

(1921) 07 PAT CK 0004
In the Patna High Court

Bhatu Das and Others

APPELLANT

Vs

Musammat Bibi Iffatun Nisha and Others

RESPONDENT

Date of Decision : 27-07-1921

Acts Referred:

Citation : 63 Ind. Cas. 280

Hon'ble Judges : Jwala Prasad, Acting C.J.; Das, J

Bench : Division Bench

Judgement

Das, J.—I am unable to agree with the view taken by the learned District Judge. I will assume, for the purpose of argument, that there was an "account stated" by the defendant to the plaintiffs on the 30th Bhado 1319 within the meaning of the term as used in Article 64 of the Limitation Act; but the question still remains whether the translation of the 30th Bhado 1319 extinguished the debts on which the account was based. The position is somewhat peculiar. The plaintiffs have six years' time to bring the suit on the original contract, which was in writing registered; but have only three years if the suit is brought on the account stated; and this result follows, that if the suit be regarded as a suit for the breach of the original contract, the suit is well within the time, whereas if the suit be regarded as a suit on the account stated, it is clearly barred by limitation. Now, so far as the form of the suit is concerned, it is undoubtedly on the original contract; but Mr. Akbari on behalf of the respondent argues that as there was a settlement of account between the parties, it was not open to the plaintiffs to sue on the original contract.

2. The critical question for our determination, therefore, is, did the transaction of the 30th Bhado 1319 extinguish the debts on which the account was based; for, if it did, there is no escape from the conclusion that the plaintiffs' suit is out of time. But, on the other hand, if it did not, there is nothing to prevent the plaintiffs from suing on the original debt which, on the assumption which I have made, still subsists.

3. It will be sufficient to refer to the case of Callander v. Howard (1850) 10 C.B.

290 : 138 E.R. 117 : 19 L.J.C.P. 312 : 1 L.M. & P. 562 : 34 R.R. 575, it was pointed out in that case that the adjustment of the account, together with the implied or express promise to pay the balance, cannot be regarded at) the extinguishment of the original debt; and consequently, that it cannot be set up, by a plea in assumpsit, as affording, per se, a defense to an action, but must be treated in pleading as a payment. It was no doubt the view at one time that, after such an account, the plaintiff could never have recourse to the original contract which was thereby merged in the account. But, as was pointed out by Wilde, C.J., in the case cited, this opinion has been since overruled. Thus in *Scarborough v. Butler* (1685) 3 Lev. 237 : 83 E.R. 668 it was pointed out that the new promise on the account was only a chose in action and that one chose in action could not be discharged by another chose in action of the same nature.

4. All these cases were cases on pleading, where the learned Judges had to consider whether a plea was a good plea so as to be an answer to a suit. The principle underlying all these cases is this, that where two persons have cross-demands against each other and they meet together and set off the demands of one against the other, this is all one as if the obligor had paid to the obligee, and he had re paid him. This is a payment by way of retainer," In other words, the transaction is one of payment, and not of the creation of a fresh contrast extinguishing the original contract. It was for this reason that the English Judges came to the conclusion that where two persons have cross demands against each other and they agree to set off the demands of one against the other and an action is brought by one on his original demand, it is not sufficient for the other to plead the adjustment of account but it is necessary for him to plead the account according to the operation it has in law, and that is, a payment. The rule they set up was this: that the plea of account is bad, unless it in effect sets-up the allowances in account by way of partial payments, and an actual payment of the residue. It must follow from this that where there is in fact no payment of the residue, the plea that there was an account stated by the defendant to the plaintiff is no answer to the plaintiff's action based on the original contrast.

5. It was argued before us that the Legislature having provided a period of limitation for a suit on an account stated, it must impliedly have prohibited a suit on the original contrast when an adjustment of account has taken place. The argument in my opinion, ignores the fact that the Limitation Act does not purport to deal with causes of action. The plaintiff is undoubtedly entitled to maintain a suit on an account stated; and where he exercises that right, Article 64 must apply. But the difficulty whether the adjustment of account extinguishes the debts on which the account is based is not solved by a reference to the Limitation Act. I hold that the plaintiffs are entitled to sue on the original contract and that their suit is within time.

6. There is some difficulty as to the sum of Rs. 273 odd alleged to have been paid by the defendants to the appellants. The learned Subordinate Judge disbelieved this payment, but the learned District Judge says that the signature

exactly tallies with that in the kabala. It is difficult to say that the learned District Judge definitely overruled the view of the learned Subordinate Judge on this point. We think that in the circumstances the learned District Judge ought to record his finding on this issue, viz., was the sum of Rs. 273 odd paid by the defendants to the plaintiffs as alleged by them?

7. Let the record be sent down to the Court below forthwith, and let the learned District Judge return his finding on this issue within a month from the date he receivee the record from this Court. Costs will abide the result.

Jwala Prasad, Acg. C.J.

8. I agree.