

(1878) 02 CAL CK 0016
In the Calcutta High Court

Hemendro Coomar Mullick

APPELLANT

Vs

Rajendrolall Moonshee and Another

RESPONDENT

Date of Decision : 11-02-1878

Acts Referred:

Contract Act, 1872 — Section 43

Citation : (1878) ILR (Cal) 354

Hon'ble Judges : Richard Garth, C.J; Markby, J

Bench : Division Bench

Judgement

Richard Garth, C.J.—This suit was brought against the defendants to recover the amount of a promissory note, which was alleged to have been made by them jointly with one Gourhurry Shaw. It appeared from the plaint, that a former suit had been brought by the plaintiff against Gourhurry Shaw and the defendants; but as the note was signed by Gourhurry alone, professing to act for himself and the defendants, and as the plaintiff did not prove at the trial that Gourhurry had authority to act for the defendants in making the note, the plaintiff obtained a decree against Gourhurry alone, leave being reserved to the plaintiff by the learned Judge to bring another suit upon the note against the present defendants.

2. No satisfaction of the debt having been obtained against Gourhurry under the former decree, the plaintiff brought the present suit; but the defendants' object in the first instance, that as the liability upon the note was a joint one, the judgment obtained against Gourhurry is a bar to this suit, and that the rule laid down in the case of King v. Hoare 13 M. and W. 494, 505 is applicable here. The defendants also raise the question, whether the plaintiff had authority to pledge their credit; but if they are right in the question of law, it is not necessary for us to enter upon the question of fact.

3. The learned Judge in the Court below has decided the point of law in the defendants' favour, and I entirely agree with him.

4. The rule which was laid down by the Court of Exchequer in the case of King v.

Hoare 13 M. and W. 494, 505, and subsequently by the Exchequer Chamber in the case of Brinsmead v. Harrison L.R. 7 C.P. 547 is not a rule of procedure only, but of principle,--viz., that a judgment obtained against one or more of several joint contractors or joint wrong-doers operated as a bar to a second suit against any of the others. There is but one cause of action for the injured party in the case of either a joint contract or a joint tort; and that cause of action is exhausted and satisfied by a judgment being obtained by the plaintiff against all or any of the joint contractors or joint wrong-doers whom he chooses to sue. If a plaintiff, under such circumstances, were allowed to sue each of his co-debtors or wrong-doers severally in different suits, he would be practically changing a joint into a several liability.

5. This rule is so fully explained by Baron Parke, in King v. Hoare 13 M. and W. 494, 505, and by Chief Baron Kelly in Brinsmead v. Harrison L.R. 7 C.P. 547, that I do not think it necessary to enlarge further upon it.

6. It is a rule which in my opinion is founded on strict justice and public convenience; and it has been acted upon in this Court in the case of Nuthoo Lull Chowdry v. Shoukee Lall 10 B.L.R. 200.

7. It was much pressed upon us in the argument by Mr. Hill, that the effect of Section 43 of the Indian Contract Act is to enable a promisee to sue one or more of his joint promisors severally in two or more suits; or, in other words, to change a joint liability into a several one at the option of the promisee; but this, I conceive, is not the object or effect of the section. It merely allows the promisee to sue one or more of several promisors in one suit; and so practically prohibits a defendant in such a suit from objecting that his co-contractors ought to have been sued with him.

8. It is true that the rule upon which I am acting may possibly lead to some hardship in cases when one or more of several co-contractors is out of the jurisdiction, and the plaintiff, if he waits for his return, would be barred by the Statute of Limitation. But this is an injustice which the Legislature, if they so pleased, could easily remedy, and which has been, in fact, remedied in England by the Statute of 19 and 20 Vict., c. 97.

9. I consider, therefore, that the appeal should be dismissed with costs on scale No. 2.

Markby, J.

10. This suit was brought against the defendants to recover the amount due upon a promissory note. It was stated in the plaint that the note was made by one Gourhurry Shaw, who carried on business in partnership with the defendants; that a suit had been previously brought against Gourhurry Shaw and the present defendants; and that on that occasion the plaintiff had obtained a decree against Gourhurry alone. By this decree the former suit as against the present defendants was ordered to be withdrawn at the request of the plaintiff

with liberty to the latter to bring a fresh suit against them for the same matter.

11. It was admitted by the defendants that they carried on business as ordinary traders in partnership with Gourhurry Shaw, and they did not deny the making of the note by Gourhurry; but they denied that Gourhurry had any authority to bind his partners by the note, which they alleged to have been in fact made for the purchase of another business in which Gourhurry was concerned.

