BOMBAY HIGH COURT

Krishnaji Shivaji Pawar

Vs.

Hanmaraddi Mallaraddi Maidur

First Appeal No. 24 of 1928

(John Beaumont, Kt., C.J. and Barlee, J.)

22.02.1934

JUDGMENT

John Beaumont, Kt., C.J.

1.The plaintiff in this suit, a minor suing by the Deputy Nazir as guardian, sued on a promissory note made in the year 1919 by the defendant in favour of the plaintiff's father, the suit being in the Court of the First Class Joint Subordinate Judge, Dharwar. The learned Subordinate Judge raised an issue as to whether the plaintiff was competent to file the suit, and he answered that issue in the affirmative. The defendant appealed, and on appeal, this Court took the view that inasmuch as the promissory note on which the plaintiff sued was given to the father, the plaintiff could not sue upon it in his own right and could only sue upon it as manager of the joint family, or as heir of his father, if it were proved that the father had renounced the world. Accordingly, an issue was sent down to the lower Court to determine, whether the plaintiff's father had renounced the world. With all respect, the issue should have been directed to the date on which this suit was commenced and the issue should have been whether the father had renounced the world at the date of the commencement of the suit. The issue was considered by the lower Court, which answered it in the negative.

2. The facts are to be ascertained mainly from the evidence of the plaintiff's mother, that is to say, the wife of the father, and it appears from her evidence that the father killed a son of his and he was prosecuted for the murder. He was found to be insane and was confined in a lunatic asylum. He Was subsequently released from the lunatic asylum, though the date of such release is not specified, and then for some time he lived in a math, and he transferred all his Immovable property into the name of the plaintiff, his son, The learned Subordinate Judge came to the conclusion that the father did at some time give up all connection with worldly affairs and all right to property to which he was entitled, but that subsequently the father resiled from that attitude because he returned to live with his family and had two children by his wife. On that

evidence the learned Judge held that it was impossible to say that the father had completely and finally renounced the world.

3. It is clear that renunciation in order to amount to civil death must be a complete and final withdrawal from earthly affairs. Mr. Nilkant Atmaram for the respondent relies on the finding of the Subordinate Judge that the father originally gave up connection with the world. He says that that must have been the position when this suit was started in 1924. But the learned Subordinate Judge was right in having regard to the evidence of subsequent events. At the highest, it may be said that if the issue had been decided in the year 1924 on the evidence then available, the Court might have come to the conclusion that the father had completely and finally renounced the world. But, in view of subsequent events it is quite clear that any such finding would have been wrong, and taking all the facts as ascertained in 1933, it seems to me that the learned Subordinate Judge's finding was right that the father never did completely and finally renounce the world.

4. It seems to have been assumed that the doctrine as to renunciation amounting to civil death would apply to these parties, who are shudras a fact by no means clear. Assuming the finding on the issue to be correct, Mr. Nilkant Atmaram urges various points of law in support of his contention that the plaintiff is entitled to sue on this promissory note. The first contention is that if the son is a wrong plaintiff and if the right plaintiff is the father, the mistake was a bona fide one within the meaning of Order 1, Rule 10, Sub-rule (1), and that this Court should now allow the proceedings to be amended by substituting the father for the son as the plaintiff. I think that the mistake probably was a bona fide one and that we ought to accede to the plaintiff's request were it not for the question of limitation. The promissory note, as I have said, was made in 1919, and the last payment under it was in June, 1922. So that, it is obvious that any fresh claim on the promissory note at the present time is statute barred, and Section 22 of the Indian Limitation Act provides that, where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party. It seems to me, therefore, that if we were to allow the amendment, it would be useless because the suit would be barred. Mr. Nilkant Atmaram relies on a decision of the Calcutta High Court in *Subodini Debi v. Cumar Ganoda Kant Roy Bahadur*[1] in support of the View that limitation is not affected by one plaintiff being substituted for another. That case certainly appears to be an authority for the proposition, but the attention of the learned Judges does not seem to have been drawn to the perfectly plain language of Section 22 of the Indian Limitation Act. That case was dissented from by a division bench of this Court in *Fatmabai v. Pirbhai Virji*[2] and also by the Madras High Court in *Subbaraya Iyer v. Vaithinatha Iyer*[3] and, in my opinion, the case cannot be relied upon as laying down an accurate proposition of law with regard to limitation. The decision of this Court in *Ravji v. Mahadev*[4], on which Mr. Nilkant Atmaram also relies, is clearly distinguishable, because in that case the original plaintiff was a benamidar and the plaint was subsequently amended by joining the beneficial owner. Mr. Justice Ranade based his decision on the view that the suit in the name of the benamidar was well founded, a view which has been adopted in later cases. Mr. Justice Parsons does refer with approval to the case of

Subodini Debi v. Cumar Ganoda Kant Roy Bahadur but his attention was not drawn to the fact that that case had been dissented from in the same year by this Court.

