

(1913) 04 MAD CK 0006
In the Madras High Court

Sitharama Chetty and Another	Vs	APPELLANT
Cotha Krishnasami Chetty		RESPONDENT

Date of Decision : 24-04-1913

Acts Referred:

Limitation Act, 1963 — Section 19

Citation : (1915) ILR (Mad) 374 : 24 Ind. Cas. 507 : (1913) 25 MLJ 264

Hon'ble Judges : Arnold White, C.J;Oldfield, J;Old Field, J

Bench : Full Bench

Judgement

Arnold White, C.J.—The first question for consideration in this appeal is whether Wallis J.'s finding on the question of estoppel is right.

2. The circumstances in which the question has arisen are these:--

On the 12th December 1904 there was an agreement (Exhibit B) between the plaintiff and the defendants under which the plaintiff leased to the

defendants his interest in a certain business for an amount which had been fixed by the arbitrators. On the same date, for the consideration

specified in, Exhibit B the defendants executed in the plaintiff's favor a promissory note for Rs. 30,000 payable by monthly instalments up to April

1906.

3. In August 1906 the plaintiff instituted a suit against the defendants in which he asked that the release (Exhibit B) should be set aside on the

ground that it had been obtained by fraud. He declined to accept instalments under the pronote after April 1906. Fourteen instalments have not

been paid. The plaintiff's suit was dismissed. On appeal the appellate Court declined to set aside the release but held the plaintiff was entitled to

receive a further sum of Rs. 1,400 odd with which, he ought to have been

credited on the taking of the account, as representing his share of certain debts which had been collected by the firm. In the Judgment their Lordships observe "" Mr. Ramachandra Aiyar further claims payment of the amount due under the promissory note. The defendants do not deny their liability to pay and they submit they have been always ready and willing to pay but they contend that no decree for the same should be passed in the suit and we think they are right.

4. The Judgment of the Appellate Court was delivered on the 19th January 1910. On the 25th January the plaintiff demanded payment of the balance of instalments on the promissory-note Rs- 14000 and then brought the present suit. The defendants pleaded limitation. Mr. justice Wallis gave the plaintiff a decree for the amount claimed. It was contended that a statement by one of the defendants in an affidavit (Exhibit G) amounted to an acknowledgment within Section 19 of the Limitation Act. I agree with the learned judge that this statement cannot be regarded as an acknowledgment within the meaning of the Section

5. The learned judge was not prepared to hold that Section 115 of the Evidence Act applied but he held on the facts that the defendants were precluded from pleading the statute. The learned judge; after citing certain passages from Mr. Bigelow's treatise on the Law of Estoppel, puts it, thus--"" It appears to me that it would be opposed to good conscience to allow defendants, who for the purpose of resisting an application against them, have stated that they did not deny their liability and were always ready and willing to pay to turn round immediately afterwards and allege that long before the date of their admission the suit had become barred by limitation.

6. The application which the defendants resisted was an application made on behalf of the plaintiff in the suit of 1906 (in which he sought to have the release set aside) that he should be given a decree for the unpaid instalments on the promissory-note. The plaintiff had refused to accept instalments after April 1903 because he had repudiated the agreement under which the instalments were payable. It was not a case, as it seems to me, in which leave to amend by adding an alternative claim for payment of the instalments could properly have been given. The learned Judges themselves say that they think the defendants were right in their contention that

no decree on the note could be given in that suit. At the time when as it is suggested, leave to amend might have been given, the right to recover some, at any rate, of the instalments had become time-barred. It was not a case of leave to amend by setting up a claim to a different relief on the same cause of action but by setting up a cause of action wholly inconsistent with that set up in the plaint. As a matter of fact no application for leave to amend was ever made.

