

(1934) 07 BOM CK 0024
In the Bombay High Court
Case No : O.C.J. Suit No. 802 of 1929

Percy F. Fisher

APPELLANT

Vs

Ardeshir Hormasji Gazdar

RESPONDENT

Date of Decision : 24-07-1934

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Contract Act, 1872 — Section 176
Limitation Act, 1908 — Article 120, 57

Citation : AIR 1935 Bom 213 : (1935) 37 BOMLR 165

Hon'ble Judges : B.J. Wadia, J

Bench : Single Bench

Judgement

B.J. Wadia, J.—The plaintiff has filed this suit to recover from the 1st defendant the sum of Rs. 13,350 and interest for moneys lent and advanced to him at different times in 1920, and for an order for sale of certain shares alleged to have been pledged with him in or about January, 1922, as security for repayment of the loans advanced to him, and for other ancillary reliefs. The 1st defendant was adjudicated insolvent on November 22, 1933, and the Official Assignee is now on record as the 2nd defendant in the suit. He has appeared at the hearing and adopted the written statement of the 1st defendant who denies the loans and payments for interest, but says that moneys were paid by him to the plaintiff on account of the losses sustained by him on certain gambling and wagering transactions which, according to him, were carried on in the plaintiff's house. He denies the pledge and says that the shares, namely, 226 deferred ordinary shares and 236 preferred ordinary shares of the British Dye Stuffs Corporation, were entrusted by him to the plaintiff for sale in England in or about January, 1922, and have still remained unsold. In or about 1926 the British Dye Stuffs Corporation was amalgamated with other corporations in England, and the 1st defendant wanted to have the shares converted into shares of the new amalgamated company, but they could not be so converted unless 236 preference shares of the British Dye Stuffs Corporation which remained with him

were also converted at the same time. He refused to hand these over to the plaintiff, and plaintiff refused to hand over the other shares to the 1st defendant unless the 1st defendant passed to him a receipt stating that the plaintiff held the shares in his possession as security for moneys advanced to the 1st defendant from time to time. Defendant has counterclaimed for the return of the shares which are still in the possession of the plaintiff.

2. Several issues were raised in the suit. The defendants, however, contend that the suit is barred by limitation, and the issue of limitation was tried as a preliminary issue. The loans having been advanced in 1920 and the alleged pledge being of January, 1922, this suit filed on May 13, 1929, is *prima facie* "barred, and it was for the plaintiff under the provisions of Order VII, Rule 6, of the Civil Procedure Code, to show the ground upon which exemption from limitation was claimed, so that the suit might still be within time. Certain payments are alleged in paragraph 3 of the plaint as payments to the plaintiff by the 1st defendant in respect of interest as such, but these do not satisfy the requirements of Section 20 of the Indian Limitation Act, as they were admittedly not made before the expiration of the period of limitation. Counsel for the plaintiff next argued that he relied on all the payments specified in Ex. B to the plaint and also on the pledge for saving the bar of limitation, and he applied for amendment of the plaint accordingly. Counsel for the defendants objected, as the plaint and the written statement had both been filed more than five years ago, and the plaintiff was well aware that the 1st defendant had raised the defence of limitation. Under Order VI, Rule 17, however, the Court may, at any stage of the proceedings of a suit, allow a party to amend, and it has been held in *Yakub Ebrahim Sayani Vs. Bat Rahimatbai*, that if the plaintiff has put forward one ground of exemption from limitation, he is not to be precluded from applying at the hearing to claim exemption on another and not inconsistent ground of exemption. In *Gunnaji Bhawaji v. Makanji Khoosalchand* ILR(1908) 34 Bom. 250 the Appeal Court has gone even further and held that even if no ground of exemption from limitation is alleged, the plaintiff may still apply for an amendment of the plaint in order to show on what precise ground he contends that the suit is within time. The application was, therefore, allowed on certain terms as to payment of costs, and the amendments have accordingly been made.

