

(1953) 07 MP CK 0006

In the Madhya Pradesh High Court

Case No : Civil Revision No. 184 of 1952

Baburam and Others

APPELLANT

Vs

Ochhelal

RESPONDENT

Date of Decision : 06-07-1953

Acts Referred:

Limitation Act, 1963 — Section 19, 20

Citation : (1953) 07 MP CK 0006

Hon'ble Judges : Dixit, J

Bench : Single Bench

Advocate : Shivdayal, for the Appellant; Bhagwandas Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Dixit, J.—This revision petition is directed against an order of the Civil Judge 1st Class Bhind granting leave to the Plaintiff-non-applicant to amend his plaint. On 10-4-1952 the Plaintiff brought a suit to recover Rs. 3400/- the amount of principal and Rs. 56/8/- interest thereon from the Defendant-applicants upon a Hundi dated 24-12-1951. It was said in the plaint that the Defendants who were the owners of the firm Baldeo Prasad Ajudhya Prasad borrowed Rs. 3400/- from the Plaintiff and to secure repayment drew and accepted in their favour a Hundi payable sixty days after 24-12-1951. The Hundi was dishonoured and the Plaintiff accordingly instituted" a suit out of which this revision-petition arises, claiming the amount due upon the Hundi with interest.

After the framing of the issues and while the evidence of the Plaintiff was being recorded, the Plaintiff applied to the Court on 12-9-1952 for permission to amend his plaint so as to convert his suit into one on the original consideration. By the amendment the Plaintiff sought to allege that on 22-4-1948 the Defendants borrowed from him Rs. 1000/- and that on 14-6-1948 they borrowed a further sum of Rs. 1000/- and to secure repayment drew and accepted in their favour a Hundi dated 14-6-1948, for the sum of Rs. 2000/-; that on 4-7-1948 the Defendants again borrowed Rs. 2000/- and secured repayment of the

amount by drawing and accepting in their favour a Hundi for the amount; that subsequently on 15-9-1950 the Defendants repaid Rs. 500/- to the Plaintiff and executed a fresh Hundi for Rs. 3500/- in respect of the balance of the amount due from them; that this Hundi was renewed first on 15-11-50 and then on 30-1-51 and that on 19-5-51 the Defendants again repaid Rs. 100/- and drew a Hundi for the balance namely Rs. 3400/-; that this Hundi was renewed on 24-12-1951. The trial Judge has relying on - Sarafalli Mahomedalli Vs. Mahasukhbhai Jechandbhai, and - "Dhondi Emki Ramal v. Hazari Vittal" AIR 1952 Hyd 137 (B) allowed the Plaintiff to amend his plaint and sue on the original consideration.

2. Mr. Shivdayal learned Counsel for the applicants objected to the leave granted by the learned Judge firstly on the ground that the effect of the amendment was to introduce a totally new and inconsistent cause of action and secondly that the claim on the original consideration was at the date of the suit itself and the date of the amendment barred by limitation. I think the learned Civil Judge was right in permitting the Plaintiff to amend his plaint and sue on the original consideration. The question raised in this revision petition is whether the lower Court was right in allowing the amendment in order to enable the Plaintiff to change the basis of his suit and sue on the original consideration.

It seems to me unnecessary to consider in this revision petition the general question of the circumstances in which it is open to a creditor to fall back on the original consideration if, for any reason, he cannot maintain an action on the instrument itself as for example where the promissory note, or a bill of exchange is found to be inadmissible in evidence for want of stamp. The precise question that I have to consider here is whether when there is a completed transaction prior to and independently of a Hundi is the Plaintiff entitled to recover on the original consideration.

The general question has been considered in a number of cases decided by various High Courts. The classical decision is of Garth C.J. in - "Sheikh Akbar v. Sheikh Khan" 7 Cal 256 (C). In that case the learned Judge observed as follows:

Where a cause of action for money is one complete in itself, whether for goods sold, or for money lent or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person. In such cases the bill or note is said to be taken by the creditor on account of the debt, and if it is not paid at maturity, the creditor may disregard the bill or note and sue for the original consideration.... But when the original cause (sic) action is the bill or note itself, and does (sic) exist independently of it, as for instance, (sic) in consideration of A depositing money with (sic) B contracts by a promissory note to repay it (sic) interest at Six months" date, here there is (sic) cause of action for money lent, or otherwise (sic) upon the

note itself, because the deposit is (sic) upon the terms contained in the note, and (sic) other. In such a case the note is the only contract between the parties, and if for want (sic) proper stamp or some other reason the note (sic) not admissible in evidence, the creditor (sic) lose his money.

