

(1871) 07 CAL CK 0008
In the Calcutta High Court

Brammamayi Dasi

APPELLANT

Vs

Abhai Charan Chowdhry

RESPONDENT

Date of Decision : 19-07-1871

Acts Referred:

Citation : (1871) 07 CAL CK 0008

Judgement

Norman, J.—The question is whether the suit is barred by clause 9, section 1, Act XIV of 1859. The first Judge of the Court of Small Causes, referring to the case of Tarini Prasad Ghose v. Ramkrishna Banerjee 6 B.L.R., 160, was of opinion that the suit was not barred, and accordingly made a decree in favour of the plaintiff, subject to the opinion of the Court on the question above stated. It is necessary to observe that the contract¹ in the present case is not a single entire indivisible contract to pay the sum lent with interest, as in the case of Norton v. Ellam 2 M. & W., 461. It contains two distinct and separate obligations, viz., first, an obligation to pay Rs. 6 month by month by way of interest; and, secondly, an obligation to repay the principal on demand. The plaintiff does not bind herself to allow the principal money to remain in the hands of the defendant for any definite period of time, and I think it must be admitted that according to the true construction of this contract, the plaintiff would at any time have a right to demand payment of the principal, and by parity of reason, the defendant would at any time have a right, instead of continuing the monthly payment of Rs. 6, to pay off the principal. In construing contracts, no rule is better established than that full effect must be given to every part of the contract. If the contract with which we have to deal be treated as an obligation to pay Rs. 6 a month, and also as an obligation to repay the principal sum immediately without any demand, the two parts of the contract would be repugnant. The defendant, however willing to perform his part of the contract, would not know whether to repay the Rs. 800 at once, or to wait for a month and pay the Rs. 6. But if the two obligations are construed as alternative, if the term "on demand" is to be construed as if it were written "upon being thereto requested" or "after demand," the whole contract becomes consistent and intelligible. The defendant is bound to pay to the plaintiff

a monthly sum of Rs. 6 until the principal sum of Rs. 800 be demanded, and immediately on such demand, and not before, except at his own election, the defendant is liable to pay to the plaintiff the principal sum of Rs. 800. If this view of the case be correct, the case before us falls within the rule that, where by the terms of the contract, either express or implied, it is stipulated that a request or demand of performance shall be made, such demand must be made in order, to complete the cause of action. This must always be the case if the obligation is in the alternative, and the obligee has the right of election.

2. In the present case, while the plaintiff consents to receive the Rs. 6 a month, and the defendant pays that sum regularly, the defendant is under no obligation to pay the Rs. 800 to the plaintiff. The defendant retains the money on terms analogous to those on which a tenant-at-will holds land on payment of a fixed rent. In order to determine the tenancy in the one case, and the right to retain the money, making the monthly payments, on the other, as notice in the one case, so a request for payment in the other, would seem to be necessary. If the construction suggested be correct, as long as the defendant fully performs the first of the two alternative obligations by paying the sum of Rs. 6 monthly, the contract continues to be fully performed, and there is no breach of it.

3. The case may be compared to that of the grant of an annuity which the defendant has a right to redeem on payment of the purchase-money.

4. The case of *Cowper v. Godmond* 9 Bing., 748 is somewhat analogous to that now before us. There the sum of ? 1,999 had been paid by the plaintiff as the consideration for an annuity of ? 237 in May 1824. Payments on account of the annuity were made by the defendant till the year 1829. In the year 1830, the defendant obtained an order from the Court of King's Bench, setting aside the warrant of attorney and judgment by which the annuity was secured, upon the ground that the grant of the annuity was void on account of a defect in the memorial. The plaintiff then brought his suit to recover back the consideration. The defendant objected that the suit was barred by limitation, on the ground that the right of action accrued at the time of the original contract in 1824. Tindal, C.J., says:--"The question is whether the plea of the statute of limitations is a bar to an action for money had and received for the recovery of the consideration-money of a void annuity, when the annuity was granted more than six years before action brought, but was treated by the grantor as a subsisting annuity within that period? That question depends upon another, at what time did the cause of action arise? The cause of action comprises two steps: the first is the original advance of the money by the grantee; the second is the grantor's election to avail himself of the defect in the memorial of annuity. The cause of action was therefore not complete till the last step was taken in Michaelmas Term, 1830. If we were to decide otherwise, the grantor of a defective annuity might in every case defraud the annuitant by paying the annuity for six years, and then, having set aside the securities, by pleading the statute of limitations." It is true that this case is not precisely in point, because, as was pointed out by

Sergeant Wilde in argument, the grantee was precluded from questioning the validity of the annuity, and consequently could maintain no action till the grantor had elected to avoid the annuity. In the present case it was in the power of the plaintiff at any time, by notice or demand, to determine the defendant's obligation to pay the monthly sum of Rs. 6, and to call on him to perform the other branch of the agreement. But the fact that the plaintiff had an option to that effect, does not show that she was bound to exercise it. Nor can it be presumed, for the purpose of defeating her right by a plea of limitation, that she had exercised that option when such presumption would be contrary to the fact. It may be that the defendant, by ceasing to pay the monthly instalment of interest, might render it unnecessary for the plaintiff to make a demand before bringing any suit. But on that point it is not necessary to express any opinion.

5. If the true construction of this contract be, as I have supposed, it is clear that the suit, having been brought within three years from the date of the last monthly payment, and within three years from the demand, is within time.

