

(2009) 03 AP CK 0033

In the Andhra Pradesh High Court

Case No : Appeal Suit No. 1195 of 1991

M.S.N. Charities

APPELLANT

Vs

Pilla Ramarao and Others

RESPONDENT

Date of Decision : 25-03-2009

Acts Referred:

Contract Act, 1872 — Section 25(3)

Limitation Act, 1963 — Section 18, 19, 20, 20(2)

Citation : (2009) 4 ALD 123 : (2009) 2 APLJ 226

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : C.S.K.V. Ramana Murthy, for the Appellant; Srinivas Chittusu, for the Respondent

Final Decision : Dismissed

Judgement

V.V.S. Rao, J.—This is plaintiff's appeal against the judgment and decree dated 25.02.1991 in O.S. No. 3 of 1989 on the file of the Court of the Subordinate Judge, Pithapuram. Suit for recovery of Rs. 2,46,584.05ps was partly decreed and plaintiff is in appeal with regard to other part. During pendency of the appeal first respondent/first defendant died and his LRs are on record. Respondent Nos. 3 and 4/defendant Nos. 3 and 4 are represented by counsel. In spite of service of notice, defendant Nos. 2 and 6 have not chosen to enter appearance.

2. Appellant (hereafter called, plaintiff), which is an institution - Malladi Satyalingam Nayikar Charities, Kakinada, for charitable purposes, statedly owns about 100 acres of fertilised lands. An extent of agricultural double crop wet land in Acs.31.64 comprised in survey Nos. 95/1 and 98/1 situated at Fakhruddinpalem Village, Pithapuram Mandal, East Godavari District, was leased out to defendants. Be it noted that second defendant is mother and defendant Nos. 1, 3 to 6 are her children, who had joint lease from 1955. The agreed makta was 242 kata bags (each 75 kgs) payable on or before 15th January of each year. Defendants did not pay makta for ten years for the period from

1978-79 to 1987-88. Plaintiff's institution filed the suit for recovery of makta for these years alleging that from 1977-78 to 1982-83 first defendant paid an amount of Rs. 60/- as part payment duly acknowledging the debt towards makta. It was further alleged that first defendant made part payment of Rs. 90/- from 1977-78 to 1985-86, but failed to pay balance amount in spite of such fresh contract. Hence, the suit.

3. First defendant filed written statement, which was adopted by second defendant. Defendant Nos. 3 to 6 remained ex parte.

It is the case of defendant Nos. 1 and 2 that on account of various proceedings initiated by plaintiff, defendants could not realise the usufructs from the tenancy lands for 1978-79. For 1979-1980, defendants filed remission petitions and therefore, they cannot be said to be in arrears. For the years from 1980- 1981 to 1987-88 defendants also filed remission petitions before special officer, Pithapuram, which were pending and therefore, defendants cannot be said to be in arrears for payment of makta for the leased lands. Rent for 1986-87 and 1987-88 was paid completely in cash and therefore, plaintiff is not entitled to claim the amount. The allegation of plaintiff that there was fresh contract by reason of part payments was denied. Defendants further contended that they never entered into fresh contract and the suit is barred by limitation. In view of rival pleadings, trial Court framed the following issues. (i) Whether the plaintiff has got right to collect 170 bags and 43 kgs of paddy as arrears of rent for the year 1978-79? (ii) Whether the plaintiff is entitled to collect 241 bags 45 kgs of paddy towards rent for 1979-1980? (iii) Whether the plaintiff is entitled to receive 1 bag 9 kgs of paddy as arrears of rent for 1980-81? (iv) Whether there are arrears for the years 1981-82 to 1987-88 as shown in the plaint? (v) Whether the first defendant undertook to pay the entire balance on his behalf and on behalf of other defendants for the years 1977 to 1983? (vi) Whether the plaintiff is entitled to interest at the rate of 12% per annum? (vii) Whether the plaintiff is entitled to claim an amount of Rs. 2,46,584-05ps? and (viii) To what relief? Senior Assistant of plaintiff institution was lone witness who marked Exs.A1 to A29. First defendant gave evidence as D.W.1 and marked Exs.B1 to B40. Though issues like binding nature of acknowledgement made by first defendant on other defendants were also considered, crucial issue before trial Court was issue (v) which deals with the question whether first defendant undertook to pay the entire balance on his behalf and on behalf of other defendants for the years from 1977 to 1983? Insofar crop years from 1982-83 to 1987-88, trial Court accepted the plea and passed decree for an amount of Rs. 1,56,800-60ps (principal amount is Rs. 1,13,039-10ps with interest at 12% p.a.,).