12. No evidence was given in the case, but it is admitted that nothing has been recovered by the plaintiff upon the decree against Gourhurry. The learned Judge below dismissed the suit upon the ground that the plaintiff having elected to take a decree in the former suit against one of the joint-makers of the note only, could not bring another suit against the other joint-makers.

13. The note was not produced, so that we do not know the exact form of it. The question, however, as I understand it, which is submitted for our consideration, is this: if several persons carrying on an ordinary trading partnership make a joint promissory note, and one partner be sued upon it and a decree obtained, is any subsequent suit upon the same note against the remaining partners barred, even although nothing has been recovered upon the former decrees? If this question be answered in the affirmative, the appeal is to be dismissed.

14. I also understand it to have been conceded on the argument that this is a question which is to be determined by the English Law of Contract, except so far as the same may have been modified by the Indian Contract Act. I think it impossible to deny that, under the English law, this suit would have been barred, and notwithstanding the great authority of Mr. Justice Willers, who seems to think otherwise, I should say, not as a mere rule of procedure, but upon principle of the Law of Contract. If this were a mere matter of procedure, the English law would not necessarily bind us. But I understand Parke, B.'s judgment in *King v. Hoare* 13 M. and W. 493, 505, which is the leading authority, to rest upon this, that, under a joint contract to pay a sum certain, there is but one single obligation which may indeed be enforced severally, but can be enforced once only.

15. Other principles are stated in the judgment, but they are either based upon rules of pleading not applicable to the case now under consideration, or they apply only to cases where the suit is brought to recover damages and not for a sum certain.

16. Of course, in all questions of this kind, the liability must depend ultimately upon the intention of the parties; but I consider that it is now finally settled by the law of England that, apart from a Statute which I shall notice presently, and which is not applicable here, a joint promissory note creates an obligation which can be sued on once only.

17. If this be, as it seems to me to be, the true mode of stating the law, all difficulty about the further question which has been argued disappears. Mr. Hill contended that Section 43 of the Contract Act did away with the rule that the

second suit was barred in such a case as this. But that section does no more than place the liability arising from the breach of a joint contract and the liability arising from a tort upon the same footing,--that is to say, that each wrong-doer is liable to be separately sued in respect of the whole liability. But it does not touch that which has been determined to be the nature of the obligation created by the breach of contract,--namely, that it is one which can be sued on once only.

18. I have searched into this matter with some care in order to see if the rule laid down in *King v. Hoare* 13 M. and W. 494, 505 was really binding upon us, because if it was not, I think it would require some consideration how far it is desirable that in such a case as this a note made by an ordinary trading partnership, the second suit should be barred. The rule laid down by Parke B. in *King v. Hoare* 13 M. and W. 494, 505 is very likely correct in theory. It is at any rate identical, or nearly identical, with the strict rule of the ancient Roman law. But it must be borne in mind that this rule was abolished in the Roman law 1300 years ago; and has been since repudiated in America and everywhere in Europe, except in England. Even in England, until the decision of *King v. Hoare* 13 M. and W. 494, 505 it was very doubtful whether the rule prevailed or not in joint contract; whilst since that time one learned Judge (Sir James Knight Bruce has spoken of the rule in strong terms of disapprobation 27 L.J. Bank. 29. Lord Mansfield also expressed the opinion in *Rice v. Shute* 1 Sm. L.C. 6th ed. 513 that all contracts with partners were joint and several; and the rule in *King v. Hoare* 13 M. and W. 494, 505 has been since modified by Statute in England. The 19 and 20 Vict., c. 97 Section 11, directs that the period of limitation as to joint-debtors shall run notwithstanding that some are beyond seas; but expressly provides that the creditor shall not be barred as against those out of the jurisdiction by judgment recovered against those who remain within it. If the rule laid down in *King v. Hoare* 13 M. and W. 494, 505 be combined with the law of limitation here, which is very strict, it is by no means clear that a creditor might not very often be left to the choice between a remedy against an insolvent debtor and having his debt barred.

19. I do not deny that there are important considerations of convenience the other way. These considerations have been pointed out and insisted on by several learned Judges of great experience in England, and just now by the Chief Justice. I only say that if I were at liberty to enter upon the general question of convenience, I should hesitate much before applying to this country without any qualification the rule laid down in *King v. Hoare* 13 M. and W. 494, 505. As it is, however, I am bound to follow that decision, and to hold that this being a case governed by the English law, the learned Judge was right in dismissing the suit.