
(1976) 08 CAL CK 0027
In the Calcutta High Court
Case No : Civil Rule No. 2377 of 1975

Tridibesh Bose

APPELLANT

Vs

Baladeb Basu

RESPONDENT

Date of Decision : 23-08-1976

Acts Referred:

Civil Procedure Code, 1882 — Section 215, 216
Civil Procedure Code, 1908 (CPC) — Order 20 Rule 16, Order 20 Rule 19, Order 47 Rule 1, 151
Contract Act, 1872 — Section 73
Limitation Act, 1963 — Section 5

Citation : (1976) 1 CALLT 281 : (1977) 2 ILR (Cal) 15

Hon'ble Judges : S.K. Bhattacharyya, J;Janah, J

Bench : Division Bench

Advocate : Saktinath Mukherjee, Partha Pratim Mukherjee and Tarun Chatterjee, for the Appellant;Tarak Nath Roy and Sankar Lal Sil, for the Respondent

Judgement

Janah, J.—This Rule is directed against three orders passed by the Subordinate Judge, Sixth Court, Alipore, in T.S. No. 71 of 1930. The orders complained of are orders Nos. 1342, 1401 and 1422 dated respectively August 12, 1974, March 19, 1975 and May 24, 1975. As one of the aforesaid orders, namely, order No. 1342 dated August 12, 1974, was not moved against within the period of limitation the Petitioner has prayed for Condonation of delay in moving the present application in so far as the said order is concerned u/s 5 of the Limitation Act, 1963.

2. The facts which are not in dispute between the parties are as follows:

The Plaintiff-Petitioner who is the younger son of the renowned mathematician late K.P. Basu filed the aforesaid suit against his elder brother Jitendra and his mother Meghmala for partition and accounts. Copy-rights in respect of certain works of late K.P. Basu formed one of the subject-matters of partition. The copy-rights in question were sold in auction under the orders of the Court. The Plaintiff-Petitioner auction-purchased the same for a sum of Rs. 2,50,000. After deducting the sum of Rs. 83,333-5-4 being the 1/3rd share of the Plaintiff-Petitioner he

deposited the balance sum of Rs. 1,66,666-10-8 in Court. The original Defendant No. 1 withdrew his share of Rs. 83,333-5-4 out of the aforesaid sum deposited by the Plaintiff Petitioner in the Court. In so far as the share of Meghmala, the Defendant no. 2 in the sale proceeds, was concerned, the parties entered into a compromise on the basis of which an order was passed on September 24, 1954. In terms of the said compromise the Defendant No. 2 withdrew the sum of Rs. 20,000 being a part of her share in the sale proceeds and the balance amount of Rs. 63,333 and odd was invested in the business of the Plaintiff-Petitioner with a condition that the Plaintiff-Petitioner would pay interests on the said sum of Rs. 63,333 and odd to Meghmala, the Defendant No. 2, at the rate of 9% per annum. It was further provided that after the death of the Defendant No. 2 half of the aforesaid sum of Rs. 63,333 and odd would be payable to the Defendant No. 1 Jitendra. Meghmala, the Defendant No. 2, died on June 19, 1961 and the Defendant No. 1 claimed that on her death half of the money amounting to Rs. 31,666 and odd became payable to him by the Plaintiff. The Defendant No. 1 filed a petition on February 18, 1963, praying for a direction upon the Plaintiff-Petitioner to pay the said sum of money to the Defendant No. 1. In this petition there was no prayer for payment of any interest by the Plaintiff. Subsequently on or about August 13, 1967, the Defendant No. 1 filed another petition in which a prayer was made for a direction upon the Plaintiff to pay interest at the rate of 9% per annum on the aforesaid amount of Rs. 31,000 and odd. The prayer of the Defendant No. 1 for payment of Rs. 31,000 and odd was allowed by the Court by order No. 1311 dated August 6, 1969, but no direction for payment of interest was passed. Against the said order a grandson of the deceased Defendant No. 2 by her daughter moved this Court and obtained Civil Rule No. 3520 of 1969, which was ultimately discharged by this Court on March 2, 1970 and the order passed by the trial Court was confirmed. Thereafter, the Defendant No. 1 died on May 3, 1971, leaving a will. The said will was duly probated in favour of the opposite parties and they were brought on record in place of the deceased Defendant No. 1. On June 26, 1974, the opposite parties filed an application before the trial Court for a direction upon the Petitioner to pay to the opposite party No. 1, one of the executors to the estate of the deceased Defendant No. 1, the aforesaid sum of Rs. 31,000 and odd with interest at the rate of 9% per annum from June 19, 1961, till the date of payment. The Petitioner filed an objection to the said application. The trial Court by its order No. 1342 dated August 12, 1974, allowed the application filed by the opposite parties and directed the Plaintiff to pay the aforesaid sum of Rs. 31,666-66 together with interest thereon at the rate of 9% per annum from June 19, 1961, till the date of payment. The opposite parties levied execution of the said sum in Title Execution case No. 7 of 1975 praying for attachment and sale of the residential house of the Petitioner. On September 9, 1974 the Petitioner applied for review of the order under Order 47, Rule 1 of the Code of Civil Procedure. The review application was, however, dismissed by the trial Court by order No. 1401 dated March 19, 1975. The Petitioner, thereafter, filed an application u/s 151 of the Code on May 2, 1975, praying for vacating order No. 1342 dated August 12,