It is also necessary to notice that first defendant filed A.S.No.1494 of 1991 challenging the decree in the suit and the same was dismissed by this Court on 23.07.2007 as abated because after death of first defendant his LRs did not come on record within the time nor they filed any application. Be that as it is on

issue (v) learned trial Court while relying on decisions of Allahabad, Madras, Nagpoor, Patna High Courts as well as Supreme Court judgment and rejected the plea of plaintiff.

In this appeal learned Counsel for appellant - plaintiff relying on counterfoils - Ex.A1 dated 10.01.1986 and Ex.A4 dated 03.11.1988, contends that D.W.1 accepted and acknowledged, that he promised to pay debt though it is time barred and therefore, a new contract came into existence. When a new contract exists same can be enforced as per Section 25(3) of the Indian Contract Act, 1872 (Contract Act, for brevity). He further submits that even in the absence of an express promise in Exs.A1 and A4, it can be inferred by the Court. He relied on Kanai Lal Marwari Vs. Babulal Munchi and Another, , Girdhari Lal and Another Vs. Firm Bishnu Chand , Ramprasad v. Anandi AIR 1938 Nag 180, Shivjiram Dhannalal v. Gulabchand Kalooram AIR 1941 Nag100, Hiralal and Others Vs. Badkulal and Others, and Sri Kapaleeswarar Temple, Mylapore Vs. T. Tirunavukarasu, .

Learned Counsel for respondent Nos. 3, 4 and 5 relies on Section 20(2) of Limitation Act, 1963 (Limitation Act, for brevity) and contends that when the lease was held jointly and all lessees were liable separately to pay rent, mere acknowledgement by one of the joint lessees would not bind other lessees. He, therefore, would urge that finding recorded by trial Court to the effect that all lessees are bound by acknowledgement made by first defendant is erroneous. He nextly contends that Exs.A1 and A4 do not contain specific promise as required u/s 25(3) of Contract Act and therefore, suit is not maintainable.

The only point that would arise for consideration in this appeal is whether Exs.A1 to A4 amount to an enforceable agreement in law under which plaintiff is entitled to sue for recovery of makta.

As noticed supra, suit was filed for recovery of makta (rent) for the years from 1978-79 to 1987-88. Trial Court decreed the suit for an amount of Rs. 1,13,039-10ps being makta for six years for the period from 1982-83 to 1987-88. There is no cross appeal by defendants and therefore, that part of the decree has become final. This appeal is limited to right of plaintiff to recover makta for the years from 1978-79 to 1981-82. There is no dispute that defendants are lessees. There is also no dispute that except part payments under Exs.A1 and A4, defendants did not pay rent every year to plaintiff's institution at agreed rate or time. There is also no dispute that first defendant filed remission petitions before Special Officer year after year seeking exemption for payment of rent for various reasons, pending which, suit was filed. Exs.A1 and A4 have to be appreciated and examined in this background. Ex.A1 is signed by first defendant on 10.01.1986. He made part payment of Rs. 60/- at the rate of Rs. 10/- for each year starting from 1977-78 to 1982-1983 (six years). The payment made is subject to two conditions, namely, that he is making payment without prejudice to rights of plaintiff institution and lessees under law of limitation, and without prejudice to remission petitions filed by first defendant. Under Ex.A4 part

payment of Rs. 90/- was paid at Rs. 10/- for each year commencing from 1977-78 to 1985-86 (nine years). This payment is subject to one condition, namely, that payment is without prejudice to the rights of the institution and lessees under law of limitation. Whether these can be enforced as fresh contract binding on the parties?

Sections 18, 19 and 20 of Limitation Act form one group of provisions postulating the effect of acknowledgement of debt, which expired as per law of limitation. Section 25(3) of Contract Act is also an acknowledgement of debt but with little difference. Before considering this, it is necessary to read Section 25(3) of Contract Act together with Section 18 of Limitation Act. Section 25(3) of Contract Act Section 18 of Limitation Act.

25. Agreement without consideration void, unless it is in writing and registered.-

An agreement made without consideration is void, unless, (1) and (2) omitted (3) or is a promise to pay a debt barred by limitation law - it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

18. Effect of acknowledgement in writing-

(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

The effect, purport and difference between these two provisions dealing with somewhat similar rights and duties of parties to contracted debt is explained by Justice Natarajan in *Kapaleeswarar* (supra) thus.

