APPELLATE CIVIL

Before Mr. Justice Bennet and Mr. Justice Ismail

GOPI NATH (DEFENDANT) *v.* SRIMATI CHAMELI (PLAINTIFF)*

1938 *May*, 6

Evidence Act (I of 1872), section 91—Promissory note not genuine—Original cause of action bahi khata accounts—Whether suit maintainable—Amendment of plaint whether necessary—Limitation Act (IX of 1908), articles 64, 85—"Mutual, open and current account"—Striking a balance from time to time, whether makes it an "account stated"—Joint and several liability—Admitted severance before suit—Decree apportioning liability.

Two firms had dealings with each other extending over a large number of years; there were transactions on each side creating independent obligations on the other; accounts were drawn up between the parties at the end of every year; some times the balance was in favour of one firm and some times in favour of the other. A balance was struck, in the usual course, on 31st March, 1928, when Rs.54 thousand odd was found due to the plaintiff's firm, and a promissory note for the amount was executed by the defendant No. 1. The balance struck on 31st March, 1929, was for Rs.57 thousand odd in favour of the plaintiff's firm, including the previous Rs.54 thousand, and a promissory note was executed for the amount by defendant No. 1. Neither of the defendants signed the account books on these occasions. The account was never closed and the parties continued to deal with each other on the old footing. The plaintiff brought a suit for recovery of the amount, setting forth all these details in the plaint. The promissory notes were found to be not genuine; it was found, however, that the circumstances were such that the plaintiff, who was a pardanashin lady of mature age, could not be held responsible for the production of the promissory notes:

Held that in the circumstances the plaintiff was entitled to fall back upon the original cause of action, namely the transactions entered in the bahi khata accounts, which transactions were antecedent in fact as well as in time to the promissory notes and truly independent of them. As all the facts necessary

*First Appeal No. 136 of 1934, from a decree of P. D. Pandey, Additional Civil Judge of Meerut, dated the 10th of February, 1934.

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for the disposal of the suit were fully stated in the plaint, which was based on the original cause of action as well as on the promissory notes, and the defendants had full opportunity of meeting the allegations of the plaintiff, no amendment of the plaint was necessary.

Held, also, that article 85, and not article 64, of the Limitation Act applied to the case. As there were transactions on each side creating independent obligations on the other, it was a mutual account; and as the parties continued, after the striking of the balance in 1928 and 1929, to deal with each other on the old footing, the account remained open and current; the mere striking of the balance did not make the account closed. A mere striking of the balance which is due on a particular date cannot be called an "account stated" within the meaning of article 64 of the Limitation Act.

Held, further, that in view of the admitted severance between the defendants prior to the suit, the court was justified in apportioning the amount of the liability among the defendants individually, instead of passing a joint decree against them all.

Messrs. *P. L. Banerji* and *B. Mukerji*, for the appellant.

Messrs. *S. K. Dar* and *R. N. Gurtu*, for the respondent.

BENNET and ISMAIL, JJ.:—This is a defendant's appeal against a decree of the learned Civil Judge of Meerut.

[Portions of the judgment, not material for the purpose of this report, have been omitted.]

The plaintiff Srimati Chameli, widow of Jamna Prasad, comes into court on the allegations that she is the owner of the firm styled Hira Lal Jamna Prasad; that the defendants had a firm styled Kedari Prasad Chhedi Lal at Ferozpur which carried on banking, money-lending and contract business; that for several years a current account has been running between the two firms of the parties and the two firms have been receiving and paying money to and from each other; that the interest on the outstandings was paid or received by each other at the rate of 0-7-9 per cent.

