

(1940) 07 CAL CK 0023

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 54 of 1937

Muhammed Haiderali Khan Pani and Others

APPELLANT

Vs

Brojendra Kumar Banopadhyaya and Others

RESPONDENT

Date of Decision : 25-07-1940

Acts Referred:

Citation : (1940) 07 CAL CK 0023

Final Decision : Allowed

Judgement

1. The Plaintiffs are the zemindars and the Defendants the patnidars of a patni taluk called Dihi Kashipore, etc. The patni taluk was created in 1876 by a registered document. On the 17th April, 1935, corresponding to the 4th Bysack, 1342, the zemindars instituted against the patnidars Rent Suit No. 1 of 1935 which was for recovery of arrears of patni rent from the Sraban kist of 1335 to the year 1340 B.S. The suit has been decreed against all the Defendants by the learned Subordinate Judge by his judgment dated the 31st July, 1936. Defendant, Masud Ali Khan Pani, the legal representative of the original Defendant No. 1 Wazedali Khan Pani, and Defendant No. 4, Mujafar-al-Musavi, have not preferred appeals but the remaining Defendants Nos. 2, 3, 5, 6 and 7 are Appellants before us. The principal question raised before us by the Appellants is one of limitation. It is admitted by them that the decree made by the learned Subordinate Judge for rent due from 1338 to 1340 is a good decree but it is contended that the Plaintiffs' claim against the Appellants from Sraban kist of 1335 to 1337 is barred by limitation. It is admitted by the parties that the rule of limitation applicable to the case is what is provided for in Schedule III, Art. 2 (b) of the Bengal Tenancy Act, that is, the period is three years from the last date of the agricultural year in which the arrear fell due and not Art. 116 of the First Schedule of the Indian Limitation Act. In fact the said point was decided in that manner by this Court in an earlier rent suit between the parties on the 11th May, 1932, and the matter is now res judicata (Ex. 11--II--15). It is also admitted by the Plaintiffs-Respondents that the claim from kist Sraban, 1335 to 1337 would be barred unless saved by an acknowledgment of liability by the

Defendants-Appellants in terms of sec. 19 of the Indian Limitation Act. To save the claim for that period the Plaintiffs pleaded in their plaint, as they were required to do, such acknowledgment of liability by the Defendants. The question of limitation as raised in the lower Court and also before us depends upon the question whether there was such acknowledgment of liability as would save the Plaintiff's claim for that period from the bar of time. The learned Subordinate Judge has relied upon a number of documents for supporting his finding that there was acknowledgment of liability which kept that claim alive against Defendant Haidar Ali Khan Pani. He further, held that the acknowledgment of liability by the latter kept that claim alive against Defendant Nos. 3 to 7 also. Of the documents relied upon by him, Exhibits 6, 7, 8 and 9 have to be discarded as those documents are not signed either by Haidar Ali Khan Pani or by his agent. Leaving aside the letters and telegrams coming from Wazedali Khan Pani, whose legal representative has not appealed, we consider only Exhibit 2 and Exhibit 3 (6) material for the question. These are printed at pages 13 and 42 of the paper book. Exhibit 2 is a letter dated the 5th April, 1932, written by K.N. Sarkar (Kedar Nath Sarkar), manager of Haidar Ali Khan Pani, to Abhoy Charan Dass, the Sadar Naib of the Plaintiffs and Exhibit 3 (b) is a telegram dated 20th June, 1934, sent over the signature of the same Kedar Nath Sarkar to Mr. Girindra Bose, Haidar Ali Khan Pani's pleader at Dacca. We hold for the reasons to be hereafter given that Kedar Nath Sarkar was an agent duly authorised by Haidar Ali Khan Pani within the terms of Explanation II to sec. 19 of the Indian Limitation Act, In our judgment Exhibit 2 contains a clear acknowledgment of liability for the rent that had fallen due up to date of that letter. The passage "If you do not institute a suit in the present year in consideration of the circumstances prevailing in this year then arrangement will be made to pay off the amount due to you at the time of the next collecting season, etc.," taken with the first part of the letter, satisfies the conditions of sec. 19 of the Indian Limitation Act. It contains an unconditional promise to pay a specific debt in the words of The Right Hon'ble Sir Alfred Wills in *Maniram v. Seth Rup Chand* L.R. 331. A. 165 at p. 172 : s.c. 10 C.W.N. 874 (1906). This letter accordingly contains an acknowledgment of liability for the arrears of rent due up to the Magh kist of 1337, the letter having been written on 5th April, 1932, which corresponds to the 20th Chaitra, 1338 B.S. As the suit in which the appeal arises was instituted on the 17th April, 1935, which was just beyond three years of the date of this acknowledgment the Plaintiffs would require another acknowledgment of liability from Haidar Ali Khan Pani on or after the 17th April, 1932, to save their claim for rent from Sraban kist of 1335 to 1337 from limitation. The only other document signed by an agent of Haidar Ali Khan Pani, (he never signed any) is Exhibit 3 (6), the telegram dated the 20th June, 1934. That telegram is in the following terms:

