APPELLATE CIVIL

Before Mr. Justice G. H. Thomas and Mr. Justice Ziaul Hasan

1937
April, 8

SATGUR NATH *alias* MISTER AND ANOTHER (JUDGMENT-DEBTOR-APPELLANTS) *v.* BRAHMA DATTA (DECREE-HOLDER) AND ANOTHER (JUDGMENT-DEBTORS, RESPONDENTS)*

Limitation Act (IX of 1908), sections 19 and 20—Party setting up case under section 20 Limitation Act in trial court—Appellant, whether can set up new case in appeal—Party, if can set up case under section 19, Limitation Act in appeal—Acknowledgment—Letter of debtor requesting further time for payment, if amounts to acknowledgment under section 19, Limitation Act—Letter written by debtor—Presumption of letter being also signed by debtor—Stamp Act (II of 1899) Article 1—Acknowledgment under section 19, Limitation Act, if covered by Article 1, Stamp Act.

The general proposition is that a new point which was not raised in the trial court should not be allowed to be raised in appeal except in exceptional circumstances. The question of limitation, however, stands on a different footing.

Where in the trial court a party confines his case to section 20 of the Limitation Act but fails to bring his case under that section, he can be allowed in appeal to set up a case under section 19 of the Limitation Act though it was not pleaded in the trial court. If the plaint shows the ground of exemption from limitation the requirement of the Code of Civil Procedure is satisfied but this does not preclude the plaintiff from taking another and an inconsistent ground to get over the bar of limitation if he believes that the latter is the true ground. *Hingu Miah* v. *Heramba Chandra Chakrabarti* (1), *Parmeshri Das* v. *Fakiria* (2), and *Udeypal Singh* v. *Lakshmi Chand* (3), refererd to and relied on.

Where a debtor sends a letter to his creditor asking for further time for payment of the debt, the letter is a valid acknowledgment under section 19, Limitation Act. *Sugappa* v. *Govindappa* (4), referred to.

Where it is proved that a letter was written by a debtor it can reasonably be presumed that it was also signed by him.

*Execution of Decree Appeal No. 48 of 1935, against the order of H. C. Smith, Esq., I.C.S., District Judge of Sitapur, dated the 1st of April, 1935 setting aside the order of Babu Hiran Kumar Ghoshal, Munsif of Sitapur, dated the 12th of December, 1934.

(1) (1910) 13 C.L.J., 139.
(2) (1921) I.L.R., 2 Lah., 13.
(3) (1935) A.I.R., All., 946.
(4) (1907) 12 M.L.J., 351.

For an acknowledgment to come under Article 1 of the Stamp Act it is necessary that it should have been made in order to supply evidence of the debt. An acknowledgment under section 19, Limitation Act, does not, however, come within the provisions of Article 1 of the Stamp Act.

Mr. *S. C. Das,* for Mr. *Radha Krishna* and Mr. *Jagdish Chandra,* for the appellants.

Messrs. *L. S. Misra* and *Ganga Prasad Bajpai,* for the respondent.

THOMAS and ZIAUL HASAN, JJ.:—This is an execution of decree appeal on behalf of the judgment-debtors against an order of the learned District Judge of Sitapur decreeing the decree-holder's appeal against an order of the Munsif of that place.

On the 25th of January, 1926, the decree-holder Brahma Dat obtained a decree for money against Khushwaqt Bahadur, father of the present judgment-debtors. The first application for execution was put in by him on the 5th of January, 1929 and this application was consigned to records on the 8th of February, 1929. On the 10th of February, 1932, the decree-holder certified in court a payment of Rs.50 by the judgment-debtor. On the 26th of February, 1932, the second application for execution was filed and limitation was calculated from the alleged payment of Rs.50. This application was consigned to records on the 2nd of March, 1932. The third application for execution, from which this appeal arises, was brought on the 5th of April, 1934, and it was stated in it that the payment of Rs.50 was made on the 5th of January, 1932. In the meantime the judgment-debtor Khushwaqt Bahadur had died and his sons filed an objection on the 29th of September, 1934, denying the alleged payment of Rs.50 and contending that the application for execution was barred by time.

The learned Munsif held the payment of Rs.50 proved and as that payment was sought to be brought

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under section 20 of the Indian Limitation Act by the counsel for the decree-holder and as the learned Munsif was of opinion that the requisites of that section were not fulfilled he allowed the judgment-debtors' objection and held that the application for execution was barred by time.

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The decree-holder filed an appeal against the Munsif's order and the learned District Judge, while agreeing with the learned Munsif that the payment was proved and that it could not be availed of by the decree-holder under section 20 of the Limitation Act, held that the evidence on record proved an acknowledgment within the meaning of section 19 of the Limitation Act and therefore decreed the decree-holder's appeal and held that the application for execution was not barred by time.

