant business and the plaintiff cannot receive in any other way.

3. The appeal, therefore, fails and must be dismissed with costs