Will not raise limitation objection regarding Murapara case.

2. The question is whether this constitutes an acknowledgment of liability.

3. The law is well settled that to prove an acknowledgment of liability oral evidence of the intention of the party said to have made the acknowledgment is not admissible for construing the writing given. It is equally settled that in construing such a writing it is legitimate to look to the surrounding circumstances. In *Beti Maharani v. Collector of Etawah* L.R. 22 I.A. 31 at p. 411 s.c. ILR 17 All, 198 (1894), Lord Hob-house made the following observations:

4. Their Lordships cannot follow the learned Judges of the High Court in admitting the Collector to give oral evidence of his intentions for the purpose of construing the notice. But they may for that purpose look to surrounding circumstances." The notice referred to in this passage was a notice given by the Collector as representing the Court of Wards (in which the estate of the debtor was vested) to the creditor to attend his office with papers relating to the debt, the recital of the notice being worded thus: "whereas it has been ascertained that money is due to you by the raises of Harchandpur (the debtors) " etc. The same principle formulated in the aforesaid passage has been adopted in the construction of documents of other kinds [*Bajinath Singh v. Hajee Vally Mahomed Hajee Abba* 30 C.W.N. 242 (P.C.) (1924) and *Rajendra Prosad Bose v. Gopal Chandra Sen* L.R. 57 I.A. 296 : s.C. 84 C.W.N. 1161 (1930)]. We accordingly have to look to the surrounding circumstances to find out the meaning of Exhibit 3 (b).

5. On the 16th April, 1934 (=3rd Bysack, 1341 B.S., the 1st and the 2nd were holidays) the Plaintiffs instituted a suit on deficit court-fee to recover from the Defendants arrears of rent for the same period now in suit, that is, from *Sraban kist* of 1335 to 1340. Rent being payable according to the Bengali year claim for the whole period was in time against *Haidar Ali Khan Pani* by reason of the acknowledgment of liability contained in Exhibit 2. If that suit had been proceeded with by the Plaintiffs they would have recovered all the arrears at least from *Haidar Ali Khan Pani*. Shortly after the presentation of the plaint of that suit negotiations for compromise started between the parties. The Defendants are residents of *Karatiya* in the District of *Mymensingh* and the Plaintiffs are residents of *Murapara* in the adjoining District of *Dacca*, a place very near to the town of *Dacca*. The evidence of both sides is that the negotiations for compromise were carried on in the town of *Dacca*, at the house of *Rai Keshab Chandra Banerjee Bahadur*, a near relative of the Plaintiffs and a man of position and wealth, who brought the parties together. There were three sittings at his house. The parties arrived almost at a settlement but the compromise fell through at the final stage some time in July, 1934. Neither *Haidar Ali* nor any of the other Defendants came over to *Dacca* to carry on the negotiations. At all those sittings *Suresh Chandra Mitter*, the Assistant Manager of *Haidar Ali*, his son *Khusru Mia* and his pleader *Mr. Girindra Nath Bose* were present. They carried on the negotiations on his behalf. We are not concerned with the others, the representatives of the other Defendants. What happened at these sittings and how far the negotiations progressed and when and why they fell off has been deposed to by the Plaintiffs" witnesses *Dinesh Chandra Bannerjee*, *Mr. Girish*

Chandra Dass, a pleader, and Rai Keshab Chandra Bannerjee Bahadur. These witnesses are witnesses of truth and we believe what they have said. The versions given by them are substantially the same. None of the persons who were present at these sittings on behalf of Haidar Ali or any of the other Defendants have been examined as defence witness. Only a revenue agent who according to his statement represented nobody has deposed on behalf of the Defendants. We cannot accept his evidence in preference to the evidence given by the aforesaid witnesses of the Plaintiffs. We will now summarise the evidence given by the said witnesses of the Plaintiffs as also the result of relevant documentary evidence.

