1935

PEAREY LAL v. NARAINI

Section 490 of the Criminal Procedure Code which relates to the enforcement of the order lays down: "A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due." The only conditions laid down in respect of the enforcement of the order under section 490 of the Criminal Procedure Code are the identity of the parties and the non-payment of the allowance due. If any such thing occurs as may be fit to vacate the order, the proper procedure for the husband is to apply to the court and get the order cancelled. So long as the order stands it is capable of being enforced, though in the case of the woman living with her husband it would remain suspended for the period during which she lives with her husband. This view is supported by *Kanagammal* v. *Pandara Nadar* (1) and *Parul Bala Debi* v. *Satish Chandra* (2).

There is no force in the application. It is therefore ordered that it be rejected. The stay order is discharged.

APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice and Mr. Justice Bennet

1935
September, 2

NATH SAH (DEFENDANT) *v.* DURGA SAH (PLAINTIFF)*

Negotiable Instruments Act (XXVI of 1881), section 80—Promissory note—Interest not mentioned—Right to interest—Date from which interest is to be allowed—Contract Act (IX of 1872), section 25(3)—Promise to pay time barred debt—Whether the promise must specifically mention the time

*Second Appeal No. 623 of 1932, from a decree of Shamsul Hasan, District Judge of Kumaun, dated the 7th of December, 1931, confirming a decree of L. H. Niblett, Subordinate Judge of Naini Tal, dated the 14th of March, 1931.

(1) (1926) I.L.R., 50 Mad., 663. (2) (1923) 75 Indian Cases, 529.

1935

NATH SAH v. DURGA SAH

barred debt—Promissory note in lieu of time barred debt plus fresh advance—Negotiable Instruments Act, section 44.

A promissory note, payable on demand, was executed for Rs.900. There was no mention in it about any interest to be paid; nor was there any specification or reference to any items of consideration making up the Rs.900. In the suit brought on this note it transpired that the consideration was made up of Rs.500 on a former time barred promissory note, about Rs.200 interest on that sum although that promissory note mentioned no interest nor was any oral agreement to pay interest proved, and Rs.200 fresh advance in cash: *Held* that the plaintiff was entitled to recover Rs.500, the amount of the former promissory note, but no interest thereon, plus the Rs.200 cash advance, together with interest on the aggregate Rs.700 at 6 per cent. simple from the date of institution of the suit.

According to section 80 of the Negotiable Instruments Act, where no rate of interest is specified in a promissory note or bill of exchange, then notwithstanding any agreement relating to interest to the contrary the interest is to be calculated at the rate of 6 per cent. per annum, and the date from which such interest should be calculated should be the date on which the principal amount ought to have been paid, that is, it became payable. The word "same" in the section should be understood to refer to the amount due on the instrument and not to the interest on that amount.

Where the amount on an instrument is payable immediately, there can be no doubt that the interest is to be calculated from the date of execution. But where the amount becomes payable only on demand, or at or after sight or presentation, it can not be said that the principal "ought to have been paid" on the date of execution; and therefore the interest should not be calculated from that date. No doubt it is not necessary for a plaintiff to make any previous demand of payment before instituting his suit on the basis of a promissory note, and the suit can not fail for want of a previous demand; nevertheless the amount can not be said to have been payable until the demand is made, and in this case the demand is not considered to be made until the suit is filed; accordingly the interest has to be calculated from the date of the suit.

The clause, in section 80 of the Negotiable Instruments Act, "notwithstanding any agreement relating to interest between any parties to the instrument" applies not only as regards the rate at which interest is to be calculated but also

1935

NATH SAH v. DURGA SAH

as regards the date from which such interest is to be calculated. So, in the present case, even if any private agreement to pay interest had been proved, interest at 6 per cent. would have to be calculated only from the date of the suit.

Where there is not merely a promise to pay a time barred debt, but there is a novation of contract under which fresh consideration passes from the promisee and there is on the part of the promisor the receipt of such consideration as well as a promise to pay a time barred debt, the two taken together would amount to a valid agreement, although the previous debt had been barred by time. A fresh contract of this kind is in no way illegal or void; the mere inadequacy of the consideration can not affect the validity; nor can it be said that any part of the consideration was either absent from the beginning or had subsequently failed, within the meaning of section 44 of the Negotiable Instruments Act.

Semble, where there is nothing but a mere promise in writing to pay a time barred debt, a specific reference to such debt is necessary in order that the promise may become operative under section 25(3) of the Contract Act.

Mr. *Basudeva Mukerji,* for the appellant.

Messrs. *G. Agarwala* and *Kartar Narain Agarwala,* for the respondent.