1974, after reconsideration, of the application on which the said order was passed. This application was also rejected by the trial Court by order No. 1422 dated May 24, 1975. Against the aforesaid three orders the Petitioner has obtained the present Rule.

3. Mr. Saktinath Mukherjee, learned Advocate appearing in support of the Rule, has contended before us that the instant suit is one for partition and accounts. He has contended that in a suit for accounts there is an implied undertaking by the Plaintiff that if ultimately anything is found due to the Defendant from the Plaintiff, a decree in favour of the Defendant will be passed. That being the position, he has contended the order for payment of the sum of Rs. 31,000 and odd to the Defendant by the Plaintiff before the accounts between the parties is finally settled, is not warranted by law. In support of this proposition he relied upon the decision in *Paramanand and Anr. v. Jagatnarain* ILR All. 525. That was a suit brought by the principal against an agent for rendition of accounts. The agent expressed his willingness to render accounts but alleged that on such accounts being taken money would be found due to him; he did not, however, specifically pray for a decree for the sum alleged to be due to him. The Court ultimately granted a decree to the agent upon the finding that money was due to him. It was held that the decree was justified with reference to the provisions of Sections 215 and 216 of the Code of Civil Procedure, 1882, which correspond to Order 20, Rule 16 and Order 20, Rule 19 of the Code of 1908. Reliance was also placed by Mr. Mukherjee in support of the proposition on the decision in *Narendra Krishna Chakraborty v. Ashutosh Bhattacharyya and Ors.* 35 C.W.N. 17. On behalf of the Petitioner Mr. Mukherjee did not dispute the liability of his client to pay the sum of Rs. 31,000 and odd which was payable to the Defendant No. 1 on the death of the Defendant No. 2, but what was objected to is the enforcement of the immediate payment of the said amount at this stage of the suit. It was contended that there was nothing in the compromise which was arrived at between the parties and which was recorded by order No. 997 dated September 24, 1954, to show that the money would have to be paid immediately; on the other hand, contended Mr. Mukherjee, there were sufficient indications in the consent order to show that the Amount would become payable only after the accounts were finally settled. For this purpose Mr. Mukherjee relied upon several clauses mentioned in the aforesaid consent order dated September 24, 1954. The relevant clauses of the said consent order are as follows:

...(c) out of her share of the sale proceeds namely Rs. 83,333-5-4 the Defendant. No. 2 will be entitled to withdraw or Rs. 20,000 which sum she will get absolutely. The balance viz. Rs. 63,333-5-4 will be invested in the Plaintiff's business K.P. Basu Publishing Co and K.P. Basu Printing Works. The Plaintiff will pay to the Defendant No. 2 during her lifetime the interest on the said sum of Rs. 63,333-5-4 at the rate of 9% per annum....

(f) The Plaintiff and the Defendant No. 1 undertake not to deal with or dispose of their respective shares in the residential house (11 Mahendra Gosain Lane,

Calcutta) or the Dehri-on-Sone property or the Imperial Bank share till the accounts between them are finally adjusted and the dues and obligation as between them are fully satisfied.

(g) One half of the sum of Rs. 63,333-5-4 mentioned in Clause (o) above will be payable to Defendant No. 1 after the death of the Defendant No. 2....

From these provisions it was contended on behalf of the Petitioner that the agreement contemplated that although the amount of Rs. 31,000 and odd in the share of the Defendant No. 1 was payable by the Plaintiff to the Defendant, the said payment must await the final adjustment of accounts between the parties in the suit.

