

Firm Kamta Prasad Jagannath Prasad vs Gulzari Lal And Anr. on 12 October, 1954

Equivalent citations: AIR1955ALL41, AIR 1955 ALLAHABAD 41

Author: V. Bhargava

Bench: V. Bhargava

ORDER

Malik, C.J.

1. This is a Special Appeal against a judgment of a learned single Judge. The plaintiff filed a suit for recovery of Rs. 1200/-, on the allegation that the plaintiff-firm Kamta Prasad Jagannath Prasad was a registered firm and carried on business of commission agency for sale and purchase of potato, tobacco and 'khali', and the defendants had entered into several transactions of sale of potatoes, tobacco, etc., through the plaintiff-firm and they had also made certain purchases from the firm and the amount was due on a balance of account. It was said that the accounts between the parties were mutual, open and current as the plaintiff had to pay to the defendants the price realised from defendants' customers and the defendants had to pay to the plaintiff price of the goods purchased. The last item was entered in the accounts on 31-7-1943, from which date, it was claimed, limitation should be computed. The suit was filed on 24-2-1944. Among other defences a defence was taken that the plaintiff's suit was barred by limitation. The trial Court dismissed the suit, holding that it was barred by limitation. The lower appellate Court decreed it. The learned single Judge has, however, dismissed the suit.

2. It appears from the judgment of the learned single Judge, as also from the judgment of the lower appellate Court, that it was admitted that in the beginning the accounts were mutual, open and current. The lower appellate Court has said as follows :

"The account in the present case was admittedly mutual in the beginning. The plaintiff sold goods to the defendant creating an obligation on the defendant to pay him their price. It also sold the defendant's goods to third parties making itself liable to the defendant to pay their price. It bought goods under the directions of the defendant and sold them to other persons under the directions of the defendant; in these transactions the defendant was under an obligation to pay the price paid by the plaintiff and the plaintiff was under an obligation to pay to the defendant what it realised on sale. So there were mutual dealings between the parties creating independent obligations."

The learned single Judge has said :

"It is conceded before me that the dealings between the parties were in the nature of mutual, open and current account, where there had been reciprocal demands between the parties and the Article applicable to the case is Art. 85, Limitation Act."

3. On this point, therefore, both parties were agreed that the dealings between the parties gave rise to reciprocal demands and the accounts were mutual, open and current.

4. The learned single Judge, however, has said in his judgment that it was not disputed before him that the accounts were closed in November, 1937. This statement is challenged by learned counsel for the appellant and he points out that this was the main point for decision and the lower appellate Court had given a finding on the point in his favour that the accounts being admittedly mutual, open and current giving rise to reciprocal demands, it was for the defendants to show that the accounts ceased to be such, and the mere fact that there were no fresh dealings for some time did not necessarily lead to the conclusion that at any stage during that period the nature of the accounts was altered. The learned District Judge has rightly pointed out that at any time it was open to the parties to enter into a fresh transaction which would have been entered in the accounts and become a part of the same old mutual, open and current account, and that the mere fact that there were no dealings for a period did not necessarily entitle the Court to hold in retrospect that the accounts had ceased to be mutual, open and current.

5. Neither the learned District Judge nor the learned single Judge, however, appear to have given due weight to the finding recorded by the trial Court that after the end of the year the plaintiff struck a balance in his books on 3-11-1937, and thereafter started making demands for payment, and on 18-4-1938, he served the defendant 1 with a registered notice of demand. The learned Munsif had observed as follows :

"After 3-11-1937 the account between the parties seems to have been formally closed, and the plaintiff began to demand the payment of the balance due to it from the defendant No. 1 and at last the plaintiff gave a registered notice of demand to the defendant No. 1 on 18-4-1938. The said notice dated 18-4-1938 is Ex. A1 on the record. In this notice the plaintiff referred to numerous previous demands in respect of the said balance and to the defendant's failure to pay the same, and formally demanded the payment of the said balance within a week, and further threatened the defendant No. 1 with institution of a suit for recovery of the said balance in case the defendant No. 1 would not pay it within a week, the term of the said notice."

