Sant Lal Mahton vs Kamala Prasad on 17 October, 1951

Equivalent citations: 1951 AIR 477, 1952 SCR 116, AIR 1951 SUPREME COURT 477, 1965 MADLW 5

Author: B.K. Mukherjea

Bench: B.K. Mukherjea, Vivian Bose

PETITIONER:
SANT LAL MAHTON

Vs.

RESPONDENT:
KAMALA PRASAD.

DATE OF JUDGMENT:
17/10/1951

BENCH:
MUKHERJEA, B.K.
BENCH:
MUKHERJEA, B.K.
SASTRI, M. PATANJALI
DAS, SUDHI RANJAN
BOSE, VIVIAN

CITATION:
1951 AIR 477 1952 SCR 116

ACT:
Indian Limitation Act (IX of 1908), s. 20 (1)--Payment of interest before expiry of period of limitation--Acknowledgment in writing after limitation--Whether gives fresh period of limitation-Acknowledgement after institution of suit, whether sufficient.

HEADNOTE:
While s. 20 of the Limitation Act requires that the payment should be made before the expiration of the period of limitation, it does not require that the acknowledgement of the payment should also be made within that period. But it is essential that such acknowledgement, whether made before or after the period of limitation, must be in existence prior to the institution of the suit. An acknowledgement of the payment by the defendant in a written statement

filed after the institution of the suit is not enough.
Mohd. Moizuddin v. Nalini Bala (I.L.R. [1937] 2 Cal. 137), Lal Singh Gulab Rai (I.L.R. 55 All. 280), Venkatasubbu v. Appa Sundaram (I.L.R. 17 Mad. 92}, Ram Prasad v. Mohan Lal (A.I.R. 1923 Nag. 117), Viswanath v. Mahadeo (I.L.R. 57 Born. 453) approved.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 81 of 1950. Appeal from a judgment and decree dated 17th March, 1944, of the High Court of Judicature at Patna (Fazl Ali C.J. and Beevor J.) in F.A. No. 47 of 1942, arising out of decree dated 27th February, 1942, of the Subordinate Judge of Purnea in Title Mortgage Suit No. 7 of 1940. B. C. De (Bhabhananda Mukherjee, with him) for the appellants.

S.P. Sinha (B. K. Saran, with him) for the respondent. 1951. October 17. The Judgment of the Court was deliv- ered by MUKHERJEA J.--This appeal, which was originally taken to the Judicial'Committee, on special leave, granted by an Order in Council dated August 2, 1946, now stands transferred to this court by reason of the aboli- tion of the jurisdiction of the Privy Council. It is di- rected against a judgment and decree of a Division Bench of the Patna High Court dated March 17, 1944, affirming, on appeal, a decision of the Subordinate Judge of Purnea dated February 27, 1942.

The appellants before us are the first party defendants in a suit, commenced by the plaintiffs respondents, for enforcement of a simple mortgage bond, by sale of the mort- gaged property. The trial Judge, while deciding all the other issues in favour of the plaintiffs, held on the evi- dence on the record, that the bond sued upon was not legally attested and hence could not rank as a mortgage bond. On this finding he refused to make a decree for sale of the mortgaged property in favour of the plaintiffs and passed a money decree, for the amount due on the bond, personally against the defendants first party. According to the Subor- dinate Judge, although the suit was instituted more than 6 years after the date fixed for payment in the bond, yet the claim for personal relief against the mortgagors did not become time-barred by reason of the fact that there were several payments made by the defendants towards the satis- faction of the debt, which attracted the operation of sec- tion 20 of the Indian Limitation Act. Against this decision an appeal was taken by the defendants mortgagors to the High Court of Patna, but no appeal or ,cross-objection was filed by the plaintiffs against the refusal of the trial Court to make an order for sale of the mortgaged property in their favour. The appeal was heard by a Division Bench of the Patna High Court, consisting of Fazl Ali C.J. and Beevor J., and the principal point canvassed on behalf of the defend- ants appellants was, that the trial court was wrong in holding that the plaintiffs' claim for a personal decree was not barred by time. The argument put forward was that the suit, as one for personal relief against the debtors, was barred on the expiry of 6 years from the date for repayment mentioned in the bond and the part payments relied upon by the plaintiffs in their plaint were ineffectual for the purpose of extending the period of limitation under section 20 of the Indian Limitation Act- The High Court on hearing the appeal came to the conclusion that the bond in suit was duly attested and was effective and

