

(1970) 03 GUJ CK 0010
In the Gujarat High Court
Case No : First Appeal No. 53 of 1963

Parshottam Motibhai Patel and Another APPELLANT
Vs
Ishwarbhai Lallubhai RESPONDENT

Date of Decision : 03-03-1970

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 13, 4
Stamp Act, 1899 — Section 2(22), 3

Citation : AIR 1971 Guj 252 : (1971) 12 GLR 280

Hon'ble Judges : D.P. Desai, J; A.D. Desai, J

Bench : Division Bench

Advocate : J.B. Patel, for the Appellant; M.C. Shah, for the Respondent

Judgement

D.P. Desai, J.—The only question raised in this Appeal is the question of limitation and that question depends upon the admissibility of a document produced at Ex. 34/1 in the lower Court which is dated 27-10-1954 and which has been held by the Lower Court to be an unstamped promissory note and as such inadmissible in evidence. For the purpose of this appeal only a few facts may be stated as bearing upon this question.

2. The present appellants who were plaintiffs before the lower Court filed Special Civil Suit No. 12 of 1961 from which this appeal arises, on March 7, 1961 for recovery of a total amount of Rs. 14,399-60p. As per the amended plaint, the case of the plaintiffs was that the defendant has borrowed a sum of Rs. 11,638 from the plaintiffs on 10-10-1954 i.e. the writing at Ex. 34/1, on the admissibility of which the question of limitation depends in the present case. According to the plaintiffs, demand of the dues under this oral loan were made after this writing but the defendant did not pay anything except a sum of Rupees 2000/- on 27-9-1958. Therefore, the suit was filed for the principal amount of the oral loan giving credit of Rs. 2000/-. By para 4 of the plaint, it was pleaded that the cause of action for the suit arose on 10-10-1954 when the defendant took loan from the plaintiffs. On the question of limitation the same para contains averments

that the oral loan was acknowledged by writing dated 27-10-1954 and by a further writing dated 24-10-1957 and also by payment of Rs. 2000/- on 27-9-1958 towards the dues which amount was credited in the latter writing written in the hands of the defendant. Therefore, the period of limitation has been extended by these acknowledgments as per the case pleaded in para 4 of the amended plaint. The second writing dated 24-10-1957 was duly stamped and was exhibited at Ex. 74. It was for Rs. 13, 908/-. No, it is not disputed that if the first writing at Ex. 34/1 is not admissible in evidence then the second writing having been passed more than three years after the date of original loan, would not be effective to extend the period of limitation and, therefore, the present suit would become time-barred. Thus, it is the question of admissibility of Ex. 34/1 alone which arises for determination in this appeal.

3. Before coming to that question we may deal with Civil Application No. 279 of 1963 given in this appeal for further amendment of plaint. By this application the cause of action for the suit is sought to be based on the latter writing dated 24-10-1957 saying that by this writing the defendant has made a new agreement to pay the dues. It is obvious that by this amendment a new cause of action is sought to be pleaded at a very late stage and after the period of limitation having expired and defence of limitation having accrued to the defendant before the date of this application. This is a serious difficulty in the way of the plaintiff seeking to plead an entirely new case giving him a new cause of action altogether. There is another and a more substantial objection to the granting of this amendment in appeal and it is this:

The suit as originally filed was based upon the latter writing Ex. 74 dated 24-10-1957 corresponding to Kartik Sudi 1st of S.Y.2014 alone. According to the plaintiff this writing was for Rupees 13,908/- and the defendant had executed it on 24-10-1957. The cause of action pleaded was as arising on the execution of this writing. It was further pleaded that on account of payment of Rs. 2000/- on 27-9-1958 and by crediting that amount in the said writing, the suit was within time. Thus, the suit which was filed was based on Ex. 74 alone. But the defendant raised contentions with regard to this writing saying that it was fabricated and no amount was borrowed in cash as alleged. It was further urged that nobody would lend monies on the first day of Hindu Calendar year. Thereupon plaintiffs gave application Ex. 34 before the Lower Court for amendment of the plaint stating therein that it was through oversight that they filed this suit on the writing dated 24-10-1957 Ex. 74. They further stated that the Original transaction of loan was made on 10-10-1954. Therefore, they prayed for deleting the averments with regard to the letter writing from para 2 of the plaint as originally filed altogether. In their place they substituted averments showing that the loan was taken on 10-10-1954, that it was for Rs. 11,683/- and that writing was passed in connection with the oral loan on 27-10-1954. The figure of Rs. 13, 908/- as appearing in the original plaint was also sought to be substituted by figure of Rs. 11,683/-. The cause of action was also sought to be changed by substituting the oral loan on 10-10-1954 as furnishing the cause of