In view of the oral demands followed by this registered notice and further from the circumstance that after 3-11-1937, there were no fresh dealings between the parties, the learned Munsif had rightly held that the old accounts which were mutual, open and current must be deemed to have been closed on 3-11-1937, and whatever payments were thereafter made by the defendant on 15-7-1939, 7-5-1942 and 31-7-1943 were merely payments in part satisfaction of their liability for the amount that had been found due on 3-11-1937.

6. The learned single Judge has recorded the same finding, though for different reasons, and in the view we have taken of the notice we must agree with the learned single Judge that the mutual, open and current accounts must be deemed to have been closed on 3-11-1937.

7. The question, however, remains whether the subsequent payments made by the defendant to the plaintiff, one of which at least, namely, the payment made on 31-7-1943, was in writing signed by the defendant (Ex. .4), can save limitation.

8. If the period of limitation began to run from 3-11-1937, the suit could be brought by 3-11-1940, that is, within three years. In between, however, was enacted the Temporary Postponement of Execution of Decrees Act (10 of 1937), Section 5 of which provides that :

"in computing the period of limitation prescribed by the Indian Limitation Act, 1908 for the institution of a suit in a civil court against an agriculturist for money the period during which this Act shall remain in force shall be excluded."

The Act remained in force from 1-1-1938, to 31-12-1940, that is, for a full period of three years. The plaintiff could, therefore, file the suit up to 3-11-1943. Before, however, this period expired, on 31-7-1943, the defendant made a payment which is evidenced in writing by Ex. 4. The question, therefore, arises whether this payment is a payment on account of a debt made before the expiration of the prescribed period so that a fresh period of limitation may begin to run.

9. Reliance was placed on a decision of a Pull Bench of this Court in -- 'Shankar Lal v. Rana Lal Singh', AIR 1938 All 217 (A), where the learned Judges took the view that the period prescribed meant prescribed in the first Schedule. The same view was taken by a Division Bench which followed the Full Bench in the case of -- 'Sheo Shankar v. Moti Lal', AIR 1947 All 199 (B). The Privy Council decision of -- 'Maqbal Ahmad v. Onkar Pratap Narain Singh', AIR 1935 PC 85 (C), was distinguished in -- 'Sheo Shankar Bhatt's case (B)', on the ground that their Lordships of the Judicial Committee were concerned with the exclusion of the period under Section 14, Limitation Act, and not with exclusion of a period under a Special and Local Act. In the Full Bench case ('ante') reliance was placed on a decision of Rankin C. J. in--'Debendra Nath v. Kartic Prasad', AIR 1929 Cal 68(D). That case may be distinguishable on the ground that Section 4, Limitation Act, did not exclude the period during which the court was closed, but it only enabled a person to file a Suit on the reopening of the court if the period of limitation prescribed fell on a day when the court was closed. The learned Chief Justice relied on the language of Section 4 and observed as follows:

"It is said that if one reads Section 4 together with Section 3, one finds that the prescribed period is extended; but that is not so. Section 4 is a provision to say that where the period of limitation prescribed expires on a day when the Court is closed the suit may be instituted on the day that the Court reopens, that is to say, it may be instituted notwithstanding that the period of limitation prescribed has expired."

If the suit is not instituted on the day the Court reopens, Section 4, Limitation Act, does not apply at all and the decision of the learned Chief Justice, therefore, may be distinguishable on that ground.

