

ALLAHABAD HIGH COURT

Ghulam Murtaza

Vs.

Fasiunnissa Bibi

(Sulaiman, C.J.)

28.08.1934

JUDGMENT

Sulaiman, C.J.

1. This is a defendant's appeal arising out of a suit for recovery of a certain sum of money with interest. Originally the claim was based on two promissory notes of January 1925 and December 1927; but later the plaintiff got the plaint amended and claimed to recover an earlier debt, the time being saved by the alleged acknowledgments of 1925 and 1927. The cause of action alleged in the amended plaint was the date on which the liability of the debt was admitted by the defendant. The trial Court dismissed the suit, holding that the claim was barred by time. The lower appellate Court has come to a contrary conclusion and has decreed the claim, holding that the acknowledgment of the old debt saved time. The learned Judge had relied on the case of *Govind Singh v. Bijoy Bahadur Singh*¹ in support of his view.

2. In that case Niamatullah, J., certainly was inclined to take the view that an acknowledgment, clear and unconditional, can itself be the foundation of an action I concurred in the order on the ground that the recitals in the receipt along with the circumstances indicated that there was a renewal of previous debt, so that either the previous debt had been acknowledged afresh or had been substituted by a new contract including a fresh promise to pay. It is noteworthy that in that case, although the promissory note was inadmissible in evidence as being insufficiently stamped, the receipt was admissible, and it had been executed before the expiry of the period of limitation for suing upon the earlier debt. Accordingly no question of any express acknowledgment in writing of a time-barred debt within the meaning, of Section 25, Contract Act, arose in that case. The previous debt had not become barred by time and the Bench in that case came to the conclusion that there had been a novation of the contract.

3. A Full Bench of this Court in *Nazar Khan v. Ram Mohau*² laid down that where there is a completed cause of action for recovery of money on foot of a distinct and separate transaction, and a promissory note is given as a collateral security, the plaintiff is entitled to sue for the

original consideration, even if, for some flaw in the promissory note the promissory note itself may not be sued upon, being inadmissible in evidence; but where the making and handing over of the note and the payment of the money are "concurrent conditions" (i.e., part and parcel of the same transaction), then if

¹1929 All. 980

²1931 All. 183

the promissory note turns out to be inadmissible in evidence for any reason, it is not open to the plaintiff to recover his money by proving orally the terms of the contract. The result of this pronouncement is that where the debt is separable from the promissory note, the transaction being truly independent of it and not part of the transaction of the promissory note, the debt can be proved although the promissory note was not admissible in evidence, but where it is part and parcel of the same transaction the debt cannot be separately proved.

4. The Bench which had decided *Govind Singh v. Bijoy Bahadur Singh*³ had occasion to consider a somewhat similar point in *Abdul Rafiq v. Bhajan*⁴ Nitmatullah, J., again expressed the opinion that a promise to pay an old debt was a new contract, the consideration for which is the old debt, and such promise constitutes a new cause of action, so that an unconditional acknowledgment implies a promise to pay and affords a new cause of action to the obligee. I expressed the view that a mere acknowledgment of liability is not always evidence of a new contract which can be the basis of a suit, but there may be recitals in the written acknowledgment or there may be other direct or circumstantial evidence which may show that the transaction in which the acknowledgment was made amounted in reality to a novation of the contract for a valid consideration. I also pointed out that in order that a promise to pay a time-barred debt should fall within the purview of Section 25(3), Contract Act, it was necessary that the promise to pay should be express; and that an implied promise to pay a time-barred debt would not fulfil the requirements of Section 25. I further pointed out that in order to amount to a new contract it was necessary that there should be a fresh consideration proceeding from the promisee and that a mere oral promise to pay a previous debt would not be tantamount to a new valid agreement.

5. In *Bal Krishna v. Debi Singh*⁵ another Bench of this Court has laid down that a mere acknowledgment of an older debt cannot be made the basis of a suit and that an acknowledgment of a debt does not necessarily amount to a suppression of the debt acknowledged, but only confirms the older debt, and therefore if anything has to be recovered, it is on the debt which is being acknowledged by the document called acknowledgment. The learned Judges pointed out that the case before them was different from a case where an acknowledgment amounted to a new contract including a fresh promise to pay.