3. Counsel for the defendants argued that on the facts as stated in the plaint, and assuming them for the sake of the argument on the issue of limitation to be true, the suit was still time-barred. The suit is for the recovery of the moneys alleged to have been advanced to the 1st defendant from time to time and also for realisation of the security given for the loans nearly two years later by sale of the shares which were pledged with the plaintiff and for a personal decree against defendant No. 1 in the event of a deficiency on such sale. A suit for the recovery of money secured by a pledge is really a suit for moneys lent and advanced, and it has been held in *Yellappa v. Desayappa* I.L.R.(1905) 30 Bom. 218, 7 Bom. L. R 739 that a suit to recover a balance due after the sale of the pledged property is none the less a suit for money lent, even if the money

claimed is secured by a pledge. If, therefore, the suit is one to recover the unpaid balance of a loan, the fact that moveable property has been pledged does not change the nature of the suit. The period of limitation for a suit to recover moneys lent and advanced is three years under Article 57. When money is lent from time to time, limitation runs as regards each loan from the respective date of that loan. The loans were, according to the plaintiff, made at different times in 1920. A sum of Rs. 2,086 is credited to defendant No. 1 as of February 2, 1921, and the next payment of interest, which is specified in Ex. B, is of Rs. 75 on March 31, 1924, which is more than three years later. Accordingly, Section 20 of the Indian Limitation Act does not apply. Counsel for the plaintiff, however, relied on the alleged pledge in January, 1922, and argued that the giving of the pledge was an acknowledgment of liability on the part of defendant No. 1, and though Section 19 did not apply in terms as there was no acknowledgment in writing, he argued that the acknowledgment of liability was itself a cause of action, and the pledge in January 1922 helped to extend the period of limitation. He relied on *Chunilal v. Laxman Govind* I.L.R.(1921) 46 Bom. 24, 23 Bom. L.R. 606, but in that case the acknowledgment, which formed the basis of the suit, was in writing. No authority was cited to show that a subsequent pledge in 1922 is a new cause of action in relation to the personal claim for the loans alleged to have been advanced in 1920. In my opinion, neither the payments of interest nor the alleged pledge extend the period of limitation as regards the personal claim, and the same is therefore barred.

4. With regard to the pledge, which is denied by defendant No. 1, it was conceded on both sides that the only article which applies is Article 120 of the Indian Limitation Act. Under Article 120 the period is six years, and runs from the date when the right to sue accrues. The right to sue means the right to claim relief by legal procedure, that is to say the right to bring the particular suit with reference to which the plea of limitation is raised. Generally speaking, such a right accrues when the cause of action arises. The cause of action comprises the facts which must necessarily be proved in order to entitle the plaintiff to the relief which he asks for. The question is, when does the right to sue accrue in respect of a pledge ? The answer to the question must depend on the nature of the contract of pledge, assuming that the pledge is either admitted or proved, and on a consideration of the rights of the pawnee thereunder. The pawnee has a special property in the thing pledged, while the general property continues to remain with the owner. The pawnee is entitled to retain the goods pledged for payment of the debt, interest and the expenses incurred by him for preservation of the goods. He is not entitled to a decree for foreclosure, for the pledge does not, like an English mortgage, operate as a transfer of ownership, but the contract carries with it an implication that the security may be made available to the pawnee to satisfy the obligation. The pawnee can u/s 176 of the Indian Contract Act bring a suit on the debt, retaining the goods as security, and ask for a sale through the Court, or he can sell the goods out of Court himself. He has his right of action for the debt notwithstanding the possession of the goods,

