(1964) 06 AP CK 0007

In the Andhra Pradesh High Court

Case No : Second Appeal No. 718 of 1960

Mirriyala China Subbaraidu APPELLANT

Vs

Kallarsu Mahadeva Rao RESPONDENT

Date of Decision : 23-06-1964

Acts Referred:
Contract Act, 1872 — Section 63

Citation : AIR 1965 AP 171

Hon'ble Judges : Venkatesam, J;Satyanarayana Raju, J

Bench : Division Bench

Advocate : N. Ramamohana Rao, for the Appellant; R.V. Subba Rao, for the Respondent

Judgement

Satyanarayana Raju , J.

(1) On the strength of the decision of a Division Bench of the Madras High Court in Ramaswami v. G. Rudrappa, AIR 1939 Mad 688 : 1939 Mad W N 464, the learned counsel for the appellant has contended that what Section 63 of the Contract Act permits is not an agreement to remit in future but an actual remission and that a promise to remit requires consideration in order to a binding contract.

(2) Referring to this decision, a Division Bench of the Calcutta High Court, consisting of B. K. Mukherjea J. , (as he then was) and Pal J., in Jitendra Chandra Roy Chowdhury and Another Vs. S.N. Banerjee, Barrister-at-Law, pointed out as follows : -

"In 1939 MWN 464 : AIR 1939 Mad 688, the point was not discussed properly, but the proposition of law was sought to be supported with reference to illustrations (b), (c), and (d) attached to Section 63, Contract Act. In our opinion, this is not a sound view to take and it clearly goes against the express words of the section."

(3) After considering Section 63 with the illustrations attached thereto, the

learned Judges of the Calcutta High Court pointed out as follows :

"In our opinion, it is open to the promisee to remit a portion of the obligation u/s 63, Contract Act even though the obligation on the part of the promisor to perform the unremitted part still continues."

(4) In view of the decision of the learned Judges of the Calcutta High Court, the decision in AIR 1939 Mad 688 : 1939 Mad W N 464 it is contended, requires reconsideration. The second appeal may be posted before a Division Bench.

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JUDGMENT OF DIVISION BENCH

Venkatesam, J.

(5) This Second Appeal comes before this Bench on a reference made by one of us (Mr. Justice Satyanarayana Raju).

(6) The relevant facts may briefly be stated. The sole defendant-respondent along with one Segu Ramiah executed on 12-9-1951 a promissory note (Ex. A. 1) for Rs. 4,000/- agreeing to repay the same with interest at 9 per cent per annum. Subsequently, the defendant paid Rs. 800/- on 24-9-1953 and endorsed the payment on the promissory note. Later on, another payment of Rs. 1,000/- was made only by the defendant on 26-5-1955, for which he obtained a receipt (Ex. B. 1). The plaintiff''s case is that Ex. B. 1 was obtained by fraudulent misrepresentation. Except the aforesaid two payments no other payment was made and as the suit against Segu Ramaiah became time-barred, this suit was filed for recovery of the balance of the amount due under Ex. A. 1, only against the defendant. The defendant resisted the suit on several grounds contending inter alia that the plaintiff gave up the defendant from his liability by virtue of the receipt (Ex. B. 1) after the payment of Rs. 1,000/-. He denied that Ex. B. 1 was obtained by him by fraudulent misrepresentation. As per the receipt (Ex. B. 1), the suit for the recovery of the entire amount was not maintainable.

(7) The learned District Munsif held that Ex. B. 1 was obtained by the defendant, by misrepresentation, that the defendant was not released of his joint and several liability under Ex. A. 1 by reason of Ex. B. 1, and that he was liable under the suit promissory note and granted a decree.

(8) On appeal, the learned District Judge, Kurnool came to a different conclusion. He held that the receipt (EX. B. 1) was not obtained by fraud and misrepresentation and that, by reason of Ex. B. 1, the defendant was released from joint liability under the suit promissory note, and was liable to pay only half of the debt due thereunder. He disbelieved the defendant''s case that he tendered the amount of Rs. 1,300/- to the plaintiff but that he refused to take it. In the result, the lower appellate Court granted a decree only for half the amount with subsequent interest and proportionate costs.

(9) On appeal, it was contended on behalf of the appellant that Ex. B. 1 did not

evidence a remission of half the debt due from the defendant but only proved an agreement to remit and as such that agreement ought to be supported by consideration. Inasmuch as there was no consideration for it, it is void and cannot be enforced.

(10) The following question, therefore, arises for consideration : (1) Whether Ex. B. 1 evidence an actual remission or an agreement to remit ; and (2) if it is only an agreement to remit, whether Ex. B. 1 can be enforced ?

(11) The receipt (Ex. B. 1) is in the following terms :

"You have paid me Rs. 1,000/- towards the promissory note executed in my favour by you and Segu Ramaiah and hence I received it. In addition to the amount now paid, if and when you pay your share of the balance of the amount due under the promissory note, I agree to release you from the joint liability."

It was signed by the plaintiff, Miriyala China Subbarayudu. The question for determination, is whether by means of Ex. B. 1 the plaintiff had remitted the liability of the defendant to pay the entire balance due under the promissory note after the payment of Rs. 1,000/-. The language of Ex. B. 1 is clear. It says that

''if and when you pay your share of the amount, you shall be released from liability''.

It cannot be construed as meaning that the plaintiff had released the defendant presently from his joint and several liability under Ex. B. 1 to pay the entire balance due on that date.

(12) In this view, the next question for consideration is whether this agreement can be enforced by the defendant. The answer to this is to be found in Section 63 of the Contract Act which reads as follows :

"Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit."