5. Then the next point taken is that, even assuming that the father has not so completely renounced his interest in the world as to be treated as civilly dead, he has on the evidence renounced all interest in his property and made it all over to his son, and therefore it is said that the son can sue on the promissory note, and for that purpose Mr. Nilkant

[1] I.L.R (1887) Cal. 400
[2] I.L.R(1897) 21 Bom. 580
[3] I.L.R(1909) Mad. 115
[4] I.L.R(1897) 22 Bom. 672

Atmaram relies on *Brojo Lal Saha Banikya v. Budh Nath Pyarilal & Co*[5]. In that case a promissory note had been given to a party who was a member of a firm and a suit on the promissory note was brought in the name of the firm. It was held that as the firm had no independent entity apart from the partners the suit was really a suit by all the members of the firm, and therefore the plaintiffs included the holder of the note. The actual decision clearly does not apply to the present case, which is not a suit by a firm, but is one in which the plaintiff is suing in his own name by his guardian. The father, who is the holder of the note, is not in any sense a party to the suit. But in *Brojo Lal Saha Banikya v. Budh Nath Pyarilal & Co.* the learned Judges went beyond the actual ground of the decision and expressed the view that it was competent for the beneficial owner of a promissory note to sue upon it although he was not the holder, provided that he got a discharge from the holder, thereby protecting the defendant. That seems to me a novel proposition. I have never heard of a suit upon a promissory note in which the plaintiff alleged that he was not the holder of the note, but could obtain a discharge from the person who was. The proposition has been dissented from in a later decision of the Calcutta High Court in *Harkishore Barna v. Gura Mia Chaudhuri*[6] in which the Court held that it is the holder of a promissory note who alone is entitled to maintain a suit on the note for the recovery of money due thereon. That, I venture to think, is the law, and I am not prepared to act upon the contrary view expressed in the case of *Brojo Lal Saha Banikya v. Budh Nath Pyarilal & Co.*

6. Then the last point taken is that the suit is not merely a suit on the promissory note, but also embraces a claim on the loan which gave rise to the promissory note. But, in my opinion, the plaint is clearly based on the promissory note alone. No doubt the plaintiff could have sued alternatively on the promissory note or on the loan which gave rise to the promissory note. But he did not do so, and it is too late now to allow him to amend by raising a new cause of action which at the present date is clearly barred. I am not sure that even if the amendment was allowed it would assist the plaintiff, but it is not necessary to consider that. The case is a hard one for the plaintiff because the sum due on the promissory note is substantial and the suit fails on a technicality. But legal forms cannot be ignored and the plaintiff should have seen that he had become the holder of the note, before he sued upon it. As he is not the holder, I am satisfied that the suit is not maintainable.

7. We allow the appeal and dismiss the plaintiff's suit with costs throughout.

Barlee, J.

8. I am of the same opinion. An issue was remitted to the lower Court, whether the plaintiff's father had renounced the world and thereby the plaintiff was entitled to sue on a promissory note in the name of his father as his heir. The learned Subordinate Judge has recorded a finding in the negative, and I have no doubt that he is correct What the plaintiff had to prove, as shown in paragraph 603 of Mayne's Hindu Law and Usage, was that his father had entered into an order of devotion and abandoned all earthly interests. A man does not become civilly dead merely because he leaves his family and property. It is necessary that he should enter into a religious order, so as to make it certain that he will

[5] I.L.R (1927) Cal. 551

[6] I.L.R(1930) Cal. 752

not change his mind and return to his family. It is not proved that the plaintiff's father entered into any order. In fact it is not clear that he could have done so as he was a shudra. Mr. Nilkant Atmaram has pointed to the last line of paragraph 603 of Mayne, which says " Nor does any Shudra come under this disqualification, unless by usage." I understand that to mean that by usage a shudra may have religious orders and may renounce the world by entering into them. But there is no evidence in this case that there was any order open to shudras or that he entered one. For this reason I agree with the finding of the lower Court and that the appeal must, therefore, succeed.

Appeal allowed.