SULAIMAN, C.J., and BENNET, J.:—This is a defendant's appeal arising out of a suit on a promissory note, dated the 22nd of June, 1929, for Rs.900, which contained no mention of any liability to pay interest. The plaintiff alleged in the plaint that the promissory note had been executed in respect of some old debt, and after borrowing money in cash. In his defence the defendant pleaded that he had received only Rs.200 out of the amount of the promissory note and did not get the balance. He also denied his liability to pay interest, which the plaintiff had alleged had been agreed upon orally to be at 1 per cent. per mensem. The plaintiff replied that although only Rs.200 had been paid in cash, the balance of Rs.700 consisted of a sum of Rs.500 due on a previous promissory note of the 15th of April, 1926, and Rs.200 interest due thereon at 1 per cent. per mensem as well as Rs.20 on a parole debt. The court of first instance decreed the claim for Rs.900 together

with past and future interest at 6 per cent. per annum. The defendant appealed, but the plaintiff submitted to the decree. On appeal the decree of the first court has been affirmed.

The first point urged in appeal is that the consideration of Rs.700 alleged by the plaintiff was non-existent inasmuch as the debt had become time barred. A time barred debt cannot be recovered, and an oral promise to pay a time barred debt is not a good consideration under section 25 of the Indian Contract Act. But if the promise to pay a time barred debt either wholly or in part is made in writing and signed by the person to be charged therewith, then the consideration is not void under sub-section (3) of that section. In the present case the defendant in writing signed by him agreed to pay Rs.900, which apparently included the time barred debt as well; but there was no specific reference to this earlier debt. There is some authority for the view that it is not necessary for the purposes of section 25, sub-section (3), specifically to refer to the previous time barred debt, so long as it can be ascertained that there is a promise in writing to pay such debt: *Ganapathy Moodelly* v. *Munisawmi Moodelly* (1). On the other hand, there are some observations in the case of *Appa Rao* v. *Suryaprakasa Rao* (2) which support the contrary argument, though the latter case can be distinguished on facts.

It seems to us that where there is nothing but a mere promise to pay a time barred debt, then unless that promise is in writing and signed by the person to be charged therewith, it would not form a good consideration. But where there is not merely a promise to pay a time barred debt, but there is a novation of contract under which fresh consideration passes from the promisee and there is on the part of the promisor the receipt of such consideration as well as a promise to pay a time barred debt, the two taken together would amount to a valid

(1) (1909) I.L.R., 33 Mad., 159. (2) (1899) I.L.R., 23 Mad., 94.

1935

NATH SAH v. DURGA SAH

agreement, although the previous debt had been barred by time. This would be particularly so where it was clear that the creditor would not have advanced further consideration unless a promise to pay the time barred debt had also been made. The case of *Bindeshri Prasad* v. *Sarju Singh* (1) has some bearing on this point. In that case the defendant's father, while a ward of the Court of Wards, had executed a promissory note in favour of the plaintiff for a certain sum, and after release of the estate and the death of the defendant's father, the defendant executed a fresh bond in favour of the plaintiff for an additional consideration and also promising to pay his deceased father's debt. It was held that the contract was not unlawful and was enforceable. In that case the bond was executed before the coming into force of the Usurious Loans Act of 1916. The court held that section 25 was not applicable to such a case. It is difficult to hold that a fresh contract of this kind is in any way illegal, void or ineffective. The mere inadequacy of the consideration cannot be inquired into by the court. Nor can it be said that any part of the consideration was merely absent within the meaning of section 44 of the Negotiable Instruments Act or that a part of the consideration had subsequently failed. We therefore hold that the courts below have rightly held that the amount due on the previous promissory note could have been legally included in the consideration for the second contract. The same argument would have applied to the promise to pay interest at the contractual rate of 1 per cent. per mensem on the previous debt, which also would then have been a part of the consideration for the second contract.

We find, however, that neither the plaintiff nor his father specifically stated that there was any agreement at the time of the execution of the first promissory note to pay interest at all. Indeed, as regards the second promissory note, although the plaintiff said that it was

(1) (1923) 21 A.L.J., 446.

settled orally between them that interest would be paid at 1 per cent. per mensem, the plaintiff's father clearly stated that no interest had been agreed on when the promissory note Ex. A was written. There is also no clear finding by the lower appellate court that any such agreement had really been entered into. We must accordingly disallow interest on that amount.

The second contention urged on behalf of the appellant is that the interest on the second promissory note should not be allowed at all, in any case not from a date earlier than the institution of the suit. It seems to us that although there might be no agreement as to payment of interest entered in the promissory note, a collateral agreement to this effect can be proved under proviso (2) to section 92. Where the written agreement merely mentions the promise to pay the principal and is silent as to the payment of interest, it does not amount to adding to the terms of the contract if by collateral agreement a promise to pay interest is also proved, as such an agreement is not in any way inconsistent with the terms of the written document. Were, however, a rate of interest specified and that rate were tried to be varied, the position would be different.