7. In these circumstances since no advantage was obtained and there was no change of position I feel doubtful whether the defendants, notwithstanding their admission as to their liability, with regard to instalments which were time barred can be said to be precluded on any principle of estoppel from setting up the statute when sued on the note. I do not think it can be, said that if the admission had not been made the plaintiff would have pressed for the Judgment on the note in the suit of 1906 because the parties seem to have agreed, and certainly the Court was of opinion, that judgment on the note could not be given in that suit. It seems to me, with all respect, that the learned judge in dealing with this question failed to give due weight to the express provisions of Section 4 (now Section 3 of the new Act) of the Limitation Act which enacts that every suit instituted after the prescribed period of limitation shall be dismissed although limitation has not been set up as a defence. It is well settled that there can be no estoppel against an act of the legislature. *Jagadbandher Sake v. Radhakrishna Pal* ILR (1909) C. 929 and *Abdul Aziz v. Kantha* Mullick ILR (1911) C. 572.

8. In England a party relying on the statute must plead it. As regards personal actions other than actions on penal statutes the defence of the statute may be specially pleaded even if it appears on the face of the statement of claim that the cause of action accrued out of the limited time. *Darby and Bosanquet on the Statute of Limitations* Ex. 2 page 542. Mr. Ramachendra Aiyar on behalf of the plaintiff contended that a party could waive the statute if he liked, that the defendant's admission in the suit of 1906 amounted in effect to an anticipatory waiver of the statute as regards any claim which might subsequently be made upon the note and this being so the plea of limitation raised in this suit should on equitable grounds be disregarded. The answer to this as it seems to me, is that the parties cannot

waive the statute by agreement. It would appear to be the law of this country that parties cannot waive or contract themselves out of the law of limitation. The law is thus stated by Mr. Mitra in his book in the Law of limitation "" An agreement by a person against whom a cause of action has arisen that he would not take advantage of the statute cannot affect its operation on the original cause of action unless indeed such agreement amounts to an acknowledgment of liability which the statute itself recognises as an exception to the rule "" Mitra, edition V volume I p. 39. Again on page 86 "" Reasons of public policy having dictated the enactment of the Law of limitation the Indian legislature has since 1871 expressly declared that, whether the defence of limitation be pleaded or not, the Courts, whether of first instance or of appeal are bound to give effect to such law. See Section 4 of Act IX of 1871, and Section 4 of Act XV of 1877, and the illustrations. The bar of limitation cannot be waived, and suits and other proceedings must be dismissed if after the prescribed periods of limitation."" And on page 248 ""A law of limitation and prescription may appear to operate harshly or unjustly in particular cases but when such a law has been adopted by the state, for reasons which justify the rule in the majority of cases, it must, if unambiguous, be applied with stringency and no individual case to which those reasons are inapplicable can be excepted from its operation. The general good of the community requires that even a hard case should not be allowed to disturb the law. The rule must be enforced even at the risk of hardship to a particular party. The Judge cannot on equitable grounds enlarge the time allowed by the law, postpone its operation or introduce exceptions not recognised by it."" The latest decision upon the point would seem to be Khetri Mohin Chatterjee v. Mohin Chandra Das (1913) 17 C.W.N. 518 a case to which Mr. Srinivasa Aiyangar called our attention after the hearing of the appeal. Mr. Ramachandra Aiyar who appeared for the respondent relied on Bangayya Appa Bow v. Narasimha Appa Bow ILR (1896) M. 416 Seshachala Naicker v. Varadachary ILR (1901) M. 55 where it was held that when a party has abandoned the plea in the Court of first instance he cannot revive it in appeal in a case where the appellate Court cannot deal with the plea on facts found or admitted. These cases seem to me to be clearly distinguishable. In the case now before us in the first place the

defendants are said to have abandoned the plea by an admission made in another suit and in the second place it cannot be said that the plea cannot

be disposed of on the facts found or admitted in this suit. Another case on which Mr. Ramachendra Aiyar relied was *Baij Nath Bam Goneka v.*

Hem Chunder Bose (1906) 10 C.W.N. 959. There, in an administration suit a receiver in the presence of the executor, admitted a creditor's debt

and the court directed the creditor to bring a suit. When the suit was brought the executor pleaded limitation. It was held the executor was

estopped. This case seems clearly distinguishable. When the admission was made by an officer of the Court, the Court was of opinion that, but for

the admission, the creditor would have brought his suit in time and the suit which he did bring was in pursuance of the direction of the Court. It may

be that an action would lie for breach of an agreement not to plead the statute. (*See East India Co. v. Ovichurn Paul*) (1849) 5 M.I.A. 43 but that,

of course, is a question with which we are not now concerned.