subject to the pawner's right to redeem the goods upon tender of the amount due before the sale. He has also his right of action to have the pledged property sold in order to realize his security. Now it is conceded that the right to sue on the loans arises from the respective date of each loan, for in the: absence of any stipulated period for repayment, the loan is payable on demand. The right to sue on the security in default of payment must, therefore, be simultaneous with the right to sue on the loan, for if the loan is payable on demand, the right to sell in default of payment must also accrue at the same time. Counsel for the plaintiff, however, relied on *Bolo v. Koklan* (1930) L.R. 57 I. A. 325, 32 Bom. L.R. 1596, in which it was held that the right to sue under Article 120 accrued only when the defendant had infringed or threatened to infringe the right asserted by the plaintiff in the suit, and he argued that the plaintiff's right to sue on the plaint must be deemed to have accrued to him in or about January 1927 when according to para. 9 of the written statement plaintiff asked the defendant for a receipt before handing over the shares in his possession showing that the plaintiff held the shares as security for his loan, and the defendant refused to do so. In my opinion the interpretation of the words "right to sue", as laid down by the Privy Council, must depend upon the particular class of case to which the Article is sought to be applied. In order that there may be an infringement or threatened infringement of the plaintiff's right there need not necessarily be a demand and refusal in every case. The right which the plaintiff asserts in this suit is the right given to him u/s 176 to sell the pledged property. That right accrued to him on default of payment of his debt, and the debt being payable on demand and in fact not having been paid, there is an infringement of his right to sell, and the right to sue therefore accrued to him on default. There cannot, in my opinion, be one terminus a quo or starting point of limitation for the right to sue on the debt and another for the right to sell the pledged property. In *Mahalinga Nadar v. Ganapathi Subbieri* I.L.R.(1902) Mad. 528 it was held that the claim to proceed against the pledged property was governed by Article 120, and the claim against the debtor personally was governed by Article 57 : see also *Nim Chand Baboo v. Jagabundhu Ghose* I.L.R (1894) Cal. 21, and *Pollock and Mulla's* Commentary on Section 176, 6th edn., p. 547. It is true that in neither of these two cases was the suit brought more than six years after the date of the pledge, and it has not been explicitly stated that the period of limitation runs from the date of the pledge. But that result follows from the nature of the pledge which I have discussed before. The period of limitation for a suit to recover the pledged property from the pawnee is thirty years from the date of the pledge under Article 145, and it has been held that in India, even if there is a demand and a refusal, limitation under that Article runs from the date of the pledge and not from the date of the refusal. The personal remedy of the pawnee on the loan and his right against the pledged property are distinct but concurrent, and even if the personal security is barred, the right to enforce the security against the property still remains. The suit having been filed in 1929, i.e. more than six years after the date of the alleged pledge, is, in my opinion, barred by limitation.

5. The next question is, whether the payments of interest on the loan specified in exhibit B extend the period of limitation in respect of the claim under the pledge. It must be remembered that the loans and the pledge were not contemporaneous. The loans are alleged to have been made in 1920, and the pledge is alleged to have been made sometime in the beginning of 1922. Section 20 of the Indian Limitation Act refers only to a payment of interest as such on a debt or legacy, i.e. on the loan. Now the pawnee's cause of action, which is based on his right to enforce his charge by sale of the pledged property, is embodied in the reliefs contained in prayers (c) and (d) of the plaint. As against that right the payment of interest as such on the loans within the period of limitation cannot extend limitation. Otherwise the result will be that the plaintiffs personal claim will be barred for the reason mentioned before, namely, that interest was not paid as such within the period of limitation, i.e. three years, whereas the right of action to have his security realized and his debt paid out of the sale proceeds of the property is kept alive by reason of payment of interest on the loan within the period of limitation, i.e., six years. Such a position will be inconsistent when the loan itself is barred. An acknowledgment of liability in respect of the plaintiff's right to have the property sold for the realisation of the security would extend the period of limitation if the acknowledgment satisfied the requirements of Section 19 of the Act, but with that I am not here concerned. I am only concerned with the question of payment of interest. The payments of interest as such on the loan do not save the bar of limitation, and the payment of interest on the loan so far as the pledge is concerned cannot save it either. In the result I hold that the suit is time-barred, and must be dismissed with costs.