

(1899) 05 CAL CK 0005
In the Calcutta High Court

Pratap Narain Mukhopadhyaya

APPELLANT

Vs

Surja Narain Mukhopadhyaya

RESPONDENT

Date of Decision : 16-05-1899

Acts Referred:

Citation : (1899) ILR (Cal) 955

Hon'ble Judges : Francis W. Maclean, J; Banerjee, J

Bench : Division Bench

Judgement

Maclean, C.J.—This case has been so fully argued that I do not think any useful object would be attained by our further considering the matter.

2. This is a suit by one brother against another for recovery of Rs. 900, with interest thereon at the rate of Rs. 10 per cent., and the litigation arises under the following circumstances. The two brothers, the plaintiff and defendant in this suit, were co-defendants in another suit, in the Court of the 3rd Subordinate Judge of Hooghly, a suit brought by another brother to set aside a certain deed of partition, and in that suit the present plaintiff thought it advisable to engage the services of counsel, and in that view the present defendant concurred, and the following correspondence took place between the two brothers. On the 6th May 1893 the plaintiff wrote this letter to the defendant (omitting the formal parts): "I have thought proper to engage a counsel in our suit No. 15 of 1892 in the Court of the 3rd Subordinate Judge of Hooghly. I shall bear the whole costs of the counsel except that I shall charge from you Rs. 900 only. I wont ask any more money for the counsel's fee. The rest I shall pay from my own pocket. I shall take from Bhuni Rs. 600, please accept the proposal and pay the money;" to which the defendant replied on the same date: "I think you ought to engage a counsel in suit No. 15 of 1892 in the Court of the 3rd Subordinate Judge, Hooghly. I accept the proposal made by you for the counsel's fee, shall pay you Rs. 900 only, I shall be able to pay only that sum and not more for the counsel, if you so require, I shall pay the money within ten days from this date."

3. Counsel was retained, the suit to set aside the partition came on for trial, and,

after continuing for several days, was ultimately settled. The plaintiff did pay counsel's fees, some Rs. 4,000, and asked his brother to contribute the Rs. 900 which he promised to pay. This, apparently, he did not do; and then the present suit was brought.

4. The two questions we have to decide are: First, whether the defendant is liable for the Rs. 900, and, secondly, if liable, whether he is liable for interest upon that amount.

5. Both Courts have decided against the defendant; and hence the present appeal. As regards the principal debt of Rs. 900, it is perfectly clear that the defendant is liable for that sum to the plaintiff, and we did not hear any serious argument upon the question of that liability.

6. As regards the question of interest it hinges upon the construction of the two letters, and upon the true meaning of the Indian Statute (Act XXXII of 1839). That Statute says this: "It is, therefore, hereby enacted that upon all debts or sums certain, payable at a certain time or otherwise, the Court before which such debts or sums may be recovered, may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time. * * *"

7. I need not read the rest of the section which has no application to the present case.

8. It is contended for the appellant that, although there was a written instrument within the meaning of the Statute, the debt was neither certain in amount nor payable at a certain time, and consequently that the Statute does; not apply. It is urged that the liability was a liability contingent only upon the payment of the fee to counsel, and, therefore, being a contingent liability, it was neither a debt nor amount certain, payable at a certain time.

9. Upon the construction of the defendant's letter, I am inclined to say that it was an absolute, and not a conditional promise or undertaking, to pay, but; if so, the appellant contends that it was a promissory note within the meaning of Section 4 of Act XXVI of 1881, and that not having been properly stamped the action must necessarily fail. In other words the appellant says that the plaintiff is on the horns of this dilemma: if it were a conditional promise to pay, it was not a contract for the payment of a certain sum at a certain time (within the meaning of the Statute), and if it were an unconditional promise to pay, then it is not properly stamped.

10. To the latter argument, however, Sub-section 3 of Section 34 of the Stamp Act of 1879 is a conclusive answer.

11. But in the lower Court, to get out, doubtless, of the stamp difficulty, the plaintiff's case was urged upon the footing that the promise to pay was conditional only, and I will treat the case on that footing.

12. It appears to me that the appellant's argument is based upon some confusion between the question of liability for a debt, and the question of whether or not, if the liability be established, it is in respect of a debt or sum certain payable at a certain time. The question of liability is one thing, the question of whether the liability is for a debt or sum certain, payable at a certain time, is another. If the liability be contingent or conditional, and the contingency do not happen, or the condition be not complied with, there is an end of the matter, and the liability is gone; but if a liability in its inception contingent, become, by the happening of the specified event, an absolute liability, then we must refer to the document which creates the liability, and try to discover from that document what the liability actually was, and whether it was in respect of a debt or sum certain payable at a certain time. If, then, we apply that principle to the present case, we find that the contingent liability became an absolute liability, and in respect of a debt or sum certain payable at a certain time, for, upon the construction of the defendant's letter, I entertain no doubt but that the latter requisites are complied with. In my opinion the case is within the Statute.

