

CALCUTTA HIGH COURT

Abheswari Dasya

Vs

Baburali Shaikh

(B Mukherji , J.)

07.12.1936

JUDGMENT

B.K. Mukherji, J.

1. This is a rule granted on an application under Section 25, Provincial Small Cause Courts Act. The petitioner is the plaintiff and the suit was for recovery of money due on a promissory note which was executed by one Babur Ali Shaikh, the predecessor of the present defendants. The promissory note was for Rs. 100 only and was executed on 6th May 1924. Baburali died in March 1930 leaving behind him as his heirs his widow who was defendant 1 in the suit and three infant sons who are defendants 2 to 4. The suit was instituted after three years from the date of the hand-note and the plaintiff seeks to get round the plea of limitation by proof of payment of interest amounting to Rs. 10 made by defendant 1 on 16th October 1931. The suit is admittedly within three years from that date. The trial Court found that the payment would extend the period of limitation against defendant 1 who made the payment but not against the other defendants and in this view of the case it passed a decree against defendant 1 alone for a sum corresponding to 1/8th share of the total dues upon the hand-note and dismissed the suit against the other defendants. It is against this judgment that the present rule has been obtained.

2. Mr. Jitendra Kumar Sen Gupta who appears for the petitioner has contended before us that the Court below has committed an error of law and that the payment of interest would have the effect of interrupting limitation not only against the widow but against the minor sons as well. His arguments are of a two-fold character. He first of all relies upon the wording of Section 20, Lim. Act, and says that when limitation is extended because of payment of interest by any of the debtors, it is extended with regard to the debt itself and not only against the particular person who made the payment. According to Mr. Sen Gupta in order to bring the case within Section 20, Lim. Act, it is not necessary that the payment should be made by all the debtors jointly and he tries to avoid the operation of Section 21 (2), Lim. Act, by suggesting that the position of the defendants was not that of joint contractors though their liability as the heirs of the original debtor was joint and indivisible. Mr. Sen Gupta's second argument is to the effect that the mother

though not a legal guardian of the infants could be regarded as an implied agent and hence any payment made by her could be regarded in law as payment on behalf of the minors. As regards the first contention, we agree with Mr. Sen Gupta that there is some difference in language between Sections 19 and 20, Lim. Act, and whereas Section 19 speaks of the extension of time against the person who makes the acknowledgment, Section 20 states simply that: When interest is paid as such by the person liable to pay, a fresh period of limitation shall be computed from the time when the payment was made and does not limit the extended period to the person who really makes the payment. This, in substance, was held by Maclean, C.J., in *Domi Lal Sahu v. Roshan Dobay*¹ to which our attention has been drawn by the learned advocate for the petitioner and it is true also that by the use of the expression "the person liable to pay under Section 20" it was not meant to include the whole body of debtors: vide. *Achola Sundari Debi v. Doman Sundari Debi*² In English law undoubtedly the principle on which limitation is extended by payment of interest is that the payment constitutes an acknowledgment of the debt from which a new promise to pay the principal or the balance of the principal may be inferred: vide *Morgan v. Rowlands*³ *Green v. Humphreys*⁴ and if this principle is applied, a payment by one person cannot very well keep alive the remedy of another unless the payment is regarded as made on behalf of the latter. We need not however go behind the clear words of the section as the Indian law is not identical with English law on several matters connected with acknowledgment and extension of limitation: see for example *Satyakel Dutt v. Romesh Chunder* . On a plain reading of Section 20 as it stands, we think that the payment of interest by one of the debtors would give an extended period of limitation to the debt in respect of which the payment was made. If the debt is one and indivisible, payment by one would interrupt limitation against all the debtors unless they can come within the exception laid down in Section 21(2). But if the debt is susceptible of division and though seemingly one consists really of several distinct debts each one of which is payable by one of the obligors separately and not by the rest, Section 20 in our opinion would keep alive that debt or rather the portion of the debt which has got to be discharged by the person who has made payment of interest. It cannot affect the separate shares of the other debtors unless on the principle of agency, express or implied, the payment can be said to be a payment on their behalf also. This is in accordance with the principle enunciated by Sanderson, C.J. and Ashutosh Mukherjee, J, in *Brojendra Kissore Ray v. Hindusthan Cooperative Insurance Society, Ltd*⁵. though the question there arose as to whether the payment by the principal debtor could keep alive the debt against the surety. Their Lordships held that though the liability of the debtor and the surety arose out of the same transaction yet in law they were distinct. In this case after the death of Baburali each one of his heirs was liable for the debt due from the deceased to the extent only of a share of the same proportionate to his or her share of the estate: see *Pirthi Pal v. Husaini Jan*⁶ The widow inherited the 1/8th share of the husband's estate and her liability for the debt of her husband was also to that extent. The payment which she made is referable therefore to her own debt which is 1/8th share of the total debt and in respect of this debt only, time could be extended under Section 20, Lim. Act. Mr. Sen Gupta has drawn our attention to the case in *Sarada Charan v. Burgaram*⁷ In that case certain interest was paid by the managing member of a joint Mitakshara family towards a mortgage debt contracted by the ancestor. Their Lordships

