Jagannath Prasad And Ors. vs Mst. Ram Dularey And Ors. on 17 August, 1955

Equivalent citations: AIR1956ALL63, AIR 1956 ALLAHABAD 63, ILR (1956) 1 ALL 156

JUDGMENT

Agarwala, J.

1. This is a plaintiff's appeal arising out of a suit for the recovery of a sum of Rs. 10,000/- from the defendants respondents. The facts, briefly stated, are as follows:

2. One Baijnath, brother of Sheo Prasad, Plaintiff appellant 2, and father of plaintiff appellant 1 and one Janki Prasad, husband of Smt. Ram Dulari defendant respondent 3, were close relations. Baijnath, according to the plaintiffs appellants, was a member of a joint Hindu family along with the other plaintiffs and used to 'deposit' at different times, various sums of money with Janki Prasad. Janki Prasad used to carry on money-lending business on an extensive scale.

He used to advance money to various debtors and on one occasion on 30-7-1920 he obtained a mortgage deed from two persons, Mohammad Askari and Agha Ali for a sum of Rs. 9000/-. The amount was not paid by the mortgagors and both Janki Prasad and Baijnath filed a suit on the basis of the mortgage and obtained a decree and the mortgaged property was sold and a sum of Rs. 14,850/- was deposited in court on 4-6-1921.

There was a dispute between Baijnath and Janki Prasad about the ownership of the mortgage money, and Baijnath filed a suit for a declaration to the effect that he alone owned the mortgage money and that therefore the decree passed in the suit was executable by him alone and not by Janki Prasad whose name was entered in the mortgage deed and in the suit as a benamidar. Some other property was also in dispute in this case & a declaration with regard to that property was also sought.

We are, however not concerned with that property. As regards the mortgage decree mentioned above, it was held that Baijnath should have claimed his relief by means of an objection under Section 47, C. P. C. and that he could not seek his remedy by means of a separate suit. Thereupon Baijnath filed am, objection under Section 47, C. P. C. in the execution Court.

This objection was dismissed as the Court held that Janki Prasad was the real owner of the sum advanced to the mortgagors and he alone was entitled to execute the decree. Baijnath preferred an appeal which was heard by the late Chief Court and the decision of the Court below was affirmed.

In its judgment the Chief Court expressed the opinion that Baijnath had deposited with Janki Prasad a sum of about Rs. 10,000/- part of which was used by Janki Prasad in the payment made to Mohammad Askari and Agha Ali as consideration for the mortgage. This decision was given on 19-8-1943. 'Baijnath applied for review of the judgment but the application was dismissed OIL 20-2-1944.

Thereupon the plaintiffs filed the present suit On, 17-8-1946, for the recovery of a sum of Rs. 10,000/- on the allegation that this amount had been "deposited" by Baijnath with Janki Prasad and that the plaintiffs who were the survivors of the joint Hindu family consisting of themselves and Baijnath deceased, were entitled to recover it from the defendants. Janki Prasad had died before the institution of the suit and his widow Smt. Ram Dulari was impleaded as defendant 1.

The other defendants to the suit were some of the trustees who were appointed by Janki Prasad under a deed of trust executed by him before his death. Two of these defendants respondents, namely, Ganesh and Dhani Ram died during the pendency of the appeal in this Court. No one was substituted in their place but as the other trustees could carry on the duties of the trust even in the absence of Ganesh and Dhani Ram, the appeal was allowed to proceed.

3. Although in the plaint the plaintiffs mentioned that the sum of Rs. 10,000/- was paid to Janki Prasad by way of "deposit" they did not say that they had made any demand in respect of it. They simply stated that there was no period of limitation prescribed for the return of the de-posite money & that if any article of the Limitation Act applied to the case, the period of limitation would run from 20-3-1944, the date of the dismissal of the application for the review of judgment by the Chief Court.

4. The defence of the suit mainly was that no amount was paid to Janki Prasad by way of deposit and that no amount was due and that, in any case, the suit was barred by time. The plaintiff's allegation, that Baijnath was a member of a joint Hindu family along with the plaintiffs was not specifically denied, but it was alleged that a partition had been effected amongst the members of Baijnath's family prior to the institution of the suit and the plaintiffs were not entitled to bring a suit without obtaining a succession certificate.

