CALCUTTA HIGH COURT

Ramendra Mohan Tagore

Vs.

Keshab Chandra Chanda

(Lort-Williams, J.)

31.01.1934

JUDGMENT

Lort-Williams, J.

1. The plaintiff's case was that defendant 1 had acted as agent, and that on balance of account, a sum of L 643 was due to the plaintiff. This account appeared in a hatchitta upon which there had been adjustments from time to time, the last being on 25th December 1926. On that date according to the plaint, the account was adjusted at the figure of L 643 and on that day, the defendants took a loan from the plaintiff for that sum by executing in his favor a promissory note, thereby making a part payment towards the satisfaction of the debt due on account. They agreed to repay the principal amount due on the hand-note with interest. The account was stated to have arisen in respect of some misappropriations of cash made by the defendants. The cause of action was stated to have arisen on the date when the promissory note was executed, namely, 25th December 1926, and the plaintiff asked for a decree for L 643 with interest upon the hand-note. At the end of the prayer the plaintiff concluded with the following paragraph:

> Be it declared that both the defendants have executed a hatchitta on account of the amount misappropriated, as found on a subsequent adjustment; suit will be instituted, if necessary, later on for the same.

2. It is agreed by both parties that this paragraph refers to other misappropriations and is not relevant to the present issue. The suit was instituted on 12th July 1929.

3. The defendants raised the defense of coercion and undue influence and other defenses, but both Courts have decided these issues in favor of the plaintiff. The promissory note was not properly stamped and, was therefore inadmissible in evidence. Thereupon, the plaintiff on 27th March 1930, prayed to be allowed to amend his plaint in order to enable him to sue upon the original debt which arose out of the account to which I have referred. This was opposed by the defendant's pleader on various grounds, but not on the ground that the plaintiff's claim on the original debt was barred by limitation. The Subordinate Judge came to the conclusion that the amendment would not prejudice the defendants in such a way that it could not be compensated by costs, and he allowed the amendment on payment of L 10 as compensation to the defendants. This sum was paid over at once and accepted without protest by the defendants. At this date the

plaintiff's claim on the original debt was barred, the last adjustment having been made on 25th December 1926, but it would not have been barred at the time he instituted the suit. On appeal the Subordinate Judge came to the conclusion that the amendment ought not to have been allowed and he therefore allowed the appeal, reversed the decree of the trial Court and dismissed the plaintiff's suit. The reasons for the conclusion to which the Subordinate Judge arrived were, that the amendment set up a claim different from the original claim upon the promissory note and further, it allowed the plaintiff to rely upon a claim which had become barred by limitation at the time of the amendment.

4. The questions which we have to decide are, whether the amendment ought to have been allowed, and secondly, whether in any case, the defendant can raise this point and object to the allowance of the amendment, in view of the fact that he accepted a benefit under the order made by the trial Judge, namely, the benefit of the costs which were awarded to him. There is no doubt that the general rule is correctly stated in Mulla's Civil Procedure Code, 9th Edn., at p. 499. Leave to amend ought to be refused, where the effect of the amendment would be to take away from the defendant a legal right which has accrued to him by lapse of time and this general rule ought not to be departed from except in very special cases. Upon this point the plaintiff has relied upon the case of *Charan Das v. Amir Khan*[1] where their Lordships of the Privy Council refused to interfere with the discretion exercised in allowing such an amendment. In that case it was clear that the claim which the party sought to raise by his amendment had been sufficiently indicated in the pleading, but the presentation of it had been bungled by the pleader. In the present case, the facts about the account and the hatchitta and the adjustments of the account appear clearly in the plaint. The whole story is set out there, except that the actual details of the account have not been reproduced. The amendment allowed the plaintiff to sue for the original debt without any further amendment of the plaint. In my view, no further amendment was necessary because the facts upon which the amendment was founded already appeared with sufficient clarity in the plaint. For this reason, I am of opinion that the trial Judge was right in allowing the plaint to be amended.