6. The Plaintiffs had obtained a decree from the Subordinate Judge on the 25th January, 1929, for a large amount against the Defendants for the Jaistha kist of 1327 to the Jaistha kist of 1335 in Rent Suit No. 5 of 1928 (that decree was affirmed by this Court by its judgment and decree Exhibits 11 and 12, II 15 and 22). The decretal amount had not been realised and an application for its execution had been filed on the 5th January, 1933 (Exhibit A). The money due under this decree had not been realised from the Defendants at the time when the negotiations for compromise commenced and continued. The Plaintiffs had filed a plaint (registered as Rent Suit No. 2 of 1934) on deficit court-fee on the 16th April, 1934, claiming rent for the period succeeding to the period for which they had obtained the decree in Rent Suit No. 5 of 1928 (Exhibit B. II 30). The claim in this suit was, as we have already stated, from the Sraban kist of 1335 to 1340 (The patni lease provided for bi-monthly kists Jaistha, Sraban, etc.). After the preliminaries had been settled the first sitting for carrying on the negotiations for compromise was held in Rai Keshab Chandra Bannerjee's house at Dacca towards the end of May--6 or 7 days before 1st June which had been fixed by the Subordinate Judge for payment of the deficit court-fee on the plaint of Rent Suit No. 2 of 1934. The compromise talks proceeded on the admitted basis that the dues of the Plaintiff under the decree passed in Rent Suit No. 5 of 1928 had not been paid by the Defendants and that from the latter the rent for the succeeding period, namely from Sraban kist of 1335 to 1340, which was the subject-matter of Rent Suit No. 2 of 1934 was due to the Plaintiffs. The only questions that were discussed on the first day were (1) whether interest on the money due should be paid or not: (2) whether costs of the suit would be paid or not, (3) the instalments (kistibandi) in which the Plaintiffs' dues would have to be cleared up and (4) whether deficit court-fee payable in Suit No. 2 of 1934 was to be deposited by the Plaintiffs or not to save that suit. On these matters Nawab Mia, the son of Wazedali, offered some terms which were written down in a slip of paper marked Exhibit (6) (II 50) by Birendra Nath Chakravarty, a pleader and zemindar of Gangtia, at the instance of Nawab Mia to enable discussions to proceed on definite lines. The witness Dinesh Chandra made alterations in that paper according to Gopal Babu's (the nick name of Brajendra, Plaintiff No. 1) dictation. Thus offers and counter offers were embodied in that piece of paper, but no agreement was arrived at between the parties on that date. The second

sitting was on the next day. The meeting began with a rough estimate being made of the dues of the Plaintiffs on another slip of paper Exhibit 7 (II 51). The figures noted down in that paper were on the statements of both parties, namely of Gopal Babu and the manager of Wazedali and assistant manager of Haidar Ali Khan Pani. Late at night there was a settlement and the summary of the terms were jotted down by the pleader witness Mr. Girish Chandra Das. There was no time at that late hour to copy the same fairly. On the next day it was typed in duplicate by Jagadish. One copy was made over to Gopal Babu and the other to the Defendants' men. The copy made over to Gopal Babu is Exhibit 8 (II-53). The loss of the original made by Mr. Girish Chandra Das has been proved. The men of the Defendants who had come from Karatia left Dacca for Karatia with the object of going through the accounts for the purpose of enabling the figures left in blank in Exhibit 8 to be filled up later. The third sitting was held sometime later on at Dacca when the men of the Defendants returned from Karatia. At that sitting there were differences about the interpretation of the terms embodied in Exhibit 8. The parties could not agree with the result that an informal arbitration was proposed. On the next day the arbitrators supported the view of Gopal Babu but the men of the Defendants left Dacca without saying whether they had accepted or refused and the matter was left there. This was in the beginning of July. The talks which took place at the second meeting are of importance. They have an important bearing on the interpretation of the telegram, Exhibit 3 (b).