The Full Bench (Supra) also relied on a decision of the Bombay High Court in -- 'Maganlal Harijibhai v. Amichand Gulabji', AIR 1928 Bom 319 (E) In that case, the period excluded was under Section 6, Limitation Act, and it enabled a minor to institute a suit after his disability had ceased within the period prescribed under the first Schedule to the Limitation Act. An acknowledgment made during minority was held to be of no effect under Section 19, Limitation Act. The latest decision of the Bombay High Court brought to our notice is -- 'Udhavji Anandji v. Bapudas Ramdas', AIR 1950 Bom 94 (F) where it was held that an acknowledgment of liability passed not within the period prescribed by the first Schedule but during the extended period allowed by Section 6 constitutes an acknowledgment within Section 19 and can start a fresh period of limitation.

A view contrary to the view taken by the Full Bench was taken by a Bench of the Oudh Chief Court in -- 'Sukhnandan Prasad v. Raja Ahmad All Khan', AIR 1937 Oudh 23 (G) and also by the Madras High Court in -- 'Sambayya v. P Subbayya', AIR 1938 Mad 19 (H).

10. The question raised in this case is of general importance and in our view it is necessary that the Full Bench decision in AIR 1938 All 217 (A) may be reconsidered. We, therefore, direct that the following question may be referred to a larger Bench, preferably a Bench of five Judges :

"Whether a payment made by a debtor and acknowledged by him in a writing signed by him, after the original period of limitation had expired but within the extended period after exclusion of the period during which the Temporary Postponement of Execution of Decrees Act (10 of 1937) had remained in force, gave rise to a fresh period of limitation in accordance with the provision of Section 20, Limitation Act?"

The papers may be laid before the Hon'ble the Chief Justice for constitution of a Full Bench.

OPINION Malik, C.J.

11. The facts of this case are fully set out in the referring order. The point referred to the Full Bench reads as follows:

"Whether a payment made by a debtor and acknowledged by him in a writing signed by him after the original period of limitation had expired but within the extended period after exclusion of the period during which the Temporary Postponement of Execution of Decrees Act (10 of 1937) had remained in force, gave rise to a fresh period of limitation in accordance with the provisions of Section 20, Limitation Act?"

12. The dates and facts necessary to answer this question are as follows. There was a mutual, open and current account between the parties which, it has been found, was closed on the 3-11-1937. Certain payments were made by the defendants towards this account, the payment made on 31-7-1943, being in writing signed by the defendants. The suit was filed on 24-2-1944.

13. An Act known as the Temporary Postponement of Execution of Decrees Act (10 of 1937), hereinafter called the Act, was passed in the year 1937. Section 5 of this Act provides that:

"(I) In computing the period of limitation prescribed by the Indian Limitation Act, 1908, or any other law for the time being in force, for (a) the institution of a suit in a civil court against an agriculturist for money or for foreclosure or sale in enforcement of a mortgage, and (b) the execution of such decree as is referred to in Section 3, and not covered by Section 6, the period during which this Act shall remain in force shall be excluded.

(2) In computing the period of twelve years prescribed by Section 48 of the Code of Civil Procedure, 1908, the period during which this Act shall remain in force shall be excluded."

The period, which under this Act had to be excluded, was from 1-1-1938 to 31-12-1940.

14. If this Act had not intervened, the plaintiff could have filed his suit upto 3-11-1940," i.e. within three years from the date when the account was closed and the money became payable by the defendants to the plaintiff. The payment made on 31-7-1943, on which the plaintiff relied for saving limitation would then have been of no avail as it was not paid within the "prescribed period". The plaintiff alleged that the period between 1-1-1938 to 31-12-40 during which the Act remained in force, should be excluded and on excluding that period the payment made on 31-7-1943, was within the period of limitation prescribed and, therefore, the suit was within time in view of the provisions of Section 20, Limitation Act.

15. A Full Bench of this Court had taken a contrary view in AIR 1958 All 217 (A) and that view had been followed by Division Bench in AIR 1947 All 199 (B). There was, however, a contrary view expressed by a Bench of the Oudh Chief Court in AIR 1937 Oudh, 28 (G). By reason of this difference of opinion between the Oudh Chief Court and this Court the Bench hearing the appeal considered it necessary to refer the question to a Full Bench for reconsideration.