action and by using writing dated 24-10-1957 as an acknowledgment. It is fairly clear on reading this application Ex. 35 as a whole that the original claim as based on the writing Ex. 74 was in fact abandoned and in its place the claim based on oral transaction of loan on 10-10-1954 was substituted using the writing at Exs. 34/1 and 74 merely as acknowledgments for the purpose of saving limitation for the claim as based on the original transaction of the loan. In view of this attitude taken by the plaintiffs in the lower Court, they cannot now be allowed to turn round and re-agitate the abandoned cause of action by way of amendment. We, therefore, reject the application for amendment.

4. The only question, therefore, is whether the writing Ex. 34/1 is admissible in evidence? The learned trial Judge has held it to be inadmissible on the ground that it is a promissory note. The contention raised before us on behalf of the appellants is that this writing is not a promissory note but is either an agreement or a bond. The writing when translated reads:

"Khata of the dues of Patel Parsottam Motibhai of village Simarda found from Patel Ishwerbhai Laloobhai of the said village on Samvat 2011 Kartik Sudi 1st dated 27-10-1954.

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11683-00 in words Rs. eleven thousand six hundred eighty three Cash (being) of the account of Tobacco and cash taken for use (in respect of) farmers and miscellaneous household expenses. The same is borrowed. (I) will repay (the same) whenever you demand.

Khata in the hands of Patel Ishwarbhai Laloobhai signed by self.

Attested by Patel Parbhubhai Girdharbai."

The document bears no stamp. Ex facie it contains all the requirements of a promissory note as defined by Section 2(22) of the Indian Stamp Act, 1899, read with Section 4 of the Negotiable Instruments Act, 1881. The payee is certain, the amount is certain, and there is an unconditional undertaking to pay the amount. The instrument is signed by maker. If the attestation was not there, this position would have been indisputable. In case of a document executed in a similar manner in the form of a Khata a Division Bench of this court held that the instrument is a promissory note. (See Jagjivandas Bhikhabhai Vs. Gumanbhai Narattamdas, . This decision was followed by Miabhoy J. (as he then was) in Chhabiladas Mangaldas Vs. Luhar Kohan Arja, in case of another similarly executed document. Mr. Patel for the appellant however contended in the first instance that the instrument in question amounts to an agreement. He did not show how the instrument can be classified as an agreement for the purposes of the Stamp Act. A similar contention in respect of a similarly worded document was advanced in Chhabiladas Mangaldas Vs. Luhar Kohan Arja, and was negatived. The contention was based on these features: (1) promise to pay was preceded by recitals relating to the purpose of the loan (2) the document was in

the form of an account (showing credit and debit sides) and not in the form of a mere paper which would pass from hand to hand (3) certain amounts were credited in the document on the credit side. The first two features also appear in the document under consideration and if Mr. Patel wanted to rely on these features the contention is not tenable. As observed by the Division Bench in *Chhabiladas Mangaldas Vs. Luhar Kohan Arja*, this form (form of account containing credit and debit sides) of the document is in common use in this part of the country and it is not inconsistent with the document being a promissory note. Similarly recital as to the purpose of the loan also does not detract from the character of the document as a promissory note.

5. Next contention of Mr. Patel was that the document is a bond falling within Section 2(5)(b) of the Indian Stamp Act. This section is the same as Section 2(c) (ii) of the Bombay Stamp Act, 1958 and it reads as under:

""bond" includes, -

(ii) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another".

6. There is no controversy about the fact that till the year 1919 an attested promissory note if it was not expressed to be payable to order or bearer, was classified as a bond under this definition. So far as the Bombay High Court was concerned this was the view taken consistently both in cases arising under the Stamp Act of 1879 and those arising under the present Act of 1899. In *R.D. Sethna Vs. Mirza Mahomed Shirazi* (No. 1), Beaman J. said at p. 1039:

"According to the law after the passing of the Act of 1879 a promissory note, unless it was payable to order or bearer, seems to have been deemed to be a bond if attested."