4. Mr. Tarak Nath Roy, appearing on behalf of the opposite parties, on the other hand, contended that the payment of the aforesaid amount of Rs. 31,000 and odd was never intended to be made the subject-matter of accounting between the parties. He drew our attention to Clause (f) of the consent order referred to above and argued that amongst other things the sale of copy-right had not been mentioned in the said clause. He also drew our attention to order No. 1311 dated August 6, 1969, wherein the Plaintiff's plea of adjustment of the aforesaid amount with the dues of the Plaintiff from the Defendant was negatived. Mr. Roy also referred us to annEx. A -to the affidavit-in-opposition which is a copy of order No. 984 dated July 19, 1954, passed in the suit wherein the Plaintiff's plea of adjustment of his dues from the Defendant No. 1 was also negatived and the Court allowed an ad hoc allotment to the Defendant to the extent of Rs. 20,000 from out of the joint funds, Mr. Roy also drew our attention to order No. 1067 dated August 21, 1957, which is also a part of annEx. A to the affidavit-in-opposition. By the said order the Court considered the question of the liability of the parties to render accounts in respect of different transactions and different businesses and a similar contention which was raised by the Plaintiff was negatived. From these orders Mr. Roy contends that the Plaintiff cannot now contend that the liability of the Plaintiff to pay the aforesaid amount will arise only after the accounts are fully and finally settled between the parties at the final disposal of the suit.

5. The learned Advocates for the respective parties addressed us at length on this aspect of the case. But having regard to the view which we have taken, it is not necessary for us to consider in detail the merits of the arguments advanced on behalf of the Petitioner. The original Defendant No. 1 Jitendra filed an application on February 18, 1963, for an order directing the Plaintiff to pay the amount of Rs. 31,000 and odd due in his share on the death of the Defendant No. 2 and payable by the Plaintiff in terms of the consent order No. 997 dated September 24, 1954. The Plaintiff filed objection to the aforesaid petition. There was a contested hearing and the Court by order No. 1311 dated August 6, 1969, allowed the prayer of the Defendant No. 1 and directed the Plaintiff to pay the Defendant No. 1 a sum of Rs. 31,666-66 being one-half share of the Defendant No. 1 in the money of Meghmala, the Defendant No. 2, invested in the business

of the Plaintiff. This order was not challenged by the Plaintiff. One of the daughters son of Meghmala came up in revision to this Court against the aforesaid order. The Rule was, however, ultimately discharged. There in so far as the Plaintiff is concerned that order became final and binding upon him. The original Defendant No. 1 Jitendra also filed an application for payment of the interest by way of amendment of his application for payment of the aforesaid sum of Rs. 31,000 and odd. No order was however passed on the said application for payment of interest. Subsequently after the death of the Defendant No. 1 the present opposite party filed an application on June 26, 1974, for a direction upon the Plaintiff to pay the aforesaid sum of Rs. 31,666-66 with interest at the rate of 9% per annum from June 19, 1961, till the date of payment. This application was allowed by the learned Judge by order No. 1342 dated August 12, 1974. Although this order was not initially challenged by the Plaintiff by way of revision to this Court he has however come upto this Court now, after being unsuccessful in having a review of the order and also in an application u/s 151 filed by him before the trial Court. As has already been stated, the Plaintiff has prayed for condonation of delay in moving this application against order No. 1342 dated August 12, 1974. In our view even if the Plaintiff succeeds in his challenge in so far as payment of interest as has been directed by order No. 1342 is concerned, he cannot be permitted to challenge the other part of the order, namely, the payment of Rs. 31,000 and odd to the Defendant No. 1 or to the present opposite party inasmuch as the earlier order No. 1341 dated August 6, 1969, by which a similar direction was given upon the Plaintiff, still stands. Moreover/order No. 1311 dated August 6, 1969, passed by the trial Court has merged in the order passed by this Court on March 2, 1970, in C.R. No. 3520 of 1969 to which the present Petitioner was a party. By challenging order No. 1342 dated August 12, 1974, in so far as it directs payment of the amount of Rs. 31,000 and odd the Plaintiff cannot get rid of the order which was passed in the aforesaid civil rule in which the order of the trial Court has merged. Therefore, in so far as the order passed by the trial Court directing the Plaintiff to pay the sum of Rs. 31,666-66 to the Defendant No. 1 is concerned the same cannot be questioned by the Petitioner in the present rule.