7. We have already mentioned the fact that the negotiations began on the admission that the Defendants were liable to pay the arrears of rent now in suit and the negotiations proceeded only on the four points mentioned by us. One of those points was whether the Plaintiffs would have to deposit the deficit court-fee payable in Suit No. 2 of 1934. The Plaintiffs had already taken time thrice from the Court to pay the deficit court-fee (Exhibit E--order-sheet of Suit No. 2 of 1934), and the next date for payment of the same had been fixed as the 1st June following. The second sitting was held five or six days before that date. In these circumstances both parties felt that the Court may not grant a further extension of time, and there was risk of the Plaintiffs suit being dismissed. The Plaintiffs obtained extension of time twice more and 23rd June was fixed for payment of deficit court-fees. Keeping in view these facts the matter was arranged thus: That on going back to Karatia the Defendants' men would cause the Defendants to send letters signed by the respective Defendants acknowledging their liability in respect of the claim in Suit No. 2 of 1934 and if the time was found short, telegrams were to be sent in the first instance with the same purpose? These are the circumstances in which the telegram, Exhibit 3 (b) was sent to Haidar Ali's pleader Mr. Girindra Nath Bose, which according to previous arrangement was shown to the Plaintiffs. The deficit court-fee was not paid and Suit No. 2 of 1934 was dismissed for non-payment of the same on the 5th July, 1934. In the light of the circumstances stated above we will now have to construe Exhibit 3 (b).

8. The "Murapara case" mentioned in Exhibit 3 (b) refers to the case of the

Plaintiffs, they being known as the zemindars of Murapara. The phrase does not refer to the pending suit--i.e., it does not refer to Rent Suit No. 2 of 1934, for there was no question of limitation in that suit, at least so far as Haidar Ali was concerned. The whole of the claim could have been recovered if that suit was proceeded with, for the whole claim was in time, having regard to the acknowledgment of liability contained in Exhibit 2. There was also acknowledgment by other Defendants. These words must therefore have reference, by reason of what happened at the second sitting, to a suit that may have to be instituted later on, if the compromise fell through, after the dismissal for non-payment of deficit court-fee of Rent Suit No. 2 of 1934. Such a future suit could be saved from the bar of limitation only by an acknowledgment of liability. Taken in its setting the words "will not raise limitation" is therefore an acknowledgment of liability in respect of the arrears from kist Sraban, 1335 to 1340, what was claimed in Rent Suit No. 2 of 1934 which was to be dismissed for non-payment of deficit court-fee. The whole claim in the suit which we have before us (Rent Suit No. 1 of 1935) is accordingly in time against Haidar Ali Khan Pani, provided that Kedar Nath Sarkar, his manager, was an agent who had authority to write Exhibit 2 and to send the telegram Exhibit 3 (b), the original of which, which was handed over at the Post Office for transmission, had Kedar Nath Sarkar's signature.

9. It is admitted that Kedarnath Sarkar was Haidar Ali's manager from 1931 (1338) to 1934. Haidar Ali admits that Kedar Nath Sarkar became a manager for the first time in 1338 (April 1931). The phrase used by him is that he became a temporary manager in that year, 1338. Before that he was not the manager. The power-of-attorney which Haidar Ali executed in his favour and in favour of others on the 25th October, 1930 (Exhibit F-- II 7) was therefore at a time before he became Haidar Ali's manager. His authority from April 1931 to 1934 cannot therefore be measured only by the terms of Exhibit F. As manager his authority to represent and bind Haider Ali became more extensive. As manager his duty was to see to proper management of the estate committed to his care, to arrange for collections and for payment of rent due to superior landlords. If money was short he could as manager arrange for convenient payment of the rent due to superior landlords. Those powers were implied in his office. Exhibit 2 was a letter in which he pleaded for time to pay the arrears of rent due to the Plaintiffs. This letter was written by him in the ordinary course of business and in discharge of his duties as manager. This letter accordingly binds Haider Ali. A letter written in similar circumstances and signed by the manager of the Bara taraf (Wazedali) was held to be a valid acknowledgment within sec. 19 of the Limitation Act by this Court in Exhibit 11 (II-15), a case which was inter partes and was for recovery of rent for the preceding period.