16. The point for decision is within a very narrow compass. Section 20 of the Limitation Act provides:

"Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy, or by his duly authorised agent 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 1923, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment."

In the case before us, the acknowledgment was made in writing signed by the person making the payment and the plaintiff would be entitled to claim the benefit of Section 20, if the period of three years from 1-1-1938, to 31-12-1940, can be excluded, so that the payment made on 31-7-1943, can be said to have been made within the prescribed period.

17. The argument of learned counsel for the respondent is that the payment made on 31-7-1943, was not made "before the expiration of the prescribed period", as in computing the period prescribed for the purposes of Section 20 the provisions of the Limitation Act are alone to be taken into consideration and not the provisions of any other Act.

18. This argument seems to have found favour with the learned Judges in AIR 1938 All 217 (FB) (A). In that case a claim was made for the recovery of a certain debt due on a promissory note. The debtor, however, had become a ward of the court and the debt had been acknowledged by the Collector and the Board of Revenue. The amount was not paid and the estate was released. Under Section 52, Court of Wards Act, when the Court of Wards after assuming the superintendence of the property of a ward releases the same without discharging the liability, the time from the publication of notice under Section 17 to the date of such release has to be excluded in computing the period of limitation applicable to the suit or application. The view that seems to have appealed to the learned Judges was that in considering whether the acknowledgment saved time under Section 19 the Court must confine itself to the four corners of the Limitation Act. Section 3 of the Limitation Act lays down:

"Subject to the provisions contained in Sections 4 to 25 (inclusive) every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefore by the first schedule shall be dismissed, although limitation has not been set up as a defence." It was held that when a suit is filed and the Court has to consider whether it is within time, the provisions of Sections 4 to 25 alone can be taken into consideration.

19. The learned Judges relied on the provisions of Section 29 also Section 29 provides:

"Where any special or local law prescribes for any suit, appeal or application, a period of limitation different from the period prescribed therefore by the first schedule, the provisions of Section 3 shall apply, as if such period were prescribed therefore in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application, by any special or local law.

(a) the provisions contained in Section 4, Sections 9 to 18, and Section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and

(b) the remaining provisions of this Act shall not apply."

20. We may point out that Section 29, Limitation Act, deals only with cases where a special or local law prescribes a period of limitation different from the one prescribed in the first Schedule. It has nothing to do with a case like the present in which a certain period has to be excluded from computation in determining the period of limitation prescribed under the Limitation Act, or a case like the one before the Full Bench where a certain period had to be excluded in computing the period of limitation by reason of the provisions of Section 52, Court of Wards Act.

21. The Temporary Postponement of Execution of Decrees Act of 1937 was passed by the U. P. Legislature and received the assent of the Governor-General on 20-12-1937. List III of Schedule VII, Entry No. 4, of the Government of India Act of 1935 gives concurrent legislative powers to the Federal Legislature and the Provincial Legislature to enact laws relating to the law of limitation. Section 107, Sub-section (2), Government of India Act, provides :

"Where a Provincial Law with respect to one of the matters enumerated in the Concurrent Legislative List contents any provision repugnant to the provisions of an earlier federal law or an existing Indian law with respect to that matter, then, if the Provincial law having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless Federal Legislature may at any time enact further legislation with respect to the same matter :

Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved, has received the assent of the Governor-General or of His Majesty, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion".

The Provincial law having, therefore, received the assent of the Governor-General, the provision contained in Section 5 of the Act has to be taken into consideration in computing the period of limitation for suits under the Limitation Act in addition to the provisions of Sections 4 to 25 mentioned in Section 3 of the Limitation Act.