It is well settled that the English rules relating to accord and satisfaction are not wholly applicable to India and that some departure had been made by the Indian Contract Act. While Section 62 of the Contract Act applies to agreements which more or less affect the rights of both parties under the contract discharged by such agreements, Section 63 applies only to agreements which affect the rights of only one of the parties to the contract. Cases governed by section 62 necessarily imply consideration namely, either the mutual renunciation of some obligation on the other. It is only when the agreement to discharge affects the right of only one party that consideration might be found wanting, and there alone the Indian law departs from the English law by making provision for every such possible case in Section 63. See Pollock and Mulla on the Indian Contract Act (Eighth Edition) at page 380.

(13) It is also well settled that where a promisee remits a part of the debt and

gives a discharge for the whole debt on receiving the reduced amount, the discharge is valid. An agreement to remit IN FUTURO clearly requires consideration, if it is to be a binding contract. (IBID pages 381 and 382). Thus, u/s 63 a promisee may, at his discretion, dispense with or remit wholly or partially the performance or extend time for performance or accept anything instead of performance and no consideration is needed for such dispensation, remission or extension or acceptance of substituted satisfaction. If however there is no actual remission but only an agreement to remit in future, such agreement must be supported by consideration. It is also well-settled that a remission or dispensation which is made contingent on the happening of a further event stands on a different footing. In such a case, the remission is IN PRAESENTI, though it is suspended until the event occurs. These propositions of law are established by decided cases.

(14) In Subbaraya Aiyar v. Kolandavelu Mudali, AIR 1915 Mad 1144 (2), a Bench of the Madras High Court laid down the law thus : (at page 1145)

"If it is to be treated as an agreement varying the conduct under Ex. 1, it is not valid as there was no consideration for it. But if it is treated merely as a promise to remit a portion of the rents under S. 63, Contract Act, it cannot affect the rents which fell due after the plaintiff revoked his promise to remit a portion of the rent. That a promise to remit made merely out of grace and not out of any legal obligation does not affect the right of the obligor to enforce his legal rights as regards payments due to him in future has been held in Radha Raman v. Bhowani Prosad Bhowmik 8 Ind Cas 790 (Cal) in the judgment of Gupta J. , and also by Sir V. Bhashyam Aiyanger J., in the case of Karampalli Unnikurup v. Thekku Vittil, ILR 26 Mad 195 and we are prepared to follow the said decisions.

(15) In Balasundara Naicker and Another Vs. Ranganatha Aiyar and Others, , another Bench of the Madras High Court stated the position thus : (at page 797)

"What S. 63, Contract Act, permits is not an agreement to remit but an actual remission. That is, when a portion of the sum is paid, the creditor may say ''I do not want the rest. You need not pay any more''. This last thing is, therefore, the essence of the transaction. A discharge extinguishing a debt though in receipt of a smaller sum than that strictly due is not an agreement substituting different terms for the original terms which will govern the further working out of the obligation but an extinction of the obligation itself. Though such a discharge extinguishing a debt is generally effected by creditor on the importunity or the request of the debtors, still it cannot be said to amount to a contract which binds two persons and put them to further obligations. Where there is nothing more to be done, the whole thing is practically an act of grace on the part of the creditor. The request of the debtor is immaterial and in law it is not a case of consensus of two minds ending in a contract but merely a liberal act on the part of the creditor only. Looked at from this point of view we think that S. 92(4) does not touch any act of a creditor which extinguishes a debt by taking a smaller sum of money."

(16) The same view was reiterated in C. Vaidyanatha Rao Vs. Kandappa Chetty and Others, . In T.K. Shanmugasundara Mudaliar Vs. S.C. Sivalinga Mudaliar and Another, , Raghava Rao, J., referred to the earlier cases and held thus :

"A remission in ''praesenti'' which is suspended until a certain future event occurs is valid but an agreement to remit ''in futuro'' requires consideration if it is to be a binding contract. If in a case the plea amounts to an agreement to remit, proof of the agreement must fail for want of consideration although the agreement may not offend against S. 92, proviso (4), Evidence Act."

A similar view is also taken by the Calcutta High Court in AIR 1943 Cal 181 at p. 184 and Ma On Baw v. V. E. P. R. Chettyar Firm, AIR 1935 Rang 188.

(17) In view of this overwhelming authority, we must hold that Ext. B. 1, which evidences only an agreement to remit, must be supported by consideration. The liability of the defendant under the suit promissory note, which is payable on demand, accrued even from the date of its execution. He along with the other executant were jointly and severally liable for the entire debt and his promise to pay the half-share of that debt cannot in law constitute any consideration for the promise of the plaintiff to give up his right to recover the remaining half of the debt due from him. It follows that this promise on the part of the plaintiff is nudum pactum. The agreement (Ex. B. 1) is, therefore, void and cannot be enforced.

(18) Shri Subba Rao, the learned counsel for the respondent, placed reliance on Mathew Henry Abraham v. Lodge ''Good Will'' ILR 34 Mad 156. That case has no application as, on a construction of the agreement, it was held by the learned Judges that the agreement was a release but subject to a contingency and, therefore, it was valid and binding on the creditor. The above decision was referred to in T.K. Shanmugasundara Mudaliar Vs. S.C. Sivalinga Mudaliar and Another, and distinguished.

(19) In the result, the contention of the appellant must be upheld. The view of the learned District Judge is clearly unsustainable and it is hereby set aside. The second appeal is allowed and there will be a decree for the entire suit amount against the defendant. The appellant shall have his costs from the defendant-respondent throughout.

(20) Appeal allowed.