10. With regard to Exhibit 3 (b) we have stated the circumstances under which it was sent. At the negotiations for compromise at Dacca, Kedar Nath Sarkar was not present, but Suresh Chandra Mitter, Haider Ali's assistant manager and his son Khushru Mia, were. They left for Karatia after the second sitting. It is difficult

to believe that they did not inform Haider Ali on their return to Karatia as to what had transpired at Dacca. The telegram Exhibit 3 (b) could not have been despatched by Kedar Nath Sarcar on his own responsibility without consulting his master who was at Karatia then. We find it difficult to believe what Haider Ali has stated in his deposition. The inference is irresistible that the said telegram was sent by Kedar Nath Sarcar with the knowledge and consent of his master. Limitation is accordingly saved so far as Haider Ali Khan Pani is concerned. There is no acknowledgment of liability in writing either signed by or on behalf of the other Defendants Appellants Zafar Ali Khan Pani, Moin Khan Pani, Noin Khan Pani and Safura Khatun. The acknowledgment by their joint debtor Haider Ali Khan Pani cannot extend the period of limitation against them (Sec. 21, Limitation Act). The Plaintiffs' claim for rent from Sraban, 1335 to 1337 against these Appellants must be dismissed. But as the liability of each tenant is joint and several the decree for the whole claim in suit must be maintained against Haider Ali Khan Pani and Defendants Nos. 1 and 4 who have not appealed.

11. Two other points have been raised by the Appellants. Under the terms of the patni settlement the patnidars undertook to pay Government revenue for the share of zemindaries settled in patni and to pay the balance of the patni rent (munafa) to the zemindars. In 1925-26 as a result of a Diara Survey it was found that there were accretions to the lands of the said zemindaries. The said accreted lands were assessed to an additional revenue. This additional revenue the Defendants also deposited on behalf of the Plaintiffs with the Collector. The Defendants are possessing those accreted lands and if those added lands were not in existence at the time of the patni settlement it is admitted by the Defendants' Advocate that the Defendants would not be entitled to get credit for those payments in this suit and to deduct them from the munafa but if those lands were firm lands in March, 1876, when the patni was created and so included in the patni taluk they would be entitled to get such credit. This is also the position in law, for if those lands had accreted after the creation of the patni, the patnidars would be bound to pay the zemindars additional rent for possessing the same. There is however no evidence to show that those accreted lands for which additional revenue was assessed in 1925-1926 were in existence at the time of the creation of the patni taluk in March, 1876, and so included therein. This contention of the Defendants-Appellants accordingly fails.

12. The other point is that the Defendants are not liable to pay cess due in the Plaintiffs' share. This contention cannot be upheld, for by the patni kabuliyat (printed as Exhibit 4 at page 1, Part II of the paper book of First Appeal from Appellate Decree No.128 of 1929) the patnidars undertook the liability to pay what would be payable by the zemindars on account of road cess that may be imposed later on. When the patni was granted the Cess Act had not been passed, but the parties anticipated the imposition of cess in future and provided for that contingency by a contract in clear terms, namely, that the whole of the imposition was to be paid by the patnidars, the zemindar having "no concern with that." This point is accordingly overruled.

13. The result is that this appeal succeeds in part. The decree of the Subordinate Judge against Defendants Nos. 1, 2 and 4 is maintained, but the claim of the Plaintiffs against Defendants Nos. 3, 5, 6 and 7 from the Sraban kist of 1335 to 1337 is dismissed. The Plaintiffs will have a decree against them for the arrears with interest from 1338 to 1340. That is to say, the Plaintiffs will get a decree for Rs. 22,014 (for 1338 to 1340) against all the Defendants jointly and severally and a further decree for Rs. 26,065 (for kist Sraban, 1335 to 1337) against Defendants Nos. 1, 2 and 4 jointly and severally. Interest will run at 6 per cent. per annum from the date of the lower Court's decree till realisation. The Plaintiffs will besides get as costs of the lower Court on the claim for kist Sraban, 1335 to 1337, that is, Rs. 1,626 against Defendants Nos. 1, 2 and 4 jointly and severally and Rs. 1,343 from all Defendants jointly and severally on the claim for 1338 to 1340 B.S. and Defendants Nos. 3, 5, 6 and 7 will get costs on the claim for kist Sraban, 1335 to 1337, that is, Rs. 212 from the Plaintiffs jointly and severally. Interest will run on all these sums at 6 per cent. from the lower Court's decree till realisation. The Defendant No. 2 will pay full costs of this appeal to the Plaintiffs-Respondents and the Plaintiffs-Respondents will pay as costs to Defendants Nos. 3, 5, 6 and 7 half the hearing-fee only. These sums will carry interest at 6 per cent. per annum from this date till realisation.