6. It seems to me that there is no inconsistency in any of these decisions except that the view that an unconditional acknowledgment cannot itself be the basis of a suit and furnish a new cause of action has been too broadly stated and has not been accepted by several Judges of this Court.

7. In order that a written acknowledgment may be of avail to a plaintiff under Section 19,

Limitation Act, it is necessary that such acknowledgment must have been made before the expiration of the period prescribed for the suit. It is equally necessary that it must be a clear and unambiguous acknowledgment specifically admitting liability in respect of the debt sued upon and it must be signed by the party or by his authorized agent. If an admission amounts to such an acknowledgment, then if it is made before the expiry of the

³1929 All. 980

⁴1932 All. 199

⁵1934 All.76

period, it is helpful and the suit can be maintained for the recovery of the earlier debt, the time being extended by the acknowledgment. In such an event there is no question of there being a fresh cause of action or a fresh promise to pay a debt which can be sued upon. On the other hand, if the acknowledgment is made after the period of limitation has expired, then the acknowledgment is of no utility and cannot save limitation.

8. But there is no doubt that a receipt containing an acknowledgment of a previous debt may not be a mere acknowledgment, i.e., a bare admission of the existing liability, but it may contain words indicating an implied promise to pay the earlier debt. Whether it is a mere acknowledgment or it is more than an acknowledgment and contains an implied promise to pay will of course depend on the terms of the particular document. But assuming that it amounts to an implied promise to pay, it does not follow that they can be made the basis of a suit and treated as giving rise to a fresh cause of action. If the debt had not become barred by time then even an express promise to pay it is nothing more than a promise to do what a person is, under the law, bound to do. It cannot be treated as a fresh, contract or a novation of the old contract and is on no higher footing than mere acknowledgment. On the other hand, if the debt had become barred by time, then an implied promise to pay it would be of no avail because under Section 25(3), Contract Act, it cannot be treated as a promise, made in writing, to pay a time-barred debt. When there is no express promise to pay but the intention is inferred only indirectly it cannot be treated as a promise in writing to pay the time-barred debt. The plaintiff therefore would not be entitled to take advantage of such an implied promise to pay a time-barred debt.

9. On the other hand, if there is a fresh consideration proceeding from the promisee and the parties enter into a new contract which replaces the previous contract and supersedes it, then it certainly becomes the basis of a new cause of action and a suit would lie upon it because the contract is binding on the parties, being for consideration. But where there is no fresh consideration proceeding from the promisee, the transaction cannot be treated as an agreement between two parties as it is only a one-sided promise to pay a debt which was due.

10. In the present case it was never the plaintiff's case that in 1925 or 1927 the parties entered into a fresh contract for consideration under which the previous transaction was wiped out and a new agreement accepted, Even in the amended plaint, the plaintiff merely emphasized that the receipts of 1925 and 1927 "extended the period of limitation" and the cause of action was the date on which "the liability of the debt was admitted." There was no issue framed and the

question has never been considered by either of the Courts below as to whether there was any fresh contract. Indeed, it could not be, as the plaintiff never put forward such a case. I am therefore unable to allow the plaintiff to change the character of the suit by amending the plaint and have this new question of fact tried afresh on, production of fresh evidence by both the parties. It must be assumed that the plaintiff came to Court on the legation that he was entitled to recover the earlier debt on the strength the two acknowledgments which were made by the defendants in 1925 and 1927. Now, if the receipts of 1925 and 1927 could amount to an acknowledgment of the old debt, then there would be no difficulty in the way of the plaintiff at all for time would be kept alive. But these receipts merely refer to the promissory notes which were executed on the same dates and which are inadmissible in evidence on the ground of insufficiency of the stamps. The receipts do not purport to acknowledge liability for an earlier debt but merely state that money had been taken under promissory notes of even dates by the executant. They therefore refer to the debts created by the promissory notes themselves and not to pay earlier debt. If the promissory notes cannot be sued upon the receipts cannot amount to an acknowledgment of any earlier debts of which the plaintiff can take advantage. I am therefore of opinion that the lower appellate Court is wrong in treating them as if they were acknowledgments of earlier debts.

11. I would therefore allow this appeal and setting aside the decree of the lower appellate Court, restore that of the Court of first instance.

Harris, J.

12. I agree.

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