CALCUTTA HIGH COURT

Nobo Kumar Bhuttacharjee

Vs

Kumar Nath Bhuttacharjee

(Ameer Ali and Pratt, JJ.)

06.07.1898

JUDGMENT

Ameer Ali and Pratt, JJ.

1. This appeal arises out of a suit brought by the plaintiffs in the Court of the Subordinate Judge of Hooghly under the following circumstances.

2. The plaintiffs' father Upendra Nath Bhuttacharjee formed at one time with the defendants a joint Hindu family, but he appears to have separated from them in or about the year 1291, for we find that on the 31st of Assar of that year, corresponding with the 14th of July 1884, an ekrarnama was executed in his favour by some of the defendants, who were adults at the time, and by the guardian of the others who were minors, by which practically a partition was made of the joint estate and liabilities. It would appear from that document that, Whilst the family was joint, Upendra Nath had the management of the entire property. It also appears that he had borrowed upon a mortgage executed by him in his own name from one Srinath Roy a sum of over Rs. 11,000. After the division in 1884 Upendra died, leaving the plaintiffs as his heirs. The exact date of his death is not disclosed upon the evidence; but it is said that it took place about six or seven years before the present action. After his death Srinath brought a suit against the plaintiffs, the heirs and representatives of Upendra, upon the mortgage executed by him, which ended in a decree; and in execution of that decree the mortgagee, decree-holder, sold a Calcutta property belonging to him. The plaintiffs bring this suit upon a covenant in the ekrarnama for the purpose of obtaining from the defendants contribution in respect of the debt paid off by them as aforesaid. The covenant upon which they base their action is contained in Clause 4 of the ekrarnama. It runs thus: "We shale, be liable for one-half of the debts due by the joint estate and you shall be liable for the other half; and we shall respectively pay off the debts in proportion to our half shares. Let it be further declared that we shall pay off one-half of the amount borrowed in your own name under a mortgage from Srinath Roy and of the interest due thereon up to date, and you shall pay off the other half. "They allege that the defendants are liable to pay them a half share of the amount paid by them to Srinath Roy, together with interest up to the date of payment. The defendants Probhu Gopal and Dwarkanath did not appear in the suit. The other defendants filed written statements, and among other objections contended that Upendra Nath had realized various sums of money from different parties indebted to the joint family, and that they were entitled to have those sums credited against the amounts now claimed by the plaintiffs.

They also allege that he was also liable to them under the ekrarnama for a share of the consideration paid by the joint family for the purchase of mouzah Soudra, and that in any event the plaintiffs were not entitled to interest as claimed by them. They also pleaded limitation.

3. The Subordinate Judge has held that the plaintiffs' suit was not barred by limitation; that the defendants had failed to establish that Upendra had realized the sums of money alleged by them; and that the plaintiffs were entitled to interest as claimed. He accordingly made a decree for Rs. 11,374, with interest at the rate of 12 per cent, per annum from the 2nd of September 1893 to the date of suit, with costs in proportion and interest at 6 per cent, per annum until realization.

4. The defendants have appealed to this Court, and a number of objections have been taken to the decree of the Subordinate Judge: First, that the suit is not maintainable on the ground that the cause of action accrued either on the date when the ekrarnama was executed, that is some time in the year 1884, or when the debt became repayable upon the mortgage bond; and the suit not having been brought within six years from those dates, assuming that Article 120 was applicable to such an action, the suit was barred. It was also contended that the defendants, who were minors at the time of the ekrarnama, were not bound by the acts of their guardian. Besides these legal questions it was urged that the Subordinate Judge was wrong in disallowing the different items in respect of which credit was claimed by the defendants, and that in any event the plaintiffs were not entitled to interest allowed by the Subordinate Judge.

5. As regards the question whether the suit was maintainable or not, reference was made to Mayne on Damages, p. 405; *Loosemore v. Radford*[1] *Lethbridge v. Mytton*[2] *and Rutnessur Biswas v. Hurrish Chunder Bose*[3] All these cases point substantially to the conclusion that when a person contracts to indemnify another in respect of any liability which the latter may have undertaken on his behalf such other person may compel the contracting party, before actual damage is done, to place him in a position to meet the liability that may hereafter be cast upon him. For instance, in *Loosemore v. Radford*[4] the plaintiff and defendant were joint makers of a promissory note, the plaintiff being surety and the defendant as principal; the latter had covenanted with the former to pay the money to the holder of the note on a given day, but made default. Upon an action brought upon the covenant by the plaintiff who was the surety, it was held that the defendant was liable by way of damages for the full amount of the money that he ought to have paid according to the covenant. *Lethbridge v. Mytton* [5]*is* to the same effect, and the same principle has been enunciated in the case of *Rutnessur Biswas v.Hurrish Chunder Bose*[6] In that case B had obtained from A a lease of lands, agreeing thereunder to pay a certain rental and a further sum of Rs. 183 odd yearly to A's superior landlord and to obtain a receipt therefor. A sued B for the rent due to himself and for the sum due to his superior landlord; it was held that A was entitled to recover the sum due to his superior landlord as damages for breach of the contract and that the amount of such damages ought not to be taken as nominal, but should be assessed on the footing of the sum for which A might become liable to the landlord. These cases, therefore, show that in a certain class of cases, even before an injury is done or damage takes place, the plaintiff may bring an action in order that the person making the covenant may place him in a position to meet the liability he has undertaken on the latter's behalf. No authority has been shown to the effect that such a suit may not be brought for damages subsequent to injury sustained. The causes of action in the two classes of cases are different. In the one there is a right to bring an action to have the plaintiff put in a position to meet the liability cast upon him; in the latter to be indemnified after the plaintiff has met the liability. We think, therefore, that the plaintiffs were not bound to bring their action

within six years from the date of the mortgage; that their cause of action arose when they were damnified, that is, when they paid the mortgage debt to Srinath Roy in 1893, and calculating from that time the Subordinate Judge was right in holding that the suit was within time.

6. [The remainder of the judgment was on the merits of the case, and is unnecessary for this report. The case was eventually remanded.]

Cases Referred.

1(1842) 9 M. & W., 657
2(1831)2 B. & Ad., 772
3(1884) I.L.R., ll Cal.,221
4(1842) 9 M. & W., 657
5(1831) 2 B. & Ad., 772
6(1884) I.L.R., 11 Cal., 221