12. This takes us to the next question which is to be considered in this rule, namely, the direction with regard to payment of interest on the aforesaid sum of Rs. 31,666-66 at the rate of 9% per annum from June. 19, 1961, till such payment is made. In this connection, it has to be remembered that the trial Court by order No. 1311 dated August 6, 1969, directed the Plaintiff to pay the aforesaid sum to the Defendant No. 1 being the half share of the Defendant No. 1 in the money belonging to Meghmala and which was invested in the business of the Plaintiff. After the death of the Defendant No. 2, the Defendant No. 1 made an application to the Court on February 18, 1963, for a direction upon the Plaintiff to pay the aforesaid sum in terms of the consent order dated September 24, 1954. In this application there was no prayer for payment of any interest. Subsequently, the Defendant No. 1 filed another application on or about August

13, 1967, praying for an order that the Plaintiff might be directed to pay interest on the aforesaid sum at the rate of 9% per annum. The prayer for payment of interest was, however, not allowed by the trial Court. Subsequently, on the death of the Defendant No. 1 his executors, who have been substituted in place of the deceased descendant No. 1, made an application for a direction upon the Plaintiff to pay the aforesaid sum of Rs. 31,666-66 with interest to one of the executors. In dealing with this application the trial Court by order No. 1342 dated August 12, 1974, directed the Plaintiff to pay the said sum with interest at the rate of 9% per annum from the date of death of the Defendant No. 2. Interest on a sum due is not payable unless it is provided for by any statute or by contract between the parties. On behalf of the Petitioner reliance was placed upon the decision in *Bengal Nagpur Railway Company Ltd. v. Rattanji Ramji and Ors.* L.R. 65 IndAp 66. In that case it is held by their Lordships of the Privy Council that Section 73 of the Contract Act is merely declaratory of the common law as to damages and that interest cannot be allowed at common law by way of damages for wrongful detention of debt. It was further held that illus. (n) of Section 73 of the Contract Act does not confer upon a creditor a right to recover interest upon a debt which is due to him, when he is not entitled to such interest under, any provision of law. Nor can an illustration have the effect of modifying the language of the section which alone forms the enactment. On behalf of the Petitioner Mr. Mukherjee also relied upon the case of *Suleman and Anr. v. Abdul Latif and Ors.* L.R. 57 IndAp 245 where it was held that interest in a suit for accounts should only be allowed from the date of final decree. In *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, it has been held that before interest can be allowed under the Interest Act, 1939, the following conditions must be fulfilled; (a) There must be a debt or a sum certain, (b) it must be payable at a certain time or otherwise, (c) these debts or sum must be payable by virtue of written contract at a certain time and (d) there must have been demand in writing stating that interest will be demanded from the date or demand. Unless these conditions are fulfilled interest cannot be allowed merely because in the opinion of the Court it is reasonable to allow interest on the sum due. On the basis of these decisions it must therefore be held that the trial Court was not justified in directing the Plaintiff to pay interest on the aforesaid sum of Rs. 31,000 and odd.

7. There are also other reasons why the order for payment of interest cannot be sustained. The consent order that was originally passed on September 24, 1954, does not provide for payment of any interest to the Defendant No. 1 after the death of the Defendant No. 2. As has been noticed earlier in this judgment, Clause (c) of the aforesaid order specifically mentions that the Plaintiff will pay interest to the Defendant No. 2 during her lifetime. But in Clause (g) of the said order which provides that on the death of the Defendant No. 2 half the amount of the money belonging to her will be payable to the Defendant No. 1, there is no mention about the payment of interest to the Defendant No. 1. Secondly, the petition which was filed by the Defendant No. 1 on February 18, 1963, soon after the death of the Defendant No. 2, does not include any claim for interest and no

such claim was made till August 12, 1967, when the Defendant No. 1 filed another petition claiming interest. By order No. 1311 dated August 6, 1969, the Court granted the prayer of the Defendant No. 1 with regard to payment of the principal amount but made no order with regard to payment of interest. The prayer for payment of interest must, therefore, be deemed to have been refused, vide *Shorab Merwanji Modi and Another Vs. Mansata Film Distributors and Another*, Thirdly, the Defendant No. 1 accepted the said order passed on August 6, 1969 and did not make any grievance for interest not having been allowed. He, therefore, acquiesced in the said order. Lastly, the said order of the trial Court merged in the order of this Court passed in C.R. No. 3520 of 1969. It was not, therefore, open to the trial Court to pass an order for payment; of interest on the subsequent application filed by the executors.