9. Mr. Ramachendra Aiyar relied on the directions given by the Privy Council in the case *Muhammad Zahoor Ali Khan v. M99999-mat*

Thahooranu Rutta Koer (1867) 11 M.I.A. 468. Their Lordships in that case after considering whether they should dismiss the appellant's suit

without prejudice to his right to bring a fresh suit, pointed out that such a suit would probably be met by a plea of limitation, which in the

circumstances would be inequitable.

10. They then allowed the appellant to amend the plaint. Their Lordships took this course to avoid the raising of a plea of limitation which they

considered would be inequitable. They did not say that this plea, if raised would have been ineffectual. The fact that they thought it desirable not to

give the defendant an opportunity of raising the plea would rather suggest the contrary. Further the amendment allowed did not set up a new cause

of action but merely changed the nature of the relief claimed.

11. We are only concerned with the question whether on legal or equitable grounds, the judgment of the learned judge on this part of the case can

be supported. With all respect after careful consideration I have come to the conclusion that it cannot.

12. It was further contended on behalf of the appellant that as there had been failure to pay one or more instalments in August 1906 default was

then made, and under Article 75 of the 2nd Schedule to the Limitation Act the whole of the claim was time barred.

13. The note provided that if 3 instalments were allowed to fall into arrears the whole amount should be recoverable. The amendment of the article

to which Wallis). refers in his judgment was apparently intended to meet an agreement like the one in the present case.

14. It was contended for the appellant that default meant nothing more than the non-payment and that default was made in June or July 1906. I

cannot accept this contention. The defendants sent cheques in May and June which were returned. In July they wrote (Ex.) "" Please let us know

whether we are to understand that you will not in future receive payments tendered for the instalment of the bond so that we may cease to go

through the farce of sending a cheque every month only to be returned."" It is their case that at any rate up to the institution of the present suit they

were ready and willing to pay. The defendants, for their own purposes, and in order to get the benefit of the law of limitation now say there was

default in payment of 3 instalments in July 1903. On these facts I am prepared to hold that there was no default within the meaning of the article.

Assuming there was default, it seems to me the plaintiff waived "" the benefit of the provision"" in May 1906 or thereabouts, when he repudiated the

agreement which gave him the benefit of the provision. It was argued that waiver implied the giving up of an existing right and that the plaintiff could

not be heard to say there was an existing right since he repudiated the agreement. I do not feel called upon to construe the word ""waiver"" in this

restricted sense, In my opinion the plaintiff gave up the contract and with it the benefit of the provision contained therein. It may be that refraining to

sue will not in itself constitute a waiver; (See Seshan Pattar v. Veera Raghavan Pattar ILR (1909) M. 284 but here the plaintiff did not merely

refrain to sue. He repudiated the whole transaction. His subsequent claim on the note after the judgment of the appellate court does not in my

opinion preclude him from saying he waived the benefit of the provision. For these reasons I do not think Article 75 applies.

15. On behalf of the Respondent it was contended that Article 120 applies but it seems to me the judge was right in holding that the article

applicable is Article 74. Under Article 74 time runs from the expiration of the respective terms of payment. The right to recover the instalment due

in May 1906 became barred in May 1909, the right to recover the instalment due in June 1906 became barred in June 1909 and so on. Thus the

right to recover nine out of the 14 unpaid instalments is in my opinion barred.

16. The claim for the instalments due in February, March, April, May and June 1907 is, in my opinion not barred.

17. I would modify the decree of the learned judge by giving the plaintiff a decree for those 5 instalments with interest at the contract rate.