enforceable as a mortgage bond, and that the view taken by the trial court on the question of attestation could not be sustained on the evidence on the record. As the bond could be treated as a mortgage bond, the suit, as one for enforcement of a mort- gage, was, in the opinion of the learned Judges, quite within time, and it was not necessary in these circumstances to call in aid the provisions of section 20 of the Limita- tion Act for the purpose of extending the period of limitation. The learned Judges held, however, that as the plaintiffs had not preferred any appeal or cross objection attacking that part of the judgment of the trial Judge which dismissed their claim for a sale of the mortgaged property, they were unable to pass a mortgage decree in their favour. The result was that the decree made by the trial Judge was affirmed. It is the propriety of this decision that has been challenged before us in this appeal.

Mr. De, who appeared in support of the appeal, has contended in the first place that even if the High Court was right in holding that the bond in suit was effective as a mortgage bond and the suit could be treated as one for enforcement of a mortgage, no decree for money could be passed against the defendants personally, unless the suit was instituted within the period prescribed by Article 116 of the Limitation Act. The High Court, it is said, over- looked this aspect of the case altogether and was wrong in not considering the question of limitation. It is argued by the learned Counsel that on the point of limitation the decision of the Subordinate Judge was wrong, and as the payments relied upon by the plaintiffs had not been acknowl- edged in the manner contemplated by section 20 of the Limi- tation Act, no extension of time was permissible under the provisions of that section. Mr. De further contends that on the question of attestation, the correct finding was that arrived at by the Subordinate Judge and it is impossible to hold on the evidence that has been adduced in this case that the bond was legally s, attested. Mr. Sinha, appearing on behalf of the plaintiffs re- spondents, has, on the other hand, attempted not only to repel the contentions advanced on behalf of the appellants; he has further argued that even if no appeal or cross-objec- tion was filed by the plaintiffs against that part of the decree of the trial court which went against them, it was open to the High Court, in view of the findings which it arrived at on the question of attestation, to make a mort- gage decree in this case under the provisions of Order 41, Rule 33, of the Civil Procedure Code. The learned Counsel invited us to exercise our powers under the said provision of the Civil Procedure Code in this appeal and pass a mort- gage decree in favour of his clients on the basis of the findings of the High Court.

We will first take up the question of limitation, and to appreciate the nature of the controversy that centres round this point, it will be convenient to advert to a few rele- vant dates. The mortgage bond is dated the 8th of April, 1927, but it is no longer disputed that the executants put their signatures to the document on the 12th of April fol- lowing, and admittedly it was registered on the latter date. Whether the attesting witnesses signed the deed on the 12th of April or on the 8th when the document was actually scribed, is a debatable point upon which the courts below have divergent views and we will discuss this matter later on. The due date, as given in the mortgage, is the 6th of March, 1928. The suit was instituted on 4th of March, 1940, and if it could be treated as a mortgage suit pure and simple for enforcement of a charge on immovable property, the suit was obviously within time and no question of limi- tation would arise. If, however, the attestation is held to be defective and the mortgagee seeks to recover the debt personally from the mortgagor on the basis of a covenant to pay, such suit, if the bond is registered, would be governed by Article 116 of the

Limitation Act and the period of limitation would be 6 years from the date fixed for repayment unless it could be extended under some other provision of the Limitation Act. The mere fact that in such cases the plaintiff chooses to frame his suit as one for enforcement of a charge, would not give him an extended period of limitation for obtaining a personal decree against the debtor. The position, therefore, is that if the bond in the present case cannot be treated as a mortgage bond and the only relief which the plaintiffs can claim is one for recovery of money against the defendants personally, the suit must be deemed to be barred, as it was instituted beyond 6 years from the due date of payment unless limitation is saved by reason of the payments under section 20 of the Limitation Act. This leads us to enquire as to whether the trial Judge was right in holding that the payments made by the defendants satisfied the requirements of section 20 of the Limitation Act and were hence available to the plaintiffs for the purpose of extending the period of limitation within which the suit should otherwise have been brought.

