

(1960) 09 OHC CK 0007
In the Orissa High Court
Case No : Second Appeal No. 224 of 1958

Banambar Das, Executive Officer

APPELLANT

Vs

Udayanath Pattanaik and Others

RESPONDENT

Date of Decision : 13-09-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Contract Act, 1872 — Section 59, 60, 61
Evidence Act, 1872 — Section 114

Citation : AIR 1961 Ori 148

Hon'ble Judges : S. Barman, J

Bench : Single Bench

Advocate : H.G. Panda, for the Appellant; L.K. Das Gupta and G.N. Sengupta, for the Respondent

Final Decision : Dismissed

Judgement

S. Barman, J.—The question of creditor's right of appropriation under the Indian Contract Act. is the main point involved in this second appeal filed by the Executive Officer, Endowment Trustee Board Dakhinparswa alias Sree Ramdas Math, Town Puri (defendant No. 3 in the suit) as the appellant from a reversing decision of the learned Subordinate Judge, Puri, whereby he modified the decree of the learned Munsif and decreed the plaintiff's suit in full for arrears of salary, on the facts and circumstances hereinafter stated.

2. The defendant Mahant Jagannath Ramanuj Das as Marfatdar of Sri Jagannath Mahapravu deity employed the plaintiff as his law agent under verbal agreement at a monthly salary of Rs. 25/- and 12 Gounies of paddy. The plaintiff worked as such agent but due to his having incurred dissatisfaction of the Mahant, the plaintiff had to leave service on February 11, 1955. The amount claimed by the plaintiff in the suit was for Rs, 1,144/6/9 (inclusive of Rs. 859/2/9, the balance being for paddy which was found to have been paid) for his salary from April 1, 1952 to February 11, 1955.

The defendants in the suit are Jaggannath Mahaprabu through the Marfatdar as defendant No. 1; defendant No. 2 Mahant Srinivas Ramanuj as Chela of Jagannath Ramanuj Das; and defendant No. 3 is the appellant herein who as Executive Officer had taken charge of the administration of the Math.

The main defence was on the question of the right of appropriation of certain moneys towards past arrears of salary due to the plaintiff. Admittedly, the plaintiff had received, during the period in question, a sum of Rs. 553/10/9, The question is whether the sum could be appropriated towards past arrears due to the plaintiff.

The trial Court, on evidence, found that the plaintiff cannot appropriate the said sum towards past arrears, if any, prior to the institution of the suit; accordingly the trial court decreed the suit in favour of the plaintiff in part for a sum of Rs. 305/8/-, being the balance after deducting the said sum of Rs. 553/10/9. There was, however, no cross-appeal from that part of the decree. In appeal, the learned lower appellate court found that the plaintiff can appropriate the said sum towards past arrears u/s 60 of the Indian Contract Act; and accordingly decreed the suit in favour of the plaintiff for the entire sum claimed in the suit. Hence this Second Appeal.

3. The only point of law, which is involved in this appeal, is whether the plaintiff had right of appropriation of the said sum of Rs. 553/10/9 towards the past arrears of his salary under the Indian Contract Act. Mr. H. Panda, learned counsel for the defendant appellant contended that neither Section 59 nor Section 60 nor Section 61 applied in the case, because, here, according to him, there was no question of "several distinct debts", for the salary from month to month is one debt and not several distinct debts, only they become payable month after month and they are neither several nor distinct. The learned counsel's further contention was that no specific issue was raised whether the defendants owed any debt to the plaintiff for the period prior to the institution of the suit; he also commented on certain adverse inference drawn by the learned lower appellate Court against the defendant appellant for alleged non-production of accounts; and lastly he relied on certain alleged errors of fact.

4. On the main point of creditor's right of appropriation, for the sake of convenience of reference, Sections 59, 60 and 61 of the Indian Contract Act are quoted below:

"Section 59. Where a debtor, owing several distinct debts to one person makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Section 60. Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for

the time being as the limitation of suits.

Section 61. Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately."

On interpretation of the said sections, it is contended on behalf of the defendant appellant that the dues to the plaintiff, based on one cause of action, namely, his employment as the law agent under the defendants, amount to a single debt payable in instalments on monthly basis. In this context, several decisions were cited by Mr. Panda in course of the hearing. In each of these cases, it appears that the decision was based on particular facts and circumstances, of the case.