These decisions proceeded on the basis that in the absence of the words indicating negotiability of the promissory note the promissory note if attested fell within this definition of bond. Section 13 of the Negotiable Instruments Act as it stood before its amendment in 1919 defined a negotiable instrument as meaning a promissory note, bill of exchange or cheque which is payable to order or bearer. This definition as it stood before its amendment clearly excluded from its ambit promissory notes as well as cheques which did not show on their face that they were payable to order or bearer. In spite of this position at law, in the mercantile circles in the then Province of Bombay by an established custom and usage cheques which did not contain the words "bearer" or "order" were still treated as negotiable. In this state of apparent conflict between law and usage the question of recognition of this custom cropped up before Bombay High Court in *Dossabhai v. Virchand* AIR 1919 Bom 73. The High Court refused to recognise this custom because if recognised it would have the effect of overriding the express provision of law contained in unamended Section 13 of the Negotiable Instruments Act. Then the Legislature stepped in and by Act VIII of 1919 added an explanation to Section 13 which reads:

"Explanation: A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable."

7. This amendment gave legislative recognition to the mercantile custom prevailing in the then Province of Bombay.

8. Subsequent to this amendment the question whether this amendment should be considered while deciding whether a given document is payable to order within the meaning of Section 2(5)(b) of the Indian Stamp Act arose. On this question there is a conflict of opinion between different High Courts. We shall be referring to the same a little later. For the present we propose to examine this question on first principles.

9. Reading the definition of bond under consideration it is clear that the phrase "not payable to order or bearer" contained in it in substance means "not negotiable". Thus the test of non-negotiability is one of the tests which a given document has to satisfy before it can be brought within the definition of bond under consideration. Now, if a document like the one in question which satisfies all the requirements of a promissory note has the attribute of negotiability attached to it by force of law in view of the explanation referred to above that document must possess that attribute as part and parcel of it. If the question of chargeability of such a document to stamp duty arises the document cannot be considered devoid of this attribute. To do so would be to treat the document as negotiable for all purposes except for stamp duty and penalty. For stamp duty it would be not negotiable. This in our opinion would be putting an artificial construction on the phrase "not payable to order or bearer". There is nothing in that phrase or in the context to show that a document which is a promissory note can be payable to order or bearer only if it contains express stipulation that it is so payable. The phrase is descriptive of the nature of the document only. Therefore, in deciding whether a document falls within this description the attribute of negotiability conferred on the document by law cannot be ignored. The definition under consideration speaks of "any instrument attested by a witness and not payable to order or bearer." Thus, attestation and non-negotiability are indicated as two attributes of the instrument. The attribute of non-negotiability will be ruled out not only when the document in question is made negotiable expressly by the act of the parties but also when the law confers that attribute upon it.

10. But it is said that in determining whether the document is a bond or a promissory note we should confine ourselves to the terms of the document only and should not import the provisions of Explanation I to Section 13 of the Negotiable Instruments Act into the Stamp Act. We do not think this is a valid argument. In fact it is on reading the terms of the document only that we find that there are no words in it prohibiting its transfer or indicating an intention that it shall not be transferable. Having ascertained that, the next question which

arises is whether the document is negotiable; and for that we must of necessity turn to the provisions of the Negotiable Instruments Act. Nobody would suggest that it is the function of a fiscal enactment like the Stamp Act to lay down what documents are negotiable. Therefore, when we turn to the provisions of the Negotiable Instruments Act to determine this question we are not importing the explanation to Section 13 thereof in the Stamp Act. We only apply the law as it stands to the document for determining whether it is negotiable or not, because one of the conditions for applicability of the definition of "bond" is that the document should not be negotiable. Thus there is no question of importing the provisions of Section 13 of the Negotiable Instruments Act into the Stamp Act. The definition under consideration only says what documents may be classified as bonds. When a question arises whether a particular document falls within this classification the provisions of law having direct bearing upon the negotiability of the document must be considered.