per mensem; that the accounts between the two firms were settled on the 31st of March, 1928, when Rs.54,376-1-9 was found due to the firm of the plaintiff; that the defendant No. 1 represented the defendants' firm and acknowledged the liability for the aforesaid amount and executed a promissory note for the said sum on the 29th of May, 1928; that on the 31st of March, 1929, the accounts of the two firms were again examined and checked by the parties and the sum of Rs.57,205-7-3 was found due from the defendants' firm; that the defendant No. 1 on the 5th of February, 1930, executed another promissory note for Rs.57,205-7-3 which included the amount due under the previous promissory note of 1928; that the defendants were members of a joint Hindu family but separated from each other some eight months before the institution of the suit; that in spite of notice the defendants failed to pay the debt due from them; hence the present suit for the recovery of Rs.64,562-6-0 from the defendants with *pendente lite* and future interest. The defendant No. 1 admitted the claim of the plaintiff but the defendant No. 2 contested it *inter alia* on the grounds that the plaintiff was not the owner of the firm Hira Lal Jamna Prasad; that the Ferozpur firm did not borrow any money from the firm styled Hira Lal Jamna Prasad; that no promissory notes were executed with the knowledge and consent of the contesting defendant; that the promissory notes in suit were ante-dated and were executed by the defendant No. 1 some little time before the institution of the suit with a view to saddle the contesting defendant with liability for the loan which was time barred.

The following three issues were tried and decided by the judgment under appeal:

1. Is the plaintiff owner of the firm Hira Lal Jamna Prasad and entitled to maintain the suit?

2. Whether the defendant No. 1 was empowered on behalf of the firm at Ferozpur to execute the promissory note in suit?

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3. Is the suit barred by time?

* * * * *

We are not called upon to examine the finding recorded by the court below on the first issue and we proceed on the assumption that the finding of the court below on this issue is correct and that the plaintiff is the proprietress of the firm Hira Lal Jamna Prasad and is entitled to maintain this suit.

Although the finding on issue No. 2 is against the contesting defendant the court below under this issue has also dealt with the question of genuineness or otherwise of the promissory notes dated the 29th of May, 1928, and the 5th of February, 1930. The court for the reasons given in its judgment held that the promissory notes were not genuine. * * * * Taking all the circumstances into consideration we think that the promissory notes are ante-dated and were not executed in the manner alleged on behalf of the plaintiff. We agree with the conclusions of the learned Civil Judge on this point.

It is then urged that the plaintiff's suit being on the basis of the promissory notes, which are held to be fictitious, the plaintiff should not have been allowed to fall back upon the original debt to be proved by the bahi khata account and at least the plaintiff should have been called upon to amend the plaint to enable the contesting defendant to meet the allegations of the plaintiff. In support of this contention reliance has been placed on *Ravjibhai Nathabhai* v. *Ranchhod Raghunath* (1). In this case a learned single Judge observed that "Where there has been a material alteration in the document the further questions for the consideration of the court are whether the alteration is fraudulent or innocent and whether the plaint is or can also be based on the original loan itself and evidence exists *aliunde*. Where the alteration is fraudulent the

(1) A. I. R. 1930 Bom., 66.

court will not allow the plaint to be amended and the plaintiff to fall back on the original cause of action." It is true that in the present case we have held that the promissory notes were manufactured and are not genuine documents but we are not sure that the plaintiff was fully cognisant of this fact. It is admitted that the plaintiff is a pardanashin lady of mature age and it is proved that Ram Nath defendant No. 1 is the person who has been running the case on her behalf. We do not think that under the circumstances it will be fair and just to hold that the plaintiff is responsible for the production of the promissory notes in suit. It has never been disputed that the defendants did owe money to the plaintiff. The only question is whether the claim is time barred. We have examined the plaint carefully and we find that all the facts necessary for the disposal of the suit are fully stated in the plaint and that the defendant had full opportunity of meeting the allegations of the plaintiff. The plea of limitation would be redundant if the promissory notes in suit were genuine and the bar of limitation has been pleaded merely to meet the alternative case of the plaintiff which is based on the original loan. In the ruling cited above the learned Judge has further observed that "where the alteration, though material, is innocent and the plaint is based on the original cause of action as well as on the document altered, the claim, if properly proved, can be allowed on the original cause of action." In our judgment the learned Judge was justified in permitting the plaintiff to base her claim on the original cause of action: see *Gopala Padayachi* v. *Rajagopala Naidu* (1), *Jagan Prasad* v. *Indar Mal* (2) and *Nazir Khan* v. *Ram Mohan* (3). It may be noted that the original transaction of loan was antecedent in fact as well as in time to the promissory notes in suit. The transaction being truly independent and not a part of

(1) (1926) 98 Indian Cases, 75(76). (2) (1914) I.L.R. 36 All. 259.
(3) (1930) I.L.R. 53 All. 114.