22. Part III of the Limitation Act deals with computation of the period of limitation and provides what period is to be excluded for purposes of computation of that period. If a Provincial Act has been validly passed and it makes it obligatory on the Courts to exclude a period when computing the period of limitation, the courts have to exclude that period and if after excluding that period a suit or an application can be filed by a certain date any acknowledgment or payment made before that date, in accordance with the provisions of Sections 19 and 20, should be deemed to be an acknowledgment or payment made within the period prescribed for the filing of the suit or application. The object of the legislature was that the acknowledgment or payment should have been made before the claim had become time barred.

Where a claim had become time-barred a mere acknowledgment or payment, without a new promise to pay, could not revive the claim and make the period start running afresh. It could only happen if there was a fresh agreement giving rise to a fresh cause of action. In our view, there is no justification for giving these words the narrow interpretation that even if under the law then prevailing a claim was within time, taking into consideration the provisions of the Limitation Act and any other Act then in force, an acknowledgment or payment made within time would not save limitation. There is a clear difference between a case where the period was being extended of a claim still within time and a case of revival of a claim which has already become barred by limitation. In

the latter class of cases the provisions of Sections 19 and 20 would not help.

23. The next case in favour of the respondent -- 'AIR 1947 All 199 (B)', is a Division Bench case in which the previous Full Bench case was followed.

24. A view contrary to the view in -- 'Shanker Lal's case (A)', was taken by the Oudh Chief Courts (by Srivastava, Acting Chief Judge and Smith, J.) in the case of -- 'AIR 1937 Oudh 26 (G)'. In that case also the debtor had become a ward of the court and the court of wards released the estate without paying the debts. The Collector had made certain acknowledgments and the plaintiff relied on those acknowledgments and claimed that the period during which the estate had been under the superintendence of the Court of Wards had to be excluded under Section 52. The learned Judges decided in plaintiff's favour but gave no reasons for their decision.

25. In -- 'Shanker Lal's case (A)', the decision of Rankin, C. J., in -- 'AIR 1929 Cal 68 (D)', was relied on. As was pointed out in the referring order, this case was clearly distinguishable. The acknowledgment was made after the period of limitation had expired but during the period when the Court was closed. Reliance was placed on Section 4, Limitation Act, but it was pointed out that Section 4 could apply only to a case where a suit was filed on the date the Court reopened after the holidays. Section 4 is as follows :

"Where the period of limitation prescribed for any suit, appeal or application, expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens."

The learned Chief Justice pointed out that the section did not extend the period of limitation but applied only to a case where the, suit was filed on the day when the Court reopened after the holidays, that if the suit was not filed when the Court reopened after the holidays Section 4 was not applicable and the plaintiff could not claim that the payment was made within the prescribed period. It is not necessary for us to express any opinion on the point but we may with respect point out that it is possible to take the view that when the suit could be filed on the day the Court reopened after the holidays acknowledgment made during the holidays could be deemed to be within the prescribed period, so that any acknowledgment made during that period would come under Section 19.

26. There has been some conflict of opinion as to the meaning of the words "prescribed period" in Sections 19, 20 and other sections of the Act. It has been held in some cases that prescribed period means the period mentioned in the third column of the first schedule. It has also been held that there is no reason to limit the words "period prescribed" to the period mentioned in the third column of the first schedule and that prescribed period must mean the period prescribed under the Limitation Act. In other words, the period mentioned in the third column of the first schedule is subject to the provisions of Sections 4 to 25, Limitation Act. In our view the correct interpretation is that the acknowledgment or payment should have been made before the claim had become time-barred and that is the prescribed period.

27. A question had sometimes arisen whether when a period has been prescribed under some other Act the provisions of Parts II & III of the Limitation Act were applicable. Section 29 of the Act as amended has now made that point clear and in any case the point does not arise and we need not express any opinion.

28. In our view there is no good reason why the period of three years which had to be excluded under the Temporary Postponement of Execution of Decrees Act should not be taken into consideration in deciding the question whether the payment was made within the prescribed period.

29. The suit, therefore, was clearly within time the payment having been made before the period of limitation had expired. This is our answer to the question referred to the Full Bench.