The main difficulty arises in the case on account of the difficulty in interpreting section 80 of the Negotiable Instruments Act. Under section 79, where interest at a specified rate is expressly made payable on a promissory note, the interest is to be calculated at the rate specified on the amount of the principal money *from the date of the instrument;* and under section 80, when no rate of interest is specified in the instrument, interest on the amount due has to be calculated at the rate of 6 per cent. per annum "from the date at which the same ought to have been paid by the party charged". It is noteworthy that in one section the legislature has expressly used the expression "from the date of the instrument", while in the other section the words are "from the date at which the same ought to have been paid". The first

1935

NATH SAH v. DURGA SAH

point to consider is whether the word "same" means interest or amount due thereon. On this point also there has been a conflict of opinion. The Bombay High Court in the case of *Ganpat Tukaram* v. *Sopana Tukaram* (1), the Lahore High Court in the case of *Khurshid Haq* v. *Ramditta Mall* (2) and the Patna High Court in the case of *Bishun Chand* v. *Babu Audh Behari Lal* (3) have taken the view that the word "same" must mean the amount of principal and not the interest. On the other hand, a learned judge of the Calcutta High Court in *Premlal Sen* v. *Radhaballav Kankra* (4) came to the conclusion that the word "same" should mean interest. The section has been amended by Act XXX of 1926, and the words "notwithstanding any agreement relating to interest between any parties to the instrument" have been added therein.

There are difficulties in either view. If the word "same" were to refer to interest only and not to the amount, then in a case where there is neither specification of any rate of interest nor even of interest, it would be difficult to see from what date interest ought to be calculated, as there would be no date from which interest ought to have been paid, unless it were assumed that it would necessarily become payable on the date on which the principal would become payable. On the other hand, if the word "same" refers to the amount, then there may be difficulty in applying the section to a case where the principal amount is due immediately but there is a contract that interest would be payable after a fixed time, though no rate of interest is specified. If the interest is to be calculated from the date when the principal becomes payable, it would be contrary to the written contract. The matter is not free from difficulty; but we think that on the whole the word "same" should be understood to refer to the amount due on the instrument and not to the interest on that amount, because the noun "amount"

(1) (1927) I.L.R., 52 Bom., 88.
(2) A.I.R., 1928 Lah., 665.
(3) (1917) 2 Pat.L.J., 451.
(4) (1930) I.L.R., 58 Cal., 290.

was nearest to it before the amendment. It would, therefore, follow that interest is to be calculated from the date at which the amount of the principal ought to have been paid. This is a reasonable construction, because the legislature was providing for payment of interest in a case where no rate of interest is specified, and it is quite reasonable to assume that interest should be calculated from the date on which the principal sum becomes payable.

Now there is a clear distinction between (1) an amount payable immediately and (2) an amount payable on demand or an amount payable after the expiry of a fixed time after demand or after sight or after presentation. In the first case there can be no doubt that the principal amount becomes payable immediately and in such a case interest has to be charged from that date. But where the amount becomes payable only on demand or at sight or on presentation, it would be difficult to say that the amount ought to have been paid on the very date of the execution. No doubt it is not necessary for a plaintiff to make any previous demand of payment before instituting his suit on the basis of a promissory note. Such a suit cannot fail on the mere ground that no previous demand had been made. Nevertheless the amount cannot be said to have been payable until the demand is made, and in this case the demand is not considered to be made until the suit is filed. This was the view expressed in the case of *Premlal Sen* v. *Radhaballav Kankra* (1) quoted above.

Prior to the amendment of section 80 their Lordships of the Privy Council in the case of *Ghanshiam Lalji* v. *Ram Narain* (2) had distinctly held that section 80 conferred a right on creditors to interest where no rate of interest was specified and did not take away any right to recover interest which had accrued either under the Usury Laws Repeal Act or had been acquired by contract. Subsequent to that ruling section 80 was amended

(1) (1930) I.L.R., 58 Cal., 290. (2) (1906) I.L.R., 29 All., 33.

1935

NATH SAH v. DURGA SAH

and the words "notwithstanding any agreement relating to interest between any parties to the instrument" have been added, which would make the section applicable in spite of any contrary agreement relating to interest between the parties to the instrument. There seems to be no reason why this part of the section should apply only to the rate at which interest is calculated, and not to the date from which such interest is to be calculated. It would accordingly follow that where no rate of interest is specified in a written instrument, then notwithstanding any contract to the contrary the interest is to be calculated at the rate of 6 per cent. per annum, and the date from which such interest should be calculated should be the date on which the principal amount ought to have been paid, that is, it became payable. In the present case there was in fact no proof that there was any private agreement to pay interest at any rate at all. Even if there had been one, we would have been compelled to hold that under section 80 interest should be charged from the date of the demand only. There is no proof here that any demand was made prior to the suit. Accordingly the plaintiff was not entitled to charge interest for any period prior to the institution of the suit. Since the institution of the suit the plaintiff is certainly entitled to interest at 6 per cent. per annum simple until the date of realisation.

We accordingly allow this appeal in part, and modifying the decrees of the courts below, decree the plaintiff's claim for Rs.720, together with interest on this amount at 6 per cent. per annum simple from the date of the institution of the suit till realisation. The parties will receive and pay costs in proportion to success and failure throughout.