(1939) 08 PAT CK 0024

In the Patna High Court

Kamaleshwari Prasad and Another — APPELLANT

Vs

Gangadhar Mal and Others — RESPONDENT

Date of Decision : 23-08-1939

Acts Referred:

Contract Act, 1872 — Section 59
Limitation Act, 1963 — Section 25

Citation : AIR 1940 Patna 52

Hon'ble Judges : Rowland, J;Chatterji, J

Bench : Full Bench

Judgement

Rowland, J.—This is an appeal by the plaintiffs in a money suit. The claim was to recover the balance due as the net result of a series of transactions between the parties between the years 1341 and 1343 IPC. It is common ground that the plaintiffs had a Hindu joint family firm and the defendants had another. Between these there had been business relations for a long time. On 20th Asin 1341 the accounts between the parties were closed and entered up as being fully satisfied; and no balance due to either party. Then on 21st Asin 1341 the plaintiffs made an advance of Rs. 2500 to the defendants. In witness of this advance a handnote was executed which bears dates according to the Fasli and English calendars, that is to say 21st Asin 1341 corresponding to 25th October 1933. The difficulty is that these two dates do not correspond. 21st Asin 1341 was 25th September 1933.

2. After this the parties continued to do business with each other. The transactions in suit which are the transactions at Jhajha in District Monghyr consisted of further advances by the plaintiffs to the defendants and some payments by the defendants to the plaintiffs. Transactions up to Baisakh 1343 are summarized in the plaint and the net result according to the plaintiffs was a liability of the defendants to the plaintiffs of Rs. 2949-8-6 on account of principal together with some interest. The correctness of the books of account and the genuineness of the transactions were not seriously challenged by the principal defendant though the guardian ad litem for the minor defendants who are sons

of defendant 1 filed a written statement putting the plaintiffs to strict proof. The substantial defence taken by all the defendants was limitation.

3. Of the transactions to which the suit relates the only one that was beyond three years from 27th November 1936, the date of suit, is the advance of Rs. 2500 on 21st Asin 1341. The plaintiffs'' case was that this loan was not time-barred because though the advance was made on 25th September the handnote was executed on 25th October. On this point both Courts have held that the advance was in fact made and the handnote executed on 21st Asin 1341 corresponding to 25th September 1933 and that the English date 25th October 1933 is merely a mistake. The plaintiffs contend that they are entitled to count limitation from the date which the hand-note bears calculated according to the Gregorian calendar u/s 25, Limitation Act, and that the parties should not have been allowed to enter into evidence to prove that the date of execution was another date than that written according to the English calendar in the handnote.

4. We have considered this contention which appears to be a matter of first impression. It may be that if the document had borne a single date evidence would be inadmissible to prove that it was in fact executed on a different date or it may be that limitation would have run from the date which the document bears irrespective of whether in fact it had been signed on that date or on another date. But in the present instance we are not prepared to go behind the concurrent findings of fact that the date of the document is 21st Asin 1341, that is to say 25th September 1933. That being so, the finding of the lower Appellate Court must stand that the claim for anything which may be still due on the handnote either for principal or interest is barred unless otherwise saved.

5. It is next contended that this is a mutual, open and current account between the parties to which Article 85 of the Schedule to the Limitation Act is applicable and in support of this contention reference has been made to the decision of the Privy Council in AIR 1934 147 (Privy Council) . That however was not a case under Article 85 but under Article 64 and it dealt with a balance struck and acknowledged over the signature of the defendant. The plaintiff has not obtained an adjustment of account over the signature of the defendant at any period which would give him an available start for limitation for the purposes of the present suit. Indeed the Articles applicable to the suit ''appear to be Article 52 for goods sold and delivered and Article 57 for money lent.

6. Then it is contended that the suit was in substance not a simple suit on the handnote but a suit on the balance of liability; that there had been successive advances by the plaintiffs and successive payments by the defendants. In such a case the legal position is that each item of debt if unpaid becomes time-barred on the expiry of three years from the date on which it is incurred; but the balance outstanding in favour of a creditor is not generally considered to consist of the oldest items of debt. To do so would be to appropriate the payments made from time to time towards the satisfaction of the latest debts. No doubt u/s 59, Contract Act, a debtor who owes several distinct debts to one person and makes

a payment to him is entitled to demand that the payment is to be applied to the discharge of any particular debt and if he does so, the payment if accepted must be applied accordingly.

7. Section 60 deals with the case where the debtor has given no such intimation and there are no other circumstances indicating to which debt the payment is to be applied. In that case the creditor has his discretion to apply it to any lawful debt actually due and payable to him from the debtor; and he may apply it even to a debt which is barred by the law in force for the time being as to limitation. Section 61 deals with the legal consequence when neither party has chosen to exercise his rights of specific appropriation of the payment to any particular debt. The Section directs that in this case the payments shall be applied in the discharge of the debts in order of time whether they are or are not barred by the law in force for the time being as to limitation of suits.

8. These Sections were construed and applied in this Court in Jiban-Ram Ramchander Vs. Sagarmal Khemka, Against the suggestion for the appellants that moneys paid ought to be appropriated in the manner indicated by Section 61, Contract Act, Mr. Mullick''s reply was that the advance of Rs. 2500 constituted a separate debt and a separate transaction. The very same contention was advanced on behalf of the defendant in Jiban-Ram Ramchander Vs. Sagarmal Khemka, which I have just cited; but the Court held that the plaintiff had treated the account as a running account (as in this case); and in those circumstances it was said that there was no question of appropriation.

It is assumed as a matter of law that the pay. merit would go towards the earlier items in the account. But assuming for the moment that this did not constitute a running account, the method of accounting adopted by the plaintiffs quite clearly amounts to an appropriation in law and as they have appropriated, as is clearly seen from the accounts, the debt which would otherwise be barred by limitation has been saved from limitation and the plaintiffs are entitled to recover the balance.

9. This decision is in full accord with an earlier decision of this Court in Bishun Perkash Narain Singh v. Muhammad Siddique AIR (1916) Pat 326 where Section 61, Contract Act, was applied, and it was held that no specific appropriation having been made by the parties, the Court can apply the payments to discharge the debts in the order in which they Were contracted/All the payments were directed to be applied in the discharge of the debts in order of time. Mr. Mullick for the respondents objected that the plaintiffs themselves had not made the appropriation now suggested by them. There might be some force in this if Section 60 stood alone; but the argument ignores Section 61. Mr. Mullick pressed his argument further and contended that in paras. 5 and 6 of the plaint, the plaintiffs in fact had made an appropriation of the payments towards the contemporaneous and recently incurred debts; but I am unable to read these paragraphs in this sense. It is more correct to say that in these paragraphs the transactions between the parties are dealt with as constituting a running account

in which case clearly each payment ought to be appropriated to the satisfaction of the oldest then outstanding debt.

10. The amount to which the plaintiffs will be entitled on calculation of the accounts on this basis has not been found by the Courts below and it is necessary to remit the record to the lower Appellate Court for a finding under Order 41, Rule 25. The finding should be returned to this Court within two months after which this appeal will be put up for final hearing.

Chatterji, J.

11. I agree.