It is thus clear that there are a catena of decisions and plethora of authority for holding that though a debt might have become time-barred on the date a debtor entered into a fresh obligation with the creditor to pay the liability, the said obligation, if it satisfies the conditions laid down in Section 25(3) of the Indian Contract Act, will amount to a fresh contract in the eye of law and can certainly be made the basis of an action for recovering the amount promised and acknowledged therein by the debtor. While Section 18 of the Limitation Act (Section 19 of the old Act) deals with an acknowledgment made by a debtor within the period of limitation, the contractual obligation which a debtor enters

into under the terms of Section 25(3) has no reference whatsoever to the acknowledged debt being within time or not. In that sense, the provision contained in Section 25(3) is far wider in scope than the acknowledgment contemplated in Section 18 of the Limitation Act. The contract entered into u/s 25(3) is an independent and enforceable contract and has no reference to the debt acknowledged under the contract being a live one in the sense that it had not become barred under the law of limitation.

In case of acknowledgement of debt u/s 18 of Limitation Act, if such acknowledgement is before expiration of prescribed period of limitation, a fresh period of limitation shall be computed from the time of acceptance when part payment was made. This is adumbrated in Section 19 of Limitation Act. In case of Section 25(3) of Contract Act, a contract of debt, which was rendered void by reason of expiry of period of limitation, revives by reason of acknowledgement and promise made by promisor. In either case promisee gets a right to enforce the contract of debt. Difference is that in case of acknowledgement of debt u/s 18 of Limitation Act read with Section 19 of Limitation Act, no further undertaking is necessary except promisor's acknowledgement of debt. In case of Section 25(3) of Contract Act, however, promisee has to plead and prove four components/conditions. These are (i) there is debt payable by promisor, (ii) promisor acknowledges the debt, (iii) promisor agreed to make payment under the contract and (iv) there is specific promise or undertaking in writing by the promisor to treat such acknowledgement of debt as fresh enforceable contract. Whether there should be an express promise by debtor to acknowledge and promise to pay the debt? This question has come up before Indian Courts for over a century.

In *Babulal (supra)*, *Girdhari Lal (supra)* and *Shivjiram Dhannalal (supra)* the Courts considered the question whether promise to pay can be implied. In all the cases argument that for the purpose of Section 25(3) of Contract Act, promise can be implied was rejected and it was held that the promise to pay must be in writing and it should be expressly mentioned by using the words "I promise to pay" or words and phrases which connote similar meaning. It is not necessary to burden this judgment by referring to all these authorities referred herein. Suffice to excerpt the following from *Shivjiram Dhannalal (supra)*.

If then the appellants are correct in saying that the suit is founded on a mere acknowledgment, then it is barred by limitation. This therefore brings us to the question whether the suit is so founded and whether there was any consideration for the acknowledgment. u/s 25(3), Contract Act, an agreement made without consideration is void unless it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. The nature of an acknowledgment, such as that we are now considering, came before Bose J., in *ILR (1940) Nag 441* and his reasoning in that case appears to us to be

unanswerable:

Unless a promise to pay is in writing it cannot fall within the purview of Section 25(3), Contract Act. The implied promise to pay which is contained in all acknowledgments does not attract the provisions of Section 25(3) of the Act, because the promise to pay is not in writing.

Learned Counsel for appellant - plaintiff relied on Hiralal (supra) in support of the contention that the promise can be inferred by implication. This Court is afraid the submission cannot be accepted. Hiralal (supra) is a case which arose u/s 19 of Limitation Act and the question was whether mere acknowledgement would be sufficient cause of action to plaintiff to file suit or there should be something more by promisee. Rejecting the plea that defendants should not only acknowledge the time barred debt but also promise to pay such debt, Supreme Court ruled that acknowledgement itself is sufficient to form the basis for the suit.

The scope of Section 25(3) of Contract Act was not before the Supreme Court and therefore, it is not of much help to appellant herein. As already noticed, it is consistent view of all High Courts in India that to save contract from being void for want of consideration promisor must not only acknowledge time barred debt but also specifically promise in writing to pay such time barred debt.

4. Exs.A1 and A4 are mere acknowledgements of debt which at best may be binding on first defendant and they do not constitute a fresh promise or a fresh contract. The suit was filed on 10.11.1988 and therefore, the judgment of trial Court insofar denying makta from 1978-79 to 1981-82 must be held to be correct.

5. The appeal is devoid of merits and the same is accordingly dismissed with costs.