3. These observations of Garth C.J. have (sic) considered by most of the High Courts in (sic) cases. Some have followed them; others have (sic) distinguished and explained the meaning of the (sic) servations. But all the Courts are agreed, and (sic) is now well settled, that where the negotiable (sic) strument in question is a mere sequel to the (sic) transaction and not the basis of the (sic) itself, the creditor is entitled to sue both on (sic) instrument and alternatively on the consideration. The controversy in many of the decided case (sic) centred round the question whether when the (sic) and the execution of the contract therefore (sic) contemporaneous or simultaneous does a cause (sic) action exist distinct from the instrument itself. (sic) matter has been exhaustively dealt with by (sic) Rangoon High Court in - Chit Maung v. (sic) N.M.A. Kareem Oomer and Co." AIR 1934 389 (F.B.) (D). It is not necessary for me to (sic)der the decision of the Rangoon High Court (sic) other cases in that line. For, in the present case (sic) question of the Hundi having been drawn (sic) taneously with the loan does not arise.

It is obvious from the amended statements the plaint that the Hundis which the Defendant drew and accepted in their favour and (sic) from time to time were for securing the repayment of the amount due on prior and completed (sic) transactions. The Hundis were given taken (sic) conditional payments of the loan. They were (sic) in accord and satisfaction of the Defendants"(sic) lilty on the original consideration. That, (sic) loan is renewed by execution of a fresh note (sic) a renewal of a previous Hundi, the payment (sic) Hundi or note is a conditional payment only (sic) now clear from the Privy Council decision in (sic) case of - AIR 1930 238 (Privy Council) . In such cases the (sic) of action on the original consideration for (sic)lent remains suspended during the currency (sic) negotiable instrument, and it revives if the (sic) tiable instrument is dishonoured.

The present case seems to me to be con (sic) by the Privy Council decision in - "Sadasuk (sic) das v. Sir Kishen Pershad" AIR 1918 PC 148 (sic) In that case Sir Kishen Prasad and one (sic) borrowed on 14-4-1910 from the Plaintiffs who (sic) the Appellants before the Privy Council a (sic) Rs. 35000/- and to secure repayment drew (sic) accepted in their favour on the same date(sic) Hundis each for the sum of Rs. 2500/-. The (sic) were dishonoured. Thereupon, the (sic) brought an action upon the Hundis to (sic) amount due. The suit was dismissed. Lord (sic) master who delivered the judgment of the (sic) Council made the following observations (sic) very pertinent to the question before me. (sic)

It would, of course, have been open to the Plaintiffs had they thought fit to have (sic) case in an alternative form, and to have (sic) both on the Hundis and alternatively (sic) consideration.

4. These observations show that in cases such (sic) the present one the Plaintiff is entitled to claim (sic) the footing of the original consideration. The (sic) of action on a Hundi is no doubt distinct, from the cause of action on the loan which gave (sic) to the Hundi. But if the Plaintiff could have (sic) sued in the alternative upon the original consideration, it is difficult to see why he should not be allowed to amend his plaint so as to base (sic) suit only on the original consideration. This (sic) finds support in the decision of the Bombay High Court reported in Sarafalli Mahomedalli Vs. Mahasukhbhai Jechandbhai, " (sic) which has been relied upon by the lower Court.

In that case the Plaintiff sued two persons alleg-(sic) them to be partners for the recovery of moneys (sic) on a promissory note. The note was signed by (sic) of the Defendants. The trial Court decreed (sic) Plaintiff's claim against both the Defendants (sic) them to be partners. In appeal the District Judge thought that as the Plaintiff's claim has based on the promissory note which was signed only by one of the Defendants, the Plaintiff (sic) get a decree against the other Defendant (sic) had (sic) signed the note. The District Judge, however, granted leave to the Plaintiff to amend (sic) plaint by claiming in the alternative the money (sic) from that Defendant on the dealing which re-(sic) in the debt secured by the promissory note.