The plaintiffs stated specifically in their plaint that the defendants made eight payments in all, aggregating to a sum of Rs. 780-9-0, in part satisfaction of the debt, since the execution of the mortgage bond. The first payment which was of a sum of Rs. 300 was made on 21st January, 1928, and this was before the expiry of the due date mentioned in the bond. The second payment was of Rs. 75 and was made on the 5th of June, 1929. The third payment is dated 8th of March, 193l, and the fourth was made within one month after that on 3rd April, 1931. the fifth and the sixth payments were both made in the month of May, 1932, the seventh on 25th July, 1934, and the last payment was made on 15th of May, 1936. The present suit was instituted, as said above, on the 4th March, 1940. There cannot be any doubt that if a fresh period of limitation could be computed from each one of the payments mentioned above, the plaintiffs' suit would be quite in time even if it is treated as a suit for obtaining a money decree against the defendants personally. The contention of the appellants is that as San there is no acknowledgement in the handwriting of, or in any writing signed by, the payer in respect of any Of these payments, they could be of no avail in giving a fresh start to the period of limitation under section 20 of the Limitation Act. For determination of this point, it is necessary to turn to the provision of section 20 of the Limitation Act. The section, after it was amended by Act I of 1927, stands as follows :--

> 20(1). "Where interest on a debt or legacy is, before the expiration, of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:
>
> Provided that, save in the case of a payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writ- ing signed by, the person making the payment." Admittedly in the case before us, none of the payments specified above were endorsed on the bond itself and there was no acknowledgment either in the handwriting of, or signed by, the debtors prior to the institution of the suit. What the Subordinate Judge relied upon, is the admission contained in paragraph 15 of the written statement filed on behalf of

defendants 1 to 3 in the present suit where these defendants admitted not only that the payments specified in the plaint were actually made on the respective dates but asserted that there were other payments besides these, which reduced the debt still further and for which the plaintiffs' did not give any credit to the defendants. In the opinion of the Subordinate Judge as the written statement was signed by these defendants, it would fulfil all the requirements of a signed acknowledgment as is contemplated by the proviso to section 20. The short point for our consideration is: whether the view taken by the Subordi- nate Judge is correct ?

It would be clear, we think, from the language of section 20 of the Limitation Act that to attract its operation two conditions are essential: first, the payment must be made within the prescribed period of limitation and secondly, it must be acknowledged by some form of writing either in the handwriting of the payer himself or signed by him. We agree with the Subordinate Judge that it is the payment which really extends the period of limitation under section 20 of the Limitarian Act; but the payment has got to be proved in a particular way and for reasons of policy the legislature insists on a written or signed acknowledgment as. the only proof of payment and excludes oral testimony. Unless, there-

fore, there is acknowledgment in the required form, the payment by itself is of no avail. The Subordinate Judge, however, is right in holding that while the. section re- quires that the payment should be made within the period of limitation, it does not require that the acknowledgment should also be made within that period. To interpret the proviso in that way would be to import into it certain words which do not occur there. This is the view taken by almost all the High Courts in India and to us it seems to be a proper view to take(1).