5. The plaintiffs in stating their case under Order 10 Rule 2, C. P. C. definitely stated that the deposit in the suit did not amount to a loan but were made as "amanat". The Court below framed four issues;

1. Did Baijnath make the deposit in suit by way of amanat?

2. Was there a partition in the family of Baijnath deceased? If so, is the present suit not maintainable as alleged in para. 20 of the written statement? (that is, without obtaining a succession certificate).

3- Is the suit barred by time, as alleged in para. 24 of the written statement? (that is, because it was a loan and not a deposit).

4. To what reliefs are the plaintiffs entitled?"

6. On behalf of the plaintiffs Sheo Prasad Plaintiff 2 was produced. No other oral evidence was produced by either side. The account books maintained by Janki Prasad were, however, produced in the case and it was stated before the Court below, and also before us, that a sum of over Rs. 10,000/- (to be exact Rs. 10,773/-) was due to Baijnath from Janki Prasad as shown in the account books of Janki Prasad and had not been paid off.

The Court below held that the amount had been paid by Baijnath to Janki Prasad as a loan and the suit having been filed more than three years after the date of the loan, it was barred by time. The lower Court further held that the production of a succession certificate was necessary as there had been a partition in the plaintiff's family prior to the suit, but that the suit would not have failed on that account as the plaintiffs could be given an opportunity to file the succession certificate before a decree was passed in their favour. In the result the suit was dismissed.

7. The plaintiffs have now come up in appeal to this Court and they have urged that the amount paid to Janki Prasad was a deposit and not a loan and that therefore the suit was not barred by limitation. They have further urged that no succession certificate was necessary because, although there was a partition in the family, the amount due from Janki Prasad was not partitioned and it was still the joint property of the entire family.

8. Before we examine these contentions, however, a preliminary objection raised by the learned Counsel for the respondents has to be disposed of.

9. The memorandum of appeal was presented within the period of limitation on a court-fee stamp of Rs. 8/2/- while the proper court fee payable was Rs. 878/2/-. The appellants made an application on the date on which the memorandum of appeal was presented for grant of time to make good the deficiency in the Court fee. In this application the only reason for the appellant's inability to pay the full amount of court fee was their inability to collect the amount till that time.

The learned Judge before whom the application and the memorandum of appeal were put up allowed six weeks* time for the payment of the deficiency in the court fee. This was on 14-7-1947. The deficiency was made good on 25-8-1947 within the time allowed by the Court and on 28-8-1947. The deficiency was accepted and the appeal was admitted and netice was ordered to issue. If the appeal had been filed on 25-8-1947 it would have been barred by time.

10. The contention of the learned counsel for the respondents is that the ground mentioned in the application was not sufficient and the court should not have allowed time to the appellants to make good the deficiency and that therefore that

order should be set aside and the memo, of appeal returned or rejected as insufficiently stamped. In , support of this objection reliance has been placed upon a Full Bench decision of this Court -- 'Wajid Ali v. Mt. Isar Bano', AIR 1951 All 64 (A).

It was held in that case that mere poverty or inability to pay the amount of court fee is not a sufficient reason for allowing time to make a good the deficiency unless certain special circumstances existed. It is conceded that no special circumstances existed in the present case, and if the Court were to apply the principles laid down in that case the order of the learned Judge allowing time to the appellants to make good the deficiency may not be found supportable.

11. The question, however, is whether the respondents can be allowed, at this late stage, to question, the order of this Court allowing the appellants time to make good the deficiency even if it proceeded upon an insufficient ground. The appeal was filed in the year 1947. No objection as to the impropriety of the order allowing time to anake good the deficiency was ever raised before the arguments were commenced in this appeal yesterday.

But it is urged that the respondents came to know of this only recently when they looked up the record, and since they had no earlier opportunity to raise the objection they have a right of being heard at this stage. It appears to us that the respondents have no such right as is claimed by them.