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the transaction of the promissory note can be the basis of the present suit although the promissory note itself has been held to be unenforceable. In *Nazir Khan* v. *Ram Mohan* this question has been discussed at length and all the authorities on the question have been reviewed. It would not be possible for the plaintiff to maintain this suit if the money had been advanced on the basis of the promissory notes which were held to be fictitious. The plaintiff never alleged that there was any transaction of loan at the time of the execution of the promissory note. All that was alleged was that the amount that was found due on previous transactions was totalled up and a promissory note was executed for that amount. We therefore hold that the plaintiff is fully entitled to fall back upon the original loan.

The main question that has been argued at some length by learned counsel for the appellant is that the suit is barred by limitation. It is contended that the period of limitation began to run from the 31st of March, 1929, when the accounts were stated and that article 64 of the Limitation Act applied to the suit. In our judgment the contention is untenable. The accounts are alleged to have been examined on the 31st of March, 1928, and again on the 31st of March, 1929, but neither of the defendants signed the account books. A mere statement of the balance which is due on a particular date cannot be called an account stated within this article. It is admitted that the annual accounts between the parties were drawn up at the end of every year. The amount that was found due was carried forward to the next year and fresh transactions were noted down during the year. This practice prevailed throughout the period the parties had dealings with each other. Nothing unusual seems to have been done either on the 31st of March, 1928, or the 31st of March, 1929. The court below upon an examination of the transactions between the parties came to the conclusion that the suit was governed by article 85

of the Limitation Act and that the parties had a mutual, open and current account with each other. From the tabular statement prepared by the learned Civil Judge the opinion of the learned Civil Judge is fully confirmed. It appears that the defendants' firm was a debtor to the plaintiff in 1894. From 1901 to the 5th of January, 1910, the defendants' firm was a creditor. From the 9th of July, 1910, up to the 24th of September, 1917, the defendants' firm was indebted to the firm of the plaintiff. In 1917 again the defendants' firm became a creditor and continued as such till the 14th of February, 1919. From the 31st of March, 1919, onward the balance was always against the firm of the defendants. To constitute a mutual account there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side only. The former is the case here. For an account to be called a mutual account there must be mutual dealings in the sense that both parties come under mutual liability to each other. In order to bring the case under article 64 there should be something in the nature of a fresh contract. In *Jwala Das* v. *Hukum Chand* (1) the plaintiffs had sued to recover the balance due on cross transactions in which each side supplied the other with goods in kind. There were mutual dealings although balances were struck from time to time. These were merely acknowledgments and not an agreement to pay. On these facts the learned Judges held as follows: "The case is one not of a stated account but of a mutual, open and current account, where there had been reciprocal demands between the parties. The mere fact that the plaintiffs have allowed a considerable time to elapse before suing cannot in any way change the nature of the account, nor can it be held that an account becomes closed whenever a balance is struck." In the present case the account was never closed and it is

(1) A.I.R. 1922 Lah. 316.