But while it is not necessary that the written acknowl- edgment should be made prior to the expiry of the period of limitation, it is, in our opinion, essential that such acknowledgment, whether made before or after the period of limitation, must be in existence prior to the institution of the suit. Whether a suit is time-barred or not has got to be determined exclusively with reference to the date on which the plaint is filed and the allegations made therein. The legislature has expressly (1) See Md. Moizuddin v. Nalini Bala (A.I.R. 1937 Cal. 284: I.L.R. (1937) 2 Cal. 137), Lal Singh v. Gulab Rai (I.L.R. 55 All 280), Venkata Subbhu v. Appa Sundaram I.L.R. 17 Mad. 92). Ram Prasad v. Mohan Lal (A.I.R. 1923 Nagpur

117), Viswanath v. Mahadeo (57 Bom. 453).

declared in section 3 of the Limitation Act that whether defence of limitation be pleaded or not, the court is bound to dismiss a suit which is brought after the period provided therefore in the first schedule to the Limitation Act. If the plaintiff's right of action is apparently barred under the statute of limitation, Order 7, Rule 6, of the Civil Procedure Code makes it his duty to state specifically in the plaint the grounds of exemption allowed by the Limita- tion Act upon which he relies to exclude its operation; and if the plaintiff has got to allege in his plaint the facts which entitle him, to exemption, obviously these facts must be in existence at or before the time when the plaint is filed;

facts which come into existence after the filing of the plaint cannot be called in aid to revive a right of action which was dead at the date of the suit. To claim exemption under section 20 of the Limitation Act the plain- tiff must. be in a position to allege and prove not only that there was payment of interest on a debt or part payment of the principal, but that such payment had been acknowl- edged in writing in the manner contemplated by that section. The ground of exemption is not complete without this second element, and unless both these elements are proved to exist at the date of the filing of the plaint the suit would be held to be time-barred. In the plaint as it was originally filed in this case, the prayer was only for a mortgage decree in the usual form. After the hearing was closed, the plaintiffs, it seems, were apprehensive that the court might not hold the bond to be properly attested. In these circumstances. they prayed for an amendment of the plaint which was allowed by the court. By the amended plaint the cause of action was stated to arise from the different payments made on different dates as were stated in paragraph 7 of the plaint and at the end of paragraph 7 the following words were added :-

> "The suit is saved from limitation so far as the person- al remedy is concerned and the payments were made by the defendants on different dates as mentioned in Schedule A below."

These amendments must be deemed in the eye of law to be a part of the original plaint, and obviously there is neither any averment nor proof that any of these payments was acknowledgment in writing prior to the institution of the suit. This being the position, the suit treated as one for obtaining a money decree against the defendants must be held to be barred by limitation at the date on which it was instituted and the courts below consequently were not justified in giving the plaintiffs a money decree in this suit.

The question now is whether we can pass a mortgage decree in favour of the plaintiffs on the basis of the finding of the High Court that the bond was properly attest- ed; and it is not disputed that no question of limitation would in that case arise. To decide this question there are two points which require consideration :--

(1) Whether the finding of the High Court on the ques-

tion of attestation is a correct and proper finding on the evidence adduced in this case ?

(2) If it is so, whether the facts of the plaintiffs not having preferred an appeal or cross-objection against that part of the judgment of the trial Judge which refused them a mortgage decree, stands in the way of their claiming any relief other than what was given to them by the trial Judge ?

As regards the first point, the evidence shows that the mortgage bond was written and engrossed at the plaintiffs' house at village Chakla Maulanagur and the date which the document bears is 21st Chaitra 1334 Fasli corresponding to 8th April, 1027. Obviously, it was on that date the document was written. There are four attesting witnesses whose names appear in the deed, to wit, Sunderlal, Matukdhari Prasad, Dwarka Prasad and Nanak Prasad the last named person being also the scribe of the document --and all of them were residents of Chakla Maulanagur which is the place of resi-

dence of the mortgagees. The mortgagors, on the other hand, are inhabitants of a different village, namely, Chand- pur. Nanak Chand, the scribe, was not alive at the time when the suit came up for hearing and out of the remaining three witnesses two were examined on behalf of the plaintiffs. They are Sunderlal and Matukdhari Prasad. Sunderlal, who is P.W. 1, states when cross-examined on behalf of some of the defendants: "I signed the bond at the plaintiffs' house, as did the attesting witnesses." The attestation of the bond was on the same day that it was written." The other attesting witness, Matukdhari Prasad, during cross-examination said as follows: "The bond was written, signed by the executants and attested by the wit- nesses on the same date."