12. Under Section 6, Court Fees Act the Court is directed not to accept a document which is not properly stamped, but this section has to be read, as pointed out in the 'Full Bench Case' referred to above, along with Section 149, C. P. C. When an insufficiently stamped memorandum of appeal is presented before a Court the Court has jurisdiction under Section 149 to grant time for making good the deficiency in the court-fee.

At that stage there is no occasion for the Court to issue notice to the respondent as there is no appeal and no respondent till then, and discretion, vested in the Court under Section 149 has, in the very nature of things, to be exercised ex parte. It is at that very point of time that the Court has to make up its mind whether to allow time or not, No doubt, the Court must exercise its discretion in a reasonable manner, but if it errs, it appears to us that its discretion cannot be questioned at a subsequent stage of the case after the deficiency has been made good in compliance with the order of the Court unless at the time of making the order the Court expressly reserved to the opposite party the right to object the order. Section 149 provides that when the deficiency has been made good, such document "shall have the same force and effect as if such fee had been paid in the first instance."

This is a mandatory provision and must be given effect to. This view should cause no surprise when we remember that court-fee is levied mainly for the purpose of raising revenue for the State and a

question concerning it is primarily a matter between the State and the litigant though the opposite party has a right to bring to the notice of the Court that a certain document does not bear the proper court-fee.

Further, there is no provision for the refund of the amount of court-fee paid by a litigant in compliance with an order of the Court under Section 149, and, therefore, if the order of the Court were to be set aside it would work very harshly on the person who has made good the deficiency on the faith of the order of the Court, unless a right to question the order by which time was allowed had been reserved to the other side by the Court.

13. It may be noted that we are not here considering the case of an insufficiently stamped document being presented in a pending proceedings, in which case, before time is allowed under Section 149, the Court will issue notice to the opposite party.

14. However that may be, if the opposite party desires to be heard in this matter, he must raise the objection at the earliest possible opportunity. This opportunity comes to him when the notice of the appeal is served upon him. It must be at that time, after the inspection of the record, that he must raise the objection.

If he does not raise the objection at the earliest opportunity, he cannot be allowed to raise it later on as in the meanwhile the other side may have taken further steps in the matter of the preparation of the record and spent money which he would not have done, had the objection been taken earlier.

15. In this connection one other point was raised by the learned Counsel for the respondents. It was contended that the order allowing time to make good the deficiency having been passed by a single Judge was beyond his competence inasmuch as the appeal was valued at Rs. 10,000/- and was cognizable by a Bench of two Judges. This ' contention also in our opinion has no force.

Under the Rules of the Oudh Chief Court which governed the case when the memorandum of appeal was presented, a learned single Judge had jurisdiction to entertain "a motion for the admission of an appeal from an original or appellate decree or order, vide Rule 1 (i), Chap. VIII, Rules of the Chief Court. Rule 1(xv) entitles a single Judge to entertain any other application:

> (b) "Under these rules, which is not expressly required to be made to a Bench of two or more Judges or to the Registrar;
>
> (c) which is made in any matter within the jurisdiction of a Judge sitting alone and which is not otherwise expressly provided for."

The rules do not require an application for time to make good the deficiency under Section 149 to be made to a Bench of two or more Judges or to the Registrar. Indeed such an application is not expressly provided for at all in the rules. Rule 4 of the Chapter lays' down "save as provided by law or by these rules, every case shall be heard and disposed of by a Bench of two Judges."

This rule will only apply if the case is not covered by any other rule. As already noted a motion for the admission of an appeal whatever its valuation, has to be made to a learned single Judge under Rule 1(i) quoted above. In the course of this motion, when the memorandum of appeal is presented to him, he will have to see whether the court-fee paid on it is sufficient or not.

If it is sufficient, and if the other conditions for preferring the appeal are satisfied, he will admit the appeal, and if it is a civil appeal he will put it up under Order 41 Rule 11, C. P. C. But if the memorandum of appeal is insufficiently stamped, the Judge entertaining the motion for the admission of the appeal will have to decide whether he will return the memorandum as insufficiently stamped or will allow time under Section 149 C. P. C. to make good the deficiency in court-fee.