5. I do not think that in circumstances such as exist in the present case, the plaintiff is debarred from suing upon the original debt. Whether when a bill or a note is found to be inadmissible in evidence, the payee can sue on the original consideration depends upon whether the cause of action with regard to the original consideration is one which is complete in itself and the debtor then gives a bill or note to the creditor for payment of the money at a future time. If this be so, then the plaintiff may disregard the promissory note if he chooses and sue upon the original debt. Where however the original cause of action is a bill or note itself and does not exist independently of it, then the plaintiff cannot disregard the note and sue for the original consideration. This difference has been well and clearly explained by Garth, C.J., in the case of *Sheikh Akbar v. Sheih Khan*[2] Upon the last question whether the defendant can now be heard to object to this amendment having been allowed, I am of opinion that he can no longer raise that objection. The principle was laid down so far back as 1849 in the case of *Tinkler v. Hilder*[3] the head note of which is as follows:

> Where a party accepts costs under a Judge's order which but for the order would not at that time be payable, he cannot afterwards object that the order was made

[1] AIR 1921 PC 50
[2](1881) 7 Cal 256
[3]4 Ex 187

without jurisdiction.

6. Pollock, C.B., in his judgment says that the present Rule must be discharged on the ground that the party who makes the application to rescind the order, having taken something under that order, must be considered to have adopted it, and cannot be now heard to impeach it. In *King v. Simmonds*[4] it was decided that "where a Judge having ordered, on summons by the plaintiffs that they should be at liberty to amend the record and that they should pay the defendant his costs occasioned by such amendment, the defendant cannot, after taking and receiving his costs, apply to set aside the order for amendment, as made without jurisdiction.

7. These cases were considered in *Manilal Guzrati v. Harendra Lal*[5] where Mookerjee, J., while accepting as an undoubted principle that a party who has adopted an order of the Court and acted upon it, cannot after be has enjoyed a benefit under the order contend that it is valid for one purpose and invalid for another. But he distinguished the cases to which I have referred, because, in the case with which he was dealing, the plaintiff had accepted payment of costs under protest and the learned Judge came to the conclusion that the defendant had no alternative but to obey the order of the Court and accept the costs. It is clear that in the present case, the costs were not accepted under protest nor was the defendant under any obligation or compulsion to receive them. In fact, although he resisted the amendment, he did not do so on the ground of limitation, because he had not appreciated that point at the time when the amendment was made. In my opinion therefore the defendant cannot be heard on his objection that this amendment ought not to have been allowed; and for this reason as well as for the reason that I have already given about the amendment itself, this appeal must be allowed, and the judgment and decree of the Court of first instance restored with costs.

M.C.Ghose, J.

8. The case was that defendant 1 owed a sum of L 643 on adjustment of account to his master, the plaintiff, and he satisfied the account by payment of a sum of L 643 which he borrowed from his master on a promissory note. The suit was instituted on the promissory note. It was found out that the promissory note was insufficiently stamped and, as such, could not be received in evidence. Thereupon, the plaintiff filed an application praying that the sum claimed in the plaint might be allowed on the basis of the-original debt. The defendants objected to the amendment. The trial Court overruled the defendant's objection and ordered that the amendment prayed for by the plaintiff would be allowed upon his paying L 10 as compensation to the defendants. The said compensation of L 10 was paid to the defendants and the amendment was allowed. Thereupon the plaintiff proved the original debt by a hatchitta which was in the handwriting of defendant 1 himself and signed by him. The suit was decreed on contest against defendant 1 and dismissed against defendant 2. On appeal by defendant 1, the learned Subordinate Judge found that the amendment was unjust and ought to have been refused.

9. I agree with my learned brother in the particular circumstances of this case that the trial

[4]7 QBR 289

[5](1910) 8 IC 79

Court was right to allow the amendment. As to the argument of the learned advocate for the appellant that the defendant is estopped by the fact that he took L 10 as costs for the allowing

of the amendment from raising the validity of the amendment in this Court, I am of opinion, on the facts of this case, that the receipt of L 10 does not operate as an estoppel preventing the defendant from raising the question of the validity of the amendment. But as stated above the amendment was rightly made and the decree of the appellate Court should be set aside and that of the Court of first instance restored with, costs.

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