The document shows that all the three executants put their signatures to it on 12th of April, 1927, and on the same day it was presented for registration before the Regis- tering Officer at Katihar. Katihar is at some distance from the plaintiffs' village and a part of the journey has to be covered by train. The evidence of the two attesting wit- nesses makes it clear that the document was attested on the same day as it was written. As the document was written on the 8th but actually executed on the 12th, the Subordinate Judge was of opinion that the attesting witnesses must have signed the deed before it was executed land this was no attestation in the eye of law. The High Court, on the other hand, has held that the vernacular equivalent of the word "written" as used by the attesting witnesses might mean execution as well and the Subordinate Judge, who was not familiar with the language of the witnesses might have committed the mistake of taking the word "written" in the sense of mere engrossing or scribing of the deed, although the word could be interpreted to mean execution as well. We do not think that this assumption on the part of the learned Judges of the High Court is justified. In the first place, Matukdhari Prasad, the plaintiffs' own witness, is quite precise in his statement and makes a distinction between the writing of a document and its signing or execution. Accord- ing to him, the bond was written, executed and attested on the same day. But what is more important for our purpose is the place of the execution of the document. If it was executed at the plaintiffs' house, where it was admittedly written, the date of execution would naturally be the date when the deed was scribed or engrossed. This is exactly the suggestion which the plaintiffs' lawyers made to defendant No. 1 Sant Lall when he was being crossexamined. He was asked as to whether the document was executed at the' plaintiffs' village or at Katihar, where it was taken for registration. The witness persisted in saying that he and the other executants put their signatures not at the place of the plaintiffs but at Katihar where they reached by train between 9 and 10 a.m. in the morning. This story seems to fit in with the circum- stances and probabilities of the case. The document was certainly taken to Katihar on the 12th of April, 1927, and the executants were all present there on that day and admit- ted execution of the document by putting their signatures before the Registering Officer. The signatures by way of execution of the document also bear the same date. From these circumstances it would be natural to presume that the execution took place at Katihar some time before the docu- ment was presented for registration. On the other hand, it is nobody's case that any of the attesting witnesses had gone to Katihar; they belong to the plaintiffs' village and were present at the time when the document was written. It was quite natural in these circumstances that they would sign the deed at the plaintiffs' place and on the date when it was written. It might have been in contemplation of the parties that the executants should also sign the document on the same day but it seems that somehow or other that did not happen. We are not unmindful of the fact that no specific defence was taken by defendants 1 and 3 pleading want of attestation of this document and defendant No. 1 also did not say anything on the point in his

examination in chief. But the point was definitely taken in the written statement not only of the minor defendants but also of defendants 4 and 9, who are the sons of Bharath and defendant No. 2 respectively and they were no less interested in contesting the suit than defendants 1 to 3. Moreover, a specific issue on the, question of attestation was framed by the learned Subordi- nate Judge. On the Whole, our conclusion is that the view taken on this point by the Subordinate Judge is right and it is difficult to hold on the internal evidence furnished by the contents of the document itself taken along with the statements of witnesses that the bond was attested in due and proper manner. This being our view, the other question as to whether we should pass a mortgage decree in this case in exercise of our powers under Order 41, Rule 33, Civil Procedure Code, in spite of the fact that the plaintiffs did not challenge the decision of the trial court by way of appeal or cross-objection does not require to be consid- ered The result is that the appeal is allowed, the judgments and decrees of both the courts below are set aside and the plaintiffs' suit dismissed. Having regard to the facts and circumstances of this case, we would direct that each party would bear its own costs in all the courts.

Appeal allowed.

Agent for the appellant:I. N. Shroff.

Agent for the respondents: R.C. Prasad.