The decision on this point, in our opinion, forms part of the motion for the admission of the appeal within the meaning of Rule 1(i) of Chap. VIII. In our opinion an application made under Section 149 at the time of moving the motion, for the admission of the appeal is within the jurisdiction of a single Judge under Rule 1(i).

Even if it were not so, Rule 1(xv) (b) and (c) quoted above would empower a single Judge to make an order on an application under Section 149 when made along with the presentation of the memorandum of appeal insufficiently stamped. We are, therefore, of opinion that the order of the learned Judge allowing time to the appellants to make good the deficiency was made within his jurisdiction. We, therefore overrule the preliminary objection.

16. This brings us to a consideration of the points urged on behalf of the appellants. The first point to be considered is whether the sums which were paid to Janki Prasad by Baijnath were by way of deposit or were by way of loan.

17. In the books of Janki Prasad there is a khata of Baijnath. The heading is in the following words:

> "Account of Baijnath Sheo Prasad, Halwai, Zaidpur Deposit on Sawan Sudi 3, Sambat 1976 (Lekha Baijnath Sheo Prasad, Halwai, Zaidpur Ke jama rupiya miti sawan sudi teej sambat, 1976)"

This is followed by two entries of Rs. 4,000/- and 4,082/- on the credit side. These amounts, as mentioned in the cash book, were deposited with Janki Prasad by way of "amanat". The word "amanat" is specifically used in the cash book. These two amounts were paid off to Baijnath on two different dates -- Rs. 50/- on Bhadon Badi 4, and Rs. 8,032/- on Kuar Sudi 7 and the debit and the credit entries were added up, the total being Rs. 8,082/-on either side.

After this in the same Khata there were five entries on the credit side and three entries on the debit side. The five entries were totalled up along with the previous two entries and the total was noted as Rs. 19,015/12/-. Similarly, the three items on the debit side were added up along with the previous two entries on that side and the total was 8,242712/-. The difference between the credit and debit entries of Rs. 10,773/12/- was shown as carried over to the new khata.

18. Of these five entries the first one is of the sum of Rs. 6,033/12/- dated 30-7-1920, the second entry is of Rs. 3,000/- of 11-8-1920, and the third entry is of Rs. 900/- and is dated 20-5-1921, the fourth entry is of Rs. 900/- and is dated 19-8-1921 and the fifth entry is of Rs. 100/- and is dated 30-8-1921. The details of these entries are. given in the cash books. The amount of Rs. 6,033/12/- is shown in the cash book as follows: Rs. 3,233/12/- amount due under two pronotes in favour of Baijnath set off in the mortgage deed excuted by Mohammad Askari and Agna All on 30-7-1920, for a sum of Rs. 9,000/-; Rs. 2,800/-paid in cash by Baijnath through his firm Dhanni Ram Puuti Lal, total Rs. 6,033/12/-. The second entry of Rs. 3,000/- dated 11-8-1920, is for the cash amount paid by Baijnath to Janki Prasad.

These two entries total up to Rs. 9033/12/-. We find that on the date on which the second entry of Rs. 3,000/- was made, that is on 11-8-1920, there is a debit entry of Rs. 33/12/- which leaves a balance of Rs. 9,000/- on that date, in the hands of Janki Prasaid. It was for this very amount that a mortgage deed was executed by Mohammad Askari and Agha Ali in favour of Baijnath and Janki Prasad, and which was claimed by Baijnath in the earlier proceedings as his own exclusive money but which claim he failed to substantiate, the finding of the Court being that the amount advanced to Mohammad Askari and Agha All must be deemed to have been advanced exclusively by Janki Prasad inasmuch a as he had credited Baijnath in his account books with the sum of Rs. 9,000/-.

19. The third entry of Rs. 900/- was also paid in cash. The fourth entry of Rs. 900/- consists of two sums, a sum of Rs. 600/- which was paid in cash and a sum of Rs. 300/- which was left by Agha Ali, who owed it to Baijnath, in the hands of Janki Prasad to be paid to Baijnath and Janki Prasad credited this amount in the account of Baijnath. The fifth item of Rs. 100/- was paid in cash. On the debit side, besides the entry of Rs. 33/12/- there are two other entries one of Rs. 90/- and the other of Rs. 37/-.