It is contended in appeal before us that in the trial court the pleader for the decree-holder confined his case to section 20 of the Limitation Act and that no acknowledgment under section 19 was pleaded in that court and that therefore the learned District Judge should not have allowed the decree-holder to set up an entirely new case in appeal. It was argued that the requirements of section 19 were different from those of section 20 of the Limitation Act and as no case under section 19 had been set up in the trial court on behalf of the decree-holder, the judgment-debtors were prejudiced by the learned District Judge's finding that the case came under section 19. A number of cases were cited before us in support of the general proposition that a new point which was not raised in the trial court should not be allowed to be raised in appeal except in exceptional circumstances and we are in general agreement with this principle. The question of limitation, however, appears to us to stand on a different footing. In *Hingu Miah* v. *Heramba Chandra Chakrabarti* (1), it was held that if the plaint

(1) (1910) 13 C.L.J., 139.

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shows the ground of exemption from limitation the requirement of the Code of Civil Procedure is satisfied but this does not preclude the plaintiff from taking another and an inconsistent ground to get over the bar of limitation if he believes that the latter is the true ground. A similar view was taken in *Parmeshri Das* v. *Fakiria* (1), where it was held that the plaintiff having mentioned one ground of exemption in the plaint was not debarred by the provision of order VII, rule 6 of the Code of Civil Procedure from taking another and an inconsistent ground to get over the bar of limitation. Their Lordships of the Allahabad High Court also took the same view in the Full Bench case of *B. Udeypal Singh* v. *Lakshmi Chand* (2), and it was remarked—

> "Justice should not be allowed to be defeated simply because a party has not been able to prove the case which he attempted to prove but has proved certain other facts which nevertheless entitle him to a decree, provided the aggrieved party is not taken by surprise."

The case for the decree-holder was that Khushwaqt Bahadur sent a sum of Rs.50 through one Laik Singh to Sheo Narain Lal with a letter addressed to the latter in which he asked Sheo Narain Lal to pay the money to Brahma Dat, decree-holder and ask him to give him further time to pay the balance. The decree-holder alleged to have endorsed the receipt of the money on that very letter and to have returned it to Sheo Narain Lal. The decree-holder examined himself and produced both Laik Singh and Sheo Narain Lal. Both of them corroborated the decree-holder's statement about the letter. This letter was summoned by the decree-holder from the sons of Khushwaqt Bahadur but it was not forthcoming. On the evidence of the decree-holder and his witnesses Laik Singh and Sheo Narain Lal both the lower courts held the payment to be proved and it was on this evidence that the learned lower court was of opinion that the letter which

(1) (1921) I.L.R., 2 Lah., 13. (2) (1935) A.I.R., All., 946.

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accompanied the sum of Rs.50 was a valid acknowledgment under section 19 of the Limitation Act. It was urged that under section 19 it was necessary that the acknowledgment should be signed by the debtor, but that there was no evidence to show that the letter in question was signed by Khushwaqt Bahadur. No doubt none of the witnesses stated anything about Khushwaqt Bahadur's signature but as the evidence proves that the letter was written by Khushwaqt Bahadur it can reasonably be presumed that it was also signed by him.

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It was further contended that as it had not been proved that the letter was returned to Khushwaqt Bahadur the decree-holder was not justified in summoning it from the sons of Khushwaqt Bahadur and that therefore secondary evidence of the letter was not admissible. We do not agree with this contention. Sheo Narain Lal acted as Khushwaqt Bahadur's agent in paying the money to the decree-holder and in obtaining a receipt from him. In these circumstances it is but reasonable to presume that the receipt must have been sent by Sheo Narain Lal to Khushwaqt Bahadur. Under section 65 of the Indian Evidence Act one of the cases in which secondary evidence may be given of the existence, condition or contents of a document is when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved. In the present case there is reason to suppose that the letter with the endorsement of receipt of money on it was sent back to Khushwaqt Bahadur and therefore it was permissible to produce secondary evidence of the contents of the letter. In *Sugappa* v. *Govindappa* (1), it was held that an extension of time granted by the creditor upon the written application of the debtor will amount to an acknowledgment and will operate to save the bar of limitation. We are therefore of opinion that the learned Judge of the court below was perfectly right in

(1) (1907) 12 M.L.J., 351.

holding that an acknowledgment under section 19 of the Limitation Act was proved to have been made in this case in the first week of January, 1932.

It was further contended by the learned counsel for the appellants that if the letter in question was an acknowledgment it ought to have been stamped under Article 1, schedule I of the Stamp Act and that not having been so stamped it was not admissible in evidence. For an acknowledgment to come under Article 1 of the Stamp Act it is necessary that it should have been made in order to supply evidence of the debt. In the present case however the letter in question was obviously not written for that purpose. The letter therefore does not come within the purview of Article 1 of the Stamp Act.

Thomas and Ziaul Hasan JJ.

The learned counsel for the respondent challenged the learned District Judge's finding that the payment in question did not come under section 20 of the Limitation Act, and in this connection he has referred us to the cases of *Narain Das* v. *Chandrawati Kuar* (1), *Hem Chandra Biswas* v. *Purna Chandra Mukherji* (2) and some others; but though the argument advanced on behalf of the respondent before us appears to have been accepted in several of the Indian High Courts, it is unnecessary for the purposes of this case to discuss the point. We have already held that the learned District Judge was right in holding that an acknowledgment under section 19 of the Indian Limitation Act has been proved in this case and that is sufficient for the decision of this appeal.

The result therefore is that the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) (1929) 6 O.W.N., 776. (2) (1917) I.L.R., 44 Cal., 567.