8. Mr. Roy appearing on behalf of the opposite parties contends that as there is no default clause in the consent order dated September 24, 1954, his clients will be without any remedy if the Petitioner does not pay the sum of Rs. 31,000 and odd which had become payable to the Defendant No. 1 and is now payable to his clients as executors to the estate of the Defendant No. 1. This apprehension on the part of the opposite party has no foundation. If the Petitioner, who is liable to pay the said sum to the opposite party, does not pay the same, the opposite party may levy execution for realising the same. Mr. Roy further submitted that the entire money had been invested in the Plaintiff's business and the Plaintiff is deriving benefit therefrom and so it is only reasonable and proper that his clients should get interest on the amount due to them. But, as has been noticed earlier, interest cannot be allowed unless it is specifically provided for in any statute or by a contract between the parties. In the present case, there was no such contract between the parties nor is there any statutory provisions under which the Court can allow interest. Mr. Roy further contended that although there was no direction for payment or any interest in the order dated August 6, 1969, the Court is not precluded from considering the question of payment of interest afresh, inasmuch as, since that question was not dealt with by the Court it remains open for consideration in future. In support of this contention he relied upon the decision in *Sasi Mohan Saha and Others Vs. Hari Nath Saha*, . The facts of that case were, however, completely different. That was a suit for partition of those portions of the homestead which were kept joint in an earlier suit for partition. The question which arose for decision before this Court was whether the property forming the subject-matter of the subsequent partition suit were kept joint by consent of parties or whether those were kept joint by the decision of the Court for the beneficial enjoyment of these portions which were partitioned in the earlier suit. this Court held that if the properties were kept joint by the decision of the Court in the earlier suit then the subsequent suit would fail in so far as such properties were concerned. But if the parties by consent amicably left some property joint then those properties could form the subject-matter of a subsequent suit for partition. In the present case, there is no material on record to hold that the parties amicably left the question of payment of interest open, to

be decided at a subsequent stage. On the other hand, it appears that the matter was keenly contested before the trial Court and the order was made on contest.

9. The next point urged by Mr. Roy is that the Petitioner is not entitled to move against order No. 1342 dated August 12, 1974, in this application because the Petitioner has not been able to explain the delay in moving against the said order. He has contended that mere filing an application for review is not sufficient to entitle a party to get the benefit u/s 5 of the Limitation Act. In support of his contention Mr. Roy has relied upon the decision in *Asanulla v. Collector of Dacca and Ors.* ILR (1888) Cal. 242. The decision in the said case is to the effect that mere presentation of an application for review, where it is not shown that the grounds therefor are reasonable and proper, is not a sufficient reason for admitting an appeal after the period of limitation is over. The said case cannot, therefore, be taken as an authority for the absolute proposition that the prosecution of a review application can never be taken to be sufficient cause for extending period of limitation u/s 5 of the Limitation Act. In the present case, the review application was filed on the September 9, 1974, against the order dated August 12, 1974. The review application was dismissed on March 19, 1975, by order No. 1401. The present petition is within time from the date of dismissal of the review application. Therefore, if the Petitioner had been prosecuting the review application in good faith and on reasonable grounds, then the Petitioner would be entitled to pray for exclusion of the period during which the review application was pending before the trial Court. This view is supported by the decision in *Brijinder Singh v. Lala Kanshiram and Ors.* L.R. 44 IndAp 218. From the application for review which was filed by the Petitioner before the trial Court, which is annEx. 1 to the petition and the order passed thereon, being order No. 1401 dated March 19, 1975, it appears to us that the Petitioner had reasonable grounds for filing an application for review and that he was pursuing the said application bona fide before the trial Court. In these circumstances, we condone the delay u/s 5 of the Limitation Act in moving the present application in so far as order no 1342 dated August 12, 1974, is concerned.

10. For the reasons mentioned above, the orders passed by the trial Court cannot be sustained in its entirety. This rule is, accordingly, made absolute in part. The judgment and order of the trial Court in so far as it directs payment of interest by the Petitioner on the sum of Rs. 31, 666-66 from June 19, 1961, till the date of payment to the opposite parties is set aside. The other part of the order, namely, the direction upon the Petitioner to pay the principal amount of Rs. 31,666-66 to the opposite parties is affirmed. In the circumstances of the case, there will be no order as to costs. Let the records be sent down forth with.

S.K. Bhattacharyya, J.

11. I agree.