13. Dr. Rash Behary Ghose, for the appellant relied upon the case of *The London Chatham and Dover Railway Co. v. The South Eastern Railway Co.* (1893) L.E. A G., 434, in the House of Lords, where Lord Herschell, J. stated the law in these words: In order, therefore, to justify the allowance of interest, it must be shown that there is a debt or sum certain payable at a certain time by virtue of some written instrument. Unless that can be established, the case does not come within the words of that part of the section."

14. I quite agree that before interest can be allowed under the Statute the requisites stated by Lord Herschell must be forthcoming.

15. The appellant relies mainly upon certain observations of the Judicial Committee of the Privy Council in the case of *Juggomohun Ghose v. Manick Chund* (1859) 7 M.I.A., 263 and there are, doubtless, some observations which do give colour to his contention. But the facts of that case are very different from those of the present case, and I think the observations in question must be regarded as made in connection with the particular facts of that case rather than as intended to have so wide and general an application as the appellant contends for. That was a suit based upon a wager contract upon the average price that opium would fetch at the next sale, and that was held not to be within the scope of Act XXXII of 1839. Their Lordships say at p. 279 of the report: "The Statute by the qualifications which it imposes of certainty in time and amount, by requiring that this certainty and the obligation itself to pay the principal should be created by a written instrument, by making the interest run from the time at which the principal is payable, and, finally, by giving the jury a discretion as to the allowance of interest, even where all these circumstances concur, seems to have been framed, not simply on the principle of compensation to the creditor, but--" and on these words the learned Vakil for the respondent places greater stress--" also on that of penalty to the debtor for not paying punctually at a time when he

must have known the debt or sum, specific in amount, was to be paid."

16. There can be no question that in the present case the debtor did know that he had to pay the debt, which was certain in amount, and he knew the date within which he promised to pay it. If then he did not pay the money punctually why should he not pay the penalty in the shape of interest? Their Lordships then proceed: "Obviously the most honest and punctual debtor may be unprepared to pay an uncertain amount which may not be due for months or years, or only on the happening of a contingency, the falling in of which he may not know of."

17. These words can scarcely apply to the circumstances of the present case, for the amount was not uncertain, the date of payment was defined, and the defendant knew that the contingency, upon which he became liable, had occurred. Their Lordships proceed: "On this principle, too, the discretion given to the jury to consider all the circumstances of each particular case becomes perfectly reasonable. It is quite consistent with this view that, where the debt is payable "otherwise" than at a certain time, interest is not to be allowed except from and after the time of a written demand of payment. This reasoning leads their Lordships to conclude that the certainty required must exist at the time when the promise is made."

18. I read the expression "certainty required" as referring to the certainty required by the Statute, i.e., as to amount and date of payment, both of which exist in the present case, but which were absent from the case before the Privy Council, a case which, in my judgment, does not govern the present. For these reasons the plaintiff, in my opinion, is entitled to interest on the principal debt.

19. Taking this view, it becomes unnecessary to consider the question which was dealt with in the case of *Kamalammal v. Peeru Meera Levuai Rowthen* I.L.R. (1897) 20 Mad., 481, the question as to the application of Section 73 of the Contract Act to the payment of interest in cases not within the Statute XXXII of 1839.

20. Lastly, it is said that the Judge in the Court below has not found that the 10 per cent, was the current rate of interest, and that only the current rate of interest can be allowed. There is, however, force in the view urged by the respondent that it has been shown that the plaintiff had to pay 10 per cent, for the money he borrowed to pay the counsel's fees, a rate rather below the not unusual rate of interest of 12 per cent., and that in the absence of any evidence on the other side to show that was not the current rate, there was sufficient to justify the Court in treating that rate as the current rate. I see no reason to interfere with this conclusion.

21. On these grounds I think the appeal fails and must be dismissed with costs.

Banerjee, J.

22. I am of the same opinion. The two questions raised before us in this appeal are, first, whether the plaintiff was entitled to recover the amount claimed when

the purpose for which it was promised to be paid had not to be carried out to the end by reason of the suit in relation to which the agreement was made having been compromised after it had proceeded up to a certain stage only; and, second whether having regard to the nature of the agreement and to the provisions of Act XXXII of 1839, the plaintiff was entitled to any interest on the amount promised to be paid.

23. The contention upon the first point, which was but faintly pressed, was this, that as the money which the defendant promised to pay was agreed to be paid to enable the plaintiff to meet the expenses of engaging counsel in a suit, in which both the plaintiff and defendant were defendants, and as that suit had not to be defended to the end, but was compromised, the plaintiff was not entitled to recover the amount promised to be paid. But it is admitted that counsel was engaged; it is admitted also that the plaintiff had to pay counsel more than the sum of Rs. 1,500 being the sum total of the Rs. 900, which the defendant promised to pay, and a sum of Rs. 600, which the plaintiff in his letter to the defendant said he would take from another brother who was also a defendant in that suit. That being so, I do not think that the mere fact of the suit having been compromised at a certain stage can affect the liability of the defendant. Having regard to the terms of the contract, the plaintiff took the risk of having to pay more or less according as events took their course.