All these entries are of payments in cash made to Baijnath. It has been admitted before us by the learned Counsel for the respondents that the amounts paid by Baijnath to Janki Prasad were paid with the intention that they may be invested in loans advanced to third parties. On these facts the question is whether the amounts credited to Baijnath's account were paid, by way of 'deposit' or by way of loan?

20. The distinction between a loan and a deposit is well settled. In -- 'Mohammad Akbar Khan v. Attar Singh', AIR 1936 PC 171 (B), Lord Atkin observed:

> "It should be remembered that the two terms are not mutually exclusive. A deposit of money is not confined to a bailment of specific currency to be returned in specie. As in the case of a deposit with a banker it does not necessarily involve the creation of a trust, but may involve only the creation of the relation of debtor and creditor, a loan under conditions.
>
> The distinction which is perhaps the most obvious is that the deposit not for a fixed term does not seem to impose an immediate obligation on the depositee to seek out the depositer and repay him. He is to keep the money till asked for it. A demand by

> the depositor would therefore seem to be a normal condition of the obligation of the depositee to repay."

This was followed by the Privy Council in -- "Sule-man Haji Ahmad Umar v. Haji Abdulla Haji Rahim-tulla', AIR 1940 PC 132 (C). The same view has been expressed in a number of cases -- 'Gulzari Lal v. Manzoor Ahmad', AIR 1939 All 378 (D); --'Allah-Ditta v. Sadhu Shah', AIR 1934 Lah 179 (E); --Chandrabhagabai v. Tikubhai', AIR 1944 Nag 101 (F); -- 'Chandie Prasad v. Jugulkishore', AIR 1948 Nag 377 (G); -- 'Shamrao Bhagwantrao v. Mst. Saras-watibai Parashram', AIR 1954 Nag 38 (H); and --'Jogendra Nath v. Dinkar Ram Krishna', AIR 1921 Cal 644 (I).

21. In -- 'Govind Chintaman v. Kachubhai Gulabchand', AIR 1924 Bom 28 (J), it was observed that "Ordinarily when A hands over money to B on. the understanding that it is not a gift, but was to be repaid when demanded, that would be considered in law as 'a loan'; and when the plaintiff seeks to prove that the money so handed over was a deposit, the onus would lie upon him to prove that there are additional circumstances which turned the loan' into a 'deposit'."

Further on it was observed "There is no distinction in the Act (referring to the Limitation Act) between the money lent and money deposited with regard to the agreement to repay. So that it is not the agreement that the money should be payable on demand that distinguishes a deposit from a loan. There must be something further proved, and it is not possible to define exactly what that something further must be, It has some times been suggested that facts must be proved which create a sort of fiduciary relationship between the lender and the borrower. It cannot be said that that is always necessary."

With respect, we do not think the learned Judges who decided that case correctly appreciated the distinction between a loan and a deposit and the difference in the meaning of the phrase "on demand" when used in connection with a "loan" and a "deposit". It appears to us that the main difference between a loan and a deposit consists in this. If the intention of the person paying the amount is that the person to whom the amount is paid should keep the amount with him and pay it to the person only When he asks for its payment and not otherwise, then it is a deposit. If on the other hand, the intention is that the amount is to be paid by the payee without the payer asking for its return then it is a loan.

The crucial test is whether it was intended that the amount should remain with the payee indefinitely or not; or this may be put in other words, whether it was intended that the payee was to seek the payer for the payment of the amount paid or whether he was not to seek the payer, and the payer was to demand the amount from the payee before the amount became payable.

If the amount paid is intended to be retained by the payee, so long as a demand for payment is not made, it is obvious that the amount does not become payable unless the demand is made and the period of limitation does not begin to run unless the demand is made and is refused. On the other hand in the case of a loan payable on demand, no demand is necessary and the amount becomes payable forthwith and the period of limitation begins to run as soon as the advance is made.