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admitted that after the annual balance was struck in 1929 the parties continued to deal with each other on the old footing. In *Chittar Mal* v. *Bihari Lal* (1) it was held "that a mutual account within the meaning of article 85 of the second schedule to the Indian Limitation Act, 1877, is an account of dealings between two parties which are such as to create independent obligations in favour of one party against the other." In that case the learned Judges considered a large number of rulings on the subject. In the present case there is not the least doubt that independent obligations were created between the parties and the fact that during the last few years the balance was always in favour of one party will not take the transaction out of the category of article 85 of the Limitation Act. Learned counsel for the appellant has cited a ruling of their Lordships of the Privy Council, *Bishun Chand* v. *Girdhari Lal* (2). In that case the plaintiffs were money lenders and had been lending money to the defendants for 25 years. On a date within three years of the institution of the suit an account between the parties was taken, a balance was struck and was signed by the defendants. The question was whether the suit was barred by limitation or not. On behalf of the appellant it was pleaded that the case was governed by article 64 of the Limitation Act and that a fresh contract was created on the date the accounts were stated and signed. The plaintiff could therefore bring the suit on the basis of the accounts stated irrespective of the fact that some of the transactions constituting the balance were beyond three years. The contention found favour with their Lordships and it was held that the suit was within time. A perusal of the ruling will show that it was not a case under article 85 of the Limitation Act. The observations of their Lordships do not support the contention of learned counsel for the appellant that on the 31st of March, 1929, the

(1) (1909) I.L.R. 32 All. 11. (2) (1934) I.L.R. 56 All. 376.

accounts ceased to be mutual, open and current within the meaning of article 85 of the Limitation Act merely because a balance was struck on that date. The next case cited is *Kesho Prasad Singh* v. *Sarwan Lal* (1). This was also a case under article 64 of the Limitation Act. In this case it was held as follows: "Where the accounts of an agent have been taken and adjusted and a specific sum has been found due from the agent to the principal, the principal becomes entitled to sue forthwith for its recovery and the question is not altered even if the agent continues thereafter to hold his office as agent of that principal. A suit of this description falls under article 64 or article 115." We do not find anything in this case which lends support to the contention of learned counsel for the appellant. We have given our serious consideration to the argument of learned counsel for the appellant and we have no reason to hold that the learned Civil Judge has come to a wrong conclusion. In our judgment the claim is not barred by time. We therefore maintain the decree of the court below and dismiss the appeal with costs.

Learned counsel for the respondents has pressed ground No. 2 of his grounds of objections and has urged that the decree passed by the learned Civil Judge that each of the defendants shall be liable under the decree to the extent of half and half is erroneous in law. It is contended that the plaintiff is entitled to a joint decree against both the defendants. We do not agree with this contention. It is admitted that the defendants have separated from each other. We have already held that Ram Nath defendant No. 1 is siding with the plaintiff. There is ample evidence on the record to show that the two defendants are not on the best of terms. To avoid future litigation it is desirable that the liability of the two defendants should be separated.

(1) A.I.R. 1917 Cal. 156.

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In our judgment the court below was fully justified in the circumstances of this case to have separated the liabilities of the two defendants. We see no reason to interfere with the decree of the court below. The cross-objection is accordingly dismissed with costs.

FULL BENCH

Before Sir John Thom, Chief Justice, Mr. Justice Allsop, Mr. Justice Bajpai, Mr. Justice Ganga Nath and Mr. Justice Ismail

EMPEROR *v.* BENI*

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Criminal Procedure Code, section 488(3)—*Imprisonment for default in paying maintenance ordered by Magistrate—Extent of sentence on one warrant.*

Section 488(3) of the Criminal Procedure Code empowers the Magistrate, on the issue of one warrant, to sentence the person who has defaulted in the payment of maintenance, ordered under the section, to imprisonment for one month in respect of each month or part of a month for which there has been default, and the section does not enjoin that there should be a separate warrant in respect of each term of imprisonment for one month. Where arrears have been allowed to accumulate, the court can issue one warrant and impose a cumulative sentence of imprisonment for as many months as the number of months in respect of which default has been made.

Mr. *Ishaq Ahmad*, for the applicant.

The Deputy Government Advocate (Mr. *Sankar Saran*), for the Crown.

THOM, C.J., ALLSOP, BAJPAI, GANGA NATH and ISMAIL, JJ.:—This is a criminal reference by the learned Sessions Judge of Cawnpore. It raises one short question of law, namely whether a person who has defaulted in payment of maintenance ordered under section 488 of the Criminal Procedure Code can be sentenced to imprisonment for a period of more than one month where only one warrant under sub-section (3) of the aforementioned section has been issued.

*Criminal Reference No. 736 of 1937.