Thus in F.H. Manisty and Others Vs. J.V. Jameson and Another, the question was whether a certain sum was to be credited towards mortgage loans or personal loan of a party; the Patna High Court allowed the sum to be credited towards personal loan account of the party with the result that the mortgagor could not be exempted from the mortgage on the mortgage loan for the amount claimed by the plaintiff therein. There, undoubtedly the two debts --one being mortgage loan and the other personal loan -- were several and distinct debts.

So, also in Har Sahay Mull and Others Vs. Gokul Chand, , it was a case of sale of goods on several occasions and the transactions between the parties constituted mutual account that is to say, the transactions on each side created independent obligation on the other, and not merely transactions which created obligation on one side, those on the other merely being complete or partial discharge of such obligations. In this case also dues on each transaction were distinct and several debts.

But, with regard to arrears of land revenue and costs incurred in its recovery, they undoubtedly are not two distinct debts because they form single debt and thus a debtor has no right of appropriation. So, also in a case of single indivisible debt, consisting of principal and interest, if the debtor appropriates a payment towards the principal, the creditor need not accept payment on those terms; there can be no dispute that interest is only an oft-shoot of the principal and therefore it is not several nor distinct from each other -- one is as consequence of or incidental to the other.

5. In the present case, the basic facts, --on which the question of appropriation has to be decided, -- are that in the plaint it is pleaded that the plaintiff was appointed in 1931 and his employment was terminated in 1955; there is also a schedule of payments received by the plaintiff, the rate of his remuneration being Rs. 25/- and also 12 Gounis of paddy per month; after giving credit for the payments received the plaintiff claimed the balance in the suit.

In the written statement, the defendant admitted the time of commencement of

service which, according to the defence case, terminated in 1949 and not in 1955 as alleged in the plaint; as to the rate of the plaintiffs remuneration the defence case is that it was Rs. 15/- per month, and subsequently 12 gounis of paddy was agreed to be paid only from 1948; on this basis, the defendants' point is that the dues of the plaintiff had been cleared off. As to the rate of remuneration, the concurrent finding of the Courts below is that under the terms of employment, the plaintiff was to be paid Rs. 25/-per month and also 12 Gounis of paddy per month.

On these pleadings, there is no merit in the defence point that there was no specific issue raised whether the defendants owed any dues for the period prior to the institution of the suit, to which the said payment of Rs. 553/10/9 could be appropriated.

On the question whether the debt was several and distinct, Mr. L.K. Dasgupta, by way Of analogy, argued that as rent is payable in Kists although the rent becomes due to the landlord annually; there the rent is a several and distinct debt and the landlord has the right to appropriate the earlier dues. The test is whether one can sue for such dues under Order 2, Rule 2, C. P. C., providing that every suit shall include the whole of the claim, which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court; and where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Thus, put to this test, cause of action for account against the agent for each year is separate and so separate suit for each year can be brought; Rule 2 requires that every suit shall include the whole of the claim arising from one and the same cause of action and not that every suit shall include every claim or every cause of action which the plaintiff may have against the defendant. Now, in the present case, the dues in respect of the work done by the plaintiff as law agent is a debt which accrues at the end of the month. The salary, being his monthly pay, becomes due for one month's work and accordingly, in my opinion, is a several and distinct debt, for which the plaintiff can sue under Order 2 Rule 2 Civil Procedure Code. I, therefore, hold that the plaintiff can appropriate the said sum of Rs. 553/10/9 towards his past arrears of salary.

6. Mr. H.G. Panda commented on the judgment of the learned lower appellate Court for certain adverse inferences, from alleged non-production of documents, which, according to the learned counsel, were not justified. It appears that the defendant Mahant had taken receipts from the plaintiff at the time of each payment; if these receipts were produced, then they would have shown the actual position. So, the non-production of these material documents leads to certain presumption against the defendants. The defence contention on this point is untenable -- The learned counsel for the defendant appellant also relied on certain alleged errors of fact which, in my opinion, are not with regard to

material facts, as to vitiate the decision of the learned lower appellate Court.

7. I, therefore, uphold the decision of the learned lower appellate Court. This appeal is, accordingly, dismissed with costs.