The word "demand" in the phrase "on demand" when used in connection with a loan, does not really mean that the amount becomes payable only when the payment is demanded. It merely means that the loan, is not for any fixed term and is payable forthwith. On the other hand, the words "on demand" when used in connection with a "deposit really mean what they say, that is that the deposit" is to be paid when, it is demanded.

If at the time of making the payment the parties used the word "amanat" or "jama" prima facie the intention of the parties would appear to be that the payment was made by way of a "de-posit". Where the word "Qarz" is used, it would prima facie appear to denote a loan and this would appear to be so when as security for the return of loan, a promissory note or other negotiable instrument or a bond is taken.

We say prima facie because the words used by the parties may not be conclusive and the contrary may appear from other circumstances.

22. Reference has been made to certain other cases also -- 'Kashinath Shankarappa v. New Akot Cotton Ginning and Pressing Co., Ltd.', AIR 1951 Nag 255 (K), -- 'Bank of Upper India Ltd. v. Arif Husain', AIR 1931 All 59 (2) (L); -- 'Ammalu Amma v. Narayanan Nair', AIR 1928 Mad 509 (M); -- 'Balakrishnudu v. Narayanaswamy Chetty', AIR 1914 Mad 51 (N); -- 'Balabux v. Inder Kumar', AIR 1936 Pat 539 (O), and -- 'Gird Dist. Co-operative Bank Ltd v. Anandi Bai', AIR 1955 NUC (Madh-B) 3067 (P), but we do not think that these cases can be said to lay down any rule contrary to the rule laid down by the Privy Council in the two cases mentioned above.

23. In the present case from the following facts it can be legitimately inferred that the intention of the parties was that the amounts in the hands of Janki Prasad were to be treated as "deposits". Firstly, the khata in which the amounts were entered was headed as one relating to the deposits made by Baijnath. Secondly the first two amounts were admittedly of deposits and not of loans, the word "amanat" being expressly used in relation thereto.

The other five items also must be deemed to have been paid by or credited to" Baijnath, as "amanats'" or deposits, inasmuch as they were entered in the deposit khata and not in a "loam," account. Thirdly, when an old amount came into the hands of Janki Prasad to be credited to the account of Baijnath it was returned to Baijnath and round figure was allowed to remain in the hands of Janki Prasad. This is more consistent with the theory of "amanat" than that of a loan, Fourthly, the amounts were paid to Baijnath, as admitted by the learned counsel for the respondents, to be invested in loans to third parties. This would show that the intention of the parties was that the amounts were not to be returned to Baijnath till the latter made a demand for the same. We have, therefore, no hesitation in holding that the amounts in the hands of Janki Prasad were in the nature of deposits and Article 60, Limitation Act applied to the case.

As no demand was made previous to the institution of the present suit, the institution of the suit itself would amount to a demand and the suit must be held as having been, filed within time.

24. The production of the succession certificate would not be necessary if the amount in dispute passed to the plaintiffs-appellants by right of survivorship on the death of Baijnath. It is true that there was a partition between the members of the joint Hindu family consisting of Baijnath and the plaintiffs, but the amount in dispute was not taken into account and was mot partitioned. The partition deed expressly stated that the amount due under the decree obtained against Mohammad Askari and Agha Ali was not being partitioned.

At the time when the partition was effected it was considered that the amount advanced to Mohammad Askari and Agha Ali belonged to Baijnath and it was only after the Court decided that the amount belonged to Janki Prasad that the suit for the recovery of the amount as a deposit was filed against Janki Prasad's successors-in-interest. It is not disputed that Baijnath formed a joint Hindu family with the plaintiffs before the date of partition. Under the circumstances we do not think that any of the plaintiffs are required to file a succession certificate in, order to entitle them to file the present suit,

25. We, therefore, allow the appeal, set aside the decree of the Court below and decree the, plaintiffs' suit with costs throughout against the assets of Janki Prasad in the hands of the defendants. The plaintiffs appellants will also be entitled to future interest at the rate of 3 per cent per annum on the amount of Rs. 10,000/- from today's date. In the circumstances of the case we do not grant the relief for pendente lite interest.