24. Upon the second point it was argued that the requirements of Act XXXII of 1839 were not satisfied, because the debt was not certain and the time of payment was, therefore, also not certain; and in support of this contention, the cases of *Juggomohun Ghose v. Manick Chund* (1859) 7 Moore I.A., 263, and *London Chatham and Dovei Railway Co. v. South Eastern Railway Co.* I L.R (1893) AC 429, were relied upon. But though there was uncertainty in the liability to this extent, that the liability was to arise only in the event of counsel being engaged by the plaintiff, it cannot be said that there was any uncertainty either in the amount of the debt or in the time of payment, supposing the contingency arose upon the happening of which the liability was to accrue. The Act of 1839 speaks of a sum certain payable at a certain time. The language of the Act does not show that a contingency in the liability not affecting the amount of the debt or the time of payment can in any way prevent the provisions of the first part of Section 1 of the Act from applying to the ease. There is, in my opinion, a clear distinction between an uncertainty as to the arising of the liability, and an uncertainty as to the amount of the debt or the time of payment. It is true that there are observations in the cases cited, which apparently favour the contention on behalf of the appellant; but after carefully considering those two cases, the facts of which were very peculiar in their nature, I find that the uncertainty that was held as taking them out of the operation of the Statute was an uncertainty as to the amount of the debt and the time of payment. The passage in the judgment of the Judicial Committee, in the case of *Juggomohun Ghose v. Manick Chund* which was most strongly relied upon, is this: "This reasoning leads their Lordships to conclude that the certainty required must exist at the time when the

promise is made, and, therefore, that the Act does not in this part affect debts contingent in amount and time of becoming due; a construction strictly conformable to the natural meaning of the language used." But the passage shows that the uncertainty which their Lordships were considering was an uncertainty as to the amount and also as to the time. But as I have said above there was no such uncertainty in this case. And it is not denied that the contingency as to the liability was removed by counsel being engaged before the expiry of the ten days within which the defendant promised to pay the money. I am, therefore, of opinion that the case comes within the first part of Section 1 of Act XXXII of 1839.

25. I should add that if the case had not come within the scope of Act XXXII of 1839, still the plaintiff would, u/s 73 of the Indian Contract Act, be entitled to recover the amount of interest which has been awarded to him as compensation for damage caused to him by the defendant's breach of contract.

26. The view I take is, no doubt, opposed to that taken by the Madras High Court in the case of Kamalammai v. Peeru Meera Levvai Rowthen I.L.R (1897) 20 Mad., 481. But with all respect for the learned Judges who decided that case, I must say that I am unable to assent to the view expressed by them. It was argued that to give this effect to Section 73 of the Indian Contract Act would be to make the provisions of a general Act to override those of the special Act of 1839. I do not consider this argument correct. The scope of Act XXXII of 1839 is very different from that of Section 73 of the Indian Contract Act. The Act of 1839 provides for the award of interest on debts in certain cases, and provided that the conditions required by the Act are satisfied, interest will be recoverable, quite irrespective of the question whether any actual loss or damage has been caused to the creditor.

27. On the other hand Section 73 of the Contract Act provides for the award of compensation to a person to whom loss or damage has been caused by a breach of contract by another person. Compensation u/s 73 of the Contract Act will not therefore be recoverable by a creditor from his debtor on the ground that the payment of money due to him has been withheld by the debtor unless he can show that actual loss or damage has been caused to him. No doubt the law presumes the withholding of payment of money as carrying with it loss to the person to whom such money is due, the compensation for which loss is interest at the market rate. Such damage I may, without any straining of language, call damage in law, as distinguished from damage in fact, or actual damage, which a person from whom payment of money due is withheld may sustain in certain cases as the plaintiff is found to have sustained in this. Thus where A promises to pay money to B in order to enable B to meet the expenses of a common purpose, and A afterwards withholds payment, and B has to borrow money on interest to meet those expenses, then, if B claims not only the amount agreed to be paid, but also the interest on it which he had to pay, he would, u/s 73 of the Contract Act, be entitled to recover such interest, provided other conditions are

satisfied, such as that the interest is not exorbitant, but is at such a rate as a reasonable man would agree to pay, having regard to the state of the market. Here B recovers what is nominally called interest, but is really compensation for damage" sustained by him. But if B had not actually to borrow any money, and to pay any interest, he would not in such a case be entitled to recover interest by way of damages u/s 73 of the Contract Act, though if the case came within the provisions of Act XXXII of 1839, he would be entitled to such interest. This is, I think, a rational and sound distinction; and having regard to the finding of the Lower Appellate Court, that the "plaintiff has charged the amount of interest only, which plaintiff has had to pay on raising a loan for the purpose of paying the counsel's fee," the decree may be supported u/s 73 of the Contract Act, even if the case did not come within the scope of Act XXXII of 1839. This view is not in conflict with the case of *London Chatham and Dover Railway Co. v. South Eastern Railway Co.* (1893) L.R., AC 429, in which interest, so far as it was claimed as compensation, was claimed not as compensation for any loss or damage sustained in fact, but as compensation for loss or damage presumable in law from non-payment of money due.