The learned Judges of the Bombay High Court (sic) upholding the decision of the District Judge observed:

The cause of action on a promissory note is distinct from the cause of action on the loan which gives rise to the promissory note. But those two distinct causes of action can be set up in the same suit by the original plaint. Hence if two alternative and inconsistent claims can be combined originally in the plaint there is no reason on principle, why they should not be combined at a later stage by amendment. Whether in any particular case, the amendment is asked for at too late a stage or in circumstances which make (sic) unfair to grant the leave, is another matter, (sic) as a mere proposition of law there is no (sic) why amendment of this nature should not (sic) allowed at the trial or even in appeal.

5. In my opinion the amendment that has been (sic) here has not the effect of converting the (sic) another of a different and inconsistent (sic). The decision of the Privy Council in (sic) Shwe Mya v. Maung Mo Hnaung" AIR 1922 249 (G), on which Mr. Shivdayal learned (sic) for the applicants relied to support his (sic) that as the amendment made by the Plaintiffs introduced a totally different and new (sic) inconsistent case, it could not be allowed, has (sic) applicability here. When that case is carefully (sic) it will be seen that the three sites to (sic) the amended plaint related, were different (sic) the sites in respect of which the original re-(sic) Claimed. In that case the original suit (sic) upon a contract made in 1912 and it (sic) by amendment to base the suit on a (sic) different contract. The facts of the present (sic) entirely different. The subject-matter of (sic) has not been changed; the money (sic) in the original plaint, as also in the (sic) plaint remains identical. I And nothing (sic) Privy Council case referred to above to (sic) me to

give effect to Mr. Shivdayal's con- (sic) the amendment made by the Plaintiff (sic) a totally new and inconsistent cause of (sic).

As regards the further contention of the (sic) counsel for the applicants that the claim on the original consideration was at the date of the suit as well as at the date of the amendment barred by limitation, there can be no dispute as to the proposition that as a rule the power of a Court to amend the plaint should not be exercised where its effect would be to take away from a Defendant the legal right which has accrued to him by lapse of time. See - "Charandas v. Amir Khan" AIR 1921 PC 50 (H). But here the Plaintiff is relying on the repayments said to have been made by the Defendants on 15-9-1950 and 19-5-195(sic) as sufficient under Sections 19 and 20, Limitation Act to save limitation for his suit filed on 10-4-1952.

6. The questions whether these payments were made, and whether they are sufficient under Sections 19 and 20, Limitation Act to save limitation are issues of fact to be determined at the trial. The question of limitation in the present case is not one of pure law to be determined on any facts admitted in the pleadings of the parties. That being so the amendment cannot be refused merely on the allegation of the applicant that the Plaintiff's suit on the original consideration was barred by time at the date of the institution of the suit as well as at the time of the amendment. If after investigation the Plaintiff's claim on the original consideration is found to be barred by time at the date of the amendment or at the date of the suit it will no doubt be dismissed.

7. I think the learned Civil Judge was right in permitting the Plaintiff to amend his plaint and fall back upon the original consideration. The amendment cannot be refused merely on the ground that the Plaintiff did not apply for leave before the hearing. One of the settled rules with regard to amendment of the pleadings is, that "however late the proposed amendment, it should be allowed if it can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs." Here the applicant's defence is a total denial of the Hundi transaction. It cannot therefore, be said that the applicants have been prejudiced by the amendment. On the record there is no reason to think that the application for amendment was not made in good faith. Before me learned Counsel for both the parties admitted that the Plaintiff was now seeking to have this original claim tried in order to get rid of a technical plea that the Hundi was not admissible in evidence for want of proper stamp in accordance with the, Indore Stamp Act, 1907, a plea calculated to defeat his claim.

8. For all these reasons I think the amendment was rightly allowed on payment of Rs. 20/- as costs to each of the Defendants to meet the ends of justice. In the result this revision petition is dismissed. Costs of this petition will follow the result of the suit in the trial Court.