6. I prefer to rest this case, on general grounds, upon the construction, and what I conceive to be the true meaning, of the contract. But another ground was also put forward, on which the plaintiff's case may be rested, viz., that the parties are Hindus; that within the original jurisdiction of the High Court, by the 17th section of the 21st Geo. III., c. 70, "matters of contract and dealing between party and party, are to be determined," in the case of Hindus, by the laws and usages of Hindus; that by the Hindu law, a loan which has been received from the hands of another, in the form of a loan at interest, shall, if the time of payment be not expressed, be paid on demand, with the interest then due, if not previously demanded, when interest ceases, or becomes equal to the principal. In support of these propositions, the text of Vrishaspati, Colebrooke's Digest, Book I, Chapter V, verse 166, was cited. In Halhed's Code of Gentu Laws, Chapter I, section 4, page 17, it is said, "if a man lends money with stipulation to be paid on demand, and the borrower consents to take it upon this restriction, he shall accordingly pay it when demanded."

7. I desire to guard myself from being supposed to assent to the views of Mr. Austin, stated by the Court in the case of Tarini Prasad Ghose v. Ram Krishna Banerjee 6 B.L.R., 160. I cannot but think that, however plausible those views may sound, it might be quite another matter if they were reduced into practice². To say as a matter of general law that a tradesman who sells goods to a customer, without any express stipulation as to the time of payment, or that a banker who lends a customer money, or honors an overdraft, cannot sue until after a demand of the money, would be to introduce a new element into mercantile law, for which there is certainly no authority, and which I believe would lead to most inconvenient consequences. The present case is similar in all respects to that before Mr. Justice Macpherson of Parbati Charan Mookerjee Vs. Ramnarayan Matilal and Others , where that learned Judge expressed in very strong language his opinion that the suit was not barred, though he decided

otherwise, considering himself bound by English authorities, which, I think, do not decide the question. The decision of the Judge of the Small Cause Court appears to me to be correct.

8. The plaintiff will get the costs of, and occasioned by, the statement of the case. Phear, J.

It is settled in English law by the authority of such cases as *Norton v. Ellam* 2 M. & W., 461, that a simple promise to pay money on demand constitutes an obligation to pay the money at once, whether demand be actually made or not; and that consequently an action can be brought to compel payment, without any previous demand, at any the earliest time after such a promise is made. The same is the case if the promise be a promise to pay money on demand with interest; the only difference between these two instances being that in the latter the debt grows with the time, while in the other it remains constant. But the case is materially altered when any additional element is introduced into the contract. In the matter before us, as I understand the learned first Judge's statement of the facts, it was agreed between the parties that, while the money was to be repaid on demand, yet until repayment the plaintiff was to receive periodically,--namely, every month,--a specified sum by way of interest. This latter stipulation is in its character, so to speak, alternative to the first, and clearly involves duration. It seems to me that, by agreeing to this, the plaintiff impliedly undertook to wait from month to month for the payment of this sum, unless meanwhile she made demand for the principal. In other words, the contract must be considered as a whole, and the promise to pay on demand cannot be treated as separate from, and unaffected by, the arrangement for periodic payments of money by way of interest. As long as the plaintiff forbore to make demand of the principal, and the defendant at the stipulated periods paid the monthly sums by way of interest, so long it was, as it seems to me, impossible in reason to say that the plaintiff had any cause of suit; the contract was clearly in "the course of being carried out just as the parties intended it should be.

1 As to the effect of such a contract, when the contract is to pay principal and interest on a certain day, see *Watkins v. Morgan*, 6 C. & P., 661, per Norman, J.

2a The rule that, where no time is fixed for performance of a stipulation, the obligor is bound to perform the stipulation immediately, and not merely when he shall be apprized of the wish of the obligee, is by no means peculiar to English law. The American rule follows that of English law; *Story on Bills*, Chapter IX, p. 281. The rule of the Civil Law is similar. In *Domat's Civil Law*, Part I, Book I, Tit. I, s. 3, para. 6, it is said:--"If it has been omitted in a covenant to express the term of payment, or delivery of any other thing promised, it is a consequence of the covenant that, since the term is added only in favor of the person who is obliged, if no time is allowed him for performing what he ought to do or to give, he is bound to give it, or do it immediately, and without delay, unless it happens that the performance of the covenant implies the necessity of a delay, as if the performance is to be made in another place than that where the parties entered

into the covenant." See also the Digest, Book XLV, Tit. I., De Verborum Obligationibus, s. 41, ? 1, and Book L, Tit. XVII. De Regulis Juris, s. 14, "In omnibus obligationibus in quibus dies non ponitur presenti die debetur." So in the Roman Dutch law, Van Lieurnen, Book IV, Chapter III, s. 3, p. 324:--The effect of a promise made to be performed simply is that it acquires its commencement immediately, and the acceptor thereby acquires without delay a right and an action." The French Code seems to lay down the same rule--Code, Civil, Book III, Tit. III, s. 1187.

The Scotch law follows the Civil on this point--Bell's Principles of the Law of Scotland, s. 45, 46, 69, 201; Erskine's Principles of the Law of Scotland, Book III, Tit. I, s. 3, p. 277, edition of 1870; Napier on Prescription, p. 774. The rule requiring notice to the debtor if he can be found before commencing the action, contained in the Roman law, as mentioned by Mr. Austin, does not qualify the nature of the obligation. In this country the discretion of the Court as to costs is a sufficient protection to the debtor.--Per Norman, J.