11. So far as the conflict of judicial opinion is concerned we find that Calcutta, Madras, Nagpur, Andhra Pradesh, majority of Full Bench of Allahabad and Patna High Courts have refused to consider the effect of Explanation I to Section 13 of the Negotiable Instruments Act while deciding the question of chargeability of an instrument to stamp duty. See *Khetra Mohan Saha and Others Vs. Jamini Kanta Dewan and Others*, ; *Veerappudayan Vs. Oganthappudayan*, ; AIR 1937 61 (Nagpur); *Govula Ramakistiah Vs. Yerram Yellappa*, ; *Mohd. Mustafa Ali Khan Vs. Raj Rajeshwari Devi*, and *Ram Narayan Bhagat and Another Vs. Ram Chandra Singh and Others*, . All these decisions proceeded on a common basis that the amendment made in S. 13 of the Negotiable Instruments Act by adding Explanation I, cannot be read into the definition of Promissory note and Bond as given in the Stamp Act. It was also observed that for the purposes of the Stamp Act the document as it stands should be read.

12. The other view is represented by the minority judgment of Raghubar Dayal J. (as he then was) in *Mohd. Mustafa Ali Khan Vs. Raj Rajeshwari Devi*, and *Kadorilal and Another Vs. Sukhlal Sajan Singh*, Raghubar Dayal J. found no warrant for the proposition that the Court should determine the nature of the document on the express language of the document alone without taking into consideration the legal effect of the terms thereof. Madhya Pradesh High Court in *Kadorilal and Another Vs. Sukhlal Sajan Singh*, was of the opinion that the decision of the Privy Council in *Mohmed Akbar Khan v. Attarsingh* AIR 1936 PC 171 indicated that the aid of Section 13 of the Negotiable Instruments Act can be taken "even for the purpose of deciding whether the document is a promissory note or not for the purpose of the Stamp Act."

13. We have given our anxious consideration to the reasoning underlying the majority opinion. With respect, we regret however, our inability to agree with the view. It may be observed that prior to amendment of Section 13 of the Negotiable Instruments Act in 1881 a promissory note which did not contain express words indicating that it was payable to order or bearer was treated as

not payable to order or bearer and if attested was chargeable with duty as a bond. But this approach was not based only on the principle that we should look at the terms of that document alone. The terms of the document were no doubt considered & given prime importance but at the same time such promissory notes were held not payable to order or bearer because under the Negotiable Instruments Act as it then stood they could not be negotiated in the absence of express words indicating negotiability. Therefore, the law as it then stood was in fact being applied in considering the question of chargeability to stamp duty. If that was not so, then on the basis of the same principle that the terms of the document only should be read it could have been urged even without the aid of Explanation I to Section 13 of the Negotiable Instruments Act, that a promissory note which does not contain express words that it is not payable to order or bearer is for the purposes of the Stamp Act, payable to order or bearer and therefore would not fall under the definition of bond. If however the law as it stood was being applied formerly as indeed it was, there is no reason why a change in law brought about by the amendment of 1919 should not be considered and applied. In applying this change in law to a document requiring consideration under the Stamp Act we are not contravening the principle that the express terms of the document should be looked at. We are looking at the express terms and then we apply the law on the question of negotiability. Therefore, in our opinion it would be open to the Court to consider the provisions of Explanation I to Section 13 of the Negotiable Instruments Act in considering the question of chargeability to duty of a promissory note under the Stamp Act. Indeed it would be the duty of the Court not to ignore this law bearing upon the question of negotiability.

14. We therefore, agree with the learned trial Judge that this writing is a promissory note. The fact that it has been attested makes no difference in this conclusion because as observed above, it does not amount to a bond as it is negotiable by virtue of Explanation I to Section 13 of the Negotiable Instruments Act. The document is no doubt in a book of account but then it is on a separate page so that the page can be torn out and the promissory note can be negotiated. There is nothing on the face of the writing to show that the parties did not intend to execute it as a promissory note. On this point Mr. Patel for the appellant was not able to advance any contention. Undertaking or promise to pay the amount is the substance of the transaction. In this view of the matter, the lower Court was right in holding that this writing is not admissible in evidence. If that is the position, it is conceded that the suit would be time barred.

15. In the result the appeal fails and is dismissed. The appellant will pay the costs to the respondent of this appeal.

16. Appeal dismissed.