18. I would not interfere with the order of Wallis J. as to the costs and I would make no order as to the costs of this appeal.

Old field, J.

19. I have nothing to add to the judgment of the learned Chief Justice with regard to the plea of estoppel and confine myself to the question of limitation.

20. It is not necessary to state the facts again. Appellant's argument is that there was a default in payment of certain instalments in 1906, that it was

followed by no waiver, that time consequently began to run in respect of the whole amount still due and that the suit is therefore barred under

Article 75 Schedule I Act IX of 1908.

21. Firstly was there a default in respect of any instalment ? Respondents pleaded one for their own advantage and the plea must be scrutinized

closely. There is no dispute as to the facts. There is no dispute that cheques were sent for the instalments due in May and June 1906, but were

returned. In July there was no actual tender. But readiness and willingness to make one for that and the following months are implied in the working

of Ex. E, in which appellants asked whether they need go through the farce of sending cheques in future, and, though respondents' attorneys gave

no explicit answer to this enquiry in Exhibit D, the tenor of that communication is clearly that respondent intended to have the contract between the

parties avoided and with reference to that intention dispensed with performance thereof in that and subsequent months. Throughout these, the

absence of completed payments has been the result not of any failure, unreadiness or unwillingness on the part of appellants but of the conduct of

the respondent alone. The provision for immediate recovery in the pro-note sued on (Ex. A) must be regarded as introduced for respondent's

benefit. The construction of it, required by appellant's contention, is that he

could at any time have secured the advantage of special method of recovery, though his debtors were not in fault; and that cannot have been contemplated by either party to the contract. It follows that the mere absence of completed payments, for which throughout appellants have not been responsible, cannot be treated as equivalent to the default referred to in the first column of Article No. 75. Next as to waiver. The waiver in question in the article is of the benefit of the provision for immediate recovery of the whole amount still due in case of default. The contingency in which that benefit can be taken or waived is the occurrence of a default; and, as I have held, that contingency never arose. It is therefore in my opinion useless to consider whether respondent's conduct, including the sending of Exhibit D, amounted or could in any circumstances have amounted to a waiver immediate or prospective.

22. But, though there was no default, it is clear that there was money due and unpaid and that respondent (apart from limitation) had a cause of action. It remains to decide what article is applicable to it. The authorities cited afford no guidance, since they deal only with cases of default and waiver of the special provision for immediate recovery. The difficulty arises from the abnormal wording of article No. 75. For in other articles, relating to breaches of an obligation to be fulfilled in accordance with the terms of a contract as for instance Nos. 53, 63, 65, 66, 73 and 74 the third column is expressed with direct reference to that date, and not to the conduct of the promisor, as it is in article No. 75 where the word "default" is used. The difference can be material only with reference to the small class of suits, such as the present in which there is no default. There may have been no intention to make any special distinction or to do more than continue the third column of art., No. 74 concisely with a reference to the result of the provision for immediate recovery. But in order to apply the article to the present case it would be necessary in consequence of my finding against the occurrence of a default, to understand the word "default" in the third column as meaning simply "failure to pay on the due date" although the wider interpretation above referred to for the word in the first column would have to be retained. This construction would be violent; and I hesitate to adopt it, the provision for immediate recovery having no direct importance in cases, such as this, in which there is no

default, and its inclusion in Exhibit A affording no reason for allowing respondent a longer time, in which to sue them he would have had under any

other article in a similar cause of action. Article No. 75 must I think be held applicable only to the class of suits, to which that under disposal does

not belong, those in which a default has occurred and in which the provision as to waiver may be material. I would for these reasons apply article

No. 74, which deals with suits on contracts not containing such a provision, or the more general article, No. 80. So these two articles are in my

opinion applicable, the residuary article No. 120, for which respondent contends need not be considered.

23. The application of either article No. 74 or article No. 80 entails concurrence in the conclusion proposed by the learned Chief Justice; the

respondent is entitled to recover the last five instalments which fell due before the date of plaint. I agree with him also as regards costs.

24. I therefore concur in the decree which he proposes.