held that the entire equity of redemption descended to the sons who were jointly liable for the debt not as co-mortgagors but as representing their father. This may be true of a mortgage deed and as Suhrawardy, J. pointed out in *Achola Sundari Debi v. Doman Sundari Debi*⁸ referred to above, "every mortgagor is liable for the entire debt secured by the mortgage debt." Moreover, it was the case of a joint Mitakshara family where there is no severalty of the estate that devolves upon the heirs as under the Mahomedan law.

3. We hold therefore that the payment of interest in the present case did extend the limitation only so far as defendant 1 was concerned but it did not affect the debt that was payable by the sons. In *Arjun Ram Pal v. Rohima Banu*⁹ it was held by Cox, J. upon circumstances similar to those of the present case that where the widow was jointly liable with her debtors for a debt, a payment by the widow did not save limitation against the debtors. This was approved of in *Jogesh Chandra v. Manindra Narain*. Reliance was placed for this view upon Section 21(2), Lim. Act, which according to the learned Judges engrafted an exception in cases of joint debtors upon the provision of Section 20, Lim. Act. The decision in *Arjun Ram Pal v. Rohima Banu*¹⁰ undoubtedly supports the opposite party but it is not necessary for us to base our conclusion on Section 21(2), Lim. Act, as we have already said that Section 20 itself would not keep alive the debt against a debtor who did not make the payment when the debt was in the eye of the law distinct and separate from the debt in respect of which that payment was made. On this view, we have not entered into the other question raised by Mr. Sen Gupta as to whether the heirs of a deceased debtor fulfil the description of joint contractors within the meaning of Section 21(2), Lim. Act. The second contention of Mr. Sen Gupta is in our opinion not tenable. He does not press the point that the mother was a lawful guardian of the minor sons. But he says that from the facts and circumstances an implied agency could be found. We desire to note that no such case was made in the pleadings or in the evidence and the mother who admittedly married another husband cannot be said to be an implied agent of the sons after her marriage and the evidence was not clear as to whether the payment was in fact made before the date of this marriage. In any view of the case the question is one of fact which requires investigation and as it was not raised in the specific form in the Court below and no evidence was adduced on it, we cannot enter into this question in revision. The result therefore is that the Rule is discharged.

4. The same order will govern the analogous Rule 788 which arises out of identical circumstances in respect of another hand-note executed by the same Baburali in favour of the petitioner in the second Rule who is a relation of the petitioner in the other Rule. There will be no order as to costs in both the Rules.

M.C. Ghose, J.

5. I agree.

Cases Referred.

1(1906) 33 Cal 1278
2AIR 1926 Cal 150
3(1872) 7 Q B 493
4(1884) 26 Ch D 474
5AIR 1918 Cal 707
6(1882) 4 All 361
7(1910) 37 Cal 461
8AIR 1926 Cal 150
9(1912) 14 I C 